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LABOR'S ROLE IN CORPORATE RESTRUCTURINGS
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On June 18, 1985, the U.S. Court of Appeals for the District of Columbia Circuit handed down its decision in International Union, U.A.W. v. N.L.R.B. 1 In affirming the rehearing decision of the new Reagan majority on the Board, the D.C. Circuit Court has reestablished the employer's right to allocate work between union and non-union operations. This comment examines the context within which this decision was made, and the possible consequences for labor-management relations of such corporate restructurings.

HISTORICAL OVERVIEW

Labor Law, Policy, and Politics.--Labor Law provides one of the classic examples of the impact of political and social philosophy on judicial and administrative decision-making.² From the earliest state cases holding that labor unions were criminal conspiracies under the common law,³ through the use and abuse of the labor injunction⁴ and the New Deal protective legislation,⁵ to the very recent U.S. Supreme Court decision in Bildisco,⁶ the role of labor unions in the American economy has been a subject of continuing debate. Free-market economists view labor as just another factor on the productive process, whose price and terms should be subject to the same sort of market adjustments as raw materials and physical plant.⁷ This view is of course accurate in the broad sense; the cost of labor is a factor (and a very sizable one in many cases) in the price of the final product. But, carried to an extreme, this view overlooks the equally valid point that the labor "factor" consists of human beings. Individual employees worry about adequate pay, unequal treatment, and loss of their jobs. Those with relatively low-level skills, in particular, usually feel that they can not negotiate as equals with the managers representing their giant-industry employer. Without some form of protection, the threat of discriminatory treatment, including loss of the job, is ever-present.⁸

Labor unions present themselves as the protector of, and negotiator for, the individual employees. Most people, including most economists, would agree that this is, or can be, a legitimate union function.⁹ Even many managers may find bargaining once with the union preferable to bargaining individually with several thousand employees. A union contract with a time-in-grade salary schedule may be considerably easier to administer than a personnel policy which attempts to evaluate individual productivity. Agreement on the legitimacy of these basic union functions, however, still leaves open the questions of what are legitimate union tactics and how to ensure internal union democracy.

The majority view on the legitimacy of basic union objectives found early expression in the celebrated Massachusetts case, Commonwealth v. Hunt, which rejected the criminal conspiracy doctrine.¹⁰ Nearly a century later, after a sorry tale of brutalization and exploitation, bloody strikes, and court injunctions, Congress finally responded.¹¹ The Norris-LaGuardia Act of 1932¹² effectively prohibited the U.S. District Courts from issuing injunctions in labor disputes.¹³ The National Labor Relations Act of 1935 (Wagner Act)¹⁴ was one of the centerpieces of the New Deal.¹⁵ In part as a result of this legislative sponsorship, labor union membership and power increased dramatically.¹⁶ The Social Security Act of 1935¹⁷ and the Labor Standards Act of 1938¹⁸ were also designed to improve the workers' economic well-being, but had only a more indirect impact on the union movement.

In the aftermath of World War II, a wave of strikes triggered a call for a re-examination of national labor policy.¹⁹ Following extended and heated debate,²⁰ the Republican-controlled 80th Congress passed the Taft-Hartley Act of 1947. President Truman vetoed the bill, but it had originally²¹ been adopted by large majorities in both Houses, and his veto was overridden. Taft-Hartley became one of Truman's favorite targets during the presidential campaign of 1948,²² and he refused to invoke its provisions to deal with the steel strike in 1952.²³ That refusal resulted in the Youngstown Sheet & Tube case,²⁴ one of the U.S. Supreme Court's major expositions of presidential power.

Almost by definition, the union solution to personnel matters involves a lock-step, monolithic approach, with very limited room for individualism. In many unions, this need to present a united front to employers has led to an unwillingness to tolerate dissent internally, as well. For many unions, "union democracy" has been an ideal much talked about but seldom implemented.²⁵ Bossism, corruption, and racketeering have been and continue to be widespread in the labor movement.²⁶ Lengthy televised hearings by the McClellan Senate Subcommittee during the late 1950s exposed many Americans to these problems for the first time.²⁷ The Landrum-Griffin Act of 1959²⁸ was the result of these hearings.

Statutory Inconsistencies--The conflicting philosophies and objectives of the three major pieces of labor relations legislation (Wagner, Taft-Hartley, Landrum-Griffin) have resulted in some notable disharmonies in our basic national statute governing labor law. There are exceptions to exceptions, and provisos to everything.²⁹ Labor unions are free to do their thing, "except...", "unless...", but "provided, how-ever..." Not surprisingly, these areas of statutory disharmony are mirrored in the decisions of the National Labor Relations Board and the courts. Equally unsurprising is the fact that board members and judges with different perceptions of labor unions have combined these exceptions and provisos in different ways.³⁰ A seemingly clear statutory rule that labor unions can not "restrain or coerce" their members' "right to refrain from any or all" concerted activities was held not to have been violated³¹ when a union fined its members who crossed a picket line to go to work. A majority of the Supreme Court held that such fines were permissible because of a proviso which permits a union "to prescribe its own rules with respect to the acquisition or retention of membership therein."³²

Changes in membership on the Board and the courts can thus³³ produce shifts in the rules of the game, often quite basic and dramatic ones. The Nixon Supreme Court and the Reagan NLRB have recently combined to generate a change of potentially enormous significance. At issue is a company's right to shift work from a union to a non-union plant without getting the union's agreement prior to making the change.

SCOPE OF THE DUTY TO BARGAIN

Basic Approach.--Section 8(a)(5) of the NLRA makes an employer's refusal to bargain with the union chosen by his employees an unfair labor practice. Section 9(a) makes the union the exclusive bargaining representative for "rates of pay, wages, hours of employment, or other conditions of employment."

The NLRB and the courts have generally taken a very broad view of this requirement, and have required bargaining on nearly any topic which might arguably impact on the working environment. In Ford Motor Co. v. NLRB, for example, the Board and the courts ordered Ford to bargain with the UAW over the prices to be charged by an independent caterer who was selling food in the Ford plant.³⁴ The Board and the courts have also generally required disclosure by the employer of any information or economic data which might be helpful to the union in its bargaining or representation functions. The employer has also been required to participate in the bargaining process in a meaningful way. GE was held to have violated its duty to bargain when it made its "last, best" offer initially, and then tried to communicate with the employees directly, indicating that the first offer was all it could afford.³⁵ Generally, in making these determinations, the courts have tended to defer to the Board's "expertise," and have refused to overturn Board orders if they were supported by "substantial evidence in the record as a whole."³⁶ It is fair to say that the Board and the courts have interpreted the scope of the duty to bargain very broadly.

Two Landmark Cases on Management Rights.--The bargaining requirement poses a significant restraint to an employer's attempts to respond to economic conditions. To what extent is an employer duty bound to discuss proposed production changes with his employees' chosen union prior to implementing them? The U.S. Supreme Court addressed this problem in two landmark cases in the mid-1960s--Fibreboard³⁷ and Darlington.³⁸

In Fibreboard, a majority of the Court felt that the employer had violated its statutory duty to bargain by contracting out work from the bargaining unit without discussing the change with the union. There was a union contract in force at the time, and many of the employees covered by the contract lost their jobs as a result of the subcontracting. The Court held that such subcontracting is a "mandatory" subject of collective bargaining, i.e., that it must be discussed with the union prior to implementation.

