

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Shaffer v. Mitchell Transport, Inc.

635 F.2d 261 (3d Cir. 1980) · Decided December 23, 1980

SUMMARY

The Third Circuit held that a dispute over whether Mitchell Transport, as successor to Martin Trucking, was bound by a prior arbitration award was arbitrable under the broad arbitration clause in the collective bargaining agreement. The court concluded that the district court lacked jurisdiction to decide the merits and should have stayed the proceedings pending arbitration. It vacated the district court’s judgment and remanded with instructions to stay further proceedings.

CASE DETAILS

COURT	United States Court of Appeals for the Third Circuit
WRITING FOR THE COURT	Van Dusen, Senior Circuit Judge
JURISDICTION	Federal
DECIDED	December 23, 1980
DISPOSITION	vacated
PROCEDURAL POSTURE	Plaintiffs sued in federal district court to enforce against Mitchell, the successor to their former employer Martin Trucking, an arbitration award issued against Martin. The district court held that the dispute was not arbitrable, enforced the award against Mitchell, and entered judgments awarding damages and costs. Mitchell appealed.
STANDARD OF REVIEW	The court independently considered the district court's jurisdiction and the arbitrability of the dispute under the collective bargaining agreement.
PRECEDENTIAL VALUE	published and precedential federal appellate opinion
PARTIES	Mitchell Transport, Inc. v. Robert D. Shaffer and other former employees of Martin Trucking, Inc., Teamsters Local 261

TOPICS

- employment arbitration
- labor law
- collective bargaining
- arbitration
- civil procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the dispute over Mitchell's obligation to comply with JAC 1108 was arbitrable under the broad arbitration clause in the collective bargaining agreement.
2. Whether the district court had jurisdiction to enforce against Mitchell, before arbitration, an award issued against Martin.
3. Whether the successorship doctrine independently authorized the district court to impose JAC 1108 on Mitchell.

HOLDINGS

1. The dispute was arbitrable under the broad arbitration clause in the collective bargaining agreement Mitchell signed.
2. The district court lacked jurisdiction to adjudicate the merits or enforce JAC 1108 against Mitchell before the parties arbitrated whether Mitchell was bound by the award.
3. Under the circumstances presented, the district court should not have relied on the successorship doctrine because Mitchell had expressly assumed the collective bargaining agreement and its arbitration clause provided an appropriate means of resolving the dispute.

KEY QUOTATIONS

"We hold that here the successor employer expressly assumed a collective bargaining agreement which contained a broad arbitration clause and that, under the circumstances of this case, an arbitration award issued against the predecessor employer is not enforceable by a court against the new employer prior to arbitration of the controversy." (267)

"The district court was therefore without jurisdiction to address the merits of the complaint and should have stayed its proceedings." (264)

"In a situation where the enforcement of an expressly agreed to provision will resolve the dispute, it seems inappropriate for the court to go further and impose implied duties." (266)

FACTUAL BACKGROUND

Martin Trucking employed owner-drivers who leased their trucks to Martin and drove them under a collective bargaining agreement with Teamsters Local 261. A 1974 Joint Area Committee arbitration order, JAC 1108, limited Martin's use of company-owned trucks and required it to lease additional trucks from owner-drivers. Mitchell purchased Martin's cement-hauling business, expressly agreed to assume the collective bargaining agreements, signed the agreement with the Union, but immediately announced that it would use only its own newly purchased trucks and refused to lease the owner-drivers' trucks.

PROCEDURAL HISTORY

The plaintiffs initially pursued a grievance through the collective bargaining agreement's arbitration procedure and then filed suit in the district court. The district court denied a preliminary injunction, later entered findings of fact, conclusions of law, and judgments totaling \$172,833.12 plus costs, and held that Mitchell was bound by the arbitration award. The Third Circuit held that the dispute was arbitrable, vacated the judgment, and remanded for a stay pending arbitration.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The district court was directed to stay further proceedings pending arbitration under the collective bargaining agreement. The arbitrator was to determine whether Mitchell agreed to be bound by JAC 1108 and, if so, resolve the entire dispute and determine damages.

