LABOR LAW AND THE DOUBLE-BREASTED EMPLOYER: A CRITIQUE OF THE SINGLE EMPLOYER AND ALTER EGO DOCTRINES AND A PROPOSED REFORMULATION

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A unionized employer that creates an ostensibly separate firm with a nonunionized work force is said to engage in the practice of "double-breasting." This practice has proven particularly attractive to employers confronted with depressed economic conditions and competitive bidding, because it allows them to divert work to the nonunion sector and to pressure their unionized workers to grant wage and benefit concessions. Consequently, the practice of double-breasting raises a serious threat to the labor movement—a threat that, according to one administrative law judge, "means an end to all collective bargaining contracts."

To determine the conditions under which double-breasting is lawful, the National Labor Relations Board (NLRB) uses two related theories, the "single employer" doctrine and the "alter ego" doctrine. In this Article, however, Professor Stephen Befort argues that the NLRB's approach is inadequate, largely because the existing doctrines were developed to address other labor law problems. Professor Befort proposes an alternative standard that would resolve the legal status of a double-breasted operation in light of four relevant factors: common ownership, diversion of work, the scope of the appropriate bargaining unit, and the employer's motive.

I. INTRODUCTION

In 1975, union contractors performed eighty-five to ninety percent of the interior construction and decorating work in the Washington, D.C. area.[1] A decade later, the situation was reversed with nonunion employees performing eighty-five to ninety percent of the work.[2] This dramatic decline in the unionized workforce during this period, an occurrence not limited to the construction industry,[3] coincided with the

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1. D'Amico v. Painters District Council 51, 120 L.R.R.M. 3473, 3474-75 (D. Md. 1985).

2. *Id.* at 3475.

3. Union membership as a percentage of the national workforce fell from 22.6% in 1970, *Labor Month in Review*, 96 MONTHLY LABOR REVIEW 2 U.S. Dep't of Labor, Bureau of Labor Statistics (Oct. 1973), to 18.8% in 1984, U.S. Bureau of the Census, Statistical Abstract of the United States 1986, at 424, Table 713 (1986). The decline in the construction industry was

National Labor Relations Board's recognition of the legality of "double-breasting." A "double-breasted operation" exists when the same employing entity establishes both a unionized firm and a nonunionized firm.[4] Double-breasting typically occurs when a unionized employer, experiencing competitive difficulties, creates an ostensibly separate firm with a nonunion workforce.[5] From the perspective of at least one union attorney, the NLRB's acceptance of double breasting opened "the sluice gates . . . for the flow of union work to the open shop sector."[6]

Double-breasting first emerged as a common practice in the mid-1970's.[7] The construction industry, characterized by competitive bidding and a transitory workforce,[8] was an industrial sector particularly vulnerable to the development of double-breasting. Because of depressed economic conditions and the pressures of Sun Belt migration, unionized contractors were increasingly underbid by their nonunion competitors.[9] The Board's willingness to accept the practice of double-breasting provided an attractive safety valve.[10] Unionized contractors could create a separate nonunion firm to compete with other nonunion firms and underbid union firms which typically had higher labor costs. For those projects specifically requiring union labor, the double-

substantially more severe with the percentage of work performed by union firms falling from approximately 80% in 1968, Penfield, *The Double-Breasted Operation in the Construction Industry*, 27 LAB. L.J. 89 (1976) to approximately 40% in 1982, Husband & Thompson, *Establishing and Operating Both Union and Nonunion Subsidiaries: A Trap for the Unwary*, 34 LAB. L.J. 332 (1983).

4. *See* Road Sprinkler Fitters Local Union No. 669 v. NLRB, 789 F.2d 9, 12 n.2 (D.C.Cir. 1986).

5. *See* Penfield, *supra* note 3, at 89; Comment, *Double-Breasted Operations in the Construction Industry: A Search for Concrete Guidelines*, 6 U. DAYTON L. REV. 45,45 (1981) [hereinafter Comment, *Double-Breasted Operations in the Construction Industry*].

6. Fanning, *Double-Breasted Contracting Issues* 31 (Apr. 18, 1986) (on file with author) (Mr. Fanning, General Counsel for the International Union of Operating Engineers, presented this paper at the 1986 Building Trades Lawyers Conference in Chicago, Illinois.).

7. *See* Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 45, n.1; Bornstein, *The Emerging Law of the "Double-Breasted" Operation in the Construction Industry*, 28 LAB. L.J. 77, 78 (1977).

8. *See* Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1982). The unique employment practices in the construction industry underlie the NLRA's recognition of pre-hire labor agreements in that industry as an exception to the normal principle of majoritarian rule. *See* 29 U.S.C. § 158(f). For a discussion of pre-hire agreements, see King & LaVaute, *Current Trends in Construction Industry Labor Relations—The Double Breasted Contractor and the Prehire Contract*, 29 SYRACUSE L. REV. 901, 928-940 (1978).

9. *See* Husband & Thompson, *supra* note 3, at 332 (double-breasting was spurred by excessive union demands and the economic migration to the Sun Belt); Penfield, *supra* note 3, at 89 (double-breasting resulted primarily from changing economic conditions in the construction industry).

10. Some commentators suggest that the Board's willingness to recognize double-breasting as a legitimate mode of operation provided the crucial impetus for the development of this practice. *See* Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 45, n.2; Fanning, *supra* note 6, at 41.

breasted contractor could still submit bids through the unionized entity. Double-breasting, in short, provided competitively beleaguered employers with the flexibility to operate profitably in spite of costly union contracts. Not surprisingly, the practice of double-breasting has now spread far beyond its construction industry roots.[11]

Although clearly advantageous for management, the practice of double-breasting poses a significant threat to the labor movement. From the union perspective, double-breasting improperly permits an employer to shed bargaining and contractual responsibilities while still retaining the financial benefits of ownership.[12] Double-breasting not only diverts work to the nonunion sector, but it also puts considerable pressure on unions to grant wage and benefit concessions so that the shrinking number of union firms will remain competitive.

Organized labor, with very limited success, has responded to the double-breasting threat with a number of strategies including proposed legislation[13] and work-preservation clauses.[14] The principal battleground, however, is adversarial proceedings such as arbitration,[15] section 301 actions,[16] and, particularly, unfair labor practice charges

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11. *See* LaVaute, *Development of the Alter Ego Doctrine in Double-Breasted Cases and its Application in Non-Construction Industries*, at 13-16 (Feb. 5, 1985) (on file with author) (This paper was prepared for the annual mid-winter meeting of the American Bar Association Committee on the Development of the Law Under the NLRA.). Examples of the attempted use of double-breasted operations in nonconstruction settings include: NLRB v. Allcoast Transfer, 780 F.2d 576 (6th Cir. 1986) (moving and storage business); NLRB v. Big Bear Supermarkets, 640 F.2d 924 (9th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980) (supermarket chain); Leslie Oldsmobile, Inc., 276 N.L.R.B. No. 148 (1985) (automobile dealership).

12. *See* Fanning, *supra* note 6, at 41.

13. *See* H.R. 281, 99th Cong., 2nd Sess., 132 CONG. REC. H1938-54 (daily ed. Apr. 17, 1986). H.R. 281 was passed by the House on April 17, 1986, but Senate passage, at this time, appears unlikely. The bill, applicable only to the construction industry, would bind "any two or more business entities performing . . . similar work, in the same or different geographical area, and having any direct or indirect common ownership, management or control" to the terms of any existing labor agreement applicable to the geographical area covered by the agreement.

14. Some unions have attempted to negotiate work preservation clauses in labor agreements which would have the effect of applying the contract terms to unit work transferred to a double-breasted entity. *See* Fanning, *supra* note 6, at 28-45. Such provisions, however, may violate NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4), as a secondary boycott or NLRA § 8(e), 29 U.S.C. § 158(e), as an invalid construction industry work preservation clause to the extent applicable to non-signatory entities which are neither a single employer or an alter ego of the signatory employer. *See* D'Amico v. Painters District Council 51, 120 L.R.R.M. 3473 (D. Md. 1985).

15. The availability of arbitration as a means of addressing double-breasted operations depends upon the presence of contract language conferring appropriate authority on the arbitrator. *See, e.g.*, Gateway Structures, Inc. v. Carpenters Conference Bd., 779 F.2d 485 (9th Cir. 1985); Local No. 6 Bricklayers, Masons and Plasterers Int'l Union v. Boyd G. Heminger, Inc., 484 F.2d 129 (6th Cir. 1973).

16. Section 301 authorizes suits in federal district court to enforce the terms of a labor agreement. *See* § 301, Labor Management Relations Act, 29 U.S.C. § 185 (1982). While the district court has the authority to make a determination under the single employer doctrine in such a suit, the circuit courts are split concerning whether the accompanying bargaining unit issue is reserved for initial resolution by the NLRB. *Compare* Teamsters Local 70 v. California Consolidaters, 693

under section 8(a)(5) of the National Labor Relations Act (NLRA).[17] The core legal question in each of these proceedings is the same—do the bargaining and contractual obligations owed by the union firm extend to the newly created enterprise?

The Board relies upon two related, but conceptually distinct, theories to answer this question. Until recently, the most commonly used theory was the single employer doctrine. The test derived from this doctrine was first used to apply the Board's jurisdictional standards to two separate but related enterprises.[18] The single employer test uses a four-factor formula that attempts to determine whether two nominally separate firms are functionally integrated and controlled to such an extent as to be treated as a single entity for purposes of the NLRA.[19] In the double-breasted context, a single employer determination, coupled with the finding of an appropriate employer-wide bargaining unit,[20] will result in the extension of both the duty to bargain and the terms of the collective bargaining agreement, if any, to the newly created entity.[21] If the new entity is established with a sufficient degree of functional independence from the existing entity, however, the employer has successfully double-breasted and the new firm is not obligated either to bargain or to apply the union contract.

The alter ego doctrine presents a second potential hurdle for the double-breasted employer. This theory also pre-dates the double-breasting phenomenon and traditionally was applied to prevent employers from avoiding unfair labor practice sanctions through a "dis-

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F.2d 81, 82-83 (9th Cir. 1982) (bargaining unit issue is for the Board to determine in first instance) *with* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 504-05 (5th Cir. 1982) (court may decide unit issue when necessary to resolution of breach of contract issue). *See generally* Anderson, *Suits to Bind Nonsignatories to Collective Bargaining Agreements Under Section 301: The Emerging Federal Common Law*, 1983 B.Y.U. L. REV. 241; Comment, *Settling South Prairie: Section 301 Jurisdiction over Representational Issues*, 16 PAC. L.J. 1143 (1985).

17. 29 U.S.C. § 158(a)(5) (1982) ("[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ").

18. *See infra* notes 40-43 and accompanying text.

19. *See, e.g.*, Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc. 690 F.2d 489, 504-05 (5th Cir. 1982).

20. The Board determines the scope of appropriate bargaining units based upon an assessment of the "community of interests" shared by the employees involved. Peter Kiewit Sons Co., 231 N.L.R.B. 76 (1977). Among the factors considered by the Board in making this determination are:

> [A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs; . . . the infrequency or lack of contact with other employees; the lack of integration with the work functions of other employees or interchange with them . . . and the history of collective bargaining.

Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962).

21. *See, e.g.*, Carpenters Local Union No. 1846 v. Pratt, Farnsworth, Inc., 690 F.2d 489, 504-05 (5th Cir. 1982).

guised continuance" of the employing entity.[22] The Board was initially reluctant to apply the alter ego concept in the double breasting context because it was thought that the "true" alter ego situation occurred only if the former unionized entity completely disappeared.[23] Recent decisions of the Board and the courts, however, have applied the alter ego doctrine as a full-blown, alternative basis for testing the validity of double-breasting operations where both the union and nonunion entities still exist.

