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REFORMING ACCRETION ANALYSIS UNDER THE NLRA: SUPPLEMENTING A BORROWED ANALYSIS WITH MEANINGFUL POLICY CONSIDERATIONS

Matthew S. Miner*

Current accretion analysis utilizes a variety of factors to determine whether to merge a non-unionized group of employees with a unionized group of employees within the same firm. The present construction of the analysis, however, ignores employee views and potential manipulation of the doctrine. By failing to account for these two important factors, current accretion analysis neglects two key concerns of the National Labor Relations Act—preventing employer discrimination and fostering uncoerced employee action and choice. This Note advocates a better approach, which gives proper weight to employee views, and considers employer motive to control against the possibility of employers manipulating their workforces to avoid labor obligations.

INTRODUCTION

When a non-unionized group of employees and a similar group of unionized employees exist within the same firm, the following question arises: should the representation status of these two similar groups of employees differ? The answer depends on the analytical path one takes in answering that question.

One possible analytical path is through accretion analysis as established by the National Labor Relations Board (NLRB). Accretion analysis is the process by which the NLRB decides whether to merge a group of non-unionized employees with an established bargaining unit¹ of similarly situated unionized

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1. A relevant description of the importance of bargaining units under the federal labor laws can be found in 1 SECTION OF LABOR AND EMPLOYMENT LAW, AMERICAN BAR ASS'N, *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 448 (Patrick Hardin et al. eds., 3d ed. 1992):

employees.² If one utilizes the present accretion analysis to address the question posed above, the answer one arrives at will depend on a myriad of factors,³ the sum of which is not predictable to even the most experienced labor lawyers.⁴

If instead one considers the same question in light of two of the National Labor Relations Act's (NLRA or Act)⁵ most basic policies—preventing employer discrimination⁶ and fostering uncoerced employee action and choice⁷—the answer may differ from that reached using accretion analysis. The reason for this potential difference is that accretion analysis rarely considers

A bargaining unit is a grouping of two or more employees aggregated for the assertion of organizational rights or for collective bargaining. The bargaining unit provides the formal arena of the entire collective bargaining process. Section 9(a) of the National Labor Relations Act provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such units. . . ." The size and composition of the bargaining unit is often a subject of dispute between union and employer and between contending unions, since this decision can determine whether the union is entitled to representative status. A union which may enjoy majority support within a small unit may not be able to establish its majority in a larger unit. . . . When the parties to a representation proceeding disagree, the Board determines whether the unit of employees in which the petitioner seeks an election is an "appropriate unit. . . ."

Id. (alteration in original) (citations omitted).

2. See International Ass'n of Machinists and Aerospace Workers v. NLRB, 759 F.2d 1477, 1479 (9th Cir. 1985) (citing Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 756-77 (7th Cir. 1982)).

3. See *id.* (noting that numerous factors may enter into an NLRB accretion determination, including "functional integration of the business, centralized control of management, similarity of working conditions, collective bargaining history, local power to hire and fire, degree of employee interchange between the groups, and geographical distance, similarity of job classifications, skills, functions, and products, and centralization of supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations." (citations omitted)).

4. See Accretion Survey, *infra app.*

5. 29 U.S.C. § 151-69 (1994).

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

7. See 29 U.S.C. § 151 (1994) (stating that the NLRA's declaration of policy is to be accomplished, in part, by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing"); see also Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512 (5th Cir. 1982) ("One of the principal policies of the national labor laws—that embodied in section 7—is the protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . .").

employee interest,⁸ and never looks for potential employer manipulation of the two employee groups being examined.⁹ Before approving a merger of unionized and non-unionized employee groups, traditional accretion analysis looks for an "overwhelming community of interests,"¹⁰ a nebulous standard which is measured by the following factors: "geographic proximity, similarity of skills and functions, similarity of employment conditions, centralization of administration, managerial and supervisory control, employee interchange, functional integration of the employer, and bargaining history."¹¹ The policies of preventing employer discrimination and protecting employee choice, the central policies of the NLRA, are conspicuously absent from the above list of factors. This Note argues that accretion analysis should be reformed to account for these two important policies by including consideration of employee views and employer motive in the analysis.

