CORPORATE SHELL GAMES: USE OF THE CORPORATE FORM TO EVADE BARGAINING OBLIGATIONS

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In 1995, a blue ribbon panel convened by the Secretaries of the U.S. Departments of Labor and Commerce issued a comprehensive report on the state of labor-management relations in the United States (the "Dunlop Report").¹ The Report identifies a variety of incentives inherent in the U.S. labor, employment, and tax laws for employers to circumvent statutory and contractual obligations to their workers under the National Labor Relations Act ("NLRA").³ Among these is the incentive to engage in corporate transformations that shift work from the union to the nonunion sector, thereby escaping commitments under collective bargaining agreements.⁴ An increasingly popular mechanism for such a transaction is the practice of "double-breasting."⁵

Though appearing in a variety of forms, a double-breasted (or "dual shop") operation is, in its essence, one in which an employer subject to a collective bargaining agreement establishes or acquires a nonunion ("open shop") affiliate to perform the same or similar work as its union counterpart.⁶ Once unique to the construction industry,⁷ the practice gained

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1. UNITED STATES COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS (1995) [hereinafter DUNLOP REPORT].
2. See id. § 5.1.
4. See DUNLOP REPORT § 5.2.2(5).
5. See Steven G. Allen, Unit Costs, Legal Shocks, and Unionization in Construction, 16 J. LAB. RES. 367, 376 (1995) (noting that, in the early 1970s, double-breasted operations were "relatively rare," but that by the next decade, 22 of the 43 largest union contractors in the construction industry had double-breasted affiliates).
6. The National Labor Relations Board ("NLRB") defines double-breasting as "a corporate arrangement . . . in which a unionized employer forms, acquires, or maintains a separately managed nonunion company that performs work of the same type as that performed by the affiliated union company." Carpenters District Council, 143 L.R.R.M. 1049, 1050 (1993). For another definition by a leading scholar in this field, see Herbert R. Northrup, Construction Doublebreasted Operations and Pre-Hire Agreements: Assessing
wider appeal in the mid-1970s\(^8\) and has since become common in a variety of other labor-intensive industries.\(^9\)

The economic appeal to management of such operations is obvious, both in terms of the reduced labor costs enjoyed by operating open shop,\(^10\) and in the ability of the open shop to bid competitively on jobs which are only available to nonunion contractors.\(^11\) As the construction industry, traditionally one of the more heavily unionized sectors,\(^12\) has become increasingly dominated by open shops,\(^13\) those firms able to compete in

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the Issues, 10 J. LAB. RES. 215, 219 (1989) [hereinafter “Doublebreasted Operations”] (“Doublebreasting occurs when a single company has two or more subsidiaries (known as double-breasted or dual shops), one or more of which operates union and the other(s) nonunion (or open shop).”).

7. Many factors explain the susceptibility of the construction industry to double-breasted facilities. Among those commonly cited are the inflated wages within the industry, union inflexibility, frequent work stoppages, and low productivity. See, e.g., Joseph H. Bucci & Brian P. Kirwin, Double Breasting in the Construction Industry, 10 CONSTRUCTION LAW. 1, 24 (1990) (attributing the rise of double-breasted operations to “wages, productivity and work stopsages”); Marvin J. Levine, Pre-hire Agreements and “Doublebreasting” in the Construction Industry: Prospects for Legislative Change, 39 LAB. L.J. 247 (1988) (citing wages, inflexible work practices, and poor productivity as the primary reasons for the rise of double-breasted operations within the construction industry).


11. See Bucci & Kirwin, supra note 7, at 24. The primary advantage employers seek to gain from operating a dual shop is the ability to bid competitively on jobs which accept bids from both nonunion and union contractors, while continuing, with the unionized half of the operation, to bid on those jobs which restrict bids to unionized firms. See General Longshore Workers v. Pate Stevedore Co., No. 91-30292-RV, 1993 U.S. Dist. LEXIS 18638, at *8 (N.D. Fla. Dec. 30, 1993). Both companies within the double-breasted operation, therefore, can “bid more competitively in their respective markets.” C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 352 (1st Cir. 1990).

12. See Doublebreasted Operations, supra note 6, at 217-18 (noting that, even though union control over the industry had begun to slide in the 1950s, in 1973, union workers still comprised 40% of the industry).

13. There are numerous explanations for the pronounced decline of unions in the construction industry since the 1950s. Essentially, unions’ successes in getting high wages and generous benefits created a tremendous competitive advantage for open shops, whose labor costs were dramatically lower than unionized firms’ costs. See generally Bucci &
both the union and nonunion markets have gained substantial market share and the ability to diversify geographically. According to one commentator, "[t]he tremendous cost advantages of open shop over unionized construction have left many unionized contractors with few choices if they desire to remain in business."15

But while some hail the practice of double-breasting as a necessary means of survival, others see it as a serious threat to organized labor, putting unfair pressure on workers to accept lower wages and benefits. Critics blame the rise of the double-breasted employer for the stagnation of real wages and the erosion of union strength in the construction industry. While not explicitly illegal under the NLRA, double-breasted facilities are frequently challenged by labor unions as "sham" operations designed solely to siphon bargaining unit work away from unionized employees. The basic inquiry for the National Labor Relations Board ("NLRB"), therefore, is whether the open shop affiliate is created solely as a vehicle by which to escape bargaining obligations or whether it is created for legitimate business purposes. Yet, the Board has complicated this

Kirwin, supra note 7, at 1, 24; Decline of Construction Unionism, supra note 10, at 379 ("[C]onstruction union membership has fallen from 40.1% of all construction workers in 1973 to 18.8% in 1994.").

14. See NLRB v. Al Bryant, Inc., 711 F.2d 543, 552 (3d Cir. 1983) (noting that "[a] contractor engaged in a double-breasted operation has the best of both worlds, since it can bid through its union company when jobs require union contractors but can underbid a unionized company through its second operation on jobs that do not require union contractors.").

15. Doublebreasted Operations, supra note 6, at 226.

16. See id. at 219.


18. See Lisa Belkin, Showdown at Yazoo Industries, N.Y. TIMES, Jan. 21, 1996, § 6 (Magazine), at 27 (noting that "[r]eal wages in the United States have declined 28% since 1973... a reflection of the weakness of unions in a changing economy.").

19. See Allen, supra note 5, at 375-76 (suggesting that the proliferation of double-breasted facilities in the wake of the Peter Kiewit decision has led to a decline in unionization in the construction industry).

20. See C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 352 n.3 (1st Cir. 1990) ("[D]ouble-breasted operations are not inherently illegal under the NLRA.") (quoting A. Dariano & Sons, Inc. v. District Council of Painters No. 33, 869 F.2d 514, 517 (9th Cir. 1989)).


22. See Decline of Construction Unionism, supra note 10, at 383 (noting that the NLRB essentially decides "whether separate union and nonunion concerns have been created for legitimate business reasons or as pretexts to avoid obligations under an existing labor agreement."); see also NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 339 (6th Cir. 1990) (stating the issue as "whether the economic enterprise is in reality one unit, with
inquiry through the application of two pre-existing corporate law doctrines, developed in distinctly different contexts and for distinctly different purposes. The result is confusion and unpredictability in the law.

This Comment examines the use of the two doctrines to review the legitimacy of double-breasted operations and concludes, in Part I, that they not only tend to produce inconsistent, unreliable results, but also are applied in a way that enables employers to escape bargaining obligations without sufficient business justification. Part II then analyzes existing legislative, contractual, and judicial alternatives to the current doctrines and concludes that none adequately prevents employers from abusing their privilege to operate double-breasted. Finally, Part III proposes a new frame of analysis for assessing double-breasted operations that focuses on the objective business rationality underlying the decision to create an open shop affiliate, rather than on the mere mechanics of the transformation.

I. DOUBLE-BREASTING IN THE LABOR LAW CONTEXT

A. The Role of the NLRA and the NLRB

Neither the NLRA nor the Labor Management Relations Act ("LMRA") directly addresses the potential for firms to vary the corporate form to evade collective bargaining obligations. Challenges to double-breasted operations are most commonly brought under section 8(a)(5) of the NLRA, which imposes on employers a requirement to bargain collectively with the representatives of their employees. In section 8(a)(5) actions, unions contend that the open shop spin-off or subsidiary is merely clothed as a separate operation, when in reality it is part of the same enterprise as its unionized parent or sister. The new entity, they argue,
remains under an obligation to bargain collectively with its employees since the employees are effectively members of the same bargaining unit as their unionized counterparts. As such, they are entitled to share the benefits of a bargaining contract.

The determination of whether the collective bargaining agreement carries over to the open shop firm is exclusively reserved for the NLRB by section 9(b) of the NLRA. Courts are obligated to defer to Board decisions, so long as they determine that the decisions are supported by substantial evidence.

B. Analytical Approaches of the Board

In determining the validity of double-breasted operations, the NLRB applies two alternate theories: (1) the single employer doctrine; and (2) the alter ego doctrine.