The alter ego doctrine employs a seven-factor formula, including many of the same factors used in the single employer analysis, to determine both the presence of functional integration and a union avoidance intent.[24] The latter inquiry is a particularly troublesome issue, with the circuit courts of appeal currently split as to whether an anti-union motive is an essential prerequisite or only a relevant factor in determining alter ego status.[25] Similar to the single employer test, an alter ego finding binds the newly created entity to the bargaining and contractual obligations of its predecessor.[26]

Unfortunately, neither the single employer nor the alter ego doctrine succeeds in providing a cogent frame of reference for evaluating double-breasted operations. The Board and the courts have struggled with considerable confusion to apply the overlapping, fact-specific criteria of the two doctrines.[27] Significantly, both doctrines originally were created to deal with other areas of labor law, and fail to address adequately the pertinent policy issues posed by double-breasting. The single employer doctrine uses a mechanical formula that focuses on functional integration without giving consideration to the evasive potential of double-breasting. This formula can easily be manipulated through planned union avoidance techniques. The alter ego doctrine, on the other hand, places undue emphasis on the necessity of proving an employer's anti-union motivation without considering the legitimate expectations of a unionized workforce whose potential work has been diverted to a nonunion firm.

This Article first discusses the labor law context of double-breasting and the historical development of the single employer and alter ego doctrines. It then suggests the adoption of a modified, unitary test for double-breasted operations. The proposed reformulation is not so much a complete departure from the Board's current approach as an

22. *See* Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1941); *infra* notes 143-51 and accompanying text.

23. *See infra* notes 152-53 and accompanying text.

24. *See infra* notes 177-91 and accompanying text.

25. *See infra* notes 192-219 and accompanying text.

26. *See, e.g.*, NLRB v. Tricor Products, Inc., 636 F.2d 266, 269-70 (10th Cir. 1980).

27. *See infra* notes 228-35 and accompanying text.

integration of the relevant strands of the two doctrines now used. This test would ameliorate the confusion flowing from the simultaneous application of two related, yet distinct, doctrines while focusing the analysis on those factors that reflect the core policy considerations raised by double-breasting—the presence of common ownership, the diversion of work from the unionized entity, the scope of the appropriate bargaining unit, and the employer's motive in establishing the new enterprise.

II. THE LABOR LAW CONTEXT OF DOUBLE-BREASTING

In addition to the single employer and alter ego doctrines, the practice of double-breasting implicates several other related concepts in labor law. These concepts—the successorship doctrine, the accretion doctrine, the preservation of bargaining unit work, and the enforcement of the collective bargaining agreement—in turn illustrate the respective interests of employers, organized labor, and individual employees in the permissible scope of double-breasting.

In general, an employer may transfer its interest in an enterprise to a new employing entity without imposing the existing labor contract on its successor.[28] Under certain conditions, however, the successorship doctrine operates to compel the new employer to recognize and bargain with the union that represented the employees of its predecessor. As construed by the United States Supreme Court, the doctrine requires a balancing of the new employer's interest in independently arranging its business venture with the employees' interest in preserving their expectations in the employment relationship.[29] The Court has held that this balance compels the successor employer to recognize and bargain with the union only when the new employer continues operations without substantial change in the identity of the enterprise and the employees of the former owner comprise a majority of the new workforce.[30] The Court further held that the new employer, even if found to be a successor, is not bound by the terms of the predecessor's collective bargaining agreement but is free initially to establish new terms and conditions of

28. *See* NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 282-84 (1972). An employer also possesses the fundamental right to go out of business entirely, even for reasons of union animus. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965). The Court in *Darlington* also held, however, that an employer may not lawfully undertake a partial closing of a business enterprise for the purpose of discouraging union membership among the remaining portions of the employer's workforce. *Id.* at 271.

29. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964). For articles discussing the successorship doctrine, see Marsack & Eaton, *Successorship Law: The Impact on Business Transfers and Collective Bargaining*, 65 MARQ. L. REV. 213 (1981); Slicker, *A Reconsideration of the Doctrine of Employer Successorship—A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); Comment, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975).

30. NLRB v. Burns Int'l Security Services, Inc., 406 U.S. 272, 281 (1972).

employment.[31] The absence of an arm's length transaction distinguishes the single employer and alter ego situations from that of the normal successorship setting. In the typical successorship case, the sale of the enterprise extinguishes any future benefit accruing to the former owner from the operation of the business. The double-breasted employer, in contrast, continues to receive a financial benefit through the ownership and operation of the new firm.[32] A single employer or alter ego finding is, in essence, a determination that the two entities in a double-breasted operation are in reality one and the same, and thus equally bound to the contractual as well as the bargaining obligations owed by the original firm.[33]

The accretion doctrine applies where an employer retains ownership of an enterprise, but expands operations such as by merger, acquisition or the creation of a new business venture. In this situation, the accretion doctrine determines whether an existing labor agreement will extend to the new group of employees. When the two employee groups share a community of interests in employment matters, the new employees are said to "accrete" to the existing bargaining unit without an election, and the labor agreement applicable to the former employees will automatically apply.[34] When the two employee groups perform similar work functions that require similar skills, the reorganization expands the pre-existing bargaining unit in order to preserve the bargaining and contractual rights already established. When such a community of interests does not exist, however, the accretion concept recognizes the countervailing interest of the new employees to select or reject union representation on their own terms.[35]

Double-breasting similarly involves the expansion of an owner's business operations, albeit in the form of an ostensibly separate enterprise. If a financial benefit accrues to a common owner of the two

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31. *Id.* at 291.

32. *See* Alkire v. NLRB, 716 F.2d 1014, 1020 (4th Cir. 1983).

33. *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 259 n.5 (1973); NLRB v. Big Bear Supermarkets, 640 F.2d 924, 930 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980); Bell Co., 225 N.L.R.B. 474, 481 (1976), *enforced in part*, 561 F.2d 1264 (7th Cir. 1977); Anderson, *supra* note 16, at 248.

Viewed in this light, the proper analysis of a business transformation involves the sequential application of all three of these doctrines. If either a single employer or alter ego finding results, the inquiry ends and both entities are bound to comply with the bargaining and contractual obligations of the original enterprise. In the absence of such a finding, however, the new employer may still be held to be a bona fide successor bound to the bargaining, but not the contractual, obligations of its predecessor. *See* Comment, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. REV. 624 (1979).

34. *See, e.g.*, NLRB v. Security-Columbian Banknote Co., 541 F.2d 135, 140 (3rd Cir. 1976); Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352 (9th Cir. 1970); NLRB v. Sunset House, 415 F.2d 545 (9th Cir. 1969); Temple-Eastex, Inc., 228 N.L.R.B. 203 (1977).

35. *See* NLRB v. Sunset House, 415 F.2d 545, 547-48 (9th Cir. 1969).

double-breasted entities, the accretion principle should be equally applicable. Of course, even if an expanded bargaining unit is not appropriate, the employees of the new "nonunion" firm still possess the statutory right to choose union representation in their separate unit.[36]

The practice of double-breasting also implicates two fundamental concerns of organized labor—the preservation of bargaining unit work and the enforcement of the collective bargaining agreement. It is well-settled that an employer may not transfer work outside the bargaining unit, at least for reasons of labor costs, without first bargaining to impasse with the exclusive representative.[37] Both the employer and the labor organization are also bound to comply with the end result of the bargaining process—the collective bargaining agreement. Thus, an employer may not, at least short of bankruptcy,[38] unilaterally alter contract wage provisions, no matter how economically burdensome.[39] Double-breasting represents a potential exception to these principles to the extent that the new entity performs work that would have been performed by the pre-existing union firm while not complying with the terms of the labor agreement.

These related labor law principles establish the relevant context for evaluating the legality of double-breasted operations. The appropriate test, at a minimum, should reflect these principles as well as the core concerns of each of the affected parties: (I) the employer's interest in structuring its business operations in a profitable manner; (2) labor's interest in deterring union avoidance schemes and in preserving the

36. *See* National Labor Relations Act §§ 7, 9, 29 U.S.C. §§ 157, 159 (1982). Although this statutory right exists, the circumstances under which the work force of the new firm is typically hired, i.e., accompanied by a determination not to apply the arguably applicable labor contract and the offer of a lower wage rate, makes union representation unlikely to occur in the near future.

37. *See, e.g.*, Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Soule Glass & Glazing Co., 652 F.2d 1055, 1088 (1st Cir. 1981). The plurality opinion in Otis Elevator Co., 269 N.L.R.B. 891 (1984) appears to impose a more limited bargaining obligation with respect to management decisions based upon factors other than labor costs. *See* George, *To Bargain or not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 689-91 (1985).

38. *See* 11 U.S.C. § 1113 (1982) (authorizes the rejection of collective bargaining agreements under certain circumstances in bankruptcy proceedings if approved by the bankruptcy court). This provision was enacted in 1984 in response to the Supreme Court's decision in NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

39. *See, e.g.*, NLRB v. Katz, 369 U.S. 736, (1962); Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975). In the *Oak Cliff-Golman* case, the employer unilaterally reduced the wage rates specified in the labor contract in response to a severe economic crisis. In rejecting the employer's economic necessity defense, the Board stated that "[n]owhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective." 207 N.L.R.B. at 1064. For articles discussing the unilateral change proscription, see Befort, *Public Sector Bargaining: Fiscal Crisis and Unilateral Change*, 69 MINN. L. REV. 1221, 1224-29 (1985); Rabin, *Limitations on Employer Independent Action*, 27 VAND. L. REV. 133 (1974).

benefits secured through collective bargaining; and (3) the interest of the individual employees in obtaining the bargaining and contractual benefits applicable to an appropriately expanded bargaining unit consisting of similarly situated workers, as well as the right to select union representation independently when a community of interests does not exist.

III. The Single Employer Doctrine

A. Historical Development

The Board developed the single employer doctrine, as a jurisdictional device, long before the emergence of double-breasting. As a matter of discretion, the Board declines jurisdiction with respect to enterprises not engaged in a certain minimum dollar volume of business.[40] The Board uses the single employer doctrine as a basis for determining whether to aggregate the business volume of related concerns in order to meet the pertinent jurisdictional threshold.

The Board's first comprehensive description of the single employer doctrine occurred in its 1956 Annual Report.[41] That document summarized the relevant Board decisions as requiring an analysis of the following four factors in determining whether two firms are sufficiently integrated to treat them as a single employer for jurisdictional purposes:

1. Interrelation of operations;
2. Centralized control of labor relations;
3. Common management; and
4. Common ownership or common control.

The report explained that while none of these factors are controlling, the Board has stressed the first three factors, with particular emphasis given to the criterion of control over labor relations. Nine years later, in *Radio Union* the Supreme Court formally approved this four-factor test.[42]

The Board subsequently applied the single employer test in several other contexts,[43] most notably with respect to secondary boycotts. The secondary boycott provisions of the NLRA[44] ban picketing or other coercive conduct directed at an entity other than the primary employer with which the labor organization has a dispute. The Board uses the

40. *See* 29 U.S.C. § 164(c)(1) (1978); 23 NLRB Ann. Rep. 163-64 (1958).

41. 21 NLRB Ann. Rep. 14-15 (1956).

42. *See* Radio & Television Broadcast Technicians Union Local 1264 v. Broadcast Services of Mobile, Inc., 380 U.S. 255 (1965). The *Radio Union* decision, as it is commonly known, also arose with reference to the Board's jurisdictional standards.

43. *See* Husband & Thompson, *supra* note 3, at 333.

44. *See* 29 U.S.C. § 158(b)(4) (1982).

single employer test to determine whether an entity is a true neutral that is shielded from secondary pressure or is so closely related to the primary employer as to be a single employer or "ally" which is a lawful target of the union's campaign.[45]

Although the Board uses the same four-factor *Radio Union* test in the secondary boycott context, the critical factor of centralized labor relations control is applied much differently. When applied to jurisdictional issues, the Board has found single employer status even though common control of labor relations is only potential in nature[46] or exists only at the policy-making level.[47] In contrast, the Board will not make a single employer finding in a secondary boycott case unless one entity "exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other."[48] This more stringent standard in the secondary boycott setting is based, according to the Board, on the strong congressional policy favoring the protection of neutrals in labor disputes.[49] While a single employer finding in a jurisdictional setting merely allows the Board to hear a dispute, a similar finding in the circumstances of a secondary boycott subjects the related entity to the harsher consequences of economic coercion.

The first significant application of the single employer doctrine to what was soon to be known as double-breasting occurred in 1971 when the Board decided *Gerace Construction, Inc.*[50] That decision and the Board's opinion two years later in *Peter Kiewit Sons' Co.*,[51] although totalling less than three pages of conclusory discussion, launched double-breasting as a viable practice.