CASES CITED

- *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960)
- *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)
- *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960)
- *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241, 82 S. Ct. 1318, 1320, 8 L. Ed. 2d 462 (1961)
- *Westinghouse Broadcasting v. Local 804, International Alliance*, 616 F.2d 97, 98 (3d Cir. 1980)
- *Bechtel Corp. v. Local 215, Laborers' International Union*, 544 F.2d 1207, 1212 (3d Cir. 1976)
- *Teamsters Local Union No. 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), cert. denied, 444 U.S. 837 (1979)
- *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 257, 262-63 n. 9, 94 S. Ct. 2236, 2241, 2243-44, 41 L. Ed. 2d 46 (1974)
- *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181, 184, 94 S. Ct. 414, 423, 425, 38 L. Ed. 2d 388 (1973)
- *NLRB v. Burns Security Services*, 406 U.S. 272, 287-88, 92 S. Ct. 1571, 1582, 32 L. Ed. 2d 61 (1972)
- *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549, 551, 84 S. Ct. 909, 914-15, 11 L. Ed. 2d 898 (1964)
- *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976)
- *Bartenders & Culinary Workers v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir. 1976)
- *Local 103 of International Union of Electrical, Radio & Machine Workers v. RCA Corp.*, 516 F.2d 1336 (3d Cir. 1975)
- *Smith v. Evening News Assn.*, 371 U.S. 195 n. 1, 83 S. Ct. 267, 9 L. Ed. 2d 246 (1962)
- *Hart v. Overseas National Airways, Inc.*, 541 F.2d 386 (3d Cir. 1976)
- *Pharmadyne Laboratories, Inc. v. Kennedy*, 596 F.2d 568, 570 n. 3 (3d Cir. 1979)
- *In re Trimble Co.*, 479 F.2d 103, 110 (3d Cir. 1973)
- *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L. Ed. 126 (1908)

- International Association of Machinists v. NLRB, 134 U.S. App. D.C. 239, 244, 414 F.2d 1135, 1140 (1969) (Leventhal, J., concurring)

OPINION

DUSEN, J.

OPINION OF THE COURT VAN DUSEN, Senior Circuit Judge. This case involves a dispute between plaintiffs, former employees of Martin Trucking, Inc. (“Martin”), and defendant, Mitchell Transport, Inc. (“Mitchell”), a corporation which took over Martin’s cement hauling business. Plaintiffs seek to enforce an arbitration award, issued in 1974 while Martin was their employer, against Mitchell.

In an unpublished opinion, the district court¹ held that the underlying dispute was not arbitrable and that Mitchell, as Martin’s successor, was bound by the arbitration award issued against Martin. The district court awarded damages totaling \$172,833.12 and costs.

Because we conclude the district court was without jurisdiction to adjudicate plaintiffs’ claims, we vacate the district court’s judgment and remand with instructions to stay further action in the suit until *263the parties have had an opportunity to submit the dispute to arbitration under the terms of the collective bargaining agreement. Facts Defendant Mitchell is a corporation registered to do business in Pennsylvania.

Since January 2, 1975, Mitchell has hauled all the cement produced by the Bessemer Cement Co. (“Bessemer”). Mitchell uses 70 trucks, all of which it owns, to haul the cement. Prior to January 2, 1975, two trucking companies serviced the Bessemer facility, each of which hauled approximately half of the cement produced. Martin was one of these two companies. Martin used 40 trucks in its cement hauling business, 19 of which it owned, 21 of which it leased from the individual plaintiffs.

Plaintiffs include 17 former employees of Martin and their union. The 17 individual plaintiffs own trucks which they drove to haul cement for Martin. As “owner-drivers,” they received rental income for leasing their trucks to Martin and, in addition, received wages for operating those trucks. Teamsters Local 261 (“Union”), also a plaintiff, was the exclusive collective bargaining representative for both the regular drivers, who operated the company-owned trucks, and the owner-drivers.