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage his business.³⁹

As a result of this failure to bargain, the employer was required to resume the maintenance operation, to rehire the laid-off employees, with back pay, and to bargain with the union before subcontracting.

The management decision at issue in the other classic case was much more serious: to close the entire plant. When the Textile Workers Union won a bitterly contested election to organize the plant at Darlington, South Carolina, management decided to close the plant rather than to bargain with the union.⁴⁰ The NLRB found a violation of section 8(a)(3)--employer discrimination designed to discourage union membership, and of 8(a)(5)--the duty to bargain.⁴¹ On the basis that the Darlington plant, although owned by a separate corporation, was in reality part of a larger conglomerate, the U.S.

Supreme Court agreed that a partial closing could be an unfair labor practice, if motivated by a desire to "chill unionism" at the employer's other locations. The case was remanded to the Board for a finding on the motivation question. After a careful examination of the timing of events and the statements made, the Board did find an anti-union motive, and ordered back pay and rehiring remedies. In its opinion, however, the U.S. Supreme Court had said that the closing of an entire business, for whatever motive, could not be an unfair labor practice.⁴² In other words, even if the employer's sole motivation for closing was to avoid dealing with a union, there could be no unfair labor practices.

ADJUSTING TO THE NEW ECONOMY

Historically, U.S. industry has called its own shots, largely in isolation from the rest of the world economy. To be sure, we traded with other nations, but usually on our own terms. With our massive domestic market, producers worried about foreign competition only as incidental intruders. In the 1970s and 1980s, this view has had to be radically changed. The reality of effective foreign competition in our domestic market has brought a rude awakening. Flexibility and productivity are the watchwords. There are no guarantees, and management must be prepared to respond quickly to marketplace conditions. These changes in the national economic structure have brought concomitant changes in the labor relations field.

Partial Closing: FNMC.--Given the dynamic nature of the U.S. economy, it was only a question of time until the Board and the courts would have to deal with the really tough variation on Darlington: a partial closing not based on any anti-union motivation. That situation was presented by First National Maintenance Corporation, which had unilaterally decided to terminate its services to one customer, and had laid off the employees working on that job.⁴³ FNMC provided cleaning and maintenance services under individual contracts with its customers. After financial and other difficulties with one customer, the Greenpark nursing home, FNMC decided to terminate its service contract, and so notified Greenpark. Meanwhile, the Hospital and Health Care Employees' union had won a representation election among FNMC's employees on the Greenpark job. FNMC did not respond to the union's request for a bargaining meeting, but instead notified its Greenpark employees that their jobs had ended. The union filed charges with the NLRB, alleging violations of sections 8(a)(1) and 8(a)(5). The administrative law judge found in favor of the union, and recommended an order requiring FNMC to bargain about the decision, not just its effects, and to pay wages until the parties reached an agreement, or an impasse, or until the union failed to bargain in good faith.⁴⁴ The Board adopted these recommendations, and also required FNMC to rehire the discharged employees for other jobs, if necessary by discharging⁴⁵ subsequently-hired workers, if the Greenpark contract were not reinstated.⁴⁶ The Court of Appeals for the Second Circuit enforced the Board's order.

With Justices Brennan and Marshall dissenting, the U.S. Supreme Court reversed.⁴⁷ Writing for the majority, Justice Blackmun reviewed the policy objectives underlying the passages of the NLRA: "the establishment and maintenance of industrial peace to preserve the flow of interstate commerce," through the use of "collective bargaining as a method of defusing and channeling conflict between labor and management." Nevertheless, said

Blackmun, in what is sure to become an oft-quoted passage, "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."⁴⁸ Surely that is a fair and rational statement. "Despite the deliberate open-endedness of the statutory language, there is an undeniable limit to the subjects about which bargaining must take place."⁴⁹ FNMC's decision here is not really about "the terms and conditions of employment," but rather about whether to continue an unprofitable operation. Certainly a decision about the scope and direction of the business impacts on the employment relationship, but so might a decision on an advertising campaign, or on a new product line. There is no question that the employer has the duty to bargain over the effects of its shut-down decision; the issue is whether it must bargain over the decision itself, before implementation.

Blackmun thought a balance had to be struck: "(I)n view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."⁵⁰ These discharged workers were not being replaced by others, a key distinction from the Fibreboard case. Here the employer had simply decided not to engage in one particular (unprofitable) operation. If an employer can not be forced to stay in business even if its only motive in closing is to avoid dealing with a union (Darlington), how can it logically follow that an employer be required to bargain over continuing an unprofitable operation until the union is satisfied with the decision to close? Blackmun and the majority did not think that such an economically-motivated decision could be an unfair labor practice.

Runaway Shops: a Significant Reversal.--So-called "runaway shops" may occur in two rather different contexts. The first involves the shutting down of an existing unionized plant and the start-up of a new plant in a location less favorable to unionization (usually a southern state). The second situation is simply a shifting of work from a union plant to an existing non-union plant. This second situation was involved in U.A.W. v. N.L.R.B. (Milwaukee Spring).⁵¹

Illinois Coil Spring Company decided to move its assembly operations formerly conducted at its Milwaukee Division to its McHenry Division. The labor costs at Milwaukee were \$8.00 an hour in wages and \$2.00 an hour in fringe benefits; at McHenry, \$4.50 in wages and \$1.35 in fringes. A labor contract was in force at Milwaukee but not at McHenry. Illinois did bargain with its Milwaukee union about the change, by asking for wage concessions in order to keep the Milwaukee location viable. After the union rejected any concessions, Illinois did begin to relocate its assembly operations. There had also been a prior relocation of jobs from another facility, but no unfair labor practice charges had been filed in that instance.

The union alleged an illegal violation of an existing collective bargaining agreement, in violation of section 8(d) and 8(a)(1), (3), and (5). Illinois claimed that the union had waived any right to object to such changes through language in the contract, and that, in any case, it had committed no unfair labor practice since it had initially bargained about the change and was ready and willing to bargain about the effects of the change.

Milwaukee Spring I.--The Board initially found that Illinois had violated section 8(d) by making a unilateral change in the terms and conditions of employment, during the term of the contract, without the other party's consent.⁵² The then existing majority distinguished The University of Chicago case, where the U.S. Seventh Circuit had denied enforcement of a Board order in a situation where work had been shifted "to raise the quality of work at issue to a level in keeping with the high standards demanded by the University's professional staff."⁵³ This initial decision was based in large part on Los Angeles Marine Hardware Co., where the U.S. Ninth Circuit held that "repudiation of mandatory contractual terms without the union's consent during the term of the contract is not excused because the employer acted in good faith or was motivated solely by economic necessity."⁵⁴ This initial decision was reached despite a "management rights" clause in the contract which read as follows:

Except as expressly limited by the other Articles of this Agreement, the Company shall have the exclusive right to manage the plant and business and direct the working forces.