1. The Dominant Approach: The Single Employer Doctrine

Two ostensibly separate entities will be deemed a single employer under the NLRA if the Board determines that, notwithstanding their corporate entity status, they “comprise an integrated enterprise.”

nonsignatory is a sham created merely for the purpose of evading contractual obligations or is a bona fide enterprise”).

29. Section 9(b) of the NLRA instructs the Board to:

decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .


In selecting an appropriate bargaining unit, the NLRB considers the following factors:

bargaining history of each company; functional integration of operations among the companies; differences in types of work and skills of employees; extent of centralization of management and supervision, particularly with regard to labor relations, hiring and discipline of employees; control of day-to-day operations; extent of interchange and contact between the groups of employees.

Bucci & Kirwin, supra note 7, at 29; see also UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1470 (9th Cir. 1994) (“[T]he NLRB . . . has primary jurisdiction to determine whether the employees of both the union and non-union firms constitute an appropriate bargaining unit.”); General Longshore Workers v. Pate Stevedore Co., No. 91-30292-RV, 1993 U.S. Dist. LEXIS 18638, at *9-10 (N.D. Fla. Dec. 30, 1993) (noting that “[t]he determination of appropriate bargaining units is within the exclusive statutory jurisdiction of the NLRB.”).

30. See 29 U.S.C. § 9 (“[a court must accept] findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole.”).

31. Radio Union v. Broadcast Serv. Inc., 380 U.S. 255, 256 (1965) (applying the single employer test to determine whether an entity is sufficient in size to fall under the Board’s
making this determination, the Board applies a four-step analysis which focuses on the degree of (1) interrelation of operations, (2) common management, (3) centralized (or common) control of labor relations, and (4) common ownership of the two firms. In theory, no single factor is dispositive, and the Board exercises wide discretion in determining whether the circumstances of each case warrant a finding of single employer status. Such a finding, however, does not alone render a double-breasted operation invalid; the NLRB must make a secondary determination that the employees of both firms share the “community of interests” necessary to constitute an “appropriate bargaining unit” in accordance with section 9 of the NLRA.

a. Development of the Doctrine in the Labor Law Context

The NLRB’s use of the single employer test dates to the 1950s when it was applied to determine whether two or more companies, which individually failed to satisfy the Board’s jurisdictional size threshold, could be considered a single enterprise large enough to permit the Board to assert jurisdiction. The Supreme Court eventually sanctioned this use in jurisdiction); see also Lihli Fashions Corp. v. NLRB, 80 F.3d 743, 747 (2d Cir. 1996) (applying the test in the double-breasting context).

32. See Radio Union, 380 U.S. at 256.

33. See Local No. 627, Int'l Union of Operating Eng'rs v. NLRB, 518 F.2d 1040, 1045 (D.C. Cir. 1975) (concluding that application of the single employer test “depends upon all the circumstances of the case, [and] that not all of the ‘controlling criteria’ specified by the Supreme Court need be present”).

34. See NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 386 (9th Cir. 1979) (“A community of interests among employees is evidenced by a similarity in their skills, duties, and working conditions.”) (quoting Pacific Southwest Airlines v. NLRB, 587 F.2d 1032, 1038 (9th Cir. 1979)).

35. See UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1470 (9th Cir. 1994) (noting that the NLRB “has primary jurisdiction to determine whether the employees of both the union and non-union firms constitute an appropriate bargaining unit”); see also South Prairie Constr. Co. v. International Union of Operating Eng’rs Local No. 627, 425 U.S. 800, 805 (stating that “especially in the construction industry a determination that two affiliated firms constitute a single employer ‘does not necessarily establish that an employerwide [sic] unit is appropriate, as the factors which are relevant in identifying the breadth of an employer’s operation are not conclusively determinative of the scope of an appropriate unit.”) (quoting Central New Mexico Chapter, Nat’l Elec. Contractors Ass’n, 152 N.L.R.B. 1604, 1608 (1965)).

36. See 29 U.S.C. § 159(b) (“[T]he Board should decide in each case . . . [what] the unit appropriate for the purposes of collective bargaining shall be. . . .”).


38. The Board would assert jurisdiction over an employer only if gross receipts of that employer equaled or exceeded $100,000 per year. See Radio & Television Broad. Technicians, Local 1264 v. Broadcast Serv. Inc., 380 U.S. 255, 256 (1965).

39. See id.
Later, the Board expanded its use of the test as a tool to determine the legality of secondary boycott activities. A secondary boycott occurs when a unionized workforce involved in a dispute with its employer (the primary employer) induces a secondary employer to discontinue doing business with the primary employer, thus pressuring the primary employer to resolve its labor dispute. Congress has outlawed the use of such boycotts "because it believed that they 'unfairly... enmesh in a proliferating dispute a person who is in truth a... 'stranger' to that dispute.' If, however, the Board finds that the primary and secondary entities constitute a single employer, such activity escapes the NLRA's prohibition.

b. The Single Employer Test in the Double-Breasting Context

Seeing obvious parallels between the secondary boycott inquiry and the double-breasting inquiry, the Board adopted the single employer doctrine in the latter context when double-breasted facilities were first subject to challenge in the early 1970s. The Board first applied the doctrine in its 1971 Gerace Construction, Inc. decision. That case involved a union contractor, Gerace, which found itself unable to bid on coveted smaller construction projects because of the high costs associated with its unionized workforce. It therefore established an open shop subsidiary, Helger construction, whose cost efficiencies enabled it to compete for smaller contracts.

Operating side-by-side, each firm employed its own managers, but final managerial authority ultimately rested in the common directors and

40. See id.
42. See Bucci & Kirwin, supra note 7, at 26; BLACK'S LAW DICTIONARY 1351 (6th ed. 1990) (noting that the "[t]erm refers to refusal to work for, purchase from or handle products of secondary employer with whom union has no dispute, with object of forcing such employer to stop doing business with primary employer with whom union has dispute").
45. See Bucci & Kirwin, supra note 7, at 26 ("It is precisely the ability to be construed as a 'separate employer' that effectively enables a contractor to operate in a double-breasted fashion and derive protection from illegal secondary boycotts.").
47. 193 N.L.R.B. 645 (1971).
48. See id. at 647.
Moreover, day-to-day matters of the subsidiary were decided in consultation with the parent’s management.50 Finally, most of the subsidiary’s operating capital was contributed by Gerace, and Helger operated on Gerace’s land rent-free.51

Notwithstanding these facts, the Board overruled the trial examiner’s finding of single employer status, stating that common ownership alone will not render a double-breasted operation invalid.52 Rather, “[a] critical factor in determining whether separate legal entities operate as a single employing enterprise is the degree of common control over labor relations policies.”53 The Board concluded that such control had not been established,54 since control over an affiliate entity must be “actual or active,” rather than merely potential.55 Here, irrespective of close ties between Gerace and Helger, the Board found that they were distinct entities, free from active common control, since “the two companies submit separate job bids,” rely on their own capital, and “have separate health and welfare plans and workmen’s compensation insurance contracts.”56

Gerace set the tone for subsequent decisions in which the Board has consistently maintained that common ownership is not determinative, but rather that the degree of common control is “[t]he most important factor.”57 The Board continues to insist that this control must be actual or active.58 In fact, neither the “actual or active” requirement, nor the principle that common ownership is not determinative, was new to the Board. It had developed both of these standards in the application of the single employer

49. See id. at 650 (noting that the Gerace family and another principal owner of Gerace own 76% of the shares of Helger and constitute two-thirds of Helger’s board, thereby giving them the “legal right to control and direct the affairs of Helger”).
50. See id. (noting that the manager of Helger “frequently consults with” the management of Gerace on day-to-day matters).
51. See id.
52. See id. at 645.
53. Id.
54. See id. at 645-46.
55. Id. at 645.
56. Id. at 645-46.
57. UA Local 343 v. Nor Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1992) (“The most important factor is centralized control of labor relations.”); see also Bucci & Kirwin, supra note 7, at 28 (noting also that “centralized control of labor relations traditionally merits the closest attention.”).
58. See, e.g., Woods Chapel United Super, Inc., 289 N.L.R.B. 125, 137 (1988) (finding that the common owner “actually and realistically makes the major policy decisions” for both the union and nonunion shop); Alabama Metal Prods., Inc., 280 N.L.R.B. 1090, 1098 (1986) (finding that while “potential control” of both operations lay in the common owner, “actual control” of the open shop lay in its manager alone; therefore, there was no basis for a single employer finding); United Constructors, 233 N.L.R.B. 904, 912-13 (1977) (citing the Gerace requirement that control of labor relations must be actual or active). Even in those cases in which the actual or active requirement is not explicitly stated, the tenor of the decisions reveals that that Board adheres to the standard.
test in the secondary boycott context. Nonetheless, both elements of the doctrine have had a significant impact on subsequent cases and have, in many circumstances, proven an impediment to finding single employer status.

Two years after Gerace came another influential Board decision shaping the doctrine, Peter Kiewit Sons’ Co. That case involved a highway and general construction holding company which created two subsidiaries, one of which operated open shop. When the open shop facility began bidding on jobs in the same state as the unionized parent, the union filed section 8(a)(5) unfair employment practice charges, seeking to have its collective bargaining contract extended to the open shop firm. In a terse opinion, the Board rejected the claim. It determined that the two companies were separate entities and implied that a showing of common control had not been made.

