

# Federal Labor Laws

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## **XX. Successorship Issues**

### **A. The Effect of the Sale of a Plant on the Duty to Bargain**

1. Unique problems arise when a union represented plant is sold to a new owner. The union will attempt to maintain the status quo subsequent to any sale by assuring that the same workers are employed at the same terms and conditions of employment. This is not always possible.
2. Management has the right to decide to sell a plant unilaterally. However, the effects of the terms of any future sale may be a mandatory subject of bargaining, if the union attempts to negotiate successorship language into the collective bargaining agreement prior to an actual sale.
3. There are two levels of concern for the union in attempting to survive a sale of the plant. In ideal circumstances, the union may be able to extend the terms of the collective bargaining agreement to the new owner. If this is not possible, the union will at least want the duty to bargain to be imposed on the new owner.

### **B. Successor Duty to Bargain**

1. An employer will generally be required to continue the bargaining obligations of its predecessor if it qualifies as a successor. Under Supreme Court guidelines, a successor employer has a duty to bargain with an incumbent union if:
  - a. A majority of the employees of the successor, consisting of a substantial and representative complement in an appropriate bargaining unit, are former employees of the predecessor, and
  - b. The business of the successor is a substantial continuity of the work of the predecessor.<sup>1</sup>
2. Some of the factors to be considered in determining whether there is substantial continuity of the work of the predecessor by the successor include:

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<sup>1</sup> *Burns International Security Services, Inc.*, 406 U.S. 272 (1972). See, e.g., *Siemens Building Technologies*, 346 NLRB 53 (2005)(*Siemens II*) and, *Siemens Building Technologies*, 345 NLRB 1108 (2005)(*Siemens I*).

- a. Whether the same jobs are being performed under the same supervision under the same working conditions,
  - b. Whether the new owner is using the same production processes, making the same products and serving the same body of customers.<sup>2</sup>
3. A successor employer is obligated to bargain with the incumbent union if a majority of the workforce in the new business consists of workers from the old workforce.
- a. The incumbent union is entitled to a rebuttable presumption that it continues to represent a majority of the workers.<sup>3</sup>
  - b. The successor with a duty to bargain with the incumbent union normally has the right to establish initial terms and conditions of employment unilaterally. The duty is to bargain over any subsequent change in those conditions.<sup>4</sup>
  - c. If the new owner makes it clear in advance that it intends to continue the business without interruption and with the entire existing workforce, then it may be required to continue the existing conditions. Under such circumstances, the successor is considered a “perfectly clear” successor.<sup>5</sup>
4. A successor may be bound to the collective bargaining agreement of its predecessor if there is clear and convincing evidence that the successor, by its conduct, accepted the terms of that agreement.<sup>6</sup>
5. Successor status must also be distinguished from other forms of continuation of a business under different ownership. A stock purchase, for example, is the continuation of the same legal entity

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<sup>2</sup> *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

<sup>3</sup> *MV Transportation*, 337 NLRB 770 (2002). This is another example of the shifting policies of the National Labor Relations Board, based primarily on the composition of the Board. The *MV Transportation* case reversed a three-year old Board precedent that had established a “successor bar,” under which a successor was obligated to bargain with the incumbent union for a reasonable period of time after the successorship. *St. Elizabeth Manor*, 329 NLRB 341 (1999). The *St. Elizabeth Manor* decision, in turn, represented a reversal of an earlier Board decision, *Southern Moldings*, 219 NLRB 119 (1975). *MV Transport* has been applied retroactively, *Williams Energy Services*, 340 NLRB 764 (2003).

<sup>4</sup> *Burns*, note 1, *supra*.

<sup>5</sup> *Spruce Up Corp.*, 209 NLRB 194 (1974). For example, see, *Windsor Convalescent Center*, 341 NLRB No. 44(2007) and *Grenada Stamping & Assembly, Inc.*, 351 NLRB No. 74 (2007).