These rights include, but are not limited to, the right to plan, direct and control operations, to determine the operations or services to be performed in or at the plant or by the employees of the Company, to establish and maintain production and quality standards, to schedule the working hours, to hire, promote, demote and transfer, to suspend, discipline or discharge for just cause or to relieve employees because of lack of work or for other legitimate reasons, to introduce new and improved methods, materials or facilities, or to change existing methods, materials or facilities.⁵⁵

Incredibly, the Board initially decided that this language did not "expressly" grant the Company the right to move work from the Milwaukee facility to the McHenry facility. The management rights clause specifically states that the Company has the right "to determine to operations or services to be performed at or in the plant," but the Board decided that just meant the right to determine "whether, and how, its products will be manufactured."⁵⁶ The Board glossed over the contract language which gave the Company the right "to relieve employees because of lack of work or for other legitimate reasons." There was no further work at the Milwaukee facility, so the union workers were "relieved," as per the contract. There was no question that the substantial savings on labor costs was indeed a "legitimate reason" for shifting the work, but the Board ignored this language as well. Most exasperating is the cavalier treatment given to the last phrase of the quoted contract language: "or to change existing methods, materials or facilities." The Board itself, in announcing its order speaks of the "Milwaukee Spring facility."⁵⁷ The contract language clearly gives the Company the right to change existing facilities, and they have done so--from one "facility" to another "facility." Apparently these Board members would have us believe that the contract clause permitted the introduction of machinery at one facility which might result in some job losses, but not the transfer of work from one facility to a more efficient one. To say the least, such a reading of the contract clause is a narrow and tortured one, if not out and out sophistry.

Milwaukee Spring II.--When the three Board members (Van de Water, Fanning, and Jenkins) who had made this initial decision were replaced, the new Reagan Board took the unusual⁵⁸ step of asking that the case be returned to it by the Seventh Circuit Court. (Dotson is now Chairman; Zimmerman, Hunter, and Dennis were appointed; one vacancy remains.) With Zimmerman filing a lengthy dissent,⁵⁹ the new majority held that the Company had not violated section 8(d) of the NLRA by moving the work here⁶⁰ involved, nor section 8(a)5, since it had bargained over the decision.

The new majority almost totally rejected the prior analysis. It agreed with two prior Court of Appeals decisions, Boeing Co.⁶¹ and University of Chicago,⁶² which had refused to enforce Board orders. In each of these cases, the Court of Appeals had said that a "recognition clause" did not imply an agreement on work preservation. The union was merely being recognized as the bargaining representative for existing employees; there was no implied promise that those employees would have those jobs, at that location, for all time to come. The parties could, of course, have drafted and included a work-preservation clause--but they had not done so. (Rather the opposite, as the management rights clause make clear!)

It is not this second decision that overturns years of NLRB law; the first decision in this case had done that. The new majority cited the 1966 NLRB decision in Ozark Trailers, where the Board had said that the duty to bargain does not include a duty to agree, only to discuss.⁶³ "If such efforts fail, the employer is wholly free to make and effectuate his⁶⁴ decision."⁶⁵ The new majority disagreed with prior Board decisions in Boeing⁶⁵ and Chicago,⁶⁶ and with the Board and Court of Appeals in Los Angeles Marine.⁶⁷ It quoted the Seventh Circuit Court of Appeals in Chicago, as follows:

(U)nless transfers are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if: (1) the employer complies with the Fibreboard Paper Products v. NLRB, 379 U.S. 203, 57 LRRM 2609... (1964), by bargaining in good faith to impasse; and (2) the employer is not motivated by anti-union animus, Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 .. (1965)."⁶⁸

The new majority then expressly⁶⁹ overruled the inconsistent Board decisions in these three prior cases.

The new majority also said there could be no violation of section 8(a)(3)--"discrimination in regard to hire or tenure of employment"--where there was⁷⁰ no violation of section 8(a)(5), and admittedly, no anti-union animus.

The majority felt its decision would encourage the bargaining process; member Zimmerman, in dissent, felt the decision would destroy collective bargaining.⁷¹

U.A.W. v. N.L.R.B.--Writing for a unanimous panel, Judge Harry Edwards totally rejected the union's arguments. He emphasized the employer's good faith economic motivation and lack of anti-union animus. The employer had told the union that it needed relief from the provisions of the collective agreement; it had bargained with the union about the relocation of work; and

it had moved the work to the non-union facility only when the union had refused to make economic concessions. The employer remained ready to negotiate over the effects of the change. As Judge Edwards restated the precise issue presented to the Board, the answer seems almost self-evident:

[W]hether an employer, after engaging in decision bargaining and while offering to engage in further effects bargaining, may, without union consent, relocate bargaining unit work during the term of an existing collective bargaining agreement from its unionized facility to its nonunionized facility, and lay off employees, solely because of comparatively higher labor costs in the collective bargaining agreement at the unionized facility which the Union declined to modify.⁷²

Judge Edwards' focus was a bit different than that of the Board majority. He agreed that the employer's duty to bargain does not end with the signing of a collective agreement. But, he said, "During the term of a contract ..., the scope of the duty to bargain over a particular mandatory subject depends upon whether that subject is 'contained in' the contract." If a mandatory subject is not contained in the contract, "an employer must bargain in good faith to impasse with the union representatives; if no agreement is reached, the employer may unilaterally implement its bargaining proposal with respect to the matter not contained in the agreement."⁷³ Conversely, if the matter is contained in the agreement, "section 8(d) prohibits an employer from altering contractual terms concerning mandatory subjects of bargaining during the⁷⁴ life of a collective bargaining agreement without the consent of the union." This initial statement of the rules seems to indicate that the crucial decision is whether a matter is "contained in" the collective contract. As Edwards' opinion proceeds, that assumption proves to be only partially correct.

Mandatory subjects may become "contained in" an agreement either through explicit statement, as for example a wage provision, or through a "zipper clause," which "purports to close out bargaining during the contract term and to make the written⁷⁵ contract the exclusive statement of the parties' rights and obligations." Where there is a zipper clause, Edwards says, it "has the effect of incorporating all possible topics of bargaining--both those actually discussed and those neither discussed nor contemplated during bargaining--into the contract."⁷⁶ With a zipper clause, then, neither party can force the other to bargain over any mandatory subject, nor unilaterally implement any change, even after bargaining to impasse.

The contract involved in this case did contain a zipper clause,⁷⁷ but it also contained the "management rights" clause discussed previously. The union thus was not required to bargain with the company over the midterm wage concessions, but in any case it had done so voluntarily. Nor could the company implement the wage changes unilaterally, even after bargaining to impasse, since wages were a matter "contained in" the contract. The company, however, did not in fact change the agreed wages, so there could be no section 8(d) violation on that basis.