The Court of Appeals for the District of Columbia, however, reversed. It insisted that the application of the four factors of the single employer test should be governed by whether, “as a matter of substance, there is the arm’s length relationship [between the two entities] found among unintegrated companies.” Moreover, the court argued that the Board need not be able to identify specific harm, in the form of actual work lost by union employees, emanating from the change in form in order to make a single employer finding. Rather, all that is necessary is “a

59. See Glenn, supra, note 41, at 532-33; see also, Drivers, Chauffeurs & Helpers, 158 N.L.R.B. 1281, 1286 (1966) (“There must be in addition [to common ownership] such actual or active common control, as distinguished from merely a potential, as to denote an appreciable integration of operations and management policies.”); National Union of Marine Cooks & Stewards (Irwin Lyons Co.), 87 N.L.R.B. 54, 56 (1949) (noting that although common ownership is a factor to be weighed, it is not controlling); Befort, supra note 8, at 76 (noting that the Board will only make a single employer finding in a secondary boycott case if one entity exercises actual or active control of the other).
60. See Bucci & Kirwin, supra note 7, at 28.
62. See id. at 568.
63. See id. at 562-63 (citing the Gerace requirement that common control must be actual or active). As in Gerace, the Board overturned the Administrative Law Judge’s decision, which in this case was concerned about the direct loss of union work to the open shop entity. The ALJ said that, as a result of the open shop’s entry into the Oklahoma market, it “performed work which [the unionized entity] would otherwise have performed with a work force . . . covered by the union contract.” Id. at 573.
64. See Local No. 627, Int’l Union of Operating Eng’rs v. NLRB, 518 F.2d 1040, 1046-47 (D.C. Cir. 1975) (overturning the NLRB’s decision, finding the “presence of a very substantial qualitative degree of centralized control of labor relations” and “a substantial qualitative degree of interrelation of operations and common management”).
65. Id. at 1046.
66. See id. at 1049. The court noted that:

Although we recognize that the central purpose of the “single employer” principle is to make collective bargaining agreements legally binding, we do not
showing of a reasonable likelihood of such occurrences."

On appeal, the Supreme Court reversed the D.C. Circuit on procedural grounds, remanding the case to the Board for a determination of whether the employees of the two entities belonged to a single bargaining unit. The Court, however, upheld the lower court's single employer finding. On remand, the Board found that the employees of the open shop were not members of the parent employees' bargaining unit and it therefore refused to extend the collective bargaining agreement. This marked the beginning of an apparent trend by the Board to use its discretion over the bargaining unit inquiry to withhold collective bargaining obligations, even in the face of a single employer finding.

Although the arm's length standard developed in Peter Kiewit is considered by some to have become standard in the double-breasting analysis, it appears that the test has been deprived of its intended force and has failed measurably to impact the Board's analysis. Additionally,

agree that it is necessary for petitioner to have waited for hardship to occur — to show that Kiewit's employees actually lost work or that there were other detrimental effects — in order for the 'single employer' principle to apply.

Id.

67. Id.
68. See South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 804 (1976) (holding that the circuit court had overstepped its authority by determining that the employees of the double-breasted operation constituted an "appropriate bargaining unit," which, it reaffirmed, is the exclusive domain of the NLRB).
69. See id. at 806 ("[T]hat part of the judgment of the Court of Appeals which set aside the determination of the Board on the question of whether Kiewit and South Prairie were a single employer is affirmed.").
71. See infra note 107 and accompanying text for a discussion of this issue.
72. See Bucci and Kirwin, supra note 7, at 29 (noting that in the wake of the Peter Kiewit decision, the "actual versus potential control test has been discarded in favor of the more demanding 'arm's length' test"); accord Peter O'Dovero Assoc. Constructors, No. 30-CA-13325, 1997 NLRB LEXIS 680, at *21 (Sept. 2, 1997); Herbert Indus. Insulation Corp., 319 N.L.R.B. 510, 524 (1995); United Bhd. of Carpenters and Joiners of America, Local No. 745, 312 N.L.R.B. 903, 912 (1993). But see infra note 75 (suggesting that a number of Board decisions fail to engage in the arm's length inquiry at all).
73. See generally International Assoc. of Bridge Structural and Ornamental Iron Workers, No. 6-CE-28, 1991 NLRB LEXIS 793, at *27 (June 24, 1991) (refusing to make a single-employer finding despite common ownership, the sharing of customers, and an identical business purpose of the double-breasted entities, and even though the Board admitted that "something less than a full 'arm's length relationship' existed") (emphasis added).
74. In many cases, the NLRB has refused to apply the arm's length standard. See, e.g., Construction Labor Unlimited, Inc., 312 N.L.R.B. 364, 367 (1993) (concluding that the double-breasted entities constituted a single employer without mention of the arm's length requirement); Elec-Comm, Inc., 298 N.L.R.B. 705, 706 (1990) (refusing to find single employer status without discussing the arm's length standard); C.E.K. Indus. Mechanical Contractors, Inc., 295 N.L.R.B. 635, 645 (1989) (failing to mention the arm's length
the appellate court’s allowance for the mere ex ante possibility, rather than the requirement of an ex post certainty, that bargaining unit work would be lost to the open shop, appears to have resulted in no greater tendency by the Board to make single employer findings, though simple common sense suggests that it should have. This may in part be due to the subsequent treatment of the Peter Kiewit case, which has shed some doubt on the lower court decision’s validity. Ultimately, however, the Board’s reticence in applying the standard remains a mystery.

2. The Alternative Approach: The Alter Ego Doctrine

a. Development of the Doctrine

While the single employer doctrine dominated the analysis in early double-breasting cases, the Board has applied the alter ego doctrine with increasing frequency in recent years, either as an alternative to, or in conjunction with, the single employer doctrine. Like its counterpart, the alter ego doctrine has roots far deeper than the double-breasting context. Evolving out of the Supreme Court’s decision in Southport Petroleum Co. v. NLRB, the alter ego doctrine has been applied historically in the corporate veil piercing context. It later became ingrained in the labor law arena when it was applied in successorship cases to determine whether an employer making a bona fide purchase of an existing company has an obligation to bargain with the employees of that company.


75. A survey of Board decisions following the Peter Kiewit decision does not reveal any which suggest that hardship need not actually occur in order to make a single employer finding.

76. See Painters and Allied Trades District Council No. 51, 321 N.L.R.B. 158 (1996) [hereinafter Manganaro Corp.] (suggesting that the Supreme Court may not have upheld the reasoning in the Court of Appeals’ decision).

77. 315 U.S. 100 (1942).

78. A court is said to pierce the corporate veil when, in disregard of corporate formalities, it holds a dominant shareholder of the corporation liable. See WILLIAM L. CAREY & MELVIN ARON EISENBERG, CASES AND MATERIALS ON CORPORATIONS 164-75 (7th ed. 1995). Veil piercing is used to “consider whether [a] subsidiary is merely a facade for the operations of the dominant stockholder or whether the corporations simply act interchangeably and in disregard of their separateness.” Stickler & Magee, supra note 9, at § 5.03 (noting that the traditional veil-piercing inquiry can also be applied in the double-breasting context).

79. The courts impose a duty to bargain only if they determine that the new employer is “merely a disguised continuance of the old employer” and was created solely as a means of
b. The Alter Ego Test in the Double-Breasting Context

The open shop entity in a double-breasted facility will be considered the alter ego of its parallel union entity if the “two enterprises have ‘substantially identical’ management, business purpose, operation, equipment, customers, and supervision, as well as ownership.”80 These seven criteria, widely known as the “Crawford Door factors” after the Board decision in which they were first articulated,81 generally give the Board greater flexibility to assess “the totality of the relationship between different entities, rather than following the formalistic checklist approach of the single employer analysis.”82


81. In that case, an aging couple and their son, Michael Cordes, owned and operated the Crawford Door Sales Company, which employed thirteen unionized workers. See Crawford Door Sales Co., 226 N.L.R.B. at 1146. For six years Cordes had been acting as Vice President and had been making most major decisions affecting the company. See id. at 1147. He and his parents agreed that when the elder Cordes’ left the business, Crawford would be liquidated and Michael Cordes would operate what would essentially be the same business but under a new corporate entity controlled exclusively by him. Just before the change in corporate structure was to take place, however, the union representing Crawford’s employees demanded a new contract. See id. Cordes said he could not afford an increase in salaries and did not want to sign a new contract because he did not want his new company to be bound by a union contract. See id. He convinced four of Crawford’s employees to stay on and work for his new company, which operated in the same building and with the same equipment as its predecessor, but without a union contract. See id. at 1148. On these facts, the Board held that Cordes’ new company was the alter ego of Crawford Door Sales Co. In a departure from the theretofore prevailing view, the Board found that identical ownership is not the “sine qua non of alter ego status.” Id. at 1144.