The *Gerace* case presented a typical double-breasting scenario. Gerace Construction was a union contractor managed by Francis Ger-

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45. *See, e.g.*, Miami Newspaper Printing Pressman, Local 46 (Knight Newspapers, Inc.), 138 N.L.R.B. 1346 (1962). For a general discussion of secondary boycotts and the single employer doctrine, see Comment, *Single Employer Doctrine as Applied to Section 8(B)(4) of the National Labor Relations Act*, 28 CATH. U. L. REV. 555 (1979); Comment, *Dual Companies—Construction Union's Attempt to Include Parent Company in Collective Bargaining Agreement Constitutes Nonmandatory Subject of Bargaining*, 8 RUT.-CAM. L. J. 170 (1976).

46. *See, e.g.*, Family Laundry, Inc., 121 N.L.R.B. 1619 (1958).

47. *See, e.g.*, Sakrete of N. Cal., Inc., 137 N.L.R.B. 1220 (1962), *enforced*, 332 F.2d 902 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

48. Los Angeles Newspaper Guild, Local 69 (San Francisco Examiner, Div. of the Hearst Corp.), 185 N.L.R.B. 303, 304 (1970), *enforced*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

49. *See* Television & Radio Artists (Baltimore News American Div., The Hearst Corp.), 185 N.L.R.B. 593, 598, 600 (1970), enforced, 462 F.2d 887 (D.C. Cir. 1972). *See also* Nat'l Woodwork Mfgrs. Ass'n. v. NLRB, 386 U.S. 612 (1967).

50. 193 N.L.R.B. 645 (1971).

51. 206 N.L.R.B. 562 (1973), *rev'd sub nom.* Local 627, IUOE v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), *aff'd and remanded sub nom.*, South Prairie Constr. Co. v. Local 627, IUOE, 425 U.S. 800 (1976), *supplemented*, 231 N.L.R.B. 76 (1977).

ace, the firm's president and principal stockholder.[52] Gerace Construction was experiencing difficulty in bidding for jobs involving less than $100,000, a situation that prompted Francis Gerace to organize a separate nonunion firm to recapture work which Gerace Construction had lost.[53] The actual impetus for forming the new firm was the availability of a project requiring a guarantee of completion without work interruption. Gerace Construction was unable to provide such a guarantee because its union contracts were about to expire and a strike was possible. Francis Gerace, instead, established a separate company, Helger Construction, through which he bid for and obtained the job.[54]

Helger was managed by Lawrence Sweebe, a former project manager for Gerace Construction, who remained on Gerace's payroll for the first five months of Helger's existence.[55] Helger performed the same type of work in the same geographic area as Gerace Construction and also shared facilities and equipment with the unionized firm.[56] Francis Gerace was initially the primary stockholder and a director of Helger, but transferred his stock and resigned as a director shortly after unfair labor practice charges were filed alleging that Gerace and Helger constituted a single employer.[57]

The trial examiner agreed with the single employer allegation and, after concluding that the two firms comprised a single appropriate bargaining unit, recommended the extension of Gerace's labor contracts to Helger.[58] To the trial examiner, the single employer finding was clear. The two firms were commonly owned and controlled by Francis Gerace. While acknowledging Sweebe's responsibilities with respect to the daily operations of Helger, the trial examiner found it unrealistic to believe that Sweebe conducted the activities of Helger independent of Francis Gerace's overall control and direction.[59] The trial examiner also found it significant that Helger was organized for the purpose of circumventing Gerace's labor obligations by capturing work that Gerace had performed in the past and was still fully equipped to do in the future.[60]

The Board disagreed with the trial examiner's recommendations and dismissed the unfair labor practice complaint.[61] As one commentator noted, the Board's decision "was distinguished solely by its brevity,

52. Gerace Const., Inc., 193 N.L.R.B. 645, 647 (1971).
53. *Id.*
54. *Id.*
55. *Id.* at 648.
56. *Id.* at 648-49.
57. *Id.* at 648, n.6.
58. *Id.* at 651.
59. *Id.* at 650.
60. *Id.* at 651.
61. *Id.* at 645-46.

not its lucidity."[62] Although largely devoid of analytical discussion, the Board's opinion is nonetheless noteworthy for establishing three essential hallmarks of the Board's single employer analysis.

The Board's primary basis for rejecting the trial examiner's decision concerned the "common control of labor relations" criterion which the Board described as a "critical" factor in determining single employer status.[63] The Board held "that such common control must be actual or active, as distinguished from potential control."[64] This conclusion was supported merely by citation to three secondary boycott cases and without discussion of either the very different manner of application of this factor in jurisdictional cases or the policy reasons for choosing the more rigorous version.[65] While noting Francis Gerace's role as the prime mover in the formation of Helger and his potential control over operations, the Board concluded that this criterion was not met because Francis Gerace had gradually relinquished active control over Helger's daily operations to Sweebe.[66]

The Board further asserted that a single employer finding was inappropriate in the absence of a showing that Gerace Construction had lost any work to Helger. This conclusion was premised on a curious reverse twist of logic. The Board noted that Helger operated on a non-union basis and, therefore, could bid on smaller jobs not available to Gerace with its higher union labor costs.[67] The trial examiner's finding that Gerace had performed such jobs in the past and was fully equipped to do so in the future was simply not discussed.

Finally, the Board ignored the evasive context of the transaction. The candid admission of Francis Gerace that he sought to avoid Gerace's labor obligations by creating Helger[68] was not considered relevant.[69]

The *Peter Kiewit* case provided a forum for four different levels of decision-makers to clarify the appropriate test for evaluating the emerging practice of double-breasting. The result, however, was characterized more by disagreement than by clarity.

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62. Bornstein, *supra* note 7, at 80.
63. 193 N.L.R.B. 645.
64. *Id.*
65. *Id.* at 645, n. 3.
66. *Id.* at 646.
67. *Id.* at 645.
68. *Id.* at 647, 651.
69. The Board's only discussion of motive was in a footnote stating that "there is no adequate proof that the organizing of Helger was motivated by a desire to discourage union activity or to destroy the Union's majority status in relation to the existing bargaining units of Gerace Construction's employees." *Id.* at 646 n.6. The Board did not, however, discuss the more pertinent motive issue concerning whether Helger was formed to avoid the labor obligations owed by Gerace Construction.

Peter Kiewit Sons' Co. was the only unionized highway construction contractor in Oklahoma.[70] The parent company of Peter Kiewit concluded that its subsidiary could not adequately compete with nonunion firms in obtaining Oklahoma highway contracts. The parent accordingly activated another subsidiary in Oklahoma, South Prairie Construction, an already existing nonunion firm engaged in highway construction in a number of other states.[71] South Prairie essentially replaced Peter Kiewit as the parent's highway contractor in Oklahoma by using the same top management and many of the same employees to perform the same type of work as was previously handled by Peter Kiewit.[72]

Once again, the Board disagreed with a single employer finding by its administrative law judge (ALJ). The ALJ viewed the substitution of South Prairie for Peter Kiewit as a complex plan designed "for the specific purpose of circumventing Peter Kiewit's statutory duty to honor the [labor] agreement."[73] The Board ignored this discussion of intent and, relying on *Gerace*, focused its attention on the control of labor relations criterion. While acknowledging that the framework for overall labor policy flowed from the parent's decision to operate South Prairie on a nonunion basis, the Board concluded that actual control of day-to-day labor matters was handled separately in each.[74] The Board also signalled its intention to treat double-breasting as a normal state of affairs by stating that "[i]t is not uncommon in the construction industry for the same interests to have two separate organizations, one to handle contracts performed under union conditions and the other under nonunion conditions."[75] By assuming the existence of separate and distinct markets for union and nonunion operations, the Board concluded that South Prairie's operations did not result in the diversion of bargaining unit work from Peter Kiewit.[76]

The Court of Appeals for the District of Columbia Circuit disagreed sharply with the Board's approach. In the court's view, while the four-factor *Radio Union* test is controlling,[77] the appropriate standard for evaluating the application of each criterion "is whether, as a matter of substance, there is the 'arm's length relationship found among

70. Peter Kiewit Sons' Co., 206 N.L.R.B. 562 (1973).
71. *Id.*
72. *Id.* at 572.
73. *Id.* at 573.
74. *Id.* at 562-63.
75. *Id.* at 562.
76. *Id.*
77. Although the Board at this time had not expressly adopted the Radio Union test as controlling in the double-breasting context, the Board's opinions appear to assume implicitly the applicability of these criteria. *See, e.g.*, Frank N. Smith Associates, 194 N.L.R.B. 212, 217-18 (1971) (decision of administrative law judge summarily affirmed by Board).

unintegrated companies.' "[78] The court chastised the Board for placing undue emphasis on the control of labor relations criterion and for elevating form over substance in its application of that factor. In contrast to the Board, the court found that the parent company's decision to operate South Prairie on a nonunion basis was the "touchstone" for day-to-day employment decisions and illustrated the parent's practical control of labor relations matters for both firms.[79] The court of appeals concluded that Peter Kiewit and South Prairie constituted a single employer with a common appropriate bargaining unit subject to the same labor agreement.[80]

The Supreme Court, in *South Prairie Construction Co. v. Local 627, IUOE*, reluctantly affirmed the appellate court's single employer finding,[81] but remanded the case to the Board for an initial unit decision. The Court explained that a single employer determination does not necessarily establish the appropriateness of a single bargaining unit which is a necessary prerequisite to the employer-wide application of the labor contract.[82] The unit issue, the Court stated, is one for the Board to decide in the first instance.[83]

The Board, on remand, concluded that a single bargaining unit was not appropriate.[84] The Board emphasized the analytically distinct nature of the single employer and bargaining unit inquiries stating that "in determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved."[85] The Board's decision to treat the unit question as a routine representation matter without reference to the single employer context was a significant departure from prior decisions in which a single unit finding followed almost automatically from a single employer finding.[86] This prior practice was not surprising because the criteria relevant to the two issues are strikingly similar.[87] Indeed, the Board's unit determination in

78. Local 627, IUOE v. N.L.R.B., 518 F.2d 1040 (D.C. Cir. 1975).

79. *Id.*

80. *Id.* at 1048-50.

81. 425 U.S. 800, 804 n.5 (1975) ("[w]ere we called upon to pass on the Board's conclusions in the first instance . . . we might well support the Board's conclusion and reject that of the court below").

82. *Id.* at 805.

83. *Id.* at 804-06.

84. Peter Kiewit Sons Co., 231 N.L.R.B. 76 (1977) [hereinafter Peter Kiewit II].

85. *Id.* at 77.

86. *See, e.g.*, Don Burgess Constr. Co., 227 N.L.R.B. 765 (1977); Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 56.

87. *See* Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 69-70.

Peter Kiewit II was based upon a review of substantially the same factors as its prior single employer conclusion.

Following the pronouncements of the court of appeals and the Supreme Court, one might have expected the Board to adjust its analytical framework accordingly. That is, the Board would likely be expected to increase its receptiveness to a finding of single employer status with a revised "arm's length" focus yet would use the unit question as a limitation but not as a bar on contract extension.[88] This change in focus, however, did not occur. The Board, in two decisions issued within thirteen months of *Peter Kiewit II*, clearly signalled its intention to revert to the lockstep approach of *Gerace*.

In the first of these two cases, *United Constructors*,[89] two brothers owned and operated a unionized general construction firm. The brothers, along with their five sons, subsequently established a nonunion firm because, as one of the brothers testified, "we were just out of the competition."[90] The new firm operated in the same line of business, hired approximately twenty to thirty percent of its workforce from among former employees of the union firm and paid seven per cent of its gross revenues to the union firm.[91] The Board, in dismissing the General Counsel's single employer contention, relied heavily on *Gerace* and the "critical" factor of active labor relations control.[92] The Board stressed that the crucial difference in labor relations matters was the self-serving fact that one was unionized while the other was not.[93] The coordinated bidding arrangement between the two firms also led the Board to conclude that no unit work was lost to the nonunion firm.[94] The court of appeals' "arm's length" standard was not mentioned.