As to the legality of the company's decision to relocate the work, Edwards' analysis was a bit more complex. He said that the parties and the Board had somewhat obscured the "contained in" issue, but he was clear that

the relocation did not violate the contract.⁷⁸ The Board had expressly found that no term of the contract restricted relocation decisions. Moreover, "[t]he Union does not contest this contractual right, nor does it argue that the contract⁷⁹ was violated or modified in any other way by the relocation decision." Said Edwards, "it is undisputed that the Company acted consistently with the contract in deciding to relocate, and thus did not modify the agreement in violation of section 8(d)."⁸⁰

If the employer has acted in good faith, if there's no anti-union animus, if the employer has made no improper modifications in the contract's wage structure, if the union concedes that the employer had the right to relocate the work, and if the employer is ready to bargain over the effects of the relocation, what's the problem? The union argued that the employer's (lawful) request for wage concessions, when coupled with its announced intention to move the work (lawfully), amounted to a violation of section 8(d)! According to the union, since the employer could not force the wage concessions by locking out the employees, nor implement wage changes unilaterally, it should also be prohibited by section 8(d) from bringing any sort of "economic pressure" to bear on the union.

Edwards completely rejected this theory as "untenable." "First, we cannot see how two rights can make a wrong. Second, we can find no support for the UAW's proposition that section 8(d) condemns any midterm behavior by one party to a contract that results in the other party feeling 'economic pressure' to bargain over modifications. The plain language of the statute proscribes only lockouts and strikes. Nothing in the rest of section 8(d), nor the Act's legislative history, persuades us that the Union's expansive reading of section 8(d)⁴ is correct."⁸¹ The two cases cited by the Union did not support its position, since they "both concern strikes by employees, not generic 'economic pressure'."⁸²

Edwards' discussion of the policy reasons for permitting such modifications of the collective bargaining agreement is worth quoting in full.

In the absence of antiunion animus, it is lawful--and indeed common in this era of concession bargaining--for one party to a collective bargaining agreement to propose, midterm, the trade of a right it has under the contract for a modification of the agreement. The Union was under no compulsion to discuss wage concessions; it did so because it made sense in the context of the parties' bargaining relationship. This sort of ongoing flexibility in labor-management relations is crucial. The freedom to suggest exchanges of rights permits parties to adapt their relationship to unanticipated events or changed circumstances during the lifetime of a contract, thus keeping the collective bargaining process vital and responsive to both sides' needs.⁸³

Edwards thus agrees with the Board majority that such concession bargaining is a legitimate and necessary part of labor-management relations.

ALTER EGO RESTRUCTURINGS

Changes in corporate form are also subject to labor law scrutiny to determine whether an employer is utilizing such an organizational alteration to evade its obligations under the NLRA. The alter ego doctrine has evolved to ascertain whether a subsequent entity is merely a new version of the predecessor enterprise.

Under the doctrine, an inquiry into the restructuring seeks to determine whether a "bona fide discontinuance and a true change of ownership" has occurred or a mere "disguised and continuance of the old employer" exists.⁸⁴ If appropriate, doctrine will "treat two nominally separate business entities as if they were a single continuous employer."⁸⁵

The determination as to whether one entity is an alter ego of another is a question of fact,⁸⁶ not one of law. Thus, if the National Labor Relations Board's conclusion of alter ego status is supported by substantial evidence in the entire record, its orders are to be enforced by the courts.⁸⁷ If the Board faces "two fairly conflicting views" the courts must defer to its expertise in reviewing its judgment, even though the reviewing court would "justifiably have made a different choice had the matter been before it de novo."⁸⁸

Various circuit courts of appeal agree that among the relevant factors in such an NLRB probe are: "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership."⁸⁹ What is unsettled is whether the additional criterion of anti-union animus or an intent to evade one's obligations under the Act, is necessary for a finding of alter ego status. The Supreme Court has not ruled on the question and the circuit courts that have addressed the issue have provided varying answers. It is to this specific issue that we now turn.

The Circuits Requiring Anti-Union Animus. The First Circuit was the initial reviewing court to include illicit behavior by the employer as necessary for alter ego status. As stated by the court, "Unlawful motive or intent are critical inquires in an alter ego analysis."⁹⁰

In Iowa Express Distribution Inc. v. NLRB,⁹¹ the Eighth Circuit reached the identical conclusion, citing the First Circuit's decision. Interestingly enough,⁹² a slightly earlier decision of this circuit did not discuss the issue.

The position of the Third Circuit is less clear. In an alter ego case, in the context of a refusal to bargain situation, the court briefly discussed the various criteria that all the circuits find relevant. It then stated, "assuming without deciding that in this case the General Counsel must prove that Scott Printing intended to evade its duty to bargain, we find that there is substantial evidence to support the ALJ's conclusion."⁹³ It then remarked that, in light of a frequent absence of such direct evidence, "the Board may rely on circumstantial evidence to prove such intent."⁹⁴

A dissent is recorded by Judge Sloviter on the issue of a finding of alter-Ego status in the absence of an intent to evade. In his view the

majority has erred by advancing no policy reason "in support of the extension of that doctrine to a situation where no evidence of anti-union animus appears on the record."⁹⁵

Intent to Evade Not a Sine Qua Non For Alter Ego. In a decision noteworthy for its brevity (the text of the opinion is less than one page), the Second Circuit has rejected the need to demonstrate anti-union animus or an intent to evade. In the cogent and blunt words of the decision, "The argument that the Board must find anti-union animus or an intent to evade union obligations before it can impose alter ego status is unpersuasive."⁹⁶ This court is only willing to concede that its presence can lead to the imposition of alter ego status or that it may be relevant in supporting such a determination.

Anti-Union Animus One of Several criteria to be Considered. We have thus far observed that some circuits hold anti-union animus or an intent to evade statutorily imposed duties to be critical in the imposition of alter ego status whereas others hold the opposite. With such a degree of legal controversy surrounding the issue, it is not unexpected to find decisions in the middle of this spectrum.

Characterizing the decision as often times a close question, with no hard and fast rule, the Tenth Circuit epitomizes those occupying the middle ground. It thinks "evidence of anti-union sentiment by an employer, occurring either before or after the change in the structure of the business is germane."⁹⁷

We categorize this position as occupying the center of the contrasting legal views in part because of the different interpretations give the meaning of this decision by the competing courts of appeals. The opinions of the First⁹⁸ and Eighth⁹⁹ Circuits cite this decision in holding that anti-union animus is a necessity for alter-ego status. The Sixth Circuit states in a footnote¹⁰⁰ that this specific language does not support such a holding and decides that anti-union animus is not a prerequisite for the imposition of such status.

The District of Columbia Circuit has taken a position that, in addition to the factors that all the circuits agree upon, "the Board will give substantial weight to evidence that the motive for the transaction was to evade statutory and contractual duties under the NLRA or to escape the reach of the Board's remedies."¹⁰¹ This statement is then followed by citations to, among others: a) the First Circuit decision¹⁰² saying anti-union animus is a requirement; b) the Tenth Circuit decision¹⁰³ on the exact holding of which the other circuits are split; and, c) a Third Circuit decision¹⁰⁴ saying that anti-union animus can be critical in making a determination, but not the Third Circuit's earlier decision assuming that anti-union animus is required.¹⁰⁵ Making a statement, and supporting it by citations to cases that differ in slight, but legally important respects, merely adds to the legal murkiness of the area.