Exactly why employee views are not considered as an accretion factor is unclear. Employee choice is, after all, the cornerstone of the NLRA, present in the Act's initial declaration of policy¹² and manifested in section 7 of the original Act.¹³ Section 7¹⁴ already plays a role in this context, as the rights of target employees¹⁵ are one of the legal bases of an accretion

8. *Cf.* *Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971) (expressing the concern that accretion deprives the target employees of the ability to choose a bargaining representative and mentioning that "when the relevant considerations are not free from doubt, it would seem more satisfactory to resolve such close questions through the election process rather than seeking an addition of the new employees by a finding of accretion").

9. *See, e.g., Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Union v. NLRB*, 9 F.3d 218, 223 (2d Cir. 1993) (omitting any mention of employer motive from an extended list of factors that address more fully the problems associated with accretion when it is compared to a traditional bargaining unit determination).

10. *See Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994).

11. *Id.* at 454.

12. *See* 29 U.S.C. § 151 (1994).

13. 29 U.S.C. § 157 (1994) (setting forth rights of employees to self-organize, associate with labor organizations, engage in concerted activity, and choose a bargaining representative).

14. Throughout this Note, sections 7, 8, and 9 of the NLRA will be referenced generally. These references are to specific policies that are advanced generally by each of these sections (i.e., the right of employees to select their own bargaining representative under section 7, the obligation of employers to refrain from antiunion discrimination under section 8(a), and bargaining representative exclusivity and unit appropriateness under section 9).

15. The term "target employees" is used in this Note to describe the non-unionized employees to be accreted in an accretion case.

remedy.¹⁶ Given this background, one would think that an expressed desire of the non-unionized group either for or against unionization would help to justify or ease the decision of whether to merge the two units. This argument is supported by the fact that a large number of NLRB and court opinions have restrictively applied the accretion remedy out of a reluctance to deprive the unrepresented employees of their "basic right to select their own bargaining representative."¹⁷ If these target employees were given an opportunity, prior to accretion, to express their desire for or against unionization, there would be no need for such reluctance. Employee choice is clearly relevant to the accretion calculus and should be incorporated into the analysis.

Likewise, the rationale for excluding employer motive from accretion analysis is also unclear. In other quite similar contexts, the NLRB has considered employer motive, focusing on employer manipulation of the legal process to avoid labor obligations.¹⁸ This Note argues that the possibility of employer evasive intent should be factored into the present accretion analysis because under the current approach, an employer's actions can affect the outcome of an accretion determination.

Part I of this Note describes the accretion doctrine as it currently stands. Part II discusses the need to consider employee choice and outlines a plan for incorporating it as an accretion factor. Finally, Part III examines employer motive and the need to address the possibility of evasive employer intent under the accretion doctrine.

I. ACCRETION DEFINED

Accretion is the merging of a group of non-unionized employees into an existing bargaining unit of unionized employees.¹⁹ As explained by one court: "An accretion' occurs when new employees are added to an already existing

16. See *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 107 (1969); *Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters*, 495 F. Supp. 619, 633-34 (M.D.N.C. 1980).

17. *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992); see also *Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971) ("As a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit.").

18. See *infra* text accompanying notes 113-31 (discussing the alter ego doctrine).

19. See *International Ass'n of Machinists and Aerospace Workers v. NLRB*, 759 F.2d 1477, 1479 (9th Cir. 1985).

[bargaining] unit."²⁰ The additional employees are absorbed into the existing unit without first having an election if the "additional employees share a sufficient community of interest with the unit employees and have no separate identity. The additional employees are then properly governed by the unit's choice of bargaining representative."²¹ This merger into one bargaining unit ensures that the terms of one common collective bargaining agreement cover both groups of employees, and also ties the groups together for the purpose of future union representation elections.²² To justify an accretion order under the present NLRB analysis, the two groups of employees must share an "overwhelming community of interests"²³ and the non-unionized group must not possess a separate identity from the unionized group.²⁴ The NLRB measures the need for accretion with a set of factors borrowed from the context of traditional bargaining unit determinations.²⁵ While the factors are the same, the community of interests finding required under accretion analysis is more difficult to satisfy than that required in a traditional bargaining unit determination.²⁶ For example,