The Union and Martin entered into a collective bargaining agreement, effective from July 9, 1973, through June 30, 1976. This agreement established, among other terms, the wages for all drivers, rental incomes for the owner-drivers, and a four-step grievance procedure which culminated in binding arbitration. Six pages of the agreement dealt with the owner-drivers.

On January 27, 1974, the Joint Area Committee issued an order (“JAC 1108”) under step 4 of the established grievance procedure. JAC 1108 ordered Martin to comply with the Additional Company Equipment (“ACE”) agreement, an agreement separate from, but supplemental to, the original collective bargaining contract.

The ACE agreement, in part, provides: “In order to protect the owner-drivers, the Employer shall be restricted to the following limitations on increasing the number of pieces of company equipment [trucks]: (1) up to 5 pieces on or after June 1, 1974; (2) up to 5 additional pieces on or after June 1, 1975.” Martin thereby was limited to the use of 24 company-owned trucks from June 1, 1974, to June 1, 1975, and 29 such trucks from June 1, 1975, until the expiration of the collective bargaining contract on June 30, 1976.

Martin had to lease all other trucks it needed to haul cement from the owner-drivers. This arrangement gave the owner-drivers some assurance that their trucks would be leased and they would receive rental income. JAC 1108 also provided that it “shall be binding with no appeal” and that failure to abide by the order “shall give the other party the immediate right to all legal and economic recourse.” Before taking over the hauling operations, Mitchell entered into a lengthy agreement of sale with Martin.

Mitchell agreed, inter alia, to buy Martin’s authorities to haul cement, and “to assume the terms and obligations of [Martin] under the Collective Bargaining Agreements....” Mitchell met with the Union on December 30, 1974, the last working day before Mitchell began hauling the Bessemer cement. At the meeting, Mitchell’s representative, both orally and in writing, gave notice to the Union that Mitchell would not lease any trucks from the owner-drivers and that all of the cement hauling would be done in 70 new trucks recently purchased by Mitchell.

He offered to hire all drivers, including the plaintiff owner-drivers, and then signed the Martin-Union collective bargaining agreement. From January 2, 1975, when Mitchell took over, until the expiration of the collective bargaining contract on June 30, 1976, Mitchell consistently refused to lease any of the owner-drivers’ trucks. Despite this, some of the plaintiff owner-drivers accepted the offer of employment as drivers, thereby leaving their trucks idle.

Other of the plaintiffs refused to work and still others found work elsewhere. *264 Plaintiffs, through the Union, first initiated a grievance procedure to protest Mitchell’s failure to abide by JAC 1108 and lease their trucks. Shortly thereafter, plaintiffs, as individuals, filed this suit in the district court to enforce the JAC 1108 order against Mitchell.² Jurisdiction We first address the issue of the district court’s jurisdiction to address the merits of this complaint.³ The district court realized that if the collective bargaining agreement provided for resolution of the dispute through arbitration, the court had no jurisdiction to address the merits, *Steelworkers v. American Mfg.*

Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (hereinafter *The Steelworkers Trilogy*), and would have to stay its proceedings. 9 U.S.C. § 3 (1976).⁴ Whether a dispute is arbitrable pursuant to a collective bargaining agreement is a question committed to the court.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1961); *Westinghouse Broadcasting v. Local 804, Intern. Alliance*, 616 F.2d 97, 98 (3d Cir. 1980); *Bechtel Corp. v. Local 215, Laborers' Int'l Union*, 544 F.2d 1207, 1212 (3d Cir. 1976).

The district court held, over Mitchell's objection,⁵ that the present dispute was not arbitrable. We hold that the dispute is arbitrable under the terms of the collective bargaining agreement. The district court was therefore without jurisdiction to address the merits of the complaint and should have stayed its proceedings. See note 4. While recognizing that the case presents novel issues for consideration, we have concluded that the district court (1) failed to recognize that the dispute between Mitchell and the owner-drivers is not the same as the earlier dispute resolved by JAC 1108, (2) overlooked the strong federal policy favoring the arbitration of labor disputes, and (3) improperly relied on the successorship line of cases.