In a second ruling (which follows an earlier one by approximately three and 1/2 years) upholding a Board determination of alter-ego status, The Third Circuit has observed that "...it is significant, if not crucial, that (the subsequent enterprises) was created after the filing of unfair labor practice charges against (the original employers), and substantial evidence supports

the ALJ's finding that it was a disguised continuance...through which contractual obligations...and putative statutory remedies were to be avoided."¹⁰⁶

Lastly, the Ninth Circuit, in upholding a finding of alter ego status in a situation involving an attempt to evade dealing with a union, says that "No factor is controlling...."¹⁰⁷

The results of all this may appear to be less confusing when summarized, as follows, in Figure 1.

Is anti-union animus or an intent to evade the NLRA necessary for the imposition of alter ego status?

As answered by the circuit courts of appeal

Yes	No	Merely an Additional Criterion	Maybe
First Eighth* Third (Most Probably)**	Second	Sixth Ninth D.C. Third (Possibly)**	Tenth (Different circuits are split as to which proposition this case supports)

*Excluded from this chart is the Eighth Circuit decision which does not discuss the issue

**Includes two cases, Scott Printing and Al Bryant

Figure 1

The Importance of This Split Among the Circuits. Concluding that a split of opinion exists among the circuit courts of appeal on the issue of whether anti-union animus is a requirement for the application of the alter ego doctrine does not, in and of itself, illuminate this entire important sector of labor law. Thus, if all of the cases appealed to the circuit court level involve anti-union animus our observed differences among the circuits is irrelevant. The opinions would involve, not holdings, but dicta, or idle speculation about controversies not directly confronting the court. Figure 2, which follows, is our characterization of whether the cases do, or do not, involve factual situations which demonstrate a presence or absence of this animus.

Characterization of Reasons for Restructurings

Anti-union animus	Debatable anti- union animus	Possible non- labor-related purpose
Southport - S. Ct.	Goodman - 2nd Cir.	Penntech - 1st Cir.
Al Bryant 3rd Cir.		Scott Printing - 3rd Cir.
Tanaka - 9th Cir.		Allcoast - 6th Cir.
Tricor - 10th Cir.		Campbell Harris - 8th Cir.
Fugazy - D.C. Cir.		Iowa Exp.* - 8th Cir.

*Technically an Equal Access to Justice Act attorneys' fee case under 5 U.S.C. 504, although within that context it discusses the alter ego doctrine.

Figure 2

Naturally, employers who have engaged in anti-union-animus-tainted transactions gain nothing from arguing that such animus is prerequisite to the imposition of alter ego status. It is those employers who possess an arguable non-labor-related purpose for the business restructuring to whom the circuits' position is critical. If the courts adopt a stance that anti-union animus is not required for alter ego treatment of transaction, this group of employers will have one of their possible defenses eliminated. However, if the holding of the circuits is that the presence of animus is merely one of several criteria utilized in an alter ego determination, the employer is permitted to at least advance as one defense the absence of animus -- as an explanation for the enterprise realignment. Therefore, let us examine the position adopted by the courts in those cases where the employer's actions were either debatably anti-union-related or where a sound argument could be advanced that the restructuring was due to factors unrelated to labor-management relations. Figure 3 illustrates the results of such an examination.

Position of Circuits in Non
Obvious Animus Situations

Characterization of Restructuring		Animus Necessary for Alter-Ego			
Debatable Animus	Labor-Related	Yes	No	Additional Criterion	Doesn't Discuss
Goodman - 2nd Cir			X		
	Penntech - 1st Cir	X			
	Scott Printing - 3rd Cir	X			
	Allcoast - 6th Cir			X	
	Campbell - Harris - 8th Cir				X
	Iowa Exp. - 8th Cir	X			

Figure 3

Let us introduce one additional table before continuing our discussion. This will demonstrate both the results of the NLRB proceeding and the final resolution of each case listed in Figure 3.

Decisional Outcome			
Cases		Tribunal Decisions	
Debatable Animus	Possible Non Labor Related	NLRB Finding	Court of Appeals
Goodman - 2nd Cir		Alter ego	Affirmed
	Penntech - 1st Cir	Single employer	Affirmed
	Scott Printing - 3rd Cir	Alter ego	Affirmed
	Allcoast - 6th Cir	Alter ego	Affirmed
	Campbell-Harris - 8th Cir	Alter ego	Affirmed
	Iowa Exp. - 8th Cir	No alter ego	Affirmed

Figure 4

The result in the Second Circuit case is not surprising. While the employer's actions are debatably grounded in animus, the court's position is that animus is not a requirement for an alter ego determination and this factor plays no role in the determination.

Yet the results in the First, Third, Sixth, and Eighth Circuits could, to some degree, be mildly surprising. While one circuit has adopted the position that animus is one of several criteria for alter ego status, the remaining three have said it is an absolute requirement. Despite the presence of facts which support the position that the restructuring was not instigated for labor-management reasons and the ability of the employer to argue this as one element disproving the existence of a basis for the imposition of alter ego treatment, the employer lost four of the five cases.

An understanding of these results may reside in the fifth case, the one in which alter ego status was not imposed. This case, the Eighth Circuit's Iowa Express seems to share three characteristics of its brother cases in Figure 3, whereas in figure 4, it appears to be distinguished from the others by the fact that the restructuring was not regarded as one of an alter ego nature. However, a comparative look at another element of Figure 4 is most revealing. The courts of appeal, regardless of their attitude towards animus as a factor in alter ego cases, have affirmed the finding of the NLRB, vis-a-vis alter ego status, in each case. While not illustrated in these two tables, the result is the same when one examines the courts of appeals decisions in those cases where anti-union animus is clearly present -- the NLRB decision is upheld by the appellate court.

Thus, the attitude of the circuit courts of appeal on the question of the role played by anti-union animus or an intent to evade statutorily imposed duties in an alter ego determination is of no practical importance. The critical inquiry focuses upon how the NLRB has ruled in the matter because of the appellate courts' deferential posture towards the Board. This legal bow to the expertise of the board is to be expected in light of earlier Supreme Court decisions.¹⁰⁸

When conducting a review of the record, the ascertain whether substantial evidence exists to affirm a NLRB decision, upon what elements do the courts focus? They do not expend much energy exploring for indications of anti-union animus, although it is duly noted if present. This is to be expected by courts regarding its presence as unnecessary for an alter ego conclusion. But, it is also true of those reviewing courts that espouse the view that animus is one relevant criterion or a necessity for such a conclusion. Instead, all the courts appear to focus upon factual evidence, or the lack thereof, of those factors upon which they all agree: common management and ownership, business purpose, operation, equipment, customers, etc.

Thus far, in our discussion of sequential business entities, we have not referred to second employer as the successor employer. The reason being, the phrase "successor employer" is a word of art in labor law. A legal chasm separates the differing types of legal treatment accorded alter egos compared with successors. When the second, or coexisting, employer is the alter ego of the original employer, it is bound by the labor agreement between the original employer and the union. If one is legally categorized as a successor, the terms and conditions of the labor agreement usually are not binding. The

successor may even be relieved of the obligation of recognizing and bargaining with the union representing the employees of the first employer.

The Supreme Court has dealt with successor employer issues three times within the past two-decades-plus. The first case dealt with the effect of a collective bargaining agreement where the employer was merged into another corporation. The transaction was a statutory merger. The state corporation law provided that the surviving corporation assumed all the assets and liabilities of the merged corporation. The contract between the union and the merged corporation contained an arbitration clause. The union brought a 301 suit¹⁰⁹ to compel arbitration by the successor under the arbitration clause of the merged company.