The subsequent *Appalachian Construction, Inc.*[95] decision illustrated the remaining reach of the Board's renewed *Gerace* approach. In *Appalachian*, a union contractor was experiencing cost and productivity problems in performing a maintenance contract for an electric company. The firm's owners then created a nonunion company which performed the same work, with the same employees and under identical

88. Such an alteration in focus would be advantageous in at least one respect. Instead of focusing mechanically on functional integration, the Board would concentrate on the community of interest among the employees of the two firms. The Board's attention, accordingly, would shift from the employer's business structure, which is completely within the employer's control, to the expectations and work roles of the employees involved. *See generally* R.R. Maintenance Laborers' Local 1274 v. Kelly R.R. Contractors, 591 F. Supp. 889, 893 (N.D. Ill. 1984); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 507-09 (5th Cir. 1982).

89. 233 N.L.R.B. 904 (1977).

90. *Id.* at 906.

91. *Id.* at 913.

92. *Id.* at 912-13.

93. *Id.* at 913.

94. *Id.*

95. 235 N.L.R.B. 685 (1978).

supervision.[96] The adminstrative law judge, relying on the Supreme Court's decision in *South Prairie*, found a single employer relationship but not a common bargaining unit.[97] The Board held against the employer on both issues stating that it was not faced with a genuine double-breasted situation in which two companies conduct parallel and simultaneous operations "in different economic climates, one union and one nonunion."[98] While such a true double-breasted operation is legitimate, an employer, as here, may not circumvent its labor agreement merely by creating a wholly-owned subcontractor.[99] Significantly, the Board then found an employer-wide unit appropriate as a matter of course.[100]

The *United Constructors* and *Appalachian* decisions sounded the death knell for the single employer doctrine as a significant limitation on the practice of double-breasting, a result which prompted both the Board and the courts to turn increasingly to the alter ego doctrine as the primary basis for scrutinizing double-breasted operations. As described below, the Board's practice following these cases was to sanction double-breasting except in those few instances in which an ill-planned employer, as in *Appalachian*, blatantly transferred unit work to a jointly owned and supervised nonunion firm.[101]

B. The Single Employer Doctrine—Application and Critique

A closer look at the Board's current method of applying the single employer doctrine helps to understand the doctrine's shortcomings as a test for double-breasted operations. The Board, although continuing to cite the *Radio Union* test as controlling, has essentially transformed that test into a two-pronged formula that stresses control of labor relations and the diversion of unit work. This reformulation is still firmly rooted in the doctrine's jurisdictional and secondary boycott origins and fails as a coherent standard for addressing the realities of double-breasting.

The Board decisions repeatedly state that all four elements of the *Radio Union* test are relevant in determining single employer status, but that no single criterion either controls or is necessary.[102] A single em-

96. *Id.* at 685-86.
97. *Id.* at 691-92.
98. *Id.* at 686.
99. *Id.*
100. *Id.*
101. *See, e.g.*, Kenneth L. Hand, Sr., 276 N.L.R.B. No. 81 (1986); DMR Corp., 258 N.L.R.B., 1063, 1063, 1067-68 (1981), *rev'd.*, 699 F.2d 788 (5th Cir. 1983); Hageman Underground Constr., 253 N.L.R.B. 60, 69 (1980).
102. *See, e.g.*, Air Vac Industries, Inc. 259 N.L.R.B. 336 (1981); Don Burgess Constr. Corp., 227 N.L.R.B. 765, 773 (1977), *enforced*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979).

ployer finding is, in essence, a factual determination based upon all the circumstances of the particular case.[103]

The Board describes the "common ownership" criterion as the least important of the four factors and not determinative of single employer status.[104] This assessment is somewhat problematic because the single employer issue would not even arise without some form of common ownership or financial benefit with respect to the two entities. The Board apparently means that common ownership is of little importance absent the accompanying exercise of common control as exhibited under the three remaining factors.[105] Partial joint ownership is sufficient to establish the "common ownership" factor, particularly where ownership is shared among family members.[106] A continuing financial benefit in the nonunion entity, such as a share in future profits[107] or an advantageous subcontracting arrangement,[108] will also suffice even if common ownership is technically absent.

The criterion of "common management" is also given less weight in the Board's single employer analysis. The Board considers this factor to be important only if the directors or officers shared by the two firms exercise active control over day-to-day management decision, with labor relations considered to be the key management decision.[109] Thus, this factor, for all practical purposes, is subsumed within the labor relations control factor.

The most significant factor in the Board's application of the single employer test is centralized control of labor relations.[110] Some commentators suggest that the presence of this element is an absolute prerequisite to a single employer determination.[111] The Board will find

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103. *See, e.g.*, NLRB v. Al Bryant, Inc., 711 F.2d 543, 551 (3rd Cir. 1983).

104. *See, e.g.*, Western Union Corp., 224 N.L.R.B. 274, 275-76 (1976), *enforced*, 571 F.2d 665 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 827 (1978); Parklane Hosiery Co., 203 N.L.R.B. 597, 612 (1973); Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 66.

105. *See* Western Union Corp., 224 N.L.R.B. 274, 275-76 (1976), *enforced*, 571 F.2d 665 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978); Comment, *Bargaining Obligations After Corporate Transformations*, *supra* note 33 at 633-34.

106. *See, e.g.*, Angelus Block Co., 250 N.L.R.B. 868, 876 (1980); Safety Elec. Corp., 239 N.L.R.B. 40 (1978).

107. *See, e.g.*, NLRB v. Big Bear Supermarkets, 640 F.2d 924, 929-30 (9th Cir.), *cert. denied*, 449 U.S. 919 (1980).

108. *See, e.g.*, Kenneth L. Hand, Sr., 276 N.L.R.B. No. 81, at 8 (1986).

109. *See* Carpenters Local Union No. 213, 201 N.L.R.B. 23 (1973); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971); Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 65-66.

110. *See, e.g.*, Watt Electric Co., 273 N.L.R.B. 655, 657 n.13 (1984); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971); Comment, *Dual Companies—When Does a Union Have a Right to Expanded Representation?*, 12 U.S.F.L. REV. 89, 96-97 (1977).

111. *See* Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 60. *But see* NLRB v. Big Bear Supermarkets, 640 F.2d 924, 930 (9th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980).

this factor satisfied only if common control is exercised on an active, as opposed to potential, basis at the local level of operations,[112] a requirement with which the appellate courts do not always agree.[113] Thus, the Board will not find the requisite degree of control even where a centrally devised policy of labor relations is carried out for the two firms through separate supervisors.[114]

The final factor, "interrelation of operations" is the second most important of the four criteria. This factor involves the most objective inquiry, with the Board focusing on the more tangible indicia of functional integration as opposed to questions of control.[115] Under this factor the Board will evaluate a myriad of considerations including shared equipment and facilities, the interchange of employees, common bank and payroll accounts, and common clients.[116]

The most significant of the "interrelation of operations" considerations is whether the work of the union firm has been diverted to the nonunion firm. The pertinent Board decisions, such as *Appalachian*, illustrate that a single employer finding will result only if the nonunion firm directly assumes work performed by the union firm at the time of the new entity's creation.[117] The subcontracting of unit work to the nonunion firm is the most obvious example.[118] The fact that the union firm may have performed such work in the past or could potentially do so in the future is generally insufficient.[119]

As the Supreme Court explained in *South Prairie*, a single employer finding under the *Radio Union* test does not result in the application of the collective bargaining agreement unless the Board also finds appropriate an employer-wide bargaining unit. The Board in *Peter Kie-*

112. *See, e.g.*, Crest Floors & Plastics, Inc., 274 N.L.R.B. 1230, 1248 (1985); Malcolm Boring Co., 259 N.L.R.B. 597, 600, 602 (1980); Gerace Constr., Inc., 193 N.L.R.B. 645 (1971).

113. *See, e.g.*, Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 25 (1st Cir. 1983); Local 627, IUOE v. NLRB, 518 F.2d 1040, 1046 (D.C. Cir. 1975), *aff'd and remanded sub nom.* South Prairie Constr. Co. v. Local 627, IUOE, 425 U.S. 800 (1976).

114. *See, e.g.*, Western Union Corp., 224 N.L.R.B. 274 (1976), *enforced*, 571 F.2d 665 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 827 (1978); Peter Kiewit Sons Co., 206 N.L.R.B. 562, 562-63 (1973). *But cf.* Dahl Fish Co., 279 N.L.R.B. No. 150 at 7 (1986) (Board adopted recommended order of administrative law judge who concluded that overriding centralized control of labor policy was sufficient in spite of separate supervisors for each firm).

115. *See* Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 63-64.

116. For a thorough listing of the factors considered under the "interrelation of operations" rubric, see Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 64-65 (listing 23 factors).

117. *See, e.g.*, DMR Corp., 258 N.L.R.B. 1063 (1981), *rev'd*, 699 F.2d 788 (5th Cir. 1983); Hageman Underground Constr., 253 N.L.R.B. 60, 69 (1980); Angelus Block Co., 250 N.L.R.B. 868 (1980); Appalachian Constr., Inc., 235 N.L.R.B. 685, 686 (1978).

118. *See, e.g.*, Kenneth L. Hand, Sr., 276 N.L.R.B. No. 81 (1986); Appalachian Constr., Inc., 235 N.L.R.B. 685 (1978).

119. *See, e.g.*, Western Union Corp., 224 N.L.R.B. 276-77 (1976); Peter Kiewit Sons' Co., 206 N.L.R.B. 562 (1973).

wit II listed the following criteria as particularly relevant to the unit question:

> the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.[120]

Following *Appalachian*, however, the Board reverted to its prior practice of designating an employer-wide unit in virtually all instances of a single employer determination.[121] The inevitable result of the Board's return to the restrictive single employer interpretation of *Gerace* was that the unit issue was only reached where the diversion of unit work was so clear that the determination of an employer-wide unit was a foregone conclusion.[122]

Accordingly, the Board has transformed the *Radio Union* test into a two-factor formula. An employer with common ownership of two entities will be treated as a single employer only if actual control of labor relations is exercised on a centralized basis and the unit work of the union firm is clearly and unequivocally diverted to the newly created nonunion firm.

The principal shortcoming of the Board's current single employer approach is its failure to recognize the evasive potential of double-breasting.[123] The concern here is not with union animus. Unlike section 8(a)(3) cases where an anti-union motive is an essential ingredi-

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120. Peter Kiewit Sons' Co., 231 N.L.R.B. 76,77 (1977).

121. *See, e.g.*, DMR Corp., 258 N.L.R.B. 1063 n. 3 (1981), *remanded*, 699 F.2d 788 (5th Cir. 1983); Don Burgess Constr. Corp., 227 N.L.R.B. 765 (1977), *enforced*, 596 F.2d 378 (9th Cir. 1979); Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 69-72. *But cf.* Malcolm Boring Co., 259 N.L.R.B. 597, 606-08 (1981) (separate bargaining unit found despite single employer determination where employees of two firms performed different types of work requiring different levels of skills).

122. *See* Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 70-72. A single employer finding will not result in an employer-wide unit determination, however, where the union, although aware of the existence of both firms, implicitly stipulates to the appropriateness of separate units by entering into a labor agreement applicable only to one of the two firms. *See* Dahl Fish Co., 279 N.L.R.B. No. 150 at 9 (1986); A-1 Fire Proteetion, Inc., 233 N.L.R.B. 38, 39 (1977), *enforced in part and remanded sub nom.* Road Sprinkler Fitters Local Union No. 669 v. NLRB, 600 F.2d 918 (D.C. Cir. 1979), *supplemented*, 250 N.L.R.B. 217 (1980), *remanded*, 676 F.2d 826 (D.C. Cir. 1982), *supplemented*, 273 N.L.R.B. 964 (1984), *enforced*, 789 F.2d 9 (D.C. Cir. 1986).