<sup>6</sup> *Eklund’s Sweden House*, 203 NLRB 413 (1973).

under new ownership. The purchaser would be bound by the collective bargaining agreement in effect prior to the purchase.<sup>7</sup>

6. If a private business takes over operation of a public entity, the same successor rules apply to determine whether the new employer has a duty to bargain with an incumbent union.<sup>8</sup>
7. A successor may be liable for the unfair labor practices of its predecessor. If the new owner knew or should have known that the predecessor unilaterally changed conditions of employment, for example, by terminating insurance plans, the successor may be liable for the unremedied unfair labor practices.<sup>9</sup>
7. If an employer unlawfully refuses to hire the employees of the predecessor to avoid a successor's obligation to bargain, the successor may not establish initial terms and conditions of employment unilaterally. Under these circumstances, it is presumed that but for the unlawful refusal to hire, the successor would have retained the predecessors employees.<sup>10</sup>

### **C. Enforcement of Successor Language**

1. Successor language is language negotiated with the old owner limiting the conditions under which the business may be sold. Normally, such language will bind the old owner to make any sale of the plant contingent upon the new owner's acceptance of the collective bargaining agreement.<sup>11</sup>
2. Successor language is binding on the old owner. However, if a purchaser buys the business in good faith without knowledge of the successor language, it will not be bound.
3. The only effective remedy for violations of successor clauses is to prevent them from occurring. If the union is aware that the owner is attempting to sell the plant, the following strategies may be available:

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<sup>7</sup> *Transmontaigne, Inc.*, 337 NLRB 262 (2001); *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136 (1990), *enfd*, 942 F.2d 169 (3<sup>rd</sup> Cir. 1993).

<sup>8</sup> *Van Lear Equipment, Inc.*, 336 NLRB 105 (2001); *Lincon Park Zoological Society*, 322 NLRB 263 (1996).

<sup>9</sup> *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

<sup>10</sup> *Planned Building Services*, 347 NLRB No. 64 (2006); *Smoke House Restaurant*, 347 NLRB No. 16 (2006); *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997).

<sup>11</sup> *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573 (1977).

- a. Obtaining an injunction prohibiting the sale unless the sale is contingent upon the acceptance of the contract,<sup>12</sup>
- b. Serving actual notice of the existence of the language on the proposed purchaser, or
- c. If all else fails, suing the old owner for breach of the contract.

#### **D. Alter Ego Transactions**

1. Even in the absence of successor language, the collective bargaining agreement may survive a sale if the new owner is an "alter ego" of the old owner, created for the purposes of avoiding obligations under the collective bargaining agreement.
2. An alter ego transaction is one in which the two businesses have "substantially identical management, business purpose, operation, equipment, customers and supervisors, as well as ownership."<sup>13</sup>
3. An alter ego transaction is not a legitimate sale, for purposes of the duty to bargain. The collective bargaining agreement remains enforceable against the "new" entity.
4. Although evidence of the intent of the owner to avoid obligations under a collective bargaining agreement is relevant for the determination of alter ego status, a transfer can be considered an alter ego transaction even if there is a legitimate business purpose for the change in status.<sup>14</sup>
5. Although the question of alter ego status usually arises in the context of unfair labor practices, the Board may also consider whether one employer is the alter ego of another in representation cases.<sup>15</sup>

#### **E. Double-Breasted Transaction**

1. As a tactic for avoiding the obligations of a collective bargaining agreement, some employers in the construction, trucking and printing industries have established shadow, nonunion companies which duplicate the work of the unionized business. If it can be established that the two companies are the same entity or that operations of the unionized company have been transferred to the

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<sup>12</sup> *Howard Johnson Co. v. Detroit Joint Board, Hotel & Restaurant Employees*, 417 U.S. 249 (1974).

<sup>13</sup> *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

<sup>14</sup> *Michael's Painting, Inc.*, 337 NLRB 860 (2003); *Martin Bush Iron & Metal*, 329 NLRB 124 (1999).

<sup>15</sup> *All County Electric Co.*, 332 NLRB 863 (2000).

non-union entity to circumvent the union, the doublebreasting may be illegal.