While noting that an unconsenting successor to a contract is not bound to it by contract law, the court distinguished these ordinary contracts from collective bargaining agreements. It ruled that, in a merger, the successor is obligated to arbitrate the question of the extent to which it is covered by a collective bargaining contract.¹¹⁰

Two subsequent cases have undermined the broad applicability of this decision by seeming to confine it to its narrow facts. Let us now examine these cases.

In one, a company named Wackenhut had a one year contract to provide security services to a client. A representation election was held and three employees selected a union, which subsequently bargained a three year contract. All of this occurred shortly before the contract expiration date with the client. The client solicited competitive bids on a new security contract and Wackenhut lost the bidding contest to Burns. While utilizing some of its own personnel, Burns hired 17 of Wackenhut's 42 guards to fulfill its staffing needs. However, when Burns refused to recognize the union, or honor the contract, the Board ruled this an unfair labor practice.

The Supreme Court upheld the refusal to bargain violation under 8(a)(5) by noting: "...where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board...by ordering the employer to bargain with the incumbent union."¹¹¹

The court then noted that 8(d) of the NLRA provides that the bargaining obligation "...does not compel either party to agree to a proposal or require the making of a concession."¹¹² Based upon this provision it made the determination that Burns had not violated the labor law by refusing to honor the contract. As stated in the opinion, "it does not follow, however, from Burns' duty to bargain that it is bound to observe the substantive terms of the collective bargaining contract the union had negotiated with Wackenhut and to which Burns had in no way agreed."¹¹³

The last Supreme Court ruling in the area concerned the purchase by Howard Johnson of the assets of a restaurant and motor lodge and the lease of the real estate from its former owners. In structuring the transaction, Howard Johnson specifically did not recognize or assume any labor agreements between the prior owner and any unions.

Howard Johnson employed 9 of the prior owner's 53 personnel in its operation of the facility. the union, citing the John Wiley case, filed a 301 suit to arbitrate, under the old contractual terms, the extent of Howard Johnson's obligations under that contract.

The court did not mandate arbitration.¹¹⁴ It had distinguished Burns from Wiley by noting that the latter was a section 301 case while the former was an unfair labor practice case. Obviously, that distinction between Howard Johnson and Wiley does not exist, yet, in the view of the court "we do not believe that Wiley requires a successor employer to arbitrate in the circumstances of this case."¹¹⁵

The instant case was distinguished by noting that Wiley involved a merger, which resulted in the disappearance of the first employer, and the fact that Wiley hired the entire workforce of the predecessor.¹¹⁶ As to the latter fact the court remarked that "Since there was plainly no substantial continuity of identity in the workforce hired by Howard Johnson...", there is no obligation placed upon it to arbitrate.¹¹⁷ Overlooked is the fact that in Burns there was substantial continuity of the workforce, similar to Wiley, but unlike Wiley, Burns was exempted without question from all terms of previous labor agreement.

The relevance of these cases to our alter ego analysis is contained in specific language in the Howard Johnson and Burns opinions. In Howard Johnson the opinion remarks that it is not an alter ego case that involves a "mere technical change in structure or identity of th employer entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management."¹¹⁸ Burns contains the comment that there exists no duty to follow the old contract just because of the "...mere fact that an employer is doing the same work in the same place with the same employees as his predecessor."¹¹⁹

These statements can assist us in delineating between second employers that are alter egos and those which constitute successors. Earlier we noted that the relevant factors which are used to determine whether a restructuring has merely created an alter ego, and upon which all the circuit courts of appeal agree, include substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. If certain of these factors are also present in cases where the second employer has been characterized as a successor, it alerts us that such elements are not critical in identifying an entity as an alter ego.

In Wiley, Burns, and How Johnson the business purpose, operation, equipment, and customers remained basically unchanged after the alteration of the business entity. these same factors underwent no basic alteration in the alter ego cases which we have discussed earlier.¹²⁰

Wiley, Burns, and Howard Johnson involved a change in ownership and, so too, did the alter ego cases. Now, however, we are beginning to approach the differences which create the chasm between the two categories. Wiley, Burns, and Howard Johnson did not retain the substantial identical management or supervision of the predecessor employer. They seized control of the management reins and exercised their independent judgment in making managerial decisions. This did not occur in the alter-ego cases.

The alter ego (and in some instances, single employer) cases exhibit common ownership, management and supervision,¹²¹ or a limited degree of common ownership but common management and supervision.¹²² Finally, there are the alter ego case¹²³ with no common ownership but common management and supervision.

Alter Ego vs. Single Employer Status. In alter ego cases the question posed is whether a collective bargaining agreement will be applied to successive employers. In other instances, single employer cases, the question is whether two coexisting business entities constitute a single employer for purposes of collective bargaining.¹²⁴

Just as in alter ego cases, the inquiry by the NLRB is predominately factual, and the courts should uphold its findings when supported by substantial evidence.¹²⁵ In making a single employer determination, the Board examines four facets of the relationship between the companies: 1) interrelation of operations, 2) common management,¹²⁶ 3) centralized control of labor relations, and 4) common ownership.

Although there are common factors in both alter ego and single employer situations, the questions posed are legally distinct. Because of this it is possible that a group of companies will not be alter egos¹²⁷ but can constitute a single employer.¹²⁸ The doctrine of collateral estoppel will not bar such a result, since the issues in litigation are different.¹²⁹

It has also happened that multiple companies have been held to be both a single employer, as well as an alter ego.¹³⁰

Single employer questions can easily arise in the construction industry where frequently contractors will operate "double breasted" companies. One entity will have a unionized workforce, whereas the second will be a nonunion organization. The trap for the unwary contractor is, if the NLRB concludes that the employees in both entities constitute an appropriate bargaining unit and his¹³¹ operational style is that of a single employer, a refusal to bargain charge.

Bankruptcy Reorganizations. While the purpose of this manuscript is not to deal with bankruptcy related issues, we do want to make a passing reference to avoiding the terms of a labor agreement through a bankruptcy reorganization.

Early in 1984, the Supreme Court ruled that it was possible for an employer undergoing a Chapter 11 reorganization to unilaterally reject the terms of a collective bargaining agreement.¹³² Subsequent congressional action amending the Bankruptcy Code removes the employer's ability to take such unilateral action.

Under current law, the bankruptcy court exercises the power to reject the terms of a labor agreement.¹³³ The debtor in possession, or the trustee, as the case may be, must make a proposal to the union, supply the relevant information to evaluate it, and then confer in good faith in an attempt to reach a mutually satisfactory modification of the contract. If such a modification is not achieved, the court may set aside the terms of the

original agreement. This can be done only after a hearing and only if the court finds that, a) the requisite proposal has been made to the union, b) the union refused it without good cause, and c) the balance of the equities clearly favors rejection.

Thus, no longer does Chapter 11 provide a quick and clean method of amending the terms of a contract previously agreed to at the bargaining table.