123. *See* King & LaVaute, *supra* note 8, at 905-06 ("[t]he Board's mechanical application of the 'controlling criteria' to the single employer issue predictably results in separate employer findings because the issues are not considered in the admitted context of an intention to evade, and operate without the constraints of, the union agreement.").

ent,[124] section 8(a)(5) is concerned with conduct that defeats bargaining or contractual obligations.[125] In *Oak Cliff-Golman Baking Co.*,[126] for example, the Board found a violation of section 8(a)(5) in an employer's attempt to avoid the terms of a burdensome labor contract because of economic necessity. Accordingly, the appropriate concern here is with the Board's adoption of a mechanical formula that involves contract avoidance schemes, whether motivated by economic gain, union animus, or both.

This contract avoidance interest is a central theme in each of the double-breasting cases discussed above. In each of these cases, the employer admitted that its central purpose in creating the nonunion entity was to escape the competitive difficulties resulting from adherence to the labor agreement.[127] Yet the Board, in each instance, discounted this factor as irrelevant.

The historical origins of the single employer doctrine explain the Board's lack of concern for the evasive potential of double-breasting. The Board developed the single employer doctrine to aid in the application of its jurisdictional standards,[128] a context in which evasion is not a significant threat. A mechanical formula focusing on functional integration, accordingly, is sufficient. The Board's use of this formula in the double-breasted context, however, fails to recognize the very real possibility for an employer to establish a double-breasted operation for the purpose of avoiding existing labor obligations. By failing to address this potential, the Board's single employer test provides employers with a powerful temptation to manipulate that mechanistic formula to their own advantage.

The incentive to manipulate is most apparent with respect to the criterion of labor relations control.[129] Under *Gerace*, a double-breasted employer may avoid a single employer determination by es-

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124. *See, e.g.*, Mueller Brass Co. v. NLRB, 544 F.2d 815 (5th Cir. 1977).

125. *See, e.g.*, NLRB v. Katz, 369 U.S. 736, 743 (1962); Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975). The Board has adopted this interpretation of the motive element in applying the alter ego doctrine to double-breasted cases. *See, e.g.*, Watt Elec. Co., 273 N.L.R.B. 655, 658 (1984) ("Although Watt did not . . . harbor any personal dislike, animus, or hate for the Union, the absence of such a motivation is not determinative. What does resolve the [motive] issue is the undisputed fact that the Watt family created WECO in an attempt to evade the [collecting bargaining agreement] WPA was obligated to honor. . . ").

126. 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

127. *See supra* notes 21, 34, 51, 60 and accompanying text.

128. *See supra* notes 40-42 and accompanying text.

129. *See supra* notes 40-42 and accompanying text.

tablishing separate layers of supervision for the two firms, despite the presence of a centrally conceived labor relations policy.[130]

The historical roots of the single employer doctrine again are responsible for this anomalous result. Although centralized control of labor relations at the policy-making level was sufficient for a single-employer finding for jurisdictional purposes, the Board's subsequent application of this test in the secondary boycott setting was accompanied by the development of the more rigorous "actual and active" control standard. In this latter context, the Board requires an actual sharing of supervisory personnel in order to effectuate the overriding policy of protecting neutral parties from economic coercion.[131] It is this more stringent "actual and active" standard that the Board uses in its double-breasting analysis. However, the rationale for the more stringent standard in the secondary boycott context is not pertinent to double-breasting. The concern of the Board here is with contract enforcement rather than economic coercion. Accordingly, the appropriate role of the Board in the double-breasting setting should be to ascertain whether the nonunion firm is operated in a manner that defeats the legitimate contract expectations of the parties such that the labor contract should properly follow the transfer of unit work.[132] With respect to this question, the employer's supervisory structure is largely irrelevant.

The employees' legitimate expectations are based upon the employer's obligation to adhere to the terms of the labor agreement with respect to the performance of unit work. It is well-settled that an employer may not avoid its contract obligations because of economic necessity or transfer unit work out of the bargaining unit without first bargaining with the exclusive representative.[133] In this light, the Board's emphasis on the diversion of unit work is appropriate. The Board's standard for evaluating this factor, however, is unrealistic. The *Gerace* decision provides a good example. Francis Gerace created Helger with the purpose of performing the same work in the same geographic area as Gerace Construction. The administrative law judge found that the union firm had performed this type of work in the past and was fully equipped to do so in the future.[134] Nonetheless, the Board dismissed the single employer allegation, relying on the pre-de-

130. Gerace Constr., Inc., 193 N.L.R.B. 645, 645-46 (1971). *See also* Crest Tankers, Inc. v. Nat'l Maritime Union, 605 F. Supp. 1270, 1277-78 (E.D. Mo. 1985), *rev'd*, 796 F.2d 234 (8th Cir. 1986).

131. *See supra* notes 46-49 and accompanying text.

132. *See, e.g.*, NLRB v. Big Bear Supermarkets, 640 F.2d 924, 930 (9th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980).

133. *See supra* note 37 and accompanying text.

134. Gerace Constr., Inc., 193 N.L.R.B. 645, 651 (1971).

termined fact that the nonunionized Helger was more competitive in obtaining these jobs than the unionized Gerace Construction.[135]

The Labor Board's approach to the unit work factor in *Gerace* and similar cases, quite simply, puts the cart before the horse. It seems improper for the Board to give credence to an employer's refusal to apply an existing labor agreement to a newly created entity when the agreement's possible application to that firm is the very issue for determination.[136]

The Board's restrictive application of the single employer doctrine allows an employer to double-breast successfully with a minimum of planning. First, the employer should vest supervisory authority over the labor relations activities of the two firms in separate individuals. Second, the employer should not use the nonunion firm as a vehicle for directly assuming the unit work of the union firm, such as through a subcontracting arrangement. With these two steps properly arranged, the employer can then devote its energy to the nonunion operation while the union firm and its labor contract fade into the sunset.

The appellate courts have grown increasingly uncomfortable with the Board's narrow construction of the single employer doctrine. Two ameliorating trends, however, are emerging. In *Road Sprinkler Fitters Local 669 v. NLRB*,[137] a 1986 decision, the Court of Appeals for the District of Columbia Circuit found a double-breasted employer in violation of section 8(a)(5) for transferring unit work to the nonunion firm without first bargaining with the union. Although the court declined to extend the collective bargaining agreement to the nonunion firm, it did order the performance of all future unit work through the unionized entity.[138] The court's standard for determining the presence of transferred work is particularly significant. The court held that the General Counsel need not show a direct transfer of a job from the union firm to

135. *Id.* at 645. The Board in *Gerace* and similar cases apparently assumes the existence of distinct markets for union and nonunion work, at least in the construction industry, such that no diversion of unit work is possible. This assumption, even if true in 1971, is very doubtful today. *See* D'Amico v. Painters District Council 51, 120 L.R.R.M. 3473, 3475 (D. Md. 1985) ("[t]he rise in double-breasting came with a blurring of the once clear line between the union and non-union construction markets."); Fanning, *supra* note 6, at 41 ("[w]hile the Board's original approach in this area, as set out in its initial *Kiewit* decision, was grounded on a faulty perception that the construction industry consisted of two distinct bidding markets, union and nonunion, it is now beyond peradventure that such distinctions are non-existent.").

136. *See* Samuel Kosoff & Sons, 269 N.L.R.B. 424, 429 (1984) ("[s]uch factors are the products of a status designed and implemented by the parties and result from the failure of the parties to apply the union contract. . . . [a]ccordingly, they do not evidence the existence of a separate status.").

137. 789 F.2d 9 (D.C. Cir. 1986).

138. *Id.* at 16-17. The Board in this case had also found the two firms to be a single employer but declined to extend the contract to both entities because of an implied agreement between the parties to apply the contract only to the unionized firm. *See* A-1 Fire Protection, Inc., 233 N.L.R.B. 38, 39 (1977). *See also supra* note 122.

the nonunion firm. Instead, the diversion of unit work will be presumed if the General Counsel shows that the nonunion firm performs the same type of work traditionally performed by the union firm and that the decline in the union firm's business was not caused by external market forces.[139] Although the lack of contract extension detracts from the effectiveness of the court's order, the restoration of unit work and the more realistic approach to the work transfer issue are certainly steps in the right direction.

The second and potentially more significant trend is the emergence of intent as a legitimate consideration in the single employer analysis. In *NLRB v. Big Bear Supermarkets*,[140] for example, the Ninth Circuit Court of Appeals stated that it made little sense to give special weight to the control of labor relations criterion where "the purpose of the franchise agreement was the evasion of bargaining obligations."[141] The Board has also exhibited a degree of receptiveness to the intent element by its recent tendency to merge consideration of the single employer and alter ego concepts in analyzing double-breasted operations.[142]

IV. The Alter Ego Doctrine

A. Historical Development

The alter ego doctrine evolved from the Supreme Court's opinion in *Southport Petroleum Co. v. NLRB*.[143] In that case, the Board had ordered a Texas refining company to reinstate and provide back pay to three discharged employees.[144] The shareholders claimed that the order was unenforceable because they had liquidated the corporation and transferred the refinery to a newly formed Delaware corporation.[145] The Court held that the liquidation and transfer did not automatically preclude enforcement and instructed the Board to determine whether the purported transfer was a subterfuge to avoid the Board's remedial order. The appropriate inquiry, the Court explained, was "[w]hether there was a bona fide discontinuance and a true change in ownership . . . or merely a disguised continuance of the old employer."[146]

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139. *Id.* at 15.

140. 640 F.2d 924, *cert. denied*, 449 U.S. 919 (1980). *See also* Crest Tankers, Inc. v. Nat'l Maritime Union, 796 F.2d 234, 237-38 (8th Cir. 1986).

141. NLRB v. Big Bear Supermarkets, 640 F.2d 924, 930, *cert. denied*, 449 U.S. 919 (1980).

142. *See infra* notes 169-71 and accompanying text.

143. 315 U.S. 100 (1942).

144. *Id.* at 101-02.

145. *Id.* at 102-03.

146. *Id.* at 106.

The "disguised continuance" notion of *Southport* has dominated the development of the alter ego doctrine. The doctrine has been applied in a number of circumstances where a "technical change in employer identity is merely incident to the former employer's attempt to disguise its continuance" in order to avoid compliance with a Board order or to circumvent obligations arising under the labor act.[147] Although the alter ego doctrine is rooted in the successorship context,[148] the essence of an alter ego finding is a determination that "the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor."[149] Accordingly, while the successorship doctrine recognizes the legitimate interest of a bona fide purchaser to structure its business free of the predecessor's labor agreement,[150] the alter ego doctrine recognizes the need to overlook corporate fiction in order to prevent the subversion of the NLRA and national labor policy.[151]

The Board did not initially apply the alter ego doctrine to the double-breasted operations that emerged in the early 1970's. Neither the *Gerace* nor the *Peter Kiewit* decisions, for example, discussed the alter ego doctrine even though each arguably involved a "disguised continuance" of the union firm in the form of the nonunion entity. The Board's reluctance emanated from the alter ego analysis' link to the successorship doctrine. The alter ego concept was construed as applicable only in the traditional successorship context, in which the predecessor company fully ceased to exist.[152] The doctrine was thought inapplicable to the typical double-breasted setting in which an employer operates two entities simultaneously. The Board, as a result, carved out separate areas of application for the single employer and alter ego doctrines. According to the Eighth Circuit Court of Appeals, "[w]hile the single employer doctrine focuses on whether two or more existing business entities should jointly be held to a single labor obligation, the alter ego doctrine focuses on whether one business entity should be held to

147. *See* Slicker, *supra* note 29, at 1064. Typical applications of the alter ego doctrine include: NLRB v. Herman Bros. Pet Supply, Inc., 325 F.2d 68 (6th Cir. 1963) (sale of firm to son for purpose of avoiding union representation election); NLRB v. Ozark Hardwood Co., 282 F.2d 1 (8th Cir. 1960) (sale of firm to avoid unfair labor practice remedies).

148. *See* Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 47 n.10.

149. Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 259, n.5 (1974).

150. *See* NLRB v. Burns Int'l Sec. Services, Inc., 406 U.S. 272, 281 (1972).

151. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 507 (5th Cir. 1982).