(1) *Present Dispute Differs From Earlier Dispute* The district court enforced JAC 1108 against Mitchell under the mistaken belief that the present dispute is the same dispute previously arbitrated and resolved by that award.

The issue, as the district court understood it, was how many company-owned trucks could the employer use before it had to lease trucks from the owner-drivers. That is, of course, the underlying issue.⁶ But another issue is present here: Did Mitchell agree to be bound by JAC 1108, an award springing from the collective bargaining agreement it signed? This issue must be resolved before the order can be enforced against Mitchell.

Neither party contends it is not bound by the broad arbitration clause incorporated in Article VIII of the collective bargaining contract.⁷ A disagreement over what constitutes the collective bargaining agreement is a dispute arising out of that agreement.

The arbitrator must first determine whether Mitchell agreed to be bound by JAC 1108, an award issued against Martin, before that award can be enforced against Mitchell. We note that if the arbitrator finds that Mitchell is bound by JAC 1108, he should resolve the whole dispute and determine damages.⁸ (2) *Federal Policy Favors Arbitration of Labor Disputes* Our decision furthers the well established federal policy favoring the resolution of labor disputes through arbitration.

Steelworkers Trilogy, *supra*; *Teamsters Local Union No. 30 v. Helms Express, Inc.*, 591 F.2d 211 (3d Cir.), cert. denied, 444 U.S. 837, 100 S.Ct. 74, 62 L.Ed.2d 48 (1979). This policy is based on

the principle that an arbitrator, rather than a judge, can best resolve the dispute underlying plaintiffs' complaint. An arbitrator offers greater experience and competence in resolving the particular labor dispute for which he was chosen.

Steelworkers Trilogy, 363 U.S. at 582, 80 S.Ct. at 1352. The arbitrator is "chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as a criteria for judgment." *Id.* The parties should, therefore, more readily accept the determination of the arbitrator rather than that of the court.

The prior agreement by parties in a collective bargaining agreement to arbitrate disputes is "[a] major factor in achieving industrial peace.... [Arbitration is the substitute for industrial strife." Steelworkers Trilogy, 363 U.S. at 578, 80 S.Ct. at 1350.

(3) The Successorship Doctrine is Inapplicable The district court incorrectly relied on the successorship line of cases. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973); *NLRB v. Burns Security Services*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 84 S.Ct.

909, 11 L.Ed.2d 898 (1964); *NLRB v. Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976). Jurisdiction in the successorship cases is grounded on section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976).

The Supreme Court has created the successorship doctrine under which a court may impose on a successor employer certain legal obligations of its predecessor.⁹ A successor employer has been described as one who "has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations...." *Golden State Bottling Co.*, 414 U.S. at 184, 92 S.Ct. at 425.

The duties imposed on a successor employer under the doctrine have included the obligation to recognize and bargain with a union, *Burns Security Services*, *supra*, to honor unfair labor practice awards issued against the predecessor employer, *Golden State Bottling Co.*, *supra*, and to submit to arbitration, *John Wiley & Sons*, *supra*.

Before imposing a duty on a successor employer, a court must consider the particular facts of each case.¹⁰ Duties imposed by a court under the successorship doctrine should be limited to those which "may have been fairly within the reasonable expectations of the parties." *Howard Johnson Co.*, 417 U.S. at 257, 94 S.Ct. at 2241. They should not be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." *John Wiley & Sons*, 376 U.S. at 551, 84 S.Ct. at 915.

The successorship doctrine simply allows the court to imply certain contractual duties from the predecessor's collective bargaining agreement and impose them on the successor. The district court unnecessarily and unjustifiably interfered in the present dispute when it imposed from without an implied duty on Mitchell. Instead, the district court should have disposed of the dispute by simply recognizing the duty to arbitrate, a duty expressly agreed to by both parties.