CONCLUSIONS

It is clear that these issues involve important questions of economic and social policy. If U.S. industry is to remain competitive in the world economy, it must have the flexibility to respond to market conditions. If a particular product or service is no longer economically viable, changes must be made. Either the production system must be changed, or that line (at least at some point) must be discontinued. Losing operations simply cannot be continued for an indefinite time, unless our whole economic system is radically restructured. Under the present rules, the company which continues to lose money will at some point be forced into bankruptcy, and all its employees will then indeed lose their jobs.

Certainly the rights of the employees involved in these company changes must be protected, to the extent possible. The question is what is the best mechanism for doing so. Giving the union a veto over such changes during the life of a collective bargaining contract would surely be one possible rule. The difficulty with such a rule is that competitive conditions may not wait that long; an employer company could be forced out of business before it was permitted to make the necessary production changes.

A more realistic and balanced approach seems to be evolving from cases such as First National Maintenance and Milwaukee Spring. First things first-- permit management to make the production changes necessary to meet competitive conditions in the marketplace. If some jobs are lost when work is transferred to more productive facilities, or when one process is ended, so be it. The company must be able to save itself, and the jobs of the rest of its employees, first; then it can bargain with the union over termination benefits and transfer rights for the affected employees. Such a requirement would not seem to be an undue burden on the employer. It can make the decision to close, but would have to factor in the consequences in drawing its economic balance.

A more explicitly drawn management rights clause might obviate such cases as Milwaukee Spring, although one suspects that management and counsel felt that the clause included in that contract was sufficient to do the job. Perhaps as a quid pro quo for such an explicit reservation by management of the right to make drastic production changes, a carefully drafted procedure for protecting the rights of affected employees could also be included in the contract. Priority hiring rights at other company locations, for instance, could be specified as part of the package. Perhaps a partial salary payment could be continued for a certain period of time. Job location and retraining services could be provided. Of course all such suggested benefits would cost money. But sudden job loss also imposes far more drastic costs on the employees and their families. It is not too much to demand that an employer

take account of such effects in making the decision to close, move, or restructure a facility or its production.

FOOTNOTES:

1. INTERNATIONAL UNION, U.A.W. v. N.L.R.B., 765 F.2d 175 (D.C. Cir. 1985).
2. Another area would be antitrust law. See e.g., the majority and dissenting opinions in U.S. v. VON'S GROCERY CO., 384 U.S. 270 (1966).
3. See e.g., COMMONWEALTH v. PULLIS (1806), in Nelles, "The First American Labor Case," 41 YALE LAW JOURNAL 165 (1931).
4. Frankfurter, Felix and Nathan Green, THE LABOR INJUNCTION, (New York: The Macmillian Co., 1930).
5. See e.g., "The Logic of Government Protection," Chapter 7 in LABOR RELATIONS LAW, third edition, Benjamin J. Taylor and Fred Whitney, Englewood Cliffs: Prentice-Hall, In., 1979.
6. N.L.R.B. v. BILDISCO & BILDISCO, 104 S.Ct. 1188 (1984).
7. Ayers, Ronald M. "Two Myths of Employment Protection," THE FREEMAN, 34 (August 1984) 465-467.
8. Anyone who has actually worked in such a position is probably aware that this perception is not wholly incorrect. Even in public employment, including academia, the union movement is feeding on this fear.
9. Not all would agree, of course. See, e.g., Ayers, supra, note 7.
10. 4 Metcalf 3 (Massachusetts 1842).
11. Taylor & Whitney, supra, note 5, Chapter 9, "The Wagner Act."
12. Ibid., Appendix D.
13. Ibid., Chapter 5, "Control of the Labor Injunction."
14. Ibid., Appendix E.
15. Ibid., Chapter 9, "The Wagner Act."
16. Ibid., pp. 192-196.
17. Howell, Rate A., et al., THE LEGAL ENVIRONMENT OF BUSINESS, (Chicago: The Dryden Press, 1984), pp. 448-449.
18. Ibid., pp. 436-442.
19. Taylor & Whitney, supra, note 5, pp. 211-212.
20. Ibid., p. 212.
21. Ibid., p. 212.

22. Burns, James McGregor and Jack Walter Peltason, GOVERNMENT BY THE PEOPLE, (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), pp. 623-625.
23. Id., pp. 522-526.
24. YOUNGSTOWN STREET & TUBE CO. v. SAWYER, 353 U.S. 579 (1952).
25. Lipset, Seymour Martin, Martin Trow, and James Coleman, UNION DEMOCRACY, (New York: Doubleday & Co., 1956).
26. "Why Unions are Running Scared," U.S. NEWS & WORLD REPORT, (September 10, 1984), pp. 62-65; Wermiel, Stephen, "Justices Restrict Some Unions' Spending of the Dues Dissenting Workers Must Pay," WALL STREET JOURNAL, (April 26, 1984), p. 7; Penn, Stanley, "Benefit Blight: Organized Crime Finds Rich Pickings in Rise of Union Health Plans," WALL STREET JOURNAL, (October 5, 1982), pp. 1, 26.
27. Burns & Peltason, supra, note 22, p. 625; Kennedy, Robert F., THE ENEMY WITHIN, (New York: Popular Library, 1960).
28. Taylor & Whitney, supra, note 5, Appendix G.
29. For example, the proviso to Section 14(b): Does it bar the "agency shop"? The States do not agree.
30. See, e.g., the differences over the definition of an appropriate bargaining unit. Northrup, Herbert R. and Gordon F. Bloom, GOVERNMENT AND LABOR (Homewood, Illinois: Richard D. Irwin, Inc., 1963), pp. 61-64.
31. NLRB v. ALLIS-CHALMERS MFG. CO., 388 U.S. 175 (1967). Compare UNION STARCH & REFINING CO., 87 NLRB 779 (1949) with HERSHEY FOODS CORP., 207 NLRB 897 (1974). Compare PATTERN MAKERS' LEAGUE V. NLRB, 53 L.W. 4928 (1985).
32. Compare SCHOFIELD v. NLRB, 394 U.S. 423 (1969).
33. See e.g., Cooke, William N. and Frederick H. Gautschi, "Political Bias in NLRB Unfair Labor Practice Decisions," 35 INDUSTRIAL AND LABOR RELATIONS REVIEW, (July 1982), 539-549.
34. 441 U.S. 488 (1979).
35. NLRB v. GENERAL ELECTRIC CO., 418 F.2d 736 (1969).
36. UNIVERSAL CAMERA CORP. v. NLRB, 340 U.S. 474 (1951).
37. FIBREBOARD PAPER PRODUCTS v. NLRB, 379 U.S. 203 (1964).
38. TEXTILE WORKERS UNION OF AMERICA v. DARLINGTON MANUFACTURING CO., 380 U.S. 263 (1965).
39. FIBREBOARD, supra, note 37.
40. TEXTILE WORKERS, supra, note 38.