152. *See* NLRB v. Al Bryant, Inc., 711 F.2d 543, 553 (3rd Cir. 1983); Comment, *Bargaining Obligations After Corporate Transformations, supra* note 33, at 638; Comment, *Double-Breasted Operations in the Construction Industry, supra* note 5, at 47 n.10.

the labor obligations of another business entity that has discontinued operations."[153]

The Board's first significant application of the alter ego doctrine to a double-breasted type of operation was in *Crawford Door Sales Co.*[154] Crawford Door was a closely-held corporation engaged in garage door sales and installation. Due to the ill health of Cleon Cordes, the majority owner, the management of Crawford Door fell upon Cleon's son, Michael, who together with his brother owned a one-third interest in Crawford Door.[155] Michael, at that time, was eager to take over the company but only as a nonunion business. Accordingly, Crawford Door was liquidated and Cordes Door, with Michael as owner and manager, was established in the same line of business and at the same location.[156] Michael, implementing his nonunion plan, then refused the union's request to honor the labor contract negotiated by a multi-employer association on behalf of Crawford Door.[157]

In contrast to its restrictive interpretation of the single employer doctrine, the Board's application of the alter ego doctrine in *Crawford Door* was remarkably flexible. The Board enunciated a seven-factor test for determining alter ego status requiring " 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership."[158] Applying this test, the Board rejected the administrative law judge's determination that alter ego status is inappropriate absent a total identity in ownership. The Board concluded that the requisite "substantial identity" in ownership and control were adequately established by the fact that the two firms were wholly owned and managed by members of the Cordes family.[159] Although the Board's opinion did not expressly mention Michael's intention to evade the union contract, the administrative law judge clearly considered this to be a relevant factor.[160]

The invigoration of the alter ego doctrine coincided with the Board's reversion to the *Gerace* mode of analysis under the single employer doctrine. This combination of events heralded a significant change in the Board's approach to double-breasted cases. The required successorship context for alter ego application, however, still remained as a major impediment to the broader use of the alter ego doctrine. For a time, the Board continued to restrict the alter ego doctrine to situa-

153. Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir. 1984). *See also* Comment, *Bargaining Obligations After Corporate Transformations*, *supra* note 33, at 638.

154. 226 N.L.R.B. 1144 (1976).

155. *Id.* at 1146-47.

156. *Id.* at 1147-49.

157. *Id.* at 1147-48.

158. *Id.* at 1144.

159. *Id.*

160. *See id.* at 1147-50.

tions such as *Crawford Door* in which the union firm completely ceased operations.[161] This restriction gradually broke down as the Board began to apply the doctrine to settings where the union firm continued to exist but in a much deemphasized manner,[162] or where the nonunion firm was spun-off as a franchisee[163] or a subcontractor.[164]

The cessation of business prerequisite, for practical purposes, collapsed by the mid-1980's. While some cases[165] and commentators[166] continue to argue for the traditional limitation, the Board currently uses the alter ego doctrine as a full-blown additional and alternative test for double-breasted operations in which both union and nonunion firms co-exist.[167] The Board routinely cites both doctrines in double-breasted cases, and numerous decisions have resulted in combined single employer and alter ego findings.[168]

Even more significantly, the Board and the courts have recently begun to commingle the strands of the two doctrines. Three recent Board decisions describe the alter ego doctrine as "an extension of the concept of single employer."[169] In *Las Villas Produce, Inc.*, a 1986 decision, the Board summarized the pertinent test as including "a case-by-case examination both of the single employer factors and of the factor of disguised continuance as an additional element."[170] Similarly, the Court of Appeals for the Eighth Circuit stated in another 1986 decision that:

> We discuss "single employer"and "alter ego" in this opinion as though they were two separate ideas. In doing so, we adopt the approach of text-writers and digesters, to whose hearts

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161. *See id.* at 1144.

162. *See, e.g.*, Hageman Underground Constr., 253 N.L.R.B. 60 (1980); Naccarato Constr. Co., 233 N.L.R.B. 1394 (1977).

163. *See, e.g.*, Big Bear Supermarkets, 239 N.L.R.B. 179 (1978), *enforced*, 640 F.2d 924 (9th Cir. 1980), *cert. denied*, 449 U.S. 919 (1980).

164. *See, e.g.*, Fugazy Continental Corp., 265 N.L.R.B. 1301 (1982), *enforced*, 725 F.2d 1416 (D.C. Cir. 1984).

165. *See, e.g.*, Crest Tankers, Inc. v. Nat'l Maritime Union, 605 F. Supp. 1270, 1276-77 (E.D. Mo. 1985), *rev'd*, 796 F.2d 234 (8th Cir. 1986); Dahl Fish Co., 279 N.L.R.B. No. 150 at 4 (1986).

166. *See* Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 47 n. 10.

167. *See, e.g.*, Apex Decorating Co., 275 N.L.R.B. No. 205 (1985); Samuel Kossoff & Sons, 269 N.L.R.B. 424 (1984). *See also* Crest Tankers, Inc. v. Nat'l Maritime Union, 796 F.2d 234, 237-38 (8th Cir. 1986).

168. *See, e.g.*, McAllister Bros., Inc., 278 N.L.R.B. No. 91 (1986); Leslie Oldsmobile, Inc., 276 N.L.R.B. No. 148 (1985); Apex Decorating Co., 275 N.L.R.B. No. 205 (1985).

169. *See* McAllister Bros., Inc., 278 N.L.R.B. No. 91 at 28 (1986); Corson and Gruman Co., 278 N.L.R.B. No. 48 at 8 (1986); Apex Decorating Co., 275 N.L.R.B. No. 205 at 8 (1985).

170. 279 N.L.R.B. No. 120 at 2-3 (1986). *See also* Husband & Thompson, *supra* note 3, at 342 ("[i]t is not altogether clear that the two doctrines are entirely severable when applied to double-breasting").

> such neat categories are dear. In fact, what is really happening, it seems to us, is that a number of factors, including anti-union motivation, are being treated as relevant to the question whether an employer, formally separate, should be viewed as legally the same as another.[171]

B. The Alter Ego Doctrine—Application and Critique

The alter ego and single employer doctrines are similar in many respects. Like the single employer doctrine, the alter ego analysis primarily involves a factual inquiry with each case turning on the particular circumstances involved.[172] The criteria applicable to the two tests are also similar and overlapping.[173] Most importantly, the two doctrines share a similar purpose: "to promote the faithful performance of a collective bargaining agreement, not only by the signatory employer but also by a non-signatory employer with the requisite high degree of consanguinity to the signatory employer."[174]

Although some cases curiously suggest that more must be shown to establish an alter ego finding than a single employer finding,[175] the alter ego doctrine as applied in practice is clearly the less rigorous of the two standards. For example, an alter ego determination results in the extension of the labor agreement to both entities without the necessity of an independent unit determination as required in the single employer setting.[176]

The Board and the courts describe the alter ego doctrine as a seven-factor test requiring substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership.[177] As with the single employer doctrine, no one factor is con-

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171. Crest Tankers, Inc. v. Nat'l Maritime Union, 796 F.2d 234, 236 n.1 (8th Cir. 1986).

172. *See* NLRB v. Campbell-Harris Elec., Inc., 719 F.2d 292, 296 (8th Cir. 1983); Advance Elec., Inc., 268 N.L.R.B. 1001 (1984).

173. *See* Carpenters Union Local No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 507 (5th Cir. 1982).

174. *Id.* at 511.

175. *See* Victor Valley Heating, 267 N.L.R.B. 1292, 1296-97 (1983); Naecarato Constr. Co., 233 N.L.R.B. 1394, 1398-99 (1977).

176. *See* Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1277 (9th Cir. 1984); NLRB v. Al Bryant, Inc., 711 F.2d 543, 550 (3d Cir. 1983). The apparent reason for the omission of the unit issue in the alter ego analysis is that an alter ego finding is, in essence, a determination that the two entities are one and the same. *See Stevens, supra,* at 1277. Some cases suggest that the appropriate role of the Board in alter ego cases is to engage in the very limited analysis of determining whether the employer-wide unit is repugnant to any policy embodied in the NLRA. *See* Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 509 (5th Cir. 1982); R.R. Maintenance Laborers' Local 1274 v. Kelly R.R. Contractors, Inc., 591 F. Supp. 889, 896 (N.D. Ill. 1984).

177. *See, e.g.*, Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 11 (2d Cir. 1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1002 (1984).

trolling and all need not be present.[178] In practice, the alter ego standard is a flexible test[179] that focuses on three principal issues—(1) ownership, (2) integrated operations and control, and (3) motive.

The common ownership criterion is applied in substantially the same manner as under the single employer doctrine.[180] The Board, as the *Crawford Door* decision illustrates, does not require a total identity of ownership, particularly when shared among family members.[181] A potential financial benefit flowing from continued control over the nonunion entity will also suffice.[182] The Board will not make an alter ego finding, however, in the absence of either substantially identical common ownership or a potential benefit arising from the nonunion operation.[183]

The Board also applies the integrated operations and control element in a flexible manner. Numerous considerations are relevant to this criterion such as the presence of common management,[184] shared facilities and equipment,[185] and the interchange of personnel.[186] Unlike the single employer doctrine, however, the Board does not place undue weight upon the mechanical application of the factors of labor relations control and the diversion of unit work, thus inviting employer attempts at manipulation.

The Board's recent decisions in *Advance Electric* and *Samuel Kosoff & Sons* illustrate its more realistic approach to these factors under the alter ego doctrine. In both cases, day-to-day supervision of the union and nonunion operations resided in separate individuals. The Board nonetheless stressed that in both instances ultimate authority over labor relations matters was shared.[187] Under the diversion of unit work factor, the Board found in both cases that each firm was engaged in the same line of business, in the same geographic area, and with a

178. *See, e.g.*, J.M. Tanaka Constr., Inc. v. NLRB, 675 F.2d 1029, 1033 (9th Cir. 1982).

179. *See* NLRB v. Campbell-Harris Elec., Inc., 719 F.2d 292, 296 (8th Cir. 1983).

180. *See supra* notes 104-08 and accompanying text.

181. *See, e.g.*, Houshang Vazin, 273 N.L.R.B. No. 4 at 16 (1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1004 (1984); Crawford Door Sales Co., 226 N.L.R.B. 1144, 1144 (1976). *Cf.* Clinton Foods, Inc., 240 N.L.R.B. 1246 (1979) (Board found no alter ego status where sole common shareholder owned only 18% and 30% respective interests in the two firms, distinguishing cases "where both enterprises were either wholly owned by members of the same family or nearly totally owned by the same individuals").

182. *See, e.g.*, Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1311-12 (8th Cir. 1984); NLRB v. Scott Printing Corp., 612 F.2d 783, 786-87 (3d Cir. 1979).

183. *See* NLRB v. Bell Co., 561 F.2d 1264, 1267-68 (7th Cir. 1977); T.E. Elevator Corp., 268 N.L.R.B. 1461 (1984)

184. *See, e.g.*, Advance Elec., Inc., 268 N.L.R.B. 1001, 1003 (1984).

185. *See, e.g.*, NLRB v. Tricor Products, Inc., 636 F.2d 266, 270 (10th Cir. 1980).

186. *See, e.g.*, Leslie Oldsmobile, Inc., 276 N.L.R.B. No. 148 at 5 (1985).

187. Samuel Kosoff & Sons, Inc., 269 N.L.R.B. 424, 428 (1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1003 (1984).

similar market of potential customers.[188] The fact that one firm bid on projects on a union basis while the other did so on a nonunion basis, a fact of considerable significance under the single employer doctrine,[189] was disregarded as self-serving. The administrative law judge in *Samuel Kosoff & Sons* explained that "such factors are the products of a status designed and implemented by the parties and result from the failure of the parties to apply the union contract . . . [a]ccordingly, they do not evidence the existence of a separate status."[190]

The most controversial element of the alter ego test concerns the employer's motive in establishing the nonunion enterprise. The pertinent motive inquiry here concerns the presence of an intent to avoid labor obligations, rather than personal animosity directed toward a particular union.[191] The circuit courts of appeal are currently split as to whether an intent to avoid the union contract is an absolute prerequisite, merely a relevant factor, or something in between. Eight of the circuits have issued opinions but no position has attracted more than three supporters. The Board, meanwhile, has assiduously avoided taking a position on the controversy.