20. *Universal Sec. Instruments, Inc. v. NLRB*, 649 F.2d 247, 253 (4th Cir. 1981) (quoting *NLRB v. Sunset House*, 415 F.2d 545, 547 (9th Cir. 1969) (alteration in original)). An alternate statement of the accretion doctrine requires that the target group of employees be smaller in number than the existing collective bargaining unit:

Pursuant to the accretion doctrine, an employer may incorporate a small group of employees to an already existing collective bargaining unit, without holding elections, so long as the added employees (1) do not constitute a separate bargaining unit and (2) *do not outnumber the employees who belong to the existing bargaining unit*.

Local 144 v. NLRB, 9 F.3d 218, 223 (2d Cir. 1993) (emphasis added).

21. *Universal Sec. Instruments*, 649 F.2d at 253 (quoting *Lammert Indus. v. NLRB*, 578 F.2d 1223, 1225 n.3 (7th Cir. 1978)).

22. See SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 1, at 404 ("If the additional facility is found to be an accretion to the existing operation, the preexisting contract may be extended to cover employees in the new operation and thus bar an election there.").

23. *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994).

24. See *id.*; see also *Local 144, Hotel, Hosp., Nursing Home & Allied Serv. Union v. NLRB*, 9 F.3d 218, 223 (2d Cir. 1993) (noting that "where the two groups of employees can be classified appropriately into separate, viable bargaining units, accretion is not permissible").

25. See *Staten Island*, 24 F.3d at 454 (stating that both accretion and unit determination findings rely on the same shared interest determination); see also *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473 (2d Cir. 1985) (stating that the accretion criteria "include the usual factors relating to unit determinations involving two groups of employees").

26. See *Staten Island*, 24 F.3d at 455 ("The primary difference between accretion and unit determination analyses is one of degree rather than kind. Accretion requires

under traditional bargaining unit determinations, courts and the Board look for a "community of interests" between the employees involved,²⁷ while in the accretion context, the required finding is an "overwhelming community of interests."²⁸ The difference is due to the Board's restrictive application of accretion which is based on its reluctance "to deprive employees of their basic right to select their own bargaining representative."²⁹ Such a concern is not present in traditional bargaining unit determinations because those determinations typically precede representation elections.

The borrowed factors used in accretion analysis generally include: "geographic proximity, similarity of skills and functions, similarity of employment conditions, centralization of administration, managerial and supervisory control, employee interchange, functional integration of the employer, and bargaining history."³⁰ Other factors may be considered,³¹ and some of the traditional factors listed above occasionally receive additional weight.³² When the factors listed above militate both for and against accretion, a balancing of factors is necessary.³³

Situations requiring accretion analysis can arise in a number of different circumstances, such as when an employer opens a new business while owning existing businesses,³⁴ purchases new plants or facilities,³⁵ creates spin-off facilities,³⁶ or restructures its business in an attempt to avoid unionization.³⁷ Accretion can also be applied when a court

an overwhelming community of interests between a smaller group of employees and a larger unit, because accretion casts the smaller group, against its will, into the larger unit.").

27. See SECTION OF LABOR AND EMPLOYMENT LAW, *supra* note 1, at 451.

28. See *Staten Island*, 24 F.3d at 455; see also *supra* text accompanying note 23.

29. *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992).

30. See *Staten Island*, 24 F.3d at 454; see also *Local 144 v. NLRB*, 9 F.3d 218, 223 (2d Cir. 1993) (listing the same eight factors).

31. See *Local 144*, 9 F.3d at 223.

32. See, e.g., *Gitano Group, Inc.*, 308 N.L.R.B. at 1174 (giving additional weight to interchange of employees, and the amount of common day-to-day control and management); *Towne Ford Sales*, 270 N.L.R.B. 311, 311-12 (1984), *aff'd*, 759 F.2d 1477, 1478 (9th Cir. 1985) (noting that these same two factors are "especially important").