41. 139 NLRB #23 (1962).
42. TEXTILE WORKERS, supra, note 38.
43. FIRST NATIONAL MAINTENANCE CORP. v. NLRB, 452 U.S. 666 (1981). See Naffziger, "Partial Business Close-Downs by an Employer and the Duty to Bargain under the National Labor Relations Act," 20 AMERICAN BUSINESS LAW JOURNAL 223 (1982).
44. 242 NLRB 462 (1979).
45. 242 NLRB 462 (1979).
46. 627 F.2d 596 (2d Cir. 1980).
47. FNMC, supra, note 43.
48. Id.
49. Id.
50. Id.
51. 265 NLRB 28 (1982); 268 NLRB 87 (1984); 765 F.2d 175 (1985).
52. 265 NLRB 28 (1982).
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. 268 NLRB 87 (1984).
59. Id.
60. Id.
61. 230 NLRB 696 (1977), enf. denied 581 F.2d 793 (9th Cir. 1978).
62. 210 NLRB 190 (1974), enf. denied 514 F.2d 942 (7th Cir. 1975).
63. 161 NLRB 561 (1966).
64. Id.
65. BOEING CO., supra, note 61.

66. UNIVERSITY OF CHICAGO, supra, note 62.
67. 235 NLRB 720 (1978), *enfd.* 602 F.2d 1302 (9th Cir. 1979).
68. 514 F.2d 942 (7th Cir. 1975).
69. 268 NLRB 87 (1984).
70. *Id.*
71. *Id.*
72. U.A.W. v. N.L.R.B., *supra* note 1, at 178.
73. *Id.*, at 179.
74. *Id.*, at 180.
75. *Id.*, at 180, footnote 21.
76. *Id.*, at 180.
77. *Supra*, at note 55.
78. U.A.W. v. N.L.R.B., *supra* note 1, at 181.
79. *Id.*, at 181.
80. *Id.*, at 181.
81. *Id.*, at 183-184.
82. *Id.*, at 184.
83. *Id.*, at 184.
84. SOUTHPORT PETROLEUM CO. v. NLRB., 315 U.S. 100, 106 (1942).
85. ALKIRE v. NLRB, 716 F. 2d 1014, 1018 (4th Cir. 1983).
86. Southport Petroleum, *supra* note 84.
87. UNIVERSAL CAMERA CORP. v. NLRB, 340 U.S. 474, 488 (1951).
88. *Id.*
89. NELSON ELECTRIC v. NLRB, 638 F. 2d 965, 968 (6th Cir. 1981), citing Crawford Door Sales, Co., 226 NLRB 1144, (1976); GOODMAN PIPING PRODUCTS CO., INC. v. NLRB, 741 F. 2d 10, 12 (2d Cir. 1984); NLRB v. CAMPBELL-HARRIS ELECTRIC, INC. 719 F. 2d 292, 295 (8th Cir. 1983); NLRB v. AL BRYANT, INC. 711 F. 2d 543, 553-4 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN v. NLRB, 663 F. 2d 223, 226-27 (D.C. Cir. 1980).

90. PENNTECH PAPERS v. NLRB, 113 LRRM 2219, 2223 (1st Cir. 1983).
91. 739 F. 2d 1305 (8th Cir. 1984).
92. NLRB v. CAMPBELL-HARRIS ELECTRIC, INC., 114 LRRM 2881 (8th Cir. 1983).
93. NLRB v. SCOTT PRINTING CORP. 103 LRRM 2153, 2156 (3rd Cir. 1979).
94. Id.
95. Id., at 2158.
96. GOODMAN PIPING PRODUCTS CO. v. NLRB, 117 LRRM 2143, 2144 (2nd Cir. 1984).
97. NLRB v. TRICOR PRODUCTS, INC., 105 LRRM 3271, 3273 (10th Cir. 1980).
98. Penntech Papers, supra note 90.
99. Iowa Express Distribution, supra note 91.
100. NLRB v. ALLCOAST TRANSFER, INC. 121 LRRM 2393 (6th Cir. 1986) at 2397 n.6.
101. FUGAZY CONTINENTAL CORP. v. NLRB, 115 LRRM 2571, 1573 (D.C. Cir. 1984).
102. Penntech Papers, supra note 90.
103. Tricor Products, supra note 97.
104. NLRB v. AL BRYANT INC. 113 LRRM 3690 (3rd Cir. 1983).
105. Scott Printing, supra note 93.
106. Note 104 supra at 3699.
107. TANAKA CONSTRUCTION v. NLRB, 110 LRRM 2296, 2299 (9th Cir. 1982).
108. Southport Petroleum, supra note 84, holding that an alter ego determination is one of fact by the NLRB, and Universal Camera, supra note 87, which established the standard of review.
109. Section 301(a) of the Labor Management Relations Act (1947) (Taft-Hartley) provides "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."
110. JOHN WILEY & SONS v. LIVINGSTON, 376 U.S. 543, 548 (1964).
111. NLRB v. BURNS INT. SECURITY, INC. 406 U.S. 272, 281 (1972).
112. National Labor Relations Act 8(d), 29 U.S.C. 158(d) (1976).

113. Burns, supra note 111 at 291-82.
114. HOWARD JOHNSON v. HOTEL & RESTAURANT EMPLOYEES, 417 U.S. 249 (1974).
115. Id., at 262.
116. Id., at 257.
117. Id., at 264.
118. Id., at 259 n.5.
119. Burns, supra note 111 at 291.
120. See the cases supra notes 84, 85, 90, 91, 93, 94, 97, 100, 101, and 104.
121. Allcoast, supra note 100; Al Bryant, supra note 104; Penntech, supra note 90.
122. Campbell-Harris, supra note 92 (two partners own first employers, one partner forms corporation to become the second employer); Goodman Piping, supra note 96 (husband owned first employer, wife owned predecessor, one family member owns the alter ego).
123. Scott Printing, supra note 93 and Fugazy supra note 101. In both of these cases the owner sold a portion of the enterprise to an employee group although the businesses continued to operate as they always had. In the one Supreme court alter ego case, Southport, supra note 84, the record does not reveal the extent to which these were an actual change in ownership, management, and supervision.
124. Section 2(2), of the NLRA provides in Part "...the term 'employer' includes any person acting as an agent of the employer, directly or indirectly..." 29 U.S.C 152(2).
125. NLRB v. LANTZ, 607 F. 2d 290, 295 (9th Cir. 1979); NLRB v. AL BRYANT, 711 F. 2d 543, (3rd Cir. 1983).
126. RADIO & TELEVISION BROADCAST UNION v. BROADCAST SERVICE OF MOBILE, INC., 380 U.S. 255, 256 (1965) (per curiam).
127. UNITED PAPERWORKERS INT. UNION v. PENNTECH PAPER INC., 439 F. Supp. 610 (1977), aff'd sub nom. UNITED PAPERWORKERS INT. UNION v. T.P. PROPERTY CORP., 583 F. 2d 33 (1978).
128. PENNTECH PAPERS v. NLRB, 706 F. 2d 18 (1973).
129. Id.
130. NLRB v. AL BRYANT, 711, F. 2d 543 (1983).
131. See SOUTH PRAIRIE CONSTRUCTION CO. v. LOCAL NO., 627 INT. UNION OF OPERATING ENGINEERS, 425 U.S. 800 (1976) (per curiam).

132. NLRB v. BILDISCO, 465 U.S. 513 (1984).

133. Section 1113 Bankruptcy Code, 11 U.S.C. 1113.