Three circuits, the First,[192] Third[193] and Eighth,[194] require proof of an evasive motive in order to impose alter ego status. The Court of Appeals for the Eighth Circuit, for example, stated that proof of an intent to avoid labor obligations "is at the heart of the alter ego inquiry."[195]

The dissenting opinion of Judge Sloviter in the Third Circuit's *NLRB v. Scott Printing Corp.*[196] decision best describes the policy justification for this position. The alter ego doctrine, she explained, "represents a departure from the generally accepted principle that an employer's freedom to contract includes the right to transfer its assets, reorganize its business or close a portion thereof without imposing on

188. Samuel Kosoff & Sons, Inc., 269 N.L.R.B. 424, 429 (1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1002-03 (1984).

189. *See supra* notes 67, 76, 93-94 and accompanying text.

190. Samuel Kosoff & Sons, 269 N.L.R.B. 424, 429 (1984). *See also* Angelus Block Co., 250 N.L.R.B. 868 (1980).

191. *See, e.g.*, Watt Elec. Co., 273 N.L.R.B. 655, 658 (1984); Hageman Underground Constr., 253 N.L.R.B. 60, 68 (1980).

192. Penntech Papers, Inc., 706 F.2d 18, 24 (1st Cir. 1983), *cert. denied*, 464 U.S. 892 (1983).

193. *See* NLRB v. Scott Printing Corp., 612 F.2d 783, 787 (3d Cir. 1979) (the court "[a]ssum[ed] without deciding that . . . the General Counsel must prove [the employer] intended to evade its duty to bargain.").

194. Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1311 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 595 (1984).

195. *Id.*

196. Judge Sloviter dissented from the majority opinion because the court inferred an unlawful intent from circumstantial evidence rather than direct proof. *See Scott Printing Corp.*, 612 F.2d 783, 789, 791 (3d Cir. 1979) (Sloviter, J., dissenting).

its vendee the obligation to adopt its labor contract."[197] By applying the labor contract to a new enterprise, the alter ego doctrine severly restricts both the employer's right to structure its business operations as it wants and the employees' right to choose whether or not they desire union representation. Accordingly, an alter ego finding and the extension of the labor contract should result only where necessary "to prevent subversion of the NLRA process and frustration of national labor policy."[198]

The Second[199] and Sixth[200] Circuits, on the other hand, view motive as only a relevant, nonmandatory factor. The intent issue was directly presented in *Allcoast Transfer*, a 1986 decision of the Court of Appeals for the Sixth Circuit. The employer was engaged in the moving and storage business both as an agent for Atlas Van Lines and as an independent operator. Atlas adopted a policy prohibiting any of its agents from conducting business under an independent license.[201] At Atlas' suggestion, the employer created a new corporation to act as Atlas' agent.[202] The employer, however, refused the union's request to apply the existing collective bargaining agreement to the new firm.[203] The employer argued to the court that the Board's alter ego determination was improper because of the absence of an anti-union motive. The creation of the new firm, the employer contended, was solely due to the policy directive from Atlas.[204] The court, after reviewing the conflicting positions of the other circuit courts, concluded that a finding of employer intent is merely one of several factors relevant to the alter ego inquiry.[205]

The court's explanation for its conclusion in *Allcoast Transfer* was rather curious. Requiring a finding of an improper motive, the court stated, may tempt employers to act improperly under the camoufiage of a pretextual business reason. In essence, the court did not so much discount the motive factor as conclude that motive may be inferred when the surrounding circumstances strongly suggest a finding of alter ego

197. *Id.* at 789.

198. *Id.* at 791. Most of the commentators agree with Judge Sloviter that proof of an employer's intent to evade labor obligations is an essential element in an alter ego finding. *See* Slicker, *supra* note 29 at 1064; Comment, *Bargaining Obligations After Corporate Transformations, supra* note 33, at 638; Comment, *Dual Companies—When Does a Union Have a Right to Expanded Representation, supra* note 110, at 93-94.

199. Goodman Piping Products, Inc. v. NLRB, 741 F.2d 10, 17 (2d Cir. 1984).

200. NLRB v. Allcoast Transfer, 780 F.2d 576, 581 (6th Cir. 1986).

201. *Id.* at 577.

202. *Id.* at 577-78.

203. *Id.* at 578.

204. *Id.* at 579.

205. *Id.* at 581.

status.[206] Here, the factors of ownership, operation, and control all strongly pointed to an alter ego finding.[207]

Judge Sprouse of the Fourth Circuit in his dissenting opinion in *Alkire v. NLRB* provided a more cogent jusitification for the position adopted by the Second and Sixth Circuits.[208] In that case, Denzil Alkire, the sole owner of two unionized coal hauling firms, sold the assets of the two firms to a former employee who operated the new business on a nonunion basis. Alkire remained on the payroll as a consultant and was also guaranteed an amount equal to the net profits, if any, generated by the new firm under a lease-purchase agreement.[209] The majority rejected the Board's alter ego finding because of the absence of any proof that the lease arrangement resulted in an expected benefit to Alkire related to the elimination of his labor obligations.[210] In Judge Sprouse's view, the use of intent by the majority as a determinative factor resulted in a classic case of "having your economic cake and eating it, too."[211] Where, as here, an employer exercises and enjoys all the prerogatives of ownership, the obligations imposed by the NLRA should also apply regardless of the presence of an actual evasive intent.[212]

The three remaining circuits which have taken a position adopt a stance somewhere in between these two positions. The courts for the Tenth[213] and District of Columbia[214] Circuits do not require a finding of an intent to evade labor obligations but accord the motive factor "substantial weight." Finally, the Fourth Circuit in *Alkire v. NLRB*[215] attempted to recast the alter ego test by requiring a finding of intent but in a purportedly more lenient form. The majority opinion based its formulation on an analogy to *Textile Workers v. Darlington Manufacturing Co.*[216] in which the Supreme Court held that, while an employer may close its entire business even if motivated by anti-union sentiments, an employer may not lawfully undertake a partial closing with a purpose of discouraging union membership among what remains of the work force. The key ingredients in both the partial closing and alter ego settings, according to the Fourth Circuit, are a combination of contin-

206. *Id.* at 582-83.
207. *Id.*
208. 716 F.2d 1014, 1022 (4th Cir. 1983) (Sprouse, J., dissenting).
209. *Id.* at 1021, 1023.
210. *Id.* at 1021.
211. *Id.* at 1023.
212. *Id.*
213. NLRB v. Tricor Products, Inc., 636 F.2d 266, 270 (10th Cir. 1980).
214. Fugazy Continental Corp. v. NLRB, 725 F.2d 1416, 1419 (D.C. Cir. 1984).
215. 716 F.2d 1014 (4th Cir. 1983).
216. 380 U.S. 263, 271 (1965).

ued control plus a reasonably foreseeable benefit that impinges on employee rights.[217]

> Without some future benefit reasonably accruing from the employer's action, then the "force" of the action ends with the transfer itself, and the transfer is bona fide. If, however, the transfer, by eliminating an NLRA-imposed duty, provides a continuing benefit to the old employer, then the force of the closing survives the transfer. To the extent that obtaining the benefit was a motive for the transfer, or was a reasonably foreseeable effect, the result represents a disguised continuance of the old employer.[218]

The court asserted that the "reasonably foreseeable effect" inquiry represents a broader standard than requiring either anti-union animus or an intent to evade labor obligations, and "better strikes a balance between the notion of limited corporate liability and the protection of those employee rights embodied in the national labor laws."[219]

The Board has repeatedly sidestepped the motive issue without adopting an identifiable position. Some cases suggest that the Board considers an improper motive to be a sufficient but not required basis for an alter ego finding.[220] More frequently, the Board describes motive as an important additional factor that must be considered.[221]

At least one recent addition to the Board, Member Babson, appears to view the motive factor as a necessary part of the General Counsel's burden of proof. In *Leslie Oldsmobile, Inc.*,[222] the Board affirmed the decision of an administrative law judge who found an alter ego relationship in spite of concluding that the new firm was created for "economic reasons unrelated to the union."[223] Member Babson, in a footnote, defended the alter ego determination on the ground that the respondent had not rebutted the General Counsel's prima facie case of union animus.[224]

The uncertain impact of the motive factor is one of the two major flaws in the current alter ego formulation. The alter ego doctrine, by

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217. *See Alkire*, 716 F.2d at 1020.

218. *Id.*

219. *Id.*

220. *See, e.g.*, T.E. Elevator Corp., 268 N.L.R.B. 1461 (1984) ("[a]bsent a disguised continuance, the Board generally has found alter ego status only where the two enterprises have substantially identical ownership, business purpose, management, supervision, customers, operation, and equipment").

221. *See, e.g.*, Fugazy Continental Corp., 265 N.L.R.B. 1301, 1302-03 (1982), *enforced*, 725 F.2d 1416 (D.C. Cir. 1984).

222. 276 N.L.R.B. No. 148 (1985).

223. *Id.* at 4.

224. *Id.* at 1 n.1.

directly exploring the evasive potential of double-breasting, is certainly superior to the single employer doctrine. The elevation of the motive element by many of the circuit courts of appeal and perhaps the Board to a determinative status, however, errs in the opposite extreme.

The *Allcoast*[225] case illustrates the basic unfairness of predicating alter ego status upon proof of an employer's evasive intent. As described above, the employer in that case established a new firm performing the same work in the same market but without adherence to the labor agreement. Many, if not most, of the circuit courts nonetheless would not apply the labor agreement to the new firm because of the alleged business justification for the firm's creation. Such a result ignores the legitimate contract expectations of the employees and the Board's traditional preference for contract enforcement. The employer in *Allcoast* benefitted from the performance of unit work otherwise subject to the union contract. The employer's contractual responsibilities should accompany this benefit regardless of whether the new firm was created to avoid the union or merely to comply with Atlas' change in policy.

Historical roots, once again, were significant in shaping the impact of the motive factor in the alter ego analysis. The doctrine was developed as a remedial tool specifically designed to prevent the evasion of labor responsibilities.[226] The motive element, in this context, legitimately lies "at the heart of the alter ego inquiry."[227] This concern is certainly relevant in the double-breasted context as well. The creation of a double-breasted operation, however, implicates more than just the employer's intent. The transfer of unit work to the new firm also implicates the contractual expectations of the employees involved.

The motive prerequisite, accordingly, inappropriately limits the reach of the alter ego doctrine. This result mirrors the impact of the control of labor relations criterion with respect to the single employer doctrine. The single employer doctrine only protects unit work where there is a high degree of functional integration and actual control of labor relations. The alter ego doctrine only protects unit work where there is an evasive motive and a more modest integration of control and operations. Taken together, a significant gap in the wall of protection exists with respect to the diversion of unit work where neither actual control of labor relations nor an ill motive can be shown. This gap is sufficiently large for many employers to navigate successfully.

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225. NLRB v. Allcoast Transfer, Inc., 780 F.2d 576 (6th Cir. 1986). *See supra* notes 200-205 and accompanying text.

226. *See supra* notes 143-47 and accompanying text.

227. Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1311 (8th Cir. 1984).

The second principal deficiency concerns the tremendous amount of confusion that surrounds the alter ego doctrine. This confusion emanates from two sources. First, despite the Board's routine, simultaneous application of the doctrines in the double-breasted setting, some decisions[228] and some commentators[229] continue to construe the alter ego doctrine as applicable only when the predecessor firm ceases to exist. This interpretation can only be explained as another remnant of the doctrine's successorship roots.[230] The doctrine's enforcement objectives are equally pertinent whether the transfer of unit work from the old unionized firm results in that firm's demise or reduction in operations. As explained recently by the Eighth Circuit Court of Appeals, "[t]o limit the doctrine's applicability to companies which have shut down entirely would allow anti-union employers a complete escape from alter ego liability, simply by keeping a small aspect of the predecessor operation alive."[231]

The second source of confusion results from the existence of two separate yet overlapping doctrines. Both the single employer and alter ego doctrines, although conceptually distinct in origin, share a similarity in criteria and purpose.[232] Both the Board and the courts have exhibited considerable confusion in attempting to identify and apply the separate strands of the two tests. The Ninth Circuit Court of Appeals, for example, has identified the four-factor single employer test under the alter ego rubric.[233] In addition, some decisions state that a finding under one doctrine automatically determines the result under the other doctrine,[234] while still other cases indicate that the application of both doctrines to the same setting is a doctrinal impossibility.[235] The continued difficulty of the Board and the courts in identifying which of the two tests to use in gauging the legality of a double-breasted operation certainly prohibits a reasoned examination of the appropriate manner on which to apply the pertinent test.