82. General Longshore Workers Int’l Longshoremen Ass’n, Local 1988 v. Pate Stevedore Co., No. 91-30292-RV, 1993 U.S. Dist. LEXIS 18638, at *11 (N.D. Fla. Dec. 30, 1993). The court continued: “Nor are the Crawford Door criteria immutable shibboleths to be applied mechanically or calculated mathematically; rather, the significance of a criterion will vary with the circumstances of each case.” Id. at *32. In addition, the alter ego test is applied in a more relaxed fashion than in traditional veil piercing cases. See N.L.R.B. v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 336 (6th Cir. 1990) (“In order to effectuate federal labor policies, the courts and the Board have applied this version of the alter ego doctrine in a more relaxed, less exacting fashion than would be required under federal
As with the single employer test, no single factor is dispositive.\textsuperscript{83} Unlike the single employer test, however, a secondary determination of whether an appropriate bargaining unit exists is unnecessary.\textsuperscript{84} The Board looks at such factors as whether the parent company contributed to the capitalization of the subsidiary,\textsuperscript{85} whether "the affairs of the group may be so intermingled that no distinct corporate lines are maintained,"\textsuperscript{86} and, most controversially, whether the employer, in establishing an open shop subsidiary, was motivated by anti-union animus, or by a desire to avoid obligations under the NLRA.\textsuperscript{87}

The anti-union motive inquiry in the alter ego test, addressed below, has aroused a great deal of debate among scholars.\textsuperscript{88} It is also the cause of a long-standing split among the Circuit Court of Appeals, in which some courts treat anti-union intent as determinative, while others merely view it as one of many factors in a broader inquiry.\textsuperscript{89} The Board itself falls in the latter category.\textsuperscript{90}

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\textsuperscript{83} See Wilson, 83 F.3d at 759 (6th Cir. 1996) ("No one factor is dispositive in determining whether the corporate form should be disregarded in a particular case.").

\textsuperscript{84} See General Longshore Workers, 1993 U.S. Dist. LEXIS 18638, at *12 (noting that "[s]ince the alter ego is but a 'disguised continuance' of the original business, the second tier 'single bargaining unit' analysis of the single employer doctrine is not necessary.").

\textsuperscript{85} See id. at *22.

\textsuperscript{86} Wilson, 83 F.3d at 759.

\textsuperscript{87} See Stardyne, Inc. v. NLRB, 41 F.3d 141, 146 (3d Cir. 1994).

\textsuperscript{88} See Gary Alan MacDonald, Note, Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations, 86 Mich. L. Rev. 1024 (1988); see also Befort, supra note 8, at 95-99; Van Wezel Stone, supra note 9, at 110-11.

\textsuperscript{89} See Stardyne, 41 F.3d at 147 n.4. The court outlined the positions taken by courts on the motive issue:

Generally, the circuits have taken three different approaches. Both the First Circuit and Eighth Circuits [sic] have held that illicit intent is the critical inquiry in the alter ego determination. The Second, Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits have held that intent is not essential to the imposition of alter ego liability but is a factor that the Board may take into consideration. Finally, the Fourth Circuit has adopted a "reasonably foreseeable benefit" standard that focuses on "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations.

\textit{Id.} (citations omitted). For an in-depth analysis of the various circuit court positions see MacDonald, supra note 88, at 1038-53.

\textsuperscript{90} See Stardyne, 41 F.3d at 147 (noting that the Board "does not require a finding of 'intent to evade responsibilities under the Act,' but treats such intent as an additional factor to be considered (in addition to the \textit{Crawford Doors} factors) when determining alter ego status").
3. The Modern Trend: Combining the Two Doctrines

There appears to be no formula for determining why the Board and courts choose to apply one test over the other, and increasingly the two are applied interchangeably or even simultaneously, with the elements of each test combined into one. In actuality, it appears that, in the minds of at least some courts, the two tests have lost their individual identities and are no longer fundamentally distinct. Thus, according to one court, the alter ego factors "are essentially the same factors that are examined in evaluating the four criteria of the 'single employer' test."94

C. Doctrinal Failings of the Single Employer and Alter Ego Tests

Confusion, inconsistency, and unpredictability in outcome plague the Board's assessment of double-breasted operations today. A review of the shortcomings of the single employer and alter ego doctrines helps explain why.

91. Some courts continue to believe that the alter ego test is applicable only in cases in which the predecessor firm ceases to exist, thus resembling traditional successorship cases. See, e.g., Iowa Express Distrib. Inc. v. NLRB, 739 F.2d 1305, 1310 (8th Cir. 1984) ("While 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 the labor obligations of another business entity that has discontinued operations."); Bucci & Kirwin, supra note 7, at 24; Levine, supra note 7, at 252.

92. See, e.g., UA Local 343 v. Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994) (determining that the alter ego test should provide the main focus in assessing the legality of double-breasted operations, but only after "a threshold showing that [the double-breasted counterparts] constitute a single employer."); Esmark, Inc. v. NLRB, 887 F.2d 739, 754 (7th Cir. 1989) (finding that "generally, one corporation is the alter ego of another where the factors necessary to support a 'single employer' finding are met . . ."); J.M. Tanaka Constr., Inc., v. NLRB, 675 F.2d 1029, 1033 (9th Cir. 1982) (adopting a similar two-step inquiry as that in Nor-Cal).

93. See Crest Tankers, Inc. v. National Maritime Union of Am., 796 F.2d 234, 236 n.1 (8th Cir. 1986) ("We discuss 'single employer' and 'alter ego' in this opinion as if they were two separate ideas. In doing so, we adopt the approach of text-writers and digesters, to whose hearts 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 one employer, formally separate, should be viewed as legally the same as another."); J.M. Tanaka Constr., 675 F.2d at 1033-35 (purporting to apply the alter ego test but substituting the inquiry with the four factors of the single employer test); see also Befort, supra note 8, at 100 (surveying the different approaches courts use in applying the two doctrines).

94. NLRB v. Big Bear Supermarkets No. 3, 640 F.2d 924, 929 (9th Cir. 1980).
1. The Single Employer Doctrine

A strong case has been made that the failure of the single employer doctrine as a means to evaluate double-breasted operations lies, at least in part, in the origins of the test itself, and particularly in its roots in the secondary boycott context. As noted previously, in secondary boycott cases, the Board applied the test in a far more rigorous manner than it had in its original application in jurisdictional inquiries. This more stringent application in secondary boycott cases, however, is explained by the fact that both the common law and section 8(b)(4)(i)(B) of the NLRA embody a strong intent to outlaw secondary boycotts and to protect neutral bodies from being harmed by labor disputes to which they are not a party. Secondary boycotts, it has been observed, carry the potential "to injure the business of a third person who is wholly neutral to the disagreement between an employer and his employees." As such, the exception to their prohibition when the primary and secondary employers are found to be a single employer is understandably limited.

In contrast, double-breasting cases present entirely different issues, and a stringent reading of the single employer test in this context is inappropriate. In double-breasted operations, for example, it is "not...
unusual to find decentralized control of labor relations." The Board’s view that the degree of centralized control among the entities is the “most significant criteria for determining single employer status” is therefore misplaced. Such a reading grants employers too much leeway to escape bargaining agreements through cleverly devised transformations which avoid the appearance of heavy-handed control by one entity over the other.

The Board exhibits a blindness to the seemingly obvious fact that managers in double-breasted operations can, and often do, exercise subtle control over a subsidiary firm’s activities, even if such control does not involve daily oversight of the firm’s activities. In Gerace, for instance, although control over day-to-day operations was eventually ceded to the manager of the offshoot nonunion firm, it was shown by the trial examiner that the manager of the nonunion firm regularly sought guidance on matters of management from the common directors of the two firms. Clearly these common directors, though perhaps not exercising “active” control over the nonunion subsidiary, had great influence over the firm’s policies.

Moreover, the Board’s decision to place such heavy emphasis on the degree of common control comes at the expense of the other three factors of the single employer test. Yet the Board offers no explanation as to why the degree of interrelation of operations, common management, and particularly common ownership are not equally important, if not more so, in determining the validity of a double-breasted operation. Surely the presence of such factors can help reveal the existence of a sham or establish collusion between the two entities, even in the absence of heavy-handed control by one firm over the other.

Finally, the Board’s treatment of the bargaining unit question in the
wake of *Peter Kiewit*, where it refused for the first time to consider the employer-wide unit as the appropriate unit, represents a "deviat[ion] from its traditional view of the unit issue in the single employer type of case." After *Peter Kiewit*, it appears that entities in a double-breasted facility must perform *exactly* the same type of work for the employer-wide unit to be deemed the appropriate unit. Thus, if one of the entities performs a slightly broader range of work than the other, the workers of each entity may be held to be members of separate bargaining units. This not only defies precedent, but also ignores "[t]he objectives of our national labor policy... [which] require that the rightful prerogative of owners independently to arrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."  