33. See *Pan Am. Grain Co.*, 317 N.L.R.B. 442, 447 (1995).

34. See *Safety Carrier, Inc.*, 306 N.L.R.B. 960, 969 (1992).

35. See *Central Soya Co. v. NLRB*, 867 F.2d 1245 (10th Cir. 1988).

36. See *Save Mart of Modesto, Inc.*, 293 N.L.R.B. 1190, 1190-91 (1989).

37. See THOMAS A. KOCHRAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 60 (1994) (describing the UAW's tactics, including accretion, which were used to stop General Motors' use of southern facilities to avoid unionized workers).

finds the union and nonunion components of a double-breasted employer³⁸ to be a single employer.³⁹

The source of the accretion doctrine can be found both in case law and in the NLRA. Therefore, some statutory background is desirable. The NLRB derives most of its accretion authority from section 9 of the NLRA.⁴⁰ Subsection (a) of that section provides for exclusive representation by the union elected or recognized by the majority of employees within a unit.⁴¹ Subsection (b) gives the Board the direct authority to decide which unit is appropriate "to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter."⁴² To effectuate these provisions, subsection (c) of section 9 enables an employee, union, or employer to petition the Board to determine the need for an election, or in the case of accretion, the appropriateness of a bargaining unit.⁴³

Additional accretion authority is derived from section 7 of the NLRA. As mentioned above, section 9(b) allows the Board, in making its determination of unit appropriateness, to consider the goal of assuring employee "freedom in exercising the rights guaranteed by this subchapter."⁴⁴ The employee rights referenced are those found in section 7 of the NLRA. Section 7 is the backbone of the NLRA, granting employees several rights, including the rights "to self organization" and "to bargain collectively through representatives of their own choosing."⁴⁵ Unfortunately, the governing case law does not

38. An employer is referred to as double-breasted when it operates two very similar companies or branches, one of which is staffed by unionized workers and the other by non-union workers. See Stephen F. Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Reformulation*, 1987 WIS. L. REV. 67, 68 ("Double-breasting typically occurs when a unionized employer, experiencing competitive difficulties, creates an ostensibly separate firm with a nonunion workforce."). See generally *id.* (discussing the two key legal approaches to the problem of double-breasted enterprises).

39. See, e.g., *Mohenis Serv., Inc.*, 308 N.L.R.B. 326 (1992).

40. 29 U.S.C. § 159 (1994); see *Pilot Freight Carriers, Inc. v. International Bhd. of Teamsters*, 495 F. Supp. 619, 633-34 (M.D.N.C. 1980) (holding that section 9 of the NLRA allows the NLRB to determine the appropriateness of a bargaining unit); *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 108 (1969) (holding that section 9 of the NLRA mandates finding the appropriate unit to protect employee rights).

41. See 29 U.S.C. § 159(a) (providing the right of exclusive representation to the bargaining representative chosen or selected by a majority of unit employees).

42. *Id.* § 159(b).

43. See 29 U.S.C. § 159(c) (giving the NLRB authority to hear bargaining unit determinations); see also *Pilot Freight Carriers*, 495 F. Supp. at 633.

44. 29 U.S.C. § 159(b).

45. 29 U.S.C. § 157 (1994).

clarify section 7's precise link to present accretion analysis.⁴⁶ Even if not clarified in NLRB and court opinions, it is quite clear that the accretion doctrine attempts to further section 7 by protecting the unit integrity of organized workers, thereby enabling that group to bargain with its employer on a more balanced table.⁴⁷ For example, if a group of non-unionized employees were allowed to exist in an organization alongside a similar group of unionized employees, the bargaining power of the unionized employees would be weakened, and their section 7 rights would, thereby, be impaired.

While section 9 of the NLRA provides the primary authority for the present accretion doctrine, it is section 7 of the Act that dominates with respect to the underlying policy behind the accretion doctrine.⁴⁸ Alternatively stated, the employee rights found in section 7 provide a policy basis for accretion analysis, while section 9 is the enforcement arm through which the accretion doctrine functions. This function of section 9⁴⁹ is, however, subordinate to section 7 rights of organization.⁵⁰ Therefore, in any application of section 9 and its concerns for bargaining exclusivity or unit appropriateness, the interests of the employees involved should be the primary concern.