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228. *See e.g.*, Crest Tankers, Inc. v. Nat'l Maritime Union, 605 F. Supp. 1270, 1276-77 (E.D. Mo. 1985), *rev'd*, 796 F.2d 234 (8th Cir. 1986); Dahl Fish Co., 279 N.L.R.B. No. 150 at 4 (1986) (decision of administrative law judge).

229. *See, e.g.*, Comment, *Double-Breasted Operations in the Construction Industry*, *supra* note 5, at 47.

230. *See supra* notes 151-52 and accompanying text.

231. Crest Tankers, Inc. v. Nat'l Maritime Union, 796 F.2d 234, 238 (8th Cir. 1986).

232. *See supra* notes 172-74 and accompanying text.

233. *See* J.M. Tanaka Construction, Inc. v. NLRB, 675 F.2d 1029, 1033 (9th Cir. 1982). At least one administrative law judge decision has made the same error. *See* Naccarato Construction Co., 233 N.L.R.B. 1394, 1398 (1977).

234. *See, e.g.*, United Telegraph Workers v. NLRB, 571 F.2d 665, 668 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978); McAllister Bros., Inc., 278 N.L.R.B. No. 91 at 28-29 (1986).

235. *See, e.g.*, Dahl Fish Co., 279 N.L.R.B. No. 150 at 4 (1986).

V. A Proposed Reformulation

The failure of the single employer and alter ego doctrines as theoretical bases for evaluating double-breasted operations illustrates that two doctrines are not necessarily better than one. This is particularly true where both doctrines are borrowed from other contexts involving very different policy concerns. What is needed is a single coherent theory that properly balances the respective interests of management, labor and individual employees. The proposed test should address four essential factors; common ownership or continued financial benefit, diversion of unit work, appropriate bargaining unit, and motive.

A. Common Ownership or Continued Financial Benefit

This criterion is necessary in order to safeguard the employer's interest in independently structuring its business operations. An employer has the fundamental right to go out of business entirely[236] or to consummate a bona fide transfer of an enterprise without imposing the labor contract on its successor.[237] The extension of the labor contract to the successor entity is appropriate only where a less than bona fide transfer occurs such that the employer continues to benefit from the operation of the new entity.

The Board's current approach to this factor under the single employer and alter ego tests is sufficient. In order to justify contract extension, the General Counsel must show either a substantial identity in ownership or a continued financial benefit to the former owner.[238]

B. Diversion of Unit Work

The diversion of unit work factor primarily implicates the interests of labor. Employees possess a legitimate expectation of receiving the benefits of a collective bargaining agreement where the employer benefits from the performance of work covered by that agreement. This concern for the protection of unit work and contract enforcement is a common theme in the treatment given two closely related areas of labor law. An employer may not transfer work outside the bargaining unit because of labor costs without first bargaining to impasse with the exclusive representative.[239] Additionally, an employer may not unilaterally alter the terms of a collective bargaining agreement because of eco-

236. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965).

237. *See* NLRB. Burns Int'l Security Services, Inc., 406 U.S. 272, 282-84 (1972).

238. *See supra* notes 107-11, 181-83 and accompanying text.

239. *See* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Otis Elevator Co. 269 N.L.R.B. 891 (1984).

nomic necessity.[240] Logically, then, an employer should not be permitted to avoid the terms of a labor contract in the double-breasted setting simply by establishing a new firm to perform unit work under nonunion conditions.

The issue remains of determining the pertinent standard for ascertaining the occurrence of diverted unit work. The Board's single employer test, which requires proof of an actual lost project, is unrealistic. The Board's current approach, moreover, puts the proverbial cart before the horse by giving credence to the nonunion firm's ability to obtain work unavailable to the union firm because of labor costs. The *Road Sprinkler* decision of the Circuit Court of Appeals for the District of Columbia Circuit, as discussed above,[241] offers a more appropriate standard. The court in *Road Sprinkler* held that the requisite transfer of unit work will be presumed if the General Counsel shows that the nonunion firm performs work of the type traditionally performed by the union firm and that the decline in the union firm's business was not caused by external market forces.[242]

Even the *Road Sprinkler* standard however, fails to address the situation in which a double-breasted employer captures new work that, but for the creation of the nonunion entity, could have been performed by the pre-existing union firm. This "new work" context poses a more difficult problem of proof. The Board's recent alter ego decisions in *Advance Electric* and *Samuel Kosoff & Sons*, however, provide a suitable frame of reference. In these decisions, the Board found a loss of unit work based upon a determination that both firms were engaged in the same line of business, in the same geographic area, and with a similar market of potential customers.[243] When these factors are shown, the Board may properly presume a loss of potential work and shift the burden of persuasion to the employer to show that, for reasons other than the impact of labor costs, the additional work could not or would not have been performed by the former business.[244]

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240. *See, e.g.*, Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063 (1973), *enforced*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

241. *See supra* notes 137-39 and accompanying text.

242. Road Sprinkler Fitters Local 669 v. NLRB, 789 F.2d 9, 15 (D.C. Cir. 1986).

243. Samuel Kosoff & Sons, Inc., 269 N.L.R.B. 424, 429 (1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1002-03 (1984). These two decisions are discussed, *supra*, in the text accompanying notes 187-90.

244. The Supreme Court has approved a similar use of a shifting burden of persuasion in the context of an alleged violation of National Labor Relations Act § 8(a) (3), 29 U.S.C. § 158(a) (3), explaining that this allocation is not inconsistent with the General Counsel's ultimate burden under National Labor Relations Act § 10(c), 29 U.S.C. § 160(c), to prove the case "upon a preponderance of the testimony." NLRB v. Transportation Management, 462 U.S. 393, 401-04 (1983).

C. Appropriate Bargaining Unit

This factor is relevant as a basis for protecting the rights of the individual employees and, to a lesser extent, the employer. Again, the Board's approach in analogous circumstances is instructive. When an employer expands operations or establishes a new business, the labor contract does not automatically extend to the new employees unless a single bargaining unit is appropriate. If the employees share the requisite community of interests, the new group of employees will acrete to the existing unit and the labor agreement will automatically apply.[245] Where such a community of interest does not exist, however, the new employees are entitled to determine the union representation issue on an independent basis in their own separate bargaining unit.[246] This same determination is necessary where a common employing entity expands operations by means of double-breasting.

In the vast majority of cases, the unit determination will automatically follow the consideration of the other factors of the proposed test. Because of the overlap in the bargaining unit and diversion of unit work factors, the Board may properly presume the appropriateness of a unitary bargaining unit once a diversion of unit work is established. Nonetheless, an opportunity to rebut this presumption is necessary in order to provide a safety valve where contract extension unreasonably impinges on the rights of both the employer and the new group of employees.[247]

D. Motive

The employer's motive in establishing the nonunion enterprise is an important consideration in the analysis of double-breasted operations. One of the core objectives of the NLRA is to deter conduct designed to avoid labor obligations.[248] An evasive intent, however, should not be construed as an absolute prerequisite to the extension of the collective bargaining agreement. In those circumstances in which the other factors of the proposed test are clearly established, the legiti-

245. *See, e.g.*, NLRB v. Security - Columbian Banknote Co., 541 F.2d 135, 140 (3rd Cir. 1976); NLRB v. Sunset House, 415 F.2d 545 (9th Cir. 1969); Temple-Eastex, Inc., 228 N.L.R.B. 203 (1977). *See supra* notes 34-36 and accompanying text.

246. *See* NLRB v. Sunset House, 415 F.2d 545, 547-48 (9th Cir. 1969).

247. *See, e.g., id.*, at 547 (accretion inappropriate where one store so geographically separate from rest of unit that participation in union activities would be difficult or impractical.); NLRB v. Food Employers Council, Inc. 399 F.2d 501, 503 (9th Cir. 1968) (accretion inappropriate where hours, wages and working conditions, of new employees differ from those of other employees).

248. *See generally* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Southport Petroleum Co. v. NLRB, 315 U.S. 100 (1942).

mate contract expectations of the employees deserve protection regardless of the employer's intent.

What role, then, should motive play in this proposed reformulation? The Eighth Circuit Court of Appeals, discussing the evolution of the single employer and alter ego doctrines offered this suggestion:

> [W]hat is really happening, it seems to us, is that a number of factors, including anti-union motivation, are being treated as relevant to the question whether one employer, formally separate, should be viewed as legally the same as another. When the requisite degree of anti-union motivation is present, this question is answered "yes," even though the other factors considered might not suffice to produce this result.[249]

Proof of an evasive intent, accordingly, although not a necessary prerequisite, serves to assist the General Counsel in situations where the other factors are less than clearly established. Where an employer purposefully seeks to avoid statutory labor obligations, the deterrent goals of the NLRA properly places a comparatively heavier burden on the employer to rebut the presence of the other three factors of the proposed test.

The proposed test omits certain factors currently considered by the Board under the single employer and alter ego doctrines. The most significant omission is the common control of labor relations criterion. Labor relations control remains relevant under the proposed test to the extent that the employer's labor policy is motivated by an evasive intent or results in the diversion of unit work. However, the identity and number of persons responsible for supervising day-to-day employment matters is irrelevant to the core issue of whether the labor contract should follow the unit work. The proposed test also omits from consideration the numerous indicia of functional integration that are examined under the current tests. But an examination of these indicia ought to be unnecessary, except to the extent they are relevant to the unit determination issue. The Board's current search for common telephone numbers[250] and accountants[251] is a classic case of failing to see the forest for the trees.

The principal advantage of the proposed formulation is that in a single test it focuses analysis on the pertinent policy considerations. The proposed test is not a wholesale departure from the Board's current approach. Instead, the proposal represents an integration of the relevant strands of the two doctrines now used. As such, this test is merely a

249. Crest Tankers, Inc. v. Nat'l Maritime Union, 796 F.2d 234, 236 n.1 (1986).
250. *See, e.g.*, Advance Elec., Inc., 268 N.L.R.B. 1001, 1002 (1984).
251. *See, e.g.*, Leslie Oldsmobile, Inc., 276 N.L.R.B. No. 148 at 6 (1985).

logical step down the path already travelled by the Board through its recent practice of merging consideration of the single employer and alter ego doctrines in analyzing double-breasted operations.

The adoption of this proposed "double-breasting" test would undoubtedly serve to restrict the practice of double-breasting more narrowly than the Board's current approach. This restriction is appropriate. The Board's interpretation of the single employer and alter ego doctrines improperly stresses the managerial interests of employers at the expense of the equally legitimate interests of labor in contract enforcement. This imbalance is neither consistent with well-established labor law principles nor conducive to the policy goals of the NLRA. Of course, the NLRA does not and should not preclude an employer from establishing a "dual shop" operation. An employer's creation of a new business enterprise or the expansion of an existing business operation are fundamental entrepreneurial privileges. However, when an employer benefits from the transfer of unit work covered by a collective bargaining agreement to a newly created entity in which it has an ownership interest, the terms of the agreement should accompany the unit work.

VI. Conclusion

In a 1977 decision, an administrative law judge foretold the likely impact of the double-breasted phenomenon. He stated that an employer's ability to look upon each project as a new enterprise unrelated to any prior undertakings "means an end to all collective bargaining contracts, and all stable union representation in the entire industry."[252] The Board's restrictive and unintegrated application of the single employer and alter ego doctrines has done much to fulfill this gloomy prophecy in the construction industry. The practice of double-breasting has now spread to other sectors where the same battle is again taking place.

The single employer and alter ego doctrines have failed largely because they were developed for purposes other than double-breasting. The integrated "double-breasting" test proposed in this Article offers a more coherent basis for the evaluation of double-breasted operations. Such a reformulation is badly needed in order to provide a standard for the enforcement of contract rights that is consistent with the policy goals of the NLRA and that is not prone to manipulation.

252. Dee Cee Floor Covering, 232 N.L.R.B. 421, 426 (1977).