2. The Alter Ego Doctrine

Similar issues of discontinuity arise with respect to the application of the alter ego doctrine. Since its adaptation from its corporate law origins, "[t]he term 'alter ego' has accumulated a great deal of baggage in the context of labor disputes" and courts are often confused over which

107. *See* King & LaVauite, *supra* note 99, at 920. The authors note that "[t]he decisions relied on by the Board to support such separate unit findings in double-breasted cases all involve distinguishing factors not mentioned by the Board." *Id.* at 917. However, the degree to which the NLRB uses the appropriate bargaining unit inquiry to uphold double-breasted operations in the face of a preliminary finding of single employer status is a matter of debate. *See* C.E.K. Indus. Mechanical Contractors, Inc., 295 N.L.R.B. 635, 645 (1989) (finding single employer status but upholding the double-breasted operation based on the fact that the employees of the two entities "do not have the community of interests" necessary to make up an appropriate bargaining unit); A-1 Fire Protection Inc., 273 N.L.R.B. 964, 968 (1984) ("CAS and A-1 did not constitute a single appropriate bargaining unit although they constituted a single employer."); Acoustics, Inc., 270 N.L.R.B. 1046 (1984) (finding single employer status but failing to find an appropriate bargaining unit); *see also* Dunlop Report, *supra* note 1, § 5.2.2(5) ("[T]he Board generally has continued to treat the operations of related corporate entities in the construction field as separate bargaining units."). *But see* Bucci & Kirwin, *supra* note 7, at 28 (suggesting that only four decisions in the Board's history have failed to make an appropriate bargaining determination once single employer status was found).

108. In *Peter Kiewit*, the Board found that since one entity was involved solely in highway construction while the other engaged in airport, mill, and railroad bridge construction in addition to highway construction, the two sets of employees did not share the requisite community of interests necessary for an appropriate bargaining unit determination. *See* 206 N.L.R.B. at 562.

109. *See* King & LaVauite, *supra* note 99, at 920 (citing cases suggesting that the contract unit is to be respected as the appropriate unit).

110. *Id.* at 923 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)).

111. NLRB v. Fullerton Transfer & Storage Ltd., 910 F.2d 331, 336 (6th Cir. 1990)
"version" of the test to apply in a given case.\textsuperscript{112} Although in the context of double-breasting the test is often thought to deserve a more relaxed application than under common law successorship principles, not all courts agree.\textsuperscript{113} As a result, there is considerable variation in the application of the test among the circuits.

More damaging, however, is the development of the employer motive requirement in the labor law context.\textsuperscript{114} Although a clear showing of anti-union animus would no doubt be relevant in determining the validity of a double-breasted organization, the problem is that such animus is exceedingly difficult to measure. An employer can almost always mask an intent to avoid collective bargaining obligations by pointing to a business advantage gained by operating an open shop.\textsuperscript{115} In \textit{NLRB v. Allcoast Transfer, Inc.},\textsuperscript{116} for example, the court noted that "[i]f we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the [alter ego] doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape unwanted obligations."\textsuperscript{117} Identifying such a business advantage should rarely be a problem for employers since, "however motivated, any business decision that replaces union labor with nonunion labor will almost always make economic sense."\textsuperscript{118}

Moreover, a required finding of illicit intent could frustrate the purpose of the alter ego test in situations where motive may not have been a part of the decision to operate double-breasted, but an alter ego finding is nonetheless necessary to foster an equitable result.\textsuperscript{119} Although the \textit{Allcoast}

\begin{itemize}
\item \textsuperscript{112} See \textit{id.} (noting that "we must determine which doctrine referred to as an 'alter ego doctrine' applies to this case.").
\item \textsuperscript{113} See \textit{id.} at 336-37 (declining to apply the more relaxed version of the alter ego standard).
\item \textsuperscript{114} See Befort, \textit{supra} note 8, at 98-99 (noting that the motive inquiry is one of two flaws in the alter ego test, the other being the general confusion that surrounds the application of the test).
\item \textsuperscript{115} See Stardyne, Inc. v. NLRB, 41 F.3d 141, 148 (3d Cir. 1994) (noting that "[i]t may be difficult to determine intent when there are facially legitimate business reasons that support a change in corporate form."); NLRB v. Fullerton Transfer & Storage, 910 F.2d 331, 337 (6th Cir. 1990) (noting that "intent can too easily be disguised."). Of course, there are those occasional cases in which anti-union animus, as the sole motivating factor, is clear. For example, in \textit{UA Local 343}, 48 F.3d at 1471, the employer attempting to create a nonunion subsidiary repeatedly remarked on the record "I'm gonna close that f-ing Union shop!" Seldom, however, is such animus so blatant.
\item \textsuperscript{116} 780 F.2d 576 (6th Cir. 1986).
\item \textsuperscript{117} Id. at 582.
\item \textsuperscript{118} Van Wezel Stone, \textit{supra} note 9, at 101.
\item \textsuperscript{119} See, \textit{e.g.}, Alkire v. NLRB, 716 F.2d 1014, 1020-21 (4th Cir. 1983) (noting that "the employer may intend no evasiveness or subterfuge, but . . . [n]evertheless, . . . the employer obtains an economic benefit at the expense of statutory employee rights, upsetting and
court wisely recognized the perverse results that might flow from requiring proof of antiunion intent, other courts have failed to do so.\textsuperscript{120}

3. The Need for Reform

The Board's early application, and subsequent mis-application, of these two doctrines in the double-breasting context allows employers the freedom to structure their operations to escape imposition of bargaining duties without other independent business justifications. Surely the NLRA does not envision such results, nor does this comport with the underlying object of the tests: to prevent firms from evading contractual responsibilities.\textsuperscript{121} The Board's application of the doctrines presents a barrier to achieving equitable results in double-breasting cases and results in judgments that are overly deferential to employers who engage in self-serving corporate transformations and which fail to hold firms accountable for injuries suffered by their workers.\textsuperscript{122} The result is a pattern which:

suggests that an employer in the construction industry might be permitted to determine unilaterally whether he will operate as a union company, a nonunion company, or both — irrespective of collective bargaining agreements that would seemingly limit that choice and irrespective of the desires of the employees involved or the unions that represent them.\textsuperscript{123}

The remainder of this Comment, therefore, will explore alternative standards to evaluate the legality of double-breasted operations in search of a more suitable remedy.

II. LEGISLATIVE, CONTRACTUAL, AND JUDICIAL PROPOSALS

In response to the increase in double-breasted operations and the corresponding decline in union work in the construction industry, there have been an array of efforts to curb the use of the device. Unions and their lobbyists secured introduction of federal legislation that would have virtually eliminated double-breasting, while simultaneously promoting a

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undermining the balance of power between labor and management created to reflect national labor policy.”).

\textsuperscript{120} See, e.g., Iowa Express Distrib., Inc. v. NLRB, 739 F.2d 1305, 1311 (8th Cir. 1984) (requiring a finding of anti-union intent); Penntech Papers, Inc. v. NLRB, 706 F.2d 18, 24 (1st Cir. 1983) (requiring a finding of intent).

\textsuperscript{121} See Limbach Co. v. Sheet Metal Workers Int'l Assoc., 949 F.2d 1241, 1266 (3d Cir. 1991) (Sloviter, C.J., dissenting).

\textsuperscript{122} See King & LaVau, supra note 99, at 905 (lamenting the Board's "disturbing and inexplicable tendency... to consider double-breasted issues divorced from the setting in which they arise").

\textsuperscript{123} Id. at 902.
standard anti-double-breasting contractual provision to be negotiated as part of collective bargaining agreements. In addition, courts and scholars have experimented with various permutations to the current judicial doctrines.

A. Legislative Proposals

Dissatisfied with the NLRB's construction of the single employer and alter ego tests, organized labor set out to convince Congress of the need for legislative relief from the harsh effects of double-breasting. For a number of years, unions succeeded in putting the issue on Congress' agenda. Anti-double-breasting legislation was first introduced in the 99th Congress and was offered in all but one of the succeeding Congresses through the 103rd Congress. In both the 99th and 100th Congresses, the House passed the legislation, but each time the Senate failed to vote on counterpart legislation. Subsequent proposals fared no better, and, in recent Congresses, no legislation in this area has been offered.

The most significant element of these proposals is the effort to amend the definition of "employer" in section 2(2) of the NLRA to include:

Any two or more business entities engaged primarily in the building and construction industry, performing work within the geographical area covered by a collective bargaining agreement to which any of the entities is a party, performing the type of work described in such agreement, and having, directly or indirectly – (A) substantial common ownership; (B) substantial

124. See Bucci & Kirwin, supra note 7, at 32-33 (tracing the history of legislative proposals in the 99th, 100th, and 101st Congresses).


126. With Representative Clay and Senator Kennedy remaining as sponsors, similar or identical bills were introduced in the 100th Congress (H.R. 281 (1987) and S. 492 (1987)), 101st Congress (H.R. 931 (1989) and S. 807 (1989)), and 103rd Congress (H.R. 114 (1993)).

127. See Doublebreasted Operations, supra note 6, at 232.

128. No legislation was introduced in the 104th or 105th Congresses and, as of this writing, none has been introduced in the current 106th Congress.