Before proceeding into the reforms proposed in this Note, it is important to mention that the present accretion framework has other limitations beyond its failure to consider employee views and employer motive. For one, the present framework lacks clarity⁵¹ and is inconsistently applied.⁵² Such faults may be explained by the fact that certain factors like collective

46. Cf. *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 107 (1969) (mentioning how section 9(b) is designed to serve section 7 while never mentioning exactly how section 9(b) would best perform this function).

47. Accretion furthers unit integrity by keeping groups of employees together for bargaining purposes where those groups are separated by only insignificant functional differences. See *Central Soya Co. v. NLRB*, 867 F.2d 1245, 1248 (10th Cir. 1988) (noting that the NLRB, in a lower decision, found it significant that "the two groups of employees were fairly well integrated with few functional differences").

48. See *Boire v. International Bhd. of Teamsters*, 479 F.2d 778, 796-97 (5th Cir. 1973); see also *Melbet*, 180 N.L.R.B. at 109.

49. The function of section 9 referred to in the text includes both protecting the exclusivity of the bargaining representative chosen by the organized employees under section 9(a), and selecting an appropriate bargaining unit to protect both organized and unorganized employees' rights under section 9(b) of the NLRA.

50. *Melbet*, 180 N.L.R.B. at 109.

51. See *Accretion Survey*, *infra* app. (showing that only 55% of the small sample of labor attorneys polled felt that the present accretion factors were clear or provided adequate guidance).

52. See *id.* (showing that 73% of the sample of union side labor attorneys felt that the present accretion analysis was inconsistent).

bargaining history add nothing to the process,⁵³ while other factors, such as similarity of employment conditions, can vary greatly between units while the actual jobs performed and the need for accretion remain the same.⁵⁴ These other limitations are beyond the scope of this Note. Some clarity, however, can be added to the accretion process by incorporating the consideration of employee views and employer evasive intent. Addition of these concerns would give independent policy and purpose to accretion analysis beyond the current borrowed polices of traditional bargaining unit determinations.

II. CONSIDERING WORKERS' VIEWS

A. The Relevance of Employee Views

Employee section 7 rights are the foundation of the NLRA. Without this protection of employee choice and collective action, the NLRA would likely be totally ineffective.⁵⁵ The Act would also fall short on one of its policy goals which is to

53. Where one group is unionized and the other group is not, a study of collective bargaining history does nothing but restate the problem that is being examined—one group is under a bargaining agreement, while the other is not.

Some opinions have taken a waiver approach where the organized unit has entered into previous bargaining agreements without first trying to accrete the employees now targeted for accretion. Such an approach ignores the fact that two sets of employees are involved. An act of the organized group of employees should not be allowed to bind the rights of the unorganized employees involved. Likewise, employers should not be able to erase the basic right to unit integrity conveyed under section 9(b) through hard bargaining and tactical pressure applied at periods surrounding contract expiration. Insofar as employees should not be able to contract away their section 7 rights in accepting a company union under sections 8(a)(2) and (3), they should not be allowed to bargain away their right to a complete and appropriate unit under section 9(b). This right protects the process of collective bargaining as much as it protects the individual interests of employees.

54. Variance in employment conditions can occur without any change in the jobs performed by the two groups of employees and even if there is a common identity of those two groups. If anything, such variance merely indicates that one group is receiving different treatment from the other group in terms of pay, benefits, or work environment. This is precisely the point of accretion and the maintenance of unit integrity: if two groups of employees are functionally the same, they should be treated the same and included under the same bargaining agreement. Failure to do so affects the bargaining rights of the organized unit by allowing a group of employees functionally identical to union members to exist in the organization under terms unilaterally set by the employer. This weakens the bargaining strength of the organized employees and violates the exclusivity rights of their bargaining agent.

55. In fact, without section 7, the NLRA would be little more than a rulebook for union-management relations with no protection afforded the individuals within a bargaining unit.

“protect[] the exercise by *workers* of full freedom of association, self-organization, and designation of representatives of *their own* choosing.”⁵⁶ Given that protecting employee views is a primary policy goal of labor relations law, one must question why those same views are not counted in the accretion context.