In a situation where the enforcement of an expressly agreed to provision will resolve the dispute, it seems inappropriate for the court to go further and impose implied duties. There may be instances in which an employer may expressly assume the collective bargaining agreement of its predecessor and yet the court will nonetheless need to utilize the successorship doctrine.

That situation is not presented here. We need not, and do not, hold that the successorship doctrine is inapplicable to all cases where the employer expressly assumes his predecessor's collective bargaining agreement.

Under the facts of this case, where enforcement of the expressly assumed arbitration clause provides an appropriate means of resolving the dispute, that means should be used. The district court, therefore, should not have relied on the successorship line of cases.

The most persuasive case supporting the district court's application of the successor-ship doctrine, *Golden State Bottling Co.*, supra, is not controlling. In *Golden State Bottling Co.*, the Court enforced an NLRB order against a successor employer to remedy an unfair labor practice committed by the predecessor employer. That order could be equated to the arbitration award issued in the present case.

The unfair labor practice order, however, included a successor-ship clause, making the order binding on all successors and assigns of the employer. No such clause can be found in JAC 1108. In addition, the successor employer in *Golden State Bottling Co.* was shown to have known of the order. Plaintiffs have not demonstrated that Mitchell knew of JAC 1108.

Finally, arbitration was not a factor in *Golden State Bottling Co.*, as there was no collective bargaining agreement between the parties in that case. Our determination that this dispute should be decided by the arbitrator furthers at least two of the federal labor policies expressed in the successorship cases.

First, the Supreme Court has demonstrated a reluctance to impose specific duties on the new employer under the successorship doctrine. *Howard Johnson Co.*, supra (no implied duty to arbitrate); *Burns Security Services*, supra (no implied duty to assume predecessor's obligations under a collective bargaining agreement). See also *Bartenders & Culinary Workers v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir.

1976). This reluctance stems from a belief that such an imposition “may discourage and inhibit the transfer of capital.” *Burns Security Services*, 406 U.S. at 288, 92 S.Ct. at 1582. As emphasized in *Burns*, “a potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force,... and nature of supervision.” *Id.* at 287-88, 92 S.Ct. at 1582.

Our decision here is consistent with this reluctance to judicially impose unassumed obligations on the new employer.¹¹ Second, as discussed above, arbitration is the preferred method of resolving labor disputes. This policy is emphasized in the one successorship case in which the Supreme Court imposed an implied duty on a successor employer. *John Wiley & Sons*, *supra*.

In *Wiley*, the new employer had not assumed its predecessor’s collective bargaining agreement after a merger. Nevertheless, the Court affirmed an order to arbitrate issued against the successor employer. The order resulted from the successor employer’s duty to arbitrate, a duty implied from the predecessor’s collective bargaining agreement.

We have not found any cases other than *Wiley* in which the Court has upheld an order requiring a new employer to comply with the substantive terms of its predecessor’s labor contract. *Howard Johnson Co.*, *supra*; *Burns Security Services*, *supra*.

The decision in *Wiley* to order arbitration rested largely on “the central role of arbitration in effectuating national labor policy.” *John Wiley & Sons*, 376 U.S. at 549, 84 S.Ct. at 914. Indeed, some commentators have suggested that the Court may be unwilling to impose anything more than a simple duty to arbitrate. *Krupman & Kaplan, The Stock Purchaser After Burns: Must He Buy the Union Contract?*, 31 *Labor L.J.*

328, 334 (1980). Imposing an arbitration award against an employer would go far beyond what has previously been accomplished under the successorship doctrine. Our decision to have the district court stay proceedings pending arbitration is consistent with the preference for arbitration emphasized in *Wiley*. Conclusion A statement of the holding in this case must, of necessity, reflect the unique circumstances present here.

We hold that here the successor employer expressly assumed a collective bargaining agreement which contained a broad arbitration clause and that, under the circumstances of this case, an arbitration award issued against the predecessor employer is not enforceable by a court against the new employer prior to arbitration of the controversy.

Therefore, the judgment of the district court will be vacated and the case remanded to that court with a direction to stay the proceedings pending arbitration.¹² This case was assigned initially to Senior Judge Miller, who filed an opinion on July 24, 1975, in support of his conclusion that the application for a preliminary injunction should be denied.