129. Section 2(2) of the NLRA defines "employer" as including:

any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned government corporation, or any Federal Reserve bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

common management; or (C) substantial common control; shall be deemed a single employer. . . . (emphasis added).130

If enacted, such a proposal would very likely spell the death of the double-breasted employer.131 By effectively turning the single employer test into a disjunctive one, the establishment of any one element of the test would render the operation invalid. Since virtually every double-breasted operation involves some level of "indirect" common ownership, any double-breasted operation performing work in a common geographic region would fall under the proposal's definition of employer. The proposal is thus vastly overinclusive since it would render invalid double-breasted operations which function without any measurable detriment to unionized employers.

A more recent alternative for legislative reform is the one proposed by the Dunlop Commission, which advocates amending the definition of "employer" along the lines of the Internal Revenue Code (IRC).132 Section 414(c) of the IRC states that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer."133 If the NLRA were amended

130. Building and Construction Industry Labor Law Amendments of 1989, S. 807, 101st Cong. § 2(a). The language in S. 807 is substantially identical to its predecessor bills and its House counterpart and its predecessors. In addition to amending the definition of employer, the bills would also automatically extend collective bargaining agreements to any open shop subsidiaries "performing the work described in the collective bargaining agreement within the geographical area covered by the agreement," id. at § 2(b), which permits "pre-hire" agreements in the construction industry, to allow for the indefinite life of such agreements unless a majority of employees in a bargaining unit elects for its repudiation. See id. at § 2(c).

131. Some proponents of these legislative efforts describe them merely as efforts to curb the impact of double-breasting on unionized employees. Such supporters seek to reestablish the protections for workers in the construction industry which, according to Representative William Clay, "decisions of the courts and the National Labor Relations Board have so eroded." 139 CONG. REC. E56 (daily ed. Jan. 5, 1993) (statement of Rep. Clay). Others, like Senator Kennedy, see the bills as more radical vehicles to "restrict and make illegal specific 'double-breasted' operations." 135 CONG. REC. S4021 (daily ed. April 17, 1989) (statement of Sen. Kennedy). This has caused opponents to lament that double-breasting in the construction industry would be "virtually outlawed, making it the only industry in which a company may not have both a union and nonunion subsidiary." See Doublebreasted Operations, supra note 6, at 233 (noting that the legislation "would open the door for a finding of single-employer status in practically every case."). Still others believe the legislation would have the perverse effect of causing all construction operations simply to operate totally open shop, thus destroying any remaining role for unions. According to Steven G. Allen, "[if this law is passed, the unionized contractors, who are already declining in number, will simply stop signing new contracts, and more construction will go to the non-union sector." Id. at 236.

132. See DUNLOP REPORT, supra note 1, § 5.2.2(5) (recommending that the NLRB "revisit" its application of the single employer test, but suggesting merely that "the Internal Revenue Code can serve as a model for labor and employment law").

133. I.R.C. § 414(c).
to include this definition, it would, in effect, replace the four-part analysis under the single employer doctrine with a one-part test which looks solely at the degree of common control shared by the two entities in a double-breasted facility. But this approach would solve nothing, since it would only ratify the approach the Board already takes (that is, focusing primarily on common control) and would not resolve the issue of whether control must be actual or active rather than merely potential.

The validity of each double-breasted facility is highly dependent on the facts and circumstances surrounding the decision to operate open shop. The Board must have ample discretion to consider a variety of factors unique to each facility in assessing its legitimacy. None of the existing proposals grants this discretion, and it is difficult to envision a legislative solution that could. As such, the campaign to reform current doctrines is better directed elsewhere.

B. Contractual Remedies

According to the Supreme Court, "one of the fundamental policies [of the NLRA] is freedom of contract." Often, however, this dictum is ignored. In 1985, for instance, the Board determined that a union's attempt to negotiate a contractual clause to prohibit an employer from operating double-breasted was unlawful and issued an injunction against a union strike to enforce the clause. The injunction was upheld in the Maryland District Court in D'Amico v. Painters District Council.

In striking down the clause, the court reasoned that because it would not only bind the signatory employer, but also its non-signatory parent or

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135. See Van Wezel Stone, supra note 9, at 116. The clause stipulated that if the employer performed work of the type covered under a collective bargaining agreement, whether under its own name or another's, and exercised either direct or indirect management or control of the entity performing the work, then all terms of the collective bargaining agreement would carry over to that entity.

136. No. M-83-4385, 1985 U.S. Dist. LEXIS 13593, *1 (D. Md. Nov. 22, 1985). In D'Amico v. International Brotherhood of Painters, the clause at issue reads as follows: "If the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor, through its officers, directors, partners, owners or stockholders, exercises directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control, or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work." Id. at *3. D'Amico was the first of a series of cases holding that contractual arrangements designed to prevent double-breasting are unlawful. The clause at issue utilized language that the AFL-CIO's Building Trades Department had drafted as a model anti-double-breasting contract and which had become common in the industry. See Van Wezel Stone, supra note 9, at 116.
any of its subsidiaries, it was more than simply a primary work preservation agreement. Rather, it was a "bottom up" attempt "to expand . . . existing bargaining units to include unrepresented employees of totally separate employers." As such, the court concluded, it constituted unlawful secondary activity.

In D'Amico, the court relied on a Supreme Court test (the ILA test) to determine the legality of putative work-preservation clauses. The test looks at whether (1) the agreement's objective is to preserve work traditionally performed by the union employees, and (2) the employer signing the agreement has the power to assign the employees to do the work in question (the latter inquiry being referred to as the "right of control" test). Here, the Board held that the control test was not met since the clause would apply to separate, albeit commonly owned, enterprises over which the employer did not necessarily have power to assign work.

Recently, however, the NLRB has done a dramatic about-face with respect to such provisions, upholding the very clauses that had been declared violations of section 8(e) in earlier proceedings. In 1996 and again in 1998, the Board upheld the provisions of two virtually identical contracts in a pair of decisions, one of which, Manganaro Corp., was a

137. See D'Amico at *23.
138. Id. at *24.
139. An agreement between a union and employer designed to prevent the erosion of unit work is lawful only if such work preservation objectives constitute the primary purpose of the contract. See Carpenters Dist. Council of Northeast Ohio, 310 N.L.R.B. 1023, 1025 (1993). If, on the other hand, the agreement is "tactically calculated to satisfy union objectives elsewhere," it will be in violation of section 8(e) of the NLRA as secondary activity. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644 (1967).
141. Note that § 8(e) is not the only provision of the NLRA that the Board has relied on to strike down anti-dual shop clauses. In other cases, the Board has also held that such clauses violate § 8(b)(3) of the NLRA, which requires unions to bargain collectively with employers on terms that do not violate any other provision of the NLRA. In Sheet Metal Workers Local Union No. 20, 306 N.L.R.B. 834, 834 (1992) for instance, the Board found that the anti-double breasting clause at issue constituted an illegal bargaining subject. By bargaining to impasse over the clause, the Board held, the union had violated § 8(b)(3). See id. at 839. The Board went on to say that "[i]t is automatic that a labor organization violates Section 8(b)(3) when it conditions its agreement to a new contract on an employer's acceptance of an [] unlawful subject of bargaining." Id. at 839.
142. See Manufacturing Woodworkers Ass'n, 1998 N.L.R.B. LEXIS 602; Painters and Allied Trades Dist. Council No. 51, 321 N.L.R.B. 158 [hereinafter Manganaro Corp]. Note that Manganaro Corp. involved the same parties and the same disputed clause as in D'Amico.
143. The disputed clauses, which effectively require the employer to cease doing business with certain other firms unless its double-breasted counterpart was subject to the agreement, read as follows: "In order to protect and preserve, for the employees covered by this Agreement, all work heretofore performed by them, and in order to prevent any device or subterfuge to avoid the protection and preservation of such work, it is hereby agreed that if and when the Employer shall perform any work of the type covered by this Agreement,
continuation of the proceedings in *D'Amico*. The Manganaro Board held that the clause was not secondary because it would apply only to an open shop affiliate that was under the "actual, active" control of the common owners.\(^4\) The ILA control test was therefore satisfied since the signatory entity "presumptively ... has the right or the power to control the assignment of work of [the other] entity’s employees."\(^5\) As to the first element of the ILA test, the Board looked to the preamble of the clause, which stated that its objective is to "protect and preserve, for the employees ... all work they have performed and all work covered" by the collective bargaining agreement, to find that the purpose of the clause was proper.\(^6\) Using similar reasoning, in *Manufacturing Woodworkers Ass’n.*, the Board upheld an anti-dual shop contract between the union and employer, again finding that the right of control test was met because the clause "is applicable only when the signatory employer has the right of control over the work in question, regardless of the extent of any ownership interest the signatory employer might have in the other business entity."\(^7\) The Board also found that the objective of the clause, which contained the same preamble as in *Manganaro Corp.*, had on its face a valid work preservation purpose.\(^8\)

Essentially, then, the Board will uphold anti-dual shop clauses only in situations in which the two entities in a double-breasted operation meet the requirements of the single employer test.\(^9\) The Board recognized that "[i]n some situations, employers use [a] separately managed company, or dual shop, to perform work of the type covered by the union contract at a lower cost. Seeking to preserve this work for unit employees is a

under its own name or under the name of another, as a corporation, company, partnership, or any other business entity, including a joint venture, wherein the Employer exercises either directly or indirectly any significant degree of ownership management or control, the terms and conditions of this Agreement including Fringe Benefits shall be applicable to all such work." *Manufacturing Woodworkers Ass’n*, 1995 NLRB LEXIS 541, at *4; see also *Manganaro Corp.*, 321 N.L.R.B. at 161-62.