In examining this issue, it is important to note that the target employees in an accretion situation were not present to vote when the accreting bargaining representative was chosen. These employees were, after all, not in the bargaining unit when the issue of representation was decided. Therefore, if the target employees are accreted without any consideration being given to their views, they will be assigned a representative *not* of their own choosing, a result contrary to the policy of the NLRA.⁵⁷

This anomalous result under the NLRA is enough to merit some consideration of employee choice in the accretion context. Although the weight that such a consideration should receive is debatable, there is certainly room for considering employee views among the numerous accretion factors. There is also considerable demand for including employee choice in the accretion analysis, as a survey of experienced labor law attorneys suggests. Forty-one percent of those attorneys indicated that it was odd that workers' views are not factored into an accretion determination.⁵⁸ Forty-five percent of management-side respondents expressed the same view.⁵⁹ This support on both sides of the labor-management divide leaves little reason not to give some consideration to the views of target employees in an accretion situation.

There also seems to be a good measure of support within the NLRB and the judiciary for including consideration of employee views. This support can be found in the different treatment afforded accretion analysis as compared with traditional unit determination analysis.⁶⁰ For example, in *Staten Island University Hospital v. NLRB*, the Second Circuit noted that “[t]he primary difference between accretion and unit determination analyses is one of degree rather than kind.

56. 29 U.S.C. § 151 (emphasis added) (listing the Act's “[f]indings and declaration of policy”).

57. *See id.*

58. *See* Accretion Survey, *infra* app.

59. *See id.*

60. Accretion analysis requires an overwhelming community of interests between the two groups of employees involved; unit determination analysis requires only a substantial community of interests among the group of employees being considered. *See Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994).

Accretion requires an overwhelming community of interests between a smaller group of employees and a larger unit, because accretion casts the smaller group, against its will, into the larger unit."⁶¹

While the language of the *Staten Island* court is perhaps a bit too dramatic,⁶² both courts and the NLRB seem uneasy accreting target employees whose representation preference is unknown.⁶³ Key accretion opinions state that accretion must be restrictively applied due to the intrusion on the target employees' section 7 rights.⁶⁴ In *Melbet Jewelry Co., Inc.*⁶⁵ the Board went so far as subordinating section 9(b) of the NLRA (governing bargaining unit propriety), to employee section 7 rights.⁶⁶ The Board cited a mandate under the NLRA "that employees' rights are to be protected and that appropriate unit findings under Section 9(b) must be designed to preserve those rights."⁶⁷ These examples of judicial caution show that courts and the Board are already considering the target employees' choice in their decisions. It is, however, rare that the actual views of target employees are considered in the analysis.⁶⁸

Although employee views are not openly considered in the great majority of accretion cases, some opinions have expanded their analysis to include an "employee views" factor.⁶⁹ Two Second Circuit opinions contain the strongest language supporting the consideration of employee choice in the accretion context. In *NLRB v. Stevens Ford, Inc.*,⁷⁰ the court indicated that the eight factor analysis used so frequently in

61. *Id.*

62. Without measuring the views of the target group, it is impossible to say that an accretion would be "against its will." The relevant concern would be that the target employees, if accreted, had no say in choosing their own bargaining representative.

63. See, e.g., *Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971) ("As a general rule, the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit."); *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992) ("[T]he Board has followed a restrictive policy in finding accretion because it is reluctant to deprive employees of their basic right to select their own bargaining representative.").

64. See *Gitano Group*, 308 N.L.R.B. at 1174.

65. 180 N.L.R.B. 107, 109 (1969).

66. See *id.* at 109 (stating that "[s]ection 9(b) directs the Board to select units to assure to employees the fullest freedom in exercising rights guaranteed by this Act . . .—which rights, of course, are those set out in Section 7").

67. *Id.*

68. See *infra* notes 69–81 and accompanying text.

69. See, e.g., *Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Union v. NLRB*, 9 F.3d 218, 223–24 (2d Cir. 1993); *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473–74 (2d Cir. 1985); *Mohenis Servs., Inc.*, 308 N.L.R.B. 326, 332 (1992); *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 107 (1969).