- a. A doublebreasted employer intends to take advantage of both union and nonunion markets. If a construction project is heavily unionized and controlled by a unionized general contractor, the doublebreasted firm bids for work using its unionized company. However, to gain low wage access to predominantly nonunion projects, it bids through its nonunion firm.
  - b. The problem with establishing that doublebreasted operations are illegal is substantially one of proof. While the leading case on doublebreasting<sup>16</sup> established criteria for analyzing whether an operation is doublebreasted unlawfully, it also confused matters by indicating that it was legitimate for the same owners to maintain separate construction businesses for bidding on union and nonunion construction projects.
  - c. There are two theories under which doublebreasted operations may be challenged, the single entity theory and the alter ego theory. In either case, the objective of the union is to show that the transfer of work from the union to the nonunion business is an unlawful effort to circumvent the union contract.
2. Under the single entity theory, the union attempts to establish that the nonunion operation lacks a legitimate separate identity, but rather is a transfer of bargaining unit work to other nonunion employees of the same business who should be brought into the bargaining unit.
    - a. If a single entity approach is pursued, the result should be that the workers hired to do the transferred work are made a part of the union represented workforce. The union contract, under a single entity theory, is extended to cover the nonunion workforce.
    - b. To establish that a non-union, doublebreasted operation is actually a facade behind which union work is transferred, two points must be established:
      - 1) That the two entities are actually one, and
      - 2) That a single bargaining unit covering both businesses would be appropriate.
    - c. To show that the two businesses are, in fact, a single entity, four major criteria are relevant. Each of the four may be

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<sup>16</sup> *South Prairie Construction Co. v. Operating Engineers Local 627 (Peter Kiewit & Sons Co.)*, 425 U.S. 800 (1976).

critical in establishing that the firm is illegally doublebreasted. The four criteria are:

- 1) Common ownership: As a starting point, it is important to show that the same people own both businesses. A legitimate, arms length sale of assets from a union to a nonunion firm falls under the normal rules of successor transactions. However, exact identity of the owners is not critical. Neither is the structure of ownership. One side of the business could be incorporated while the other is a proprietorship.
  - 2) Common control of labor relations policy: A critical element is proof of common control over the labor relations policies of the two firms. If there is a centralized plan for the diversion of work to the "appropriate" side of the business, common control would be shown.
  - 3) Common management: If the owners and operators of the doublebreasted business employ the same management to run both businesses, it is strong evidence of illegal doublebreasting. Legitimate separate entities will normally conduct their routine managerial functions independently.
  - 4) Interrelation of operations: The easiest factor to prove, but the least significant in practice, is the existence of common facilities, equipment, supervision, work, and even workers. This is the visible side of doublebreasting where it is apparent that the two businesses are really one, even though it may be difficult to prove the other factors.<sup>17</sup>
- d. If, under the single entity theory, it is shown that the two businesses are sufficiently interrelated, it is also necessary to show that the nonunion business is actually an accretion to the existing bargaining unit. For the collective bargaining agreement to be extended to cover the nonunion firm, the union must establish that a single bargaining unit covering both businesses is appropriate.
3. Under an alter ego approach, the union attempts to establish that a unionized firm has transferred part of its operation to itself, under a different name, for the purpose of avoiding an obligation to bargain with the union which previously represented the workforce.
- a. The alter ego theory for doublebreasting is essentially the same as in other alter ego transactions. It is necessary to

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<sup>17</sup> *Radio & Television Broadcast Technicians v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965).

show that the transfer of operations is a ruse, that the business is the same after the transaction as it was before.<sup>18</sup>

- b. If an alter ego transaction is established, the collective bargaining agreement of the "predecessor" is binding on the "successor." There is no need to establish the existence of a single appropriate bargaining unit.
4. In an important development for contesting doublebreasting transactions, unions have won the right to request information about the existence of a relationship between a doublebreasted business and a business with which the union has a bargaining relationship.<sup>19</sup>

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<sup>18</sup> See, e.g., *Advance Electric*, 268 NLRB 1001 (1984).

<sup>19</sup> *Corson and Gruman Company v. NLRB*, 278 NLRB 329 (1986), *affirmed and enforced*, 811 F.2d 1504, 124 LRRM 2560 (4th Cir. 1987).