144. *See Manganaro Corp.*, 321 N.L.R.B. at 164.

145. *Id.* at 164.

146. *Id.* at 165. In finding the contract to be a lawful work preservation clause, the Board noted that, in the construction industry, with its history of heavy unionization, there was a "legitimate expectation" on behalf of employees that they would be entitled to benefit from a collective bargaining agreement, and the anti-dual shop clause simply protects workers from the threat of greater proliferation of dual shops. *See id.* at 165-66. The Board also held that a union can lawfully strike to put pressure on a double-breasted contractor to force it to extend a collective bargaining agreement to the open shop or force it to get rid of its open shop. *See id.*


148. *See id.* at *1.

149. *See Manganaro Corp.*, 321 N.L.R.B. at 164 (noting the requirement that the signatory employer must exercise “management, control, or majority ownership” over another entity, and that control must be “actual or active”).
legitimate goal to preserve work traditionally performed by unit employees. Because the enforcement of such agreements is consistent with the freedom of contract tenets of the NLRA, the recent Board decisions should control future disputes over anti-dual shop provisions and the Board should avoid a reversion to the D'Amico line of reasoning. However, while the ability to negotiate anti-dual shop clauses strengthens unions' bargaining power, more comprehensive reform of the Board's approach to this issue remains necessary to address the majority of cases in which such clauses are not successfully negotiated.

C. Attempts at Judicial Reform

To date, there have been few efforts to alter the existing judicial doctrines. Most of these attempts have done little, if anything, to bring clarity to the law.

For instance, some circuit courts of appeals, including the First, Third, and Eighth, advocate focusing almost exclusively on whether the decision to operate double-breasted was motivated by anti-union animus. At first blush, such a motive-based inquiry has a certain intuitive appeal, since, after all, what the courts are trying to prevent is employers' use of the corporate form solely to avoid paying union wages and benefits. As discussed previously, however, this type of analysis is insufficient. Anti-union animus is simply too easy to mask; an employer can almost always point to a business justification for operating an open shop, since open shop operations are, by definition, more economical than union shops. As one court noted, "an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape unwanted obligations."

In contrast, the Fourth Circuit has developed a motive-based test that purports to avoid the difficulties inherent in proving evasive intent. In Alkire v. NLRB, the court proposed replacing the alter ego intent test with an inquiry into whether the transfer of work from one entity to another "resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations."

150. Id. at 166.
151. See NLRB v. Fullerton Transfer & Storage Ltd., Inc., 910 F.2d 331, 337 n.9 (6th Cir. 1990) (citing Iowa Express Distr., Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1984); NLRB v. Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983); Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir. 1983)).
152. See Van Wezel Stone, supra note 9, at 101.
154. 716 F.2d 1014 (4th Cir. 1983).
155. Id. at 1020 (emphasis added).
foreseeable benefit were to accrue to the old employer, the court would be constrained to conclude that, in fact, the old entity's transfer of the business was not bona-fide but rather, a sham. The new entity, therefore, would be merely "a disguised continuance" of the original. If, on the other hand, there was no such foreseeable benefit to the old employer, then "nothing in labor policy justifies preventing it from arranging its affairs as it sees fit."  

Although the facts of Alkire resemble a traditional successorship scenario, the logic of that court's "reasonably foreseeable benefit" test appears to be equally applicable to the double-breasting situation. The appeal of such an application is that even in cases in which the original employer lacks an evasive intent, the employer nonetheless "obtains an economic benefit at the expense of statutory employee rights, upsetting and undermining the balance of power between labor and management." The problem, however, is that the mere expectation of a benefit arising from operating double-breasted should not necessarily render the operation invalid. In fact, the purpose of operating double-breasted is precisely to achieve a benefit, not only for the open shop, but also for the union shop.

A more promising development has occurred in the D.C. Circuit. There, in a pair of decisions, the court has focused on whether a double-breasted operation resulted in the transfer of bargaining-unit work from the unionized shop to the open shop. In the first of these decisions, the court held that if the open shop performs the same type of work as its unionized counterpart, and performance of this work was a cause of the unionized firm's decline in business, there would arise a presumption of unit work transfer. This differs from the NLRB's traditional analysis, in which the

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156. See id.
157. Id.
158. Id. at 1021.
159. Id. at 1021. The Fourth Circuit also noted that:

Linking employer motivation for the transfer of its business to obtaining a future benefit represents a broader standard than does requiring "[anti-union animus or 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."

Id. at 1020 (citation omitted).

Despite the court's criticism of the anti-union animus inquiry, some have difficulty distinguishing a substantial difference between the "reasonably foreseeable benefit" and traditional motive inquiry tests. In both cases, the inquiries boil down to whether the reorganization was effectuated to circumvent labor obligations. According to one commentator, the reasonably foreseeable benefit test somewhat cleverly "appears to let [anti-union] motive in through the back door." MacDonald, supra note 88, at 1051.

160. See Geiger Ready-Mix Co., Inc. v. NLRB, 87 F.3d 1363 (D.C. Cir. 1996); Road Sprinkler Fitters Local Union No. 669 v. NLRB, 789 F.2d 9 (D.C. Cir. 1986).
161. See Road Sprinkler, 789 F.2d at 14-16.
Board generally requires a showing of a direct transfer of jobs from the unionized to nonunionized firm when no separate union and nonunion markets exist. To date, however, these isolated decisions have not been widely followed.

Outside the courts, a prominent scholarly proposal combines selected elements of the existing alter ego and single employer doctrines into a single test. Under this test, the Board would focus exclusively on four "essential" factors: 1) common ownership; 2) diversion of unit work (or interrelation of operations); 3) appropriate bargaining unit; and 4) evasive intent. Focusing on these factors alone would arguably foster results more in line with the interests of labor; particularly, such a focus would avoid the current heavy emphasis on the common control exercised by the parent union firm's management of the nonunion subsidiary. In addition, Professor Befort's test would dramatically simplify the Board's approach taken by combining the current doctrines into a single, more coherent test. The disadvantage of this test, however, is that it would mire the Board in the tricky issues of trying to unveil anti-union animus. Moreover, like its predecessors, Professor Befort's test confines the Board to rigid criteria which impede a more objective inquiry into management justifications for operating double-breasted and the effects such an operation would have on labor. Nevertheless, the proposed test represents a significant improvement over the current model, though it has yet to receive serious attention from the Board or courts.

III. BUSINESS RATIONALITY PROPOSAL

Rather than focusing on the mechanics of a corporate transformation and on easily camouflaged employer motives, the Board should adopt a new approach to double-breasting cases that better balances the competing interests of labor and management. One way to achieve this is by adopting

162. See id. at 15.
163. Geiger Ready-Mix Co., 87 F.3d at 1369 is the only case thus far to adopt the Road Sprinkler approach (finding that the "transfer of unit work" approach is reasonable and Road Sprinkler is "the most apt precedent").
164. See Befort, supra note 8, at 101-05.
165. Professor Befort argues that the "interrelations of operations" prong of the single employer test has been read by the Board to require a showing of actual lost work to the nonunion entity. See id. at 84. The cases cited for this proposition, however, do not involve double-breasted operations. See DMR Corp., 258 N.L.R.B. 1063, 1069 (1981) (noting that unlike the Peter Kiewit case, the entities did not constitute a double-breasted operation); Hageman Underground Constr., 253 N.L.R.B. 60, 70 n.13 (1980) ("[T]he relationship between Underground and Construction did not involve a so-called 'double-breasted' operation."); Appalachian Constr., Inc., 235 N.L.R.B. 685, 686 (1978) (noting that "we are not faced with a 'double-breasted' operation").
166. See Befort, supra note 8, at 101-05.
a stringent, objective inquiry into the business rationality of a firm's decision to operate double-breasted. Such an inquiry would better curb management's ability to avoid labor obligations through mere paper transactions and would also compel the Board to heed the effect of these transactions on employees. The approach would not, however, suffer the pitfalls inherent in the current application of the single employer and alter ego tests.

Inquiring into the objective rationality of a corporate reorganization would require the Board to ascertain whether the reorganization confers upon management a compelling business benefit separate from the obvious reduced costs enjoyed by escaping collective bargaining obligations. Instead of focusing on the subjective state of mind of the employer, the Board would confine its inquiry to the economic realities underlying the change in corporate form. The Board, therefore, would look at whether the creation of a double-breasted operation allows an employer to enter markets previously unavailable to it because of its union status and, if so, whether the open shop entity would bid exclusively in these new markets (and not in the markets of its union affiliate). This analysis comports with the original theory justifying the lawful use of double-breasting, which is that "union and nonunion firms compete in different and separate markets," and that acquiring an open shop subsidiary should not harm the original union firm. Thus, if the double-breasted affiliates could potentially compete for the same jobs without identifying any other independent business justification, the union firm should be required to extend its bargaining contract to the new entity, even if that entity is separately managed and controlled (and is thus not part of a single, integrated enterprise under current application of the single employer doctrine). This would ensure that when a firm experiences the benefit of a change in form, it will bear the burden of the change as well. Under current law, entities in a double-breasted facility theoretically can compete for the same jobs, so long as they operate with the requisite level of independence (i.e., there is no active common control of labor relations).