70. 773 F.2d 468 (2d Cir. 1985).

accretion determinations (i.e., geographic proximity, interchange of employees, etc.)⁷¹ stems from unit determination cases.⁷² The court then stated that “[b]ecause accretion occurs without an election, however, factors not generally considered in unit determinations must also be taken into account.”⁷³ Among these factors the court listed the “views of the group to be accreted.”⁷⁴ The *Stevens Ford* court explained that “evidence of the views of the employees subject to accretion is relevant. Such evidence is usually available where two unions are engaged in competing organizing efforts, but may exist in other cases as well.”⁷⁵

In the other relevant Second Circuit case, *Local 144 v. NLRB*,⁷⁶ the court followed the *Stevens Ford* logic: “Factors to consider in determining whether employees should be accreted into an existing bargaining unit without an election include . . . (5) views of the employees to be accreted.”⁷⁷ The court later applied the employee views factor, looking to the Board’s decision below for guidance regarding how the factor fit into the analysis.⁷⁸ The court found it persuasive that the Board had considered “the views of the [non-unionized] employees who initiated this complaint.”⁷⁹

Additional Board authority exists to support considering the views of target employees in the accretion context. In *Mohenis Services, Inc.*,⁸⁰ the Board clearly advocated considering employee views: “In deciding whether a new group of employees is an accretion . . . the Board not only considers such factors as functional integration, level of management control, similarity of working conditions, . . . but also gives special weight to the interests of the unrepresented employees in exercising their own right to self-organization.”⁸¹

While some modest Board authority can be found to disagree with the consideration of employee views in accretion

71. See *supra* note 30 and accompanying text.

72. See *Stevens Ford*, 773 F.2d at 473.

73. *Id.*

74. See *id.* at 474.

75. *Id.* (citations omitted).

76. 9 F.3d 218 (2d Cir. 1993).

77. *Id.* at 223.

78. See *id.* at 224.

79. *Id.* (citing *Brooklyn Hosp. Ctr.*, 1992 WL 442366, at *40 (NLRB Dec. 16, 1992)).

80. 308 N.L.R.B. 326 (1992).

81. *Id.* at 332 (quoting *NLRB v. Food Employers Council, Inc.* 399 F.2d 501, 502 (9th Cir. 1968)).

cases,⁸² more case law and policy under the NLRA militate in favor of some consideration of target employee views.⁸³

Despite the doctrinal differences that exist in the case law, the reality is that the Board and courts consider employee views every time they enter into an accretion determination.⁸⁴ However, the problem with the present consideration of employee views is that the Board and courts only express a generic, passive concern for employee choice and interest and rarely, if ever, look to what the actual employees involved think or feel about the prospect of accretion or representation.⁸⁵ The consideration of employee interests generally stops with the standard doctrinal line that "the accretion doctrine should be applied restrictively since it deprives the new employees of the opportunity to express their desires regarding membership in the existing unit."⁸⁶ This nominal consideration should be extended to a genuine consideration of actual employee views and interest. Because present legal analysis already gives this nominal consideration to employee interests, and because some legal authority exists to support further consideration,⁸⁷ it naturally follows that employee views should be added to accretion analysis as a regular factor.

82. See *Honeywell, Inc.*, 307 N.L.R.B. 278, 283 (1992) ("If a proper accretion exists, then the effected employees have no right to select or decline their own bargaining representative. . ."). This case only provides modest support for not considering employee views in the accretion context because the decision does not discuss the unanimous rejection of unionization among the targeted employees with respect to the outcome of the case. *Id.* The decision ultimately denied accretion and the role that employee views actually played in that decision is, at best, ambiguous. See *id.* at 285-86.

83. See *infra* notes 84-87 and accompanying text.

84. See *supra* notes 26-29 and accompanying text.

85. See, e.g., *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992) (mentioning the Board's restrictive policy in finding accretion due to a reluctance "to deprive employees of their basic right to select their own bargaining representative"); see also *Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971) (favoring election over accretion in close cases out of a concern for depriving the target employees of the "opportunity to express their desires regarding membership in the existing unit"). But see *Mohenis Servs., Inc.*, 308 N.L.R.B. 326, 332 (1992) (echoing the language of *Westinghouse* but also mentioning that accretion might be able to go forward if the employees provided evidence indicating that they wanted the union to represent them).