On February 28, 1980, Judge Bloch filed Findings of Fact, Conclusions of Law and 15 judgments in favor of plaintiffs. Judge Bloch's final decision is on appeal here. Because Judge Bloch relied on Judge Miller's opinion, both opinions are discussed in this decision..

The plaintiffs also requested that the court enjoin the grievance procedure previously initiated by the Union. We assume, because the Union is now a plaintiff and no longer a defendant, that the grievance was withdrawn. Plaintiffs' request for a preliminary injunction was denied. See note 1 above.'. Neither party raised this issue on appeal.

We inquire, as we must, into the question of the jurisdiction of the district court. *Pharma-dyne Laboratories, Inc. v. Kennedy*, 596 F.2d 568, 570 n. 3 (3d Cir. 1979); *In re Trimble Co.*, 479 F.2d 103, 110 (3d Cir. 1973). See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908).. 9 U.S.C. § 3 provides: "Stay of proceedings where issue therein referable to arbitration "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." As indicated in note 2, the defendant is apparently not in default in proceeding with the arbitration, since it was plaintiffs who sought court action to delay use of the grievance procedure in the collective bargaining contract..

Mitchell is in the unusual position of an employer who wants to force arbitration rather than go to court. Generally, it is the union which seeks arbitration. *Krupman & Kaplan, The Stock Purchaser After Burns: Must He Buy the Union Contract?*, 31 Labor L.J. 328, 332 (1980).. It is for the arbitrator, and not the court, to decide whether the question or issue presented before an arbitrator is the same issue previously resolved in an earlier arbitration.

Local 103 of Int'l Union of Elec., R & M Wkrs. v. RCA Corp., 516 F.2d 1336 (3d Cir. 1975).. Article VIII of that agreement mandates that "[a]ll... disputes involving any controversy, complaint, dispute, or misunderstanding arising as to the meaning, application or observance of any provisions of this Agreement shall be handled in the manner hereinafter set forth." The plaintiffs, as members of the Union, were clearly bound by this clause.

See *Smith v. Evening News Assn.*, 371 U.S. 195, n. 1, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962).. Mitchell argued on appeal for the first time that the award was vague and thus damages could not be determined by the court. *Hart v. Overseas Nat'l Airways, Inc.*, 541 F.2d 386 (3d Cir. 1976). This argument misses the point.

The award is not vague as to Martin. Martin was required not to increase his truck fleet by more than five trucks per year, thereby limiting Martin to 24 or 29 company-owned trucks. It apparently conceded that Mitchell now performs all of Bessemer's cement hauling, whereas Martin only did approximately half.. Recent commentaries include Krupman & Kaplan, *The Stock Purchaser After Burns: Must He Buy the Union Contract?*, 31 Labor L.J.

328 (1980); *The Successor Employer's Obligation to Bargain: Current Problems in the Presumption of a Union's Majority Status*, 1979 B.Y.L.Rev. 99 (1979).. "But the real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?

The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of 'successor' which is applicable in every legal context.

A new employer, in other words, may be a successor for some purposes and not for others. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181, 94 S.Ct. 414, 423, 32 L.Ed.2d 388 (1973); *International Ass'n of Machinists v. NLRB*, 134 U.S.App.D.C. 239, 244, 414 F.2d 1135, 1140 (1969) (Leventhal, J., concurring); Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw.U.L.Rev.

735 (1969); Comment, *Contractual Successorship: The Impact of Burns*, 40 U.Chi.L.Rev. 617, 619 n. 10 (1973). "Howard Johnson Co., 417 U.S. at 262-63 n. 9, 94 S.Ct. at 2243-2244.. Clearly, under the holding in *Burns*, Mitchell did not have to assume Martin's collective bargaining agreements. Had Mitchell read the agreement before promising to be bound by it, this entire dispute might have been avoided..

We have not found a request by Mitchell that the court order arbitration. See page 264 above.