167. Road Sprinkler Fitters Local v. N.L.R.B., 789 F.2d 9, 12 n.2 (D.C. Cir. 1986) (quoting South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs, 425 U.S. 800 (1976)). The Road Sprinkler court went on to say that since even the employer in this instance "conceded that there exists no separate 'union' and 'nonunion' markets," the diversion of unit work to the open shop affiliate had nothing to do with external market conditions. Id. at 15.

168. But see Painters and Allied Trádes Dist. Council, Nos. 5-CC-1036, 5-CB-4687, 1992 NLRB LExIS 83, at *39-49 (Jan. 28, 1992) (stating that with the proliferation of double-breasted operations since the early 1970s, "the former distinction between union and nonunion markets became... 'blurred' or 'confusing'").

169. See Alkire v. NLRB, 716 F.2d 1014, 1023 (4th Cir. 1983) (Sprouse, J., dissenting) (arguing that failing to extend the bargaining agreement represents for the employer "a classic case of 'having your economic cake and eating it, too'").
This, however, ignores the fact that the common owners of the enterprise may, by minimizing union labor costs, obtain a benefit at the expense of the union workers.

If, on the other hand, there appears to be a compelling business objective, the Board must determine whether establishing an open shop affiliate constitutes the only viable means for achieving such an objective. Here again, the Board should focus on whether the change in form enables the employer to enter new markets or bid on projects previously unavailable to the union firm. If not, the Board must next determine whether the accrued benefit, which is unrelated to the avoidance of union obligations, justifies the enterprise in operating a nonunion affiliate, or whether this benefit is outweighed by the detriment suffered by union employees. For instance, if the transformation opens new markets to the employer, but nonetheless would require a diversion of capital from the union firm to the open shop entity, the Board might find that the union workers are unduly burdened by the transformation.170

In inquiring into the business rationality of a decision to operate double-breasted, the Board should, when possible, focus on contemporaneous justifications, rather than post-hoc rationalizations, to ensure that the employer does not have the opportunity to fabricate a business purpose after the fact.171 Moreover, the Board should carefully scrutinize these business justifications, and should avoid any "presumption of business rationality" as it has been applied in other contexts.172 Armed with the presumption "that reasonable employers make reasonable business judgments . . . the NLRB can thus conclude that any employer action that can be justified in a business sense must have been motivated by legitimate business considerations."173

170. The business rationality proposal offered here is analytically analogous to the business rationality inquiry in the application of the rule of reason in antitrust law. Antitrust law can serve as a helpful guide in this area. In that context, restraints on trade are allowed only if "reasonably necessary" to achieve legitimate objectives separate and apart from the economic advantage conferred by the anti-competitive behavior. See United States v. Brown Univ., 5 F.3d 658, 679 (3d Cir. 1993). "To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative." Id. (citation omitted) (noting further that "[o]nce a defendant demonstrates that its conduct promotes a legitimate goal, the plaintiff, in order to prevail, bears the burden of proving that there exists a viable less restrictive alternative.").

171. In the areas of investment and production decisions, for example, the NLRB has been prone to "impute[e] to an employer a legitimate business motive for any action which it finds to be 'justified' after the fact." Van Wezel Stone, supra note 9, at 101.

172. Id. at 102 n.120 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585 (1986)) (noting that such a presumption has been adopted by the Supreme Court in the antitrust context).

173. See id. at 101-02. Note that the author's discussion of the business rationality test relates to investment and production decisions.
Of course, the Board must still determine whether the employees of the two entities comprise a single, appropriate bargaining unit before deciding to extend the bargaining agreement. It follows logically, however, that if the double-breasted operation were improperly established in a situation in which separate markets did not exist, the employees of the two entities would most likely share the requisite "community of interests" necessary for an appropriate bargaining unit determination. Conversely, if the operation was properly established and operated in distinct markets, there would be little potential for erosion of unit work since the community of interests tests likely would not be met.

Although it would represent a marked departure from the current mode of analysis, adopting a business rationality test does not contemplate ignoring the large body of precedent accrued under the single employer and alter ego doctrines. Rather, it would complement those prior inquiries by providing added protection against the possibility that the traditional tests will fail to recognize the use of double-breasting for purely evasive purposes.\textsuperscript{174} Existing criteria would remain relevant to determining the legitimacy of a double-breasted operation but, to be consistent with the enhanced scrutiny of the business rationality of a decision, the Board would have to relax some of the requirements of the tests.\textsuperscript{175} In effect, this would mean reducing the emphasis on the common control criteria and increasing the weight given to the common ownership criteria. This reallocation makes sense since, regardless of who controls day-to-day operations, it is the common owners who ultimately benefit from a corporate transformation.

The advantages of a business rationality inquiry are manifold. First, such an objective inquiry would be completely divorced from an inquiry into anti-union motive, thus "tak[ing] the trier of fact out of the hazy world of motive [and] into the clear light of business rationality."\textsuperscript{176} Here, regardless of motive, an employer would be justified in operating double-breasted only by demonstrating that it makes business sense to do so and provided that the advantages received are not solely those derived from

\textsuperscript{174} See Befort, supra note 8, at 85-89 (noting the possibility that the single employer test could fail to recognize the evasive potential of double-breasting).

\textsuperscript{175} An isolated decision by the D.C. Circuit could serve as a starting point. In Road Sprinkler Fitters Local v. N.L.R.B., 789 F.2d 9 (D.C. Cir. 1986), the court held that if the open shop performs the same type of work as its unionized counterpart, and that performance of that work was a cause of the unionized firm's decline in business, there would arise a presumption of a transfer of unit work to the open shop. See also Geiger Ready-Mix Co. v. NLRB, 87 F.3d 1363, 1369 (finding that the "transfer of unit work" approach is reasonable and that Road Sprinkler is "the most apt precedent"). Such an approach would nicely complement a new and stringent focus on business rationality, since both would require inquiry into whether the change in form is actually achieving a benefit that could not otherwise be obtained by the union shop.

\textsuperscript{176} Van Wezel Stone, supra note 9, at 100.
escaping collective bargaining duties. 177

Second, the business rationality test would better account for labor's interests and would stem the tide within the construction and other labor-intensive industries toward hiring primarily nonunion employees. 178 Admittedly, the test would reduce the incidence of double-breasted operations, essentially allowing them only when created in situations in which distinct markets exist or when the open shop would only bid for jobs from which union shops were precluded from bidding. 179 Nonetheless, the test would assure that such operations are not created at labor's expense and would introduce an element of fundamental fairness that is absent from the existing approaches. Today, the Board will strike down a double-breasted operation only if the open shop is unequivocally controlled and operated by the same managers, or if clear anti-union animus drove the change in form. This approach, however, fails to recognize the possibility that heavy-handed control of one operation over the other can exist without day-to-day oversight and that the open shop may be closing off potential opportunities that would otherwise have been available to the union shop. These problems would be alleviated under the proposed test, since a decision to operate double-breasted would not be justifiable if it could potentially close off future opportunities to the unionized firm. 180

IV. CONCLUSION

Market pressures and the policies of successive administrations have left organized labor in a crisis. Union bargaining power in the construction industry has eroded to a level unknown since the Great Depression. The ever-increasing popularity of double-breasting, which has essentially gone

177. For an argument critical of the general application of a business justification test with regard to corporate investment and production decisions which result in the elimination of jobs, see id. at 96-102. However, that argument does not consider the same business justification test proposed here, under which not just any justification would suffice, but only one that is separate from the economic benefits of replacing union labor with nonunion labor.

178. See generally Belkin, supra note 18.

179. Note that this differs from the Board's current inquiry into whether the bargaining unit has actually been siphoned away since this approach would look prospectively to whether unit work could potentially be siphoned away.

180. Such an approach would not be entirely at odds with all prior Board decisions. In at least two cases, the Board has found that where the open shop affiliate in a double-breasted operation was engaged in precisely the same business, operated in the same geographic area, and shared similar markets for customers, it was effectively, if not directly, draining unit work from the unionized shop and must, therefore, have been created solely for the benefit of escaping a bargaining agreement. See Samuel Kosoff & Sons, Inc., 269 N.L.R.B. 424, 428-29 (1984); Advance Elec., Inc., 268 N.L.R.B. 1001, 1002-03 (1984). In these cases, the Board found the change in form was entirely self-serving. See Kosoff, 269 N.L.R.B. at 429.
unchecked over the last two decades, bears some responsibility for this. The NLRB has the power to restrict the widespread misuse of the right to operate double-breasted and, in turn, to give organized labor an opportunity to reestablish its presence in the construction industry. Should the Board decide to exercise its power in the manner proposed, it would help level the bargaining plane in a way consistent with the goals of federal labor law.