86. *Westinghouse*, 440 F.2d at 11.

87. See *supra* notes 69-82 and accompanying text.

B. Incorporating Employee Views into Accretion Analysis

The NLRA places a great deal of emphasis on employee choice of bargaining representatives.⁸⁸ It is, therefore, important that any new consideration of employee views not displace the protections already afforded employee choice. To achieve such a result, this Note proposes incorporating employee views at two levels of the accretion analysis. The first level adds an employee views element to the regular set of accretion factors. The second level maintains the current occasional use of representation elections to resolve close cases where the factors do not clearly and overwhelmingly support accretion.⁸⁹

Applying employee views as a regular accretion factor should not be a difficult undertaking. The factors that have traditionally been applied are numerous and sometimes vary from case to case.⁹⁰ Adding employee views to the mix would not upset the balance represented by the current list of factors because choice already influences the community of interests finding through clearly expressed policies of judicial restraint.⁹¹ Additionally, under the present analysis, no single factor is required to justify an accretion remedy, and not all of the factors must point toward a shared community of interests in order to allow for an accretion finding.⁹² Accordingly, if employee views were added to the present analysis of factors, there would not necessarily have to be a definitive finding as to employee choice in order to grant accretion, and the factor analysis would not be diluted in a situation where the employee views factor was ambiguous.⁹³

88. See 29 U.S.C. §§ 151, 157 (1994); see also *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 512 (5th Cir. 1982) (noting that one of the principal policies of the NLRA is the "protection of the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing").

89. See *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1036, 1041-42 n.16 (9th Cir. 1978).

90. See *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 473-74 (2d Cir. 1985) (adding five additional factors to the traditional set of unit determination factors).

91. See *supra* notes 64-66 and accompanying text.

92. See, e.g., *Pan Am. Grain Co., Inc.*, 317 N.L.R.B. 442, 447 (1995) (providing for a balancing of factors where factors militate both for and against accretion).

93. Considering employee views, however, could affect the possibility of settlement. If it seems probable that employees would favor unionization, the parties could well settle their dispute for a stipulated election. After the election, if the result was

If employee views were added as a factor, the amount of weight to give that factor is unclear. As already mentioned, courts occasionally place a greater amount of emphasis on two of the traditionally considered accretion factors: interchange of employees and common management and supervision.⁹⁴ Courts could give similar weight to employee views in light of the special protections afforded employee choice under the NLRA,⁹⁵ and considering that the present judicial reluctance to apply accretion has been linked with a general uncertainty as to the target employees' views.⁹⁶ If evidence of employee views could routinely be introduced into the analysis, the need for such judicial reluctance would be alleviated. Accordingly, there appears to be sufficient reason to afford an employee views factor more weight in the accretion analysis.

There is, however, a problem with giving additional weight to the views of the employees to be accreted. For example, what should happen in a situation where the target employees oppose an accretion, but all other factors indicate an overwhelming community of interests between the two groups? Which prevails, the section 7 rights of the target employees, or the section 9 rights of the organized unit's representative? If one only considered the language of the Board in *Melbet Jewelry*, declaring that section 9(b) is subservient to the purposes

positive, the two groups could then be merged under a lesser community of interests showing as is allowed under less strict traditional unit determinations. Such a result would reduce both sides' legal expenses by avoiding the more knotty accretion issue.

The inclusion of employee views would in some degree foster this kind of settlement because after either a positive employee views showing or an election, the process would revert to a less burdensome community of interests showing. A lesser community of interests showing would be required where employee views were found to favor accretion under the proposed reform. This is because a finding that employee views favored accretion would be given more weight in the analysis. *See infra* notes 94-102 and accompanying text. The lesser community of interests showing would also be sufficient after a positive election result because such a demonstration of employee choice alleviates the need for the more restrictive shared interests test. *See International Ass'n of Machinists v. NLRB*, 759 F.2d 1477, 1481 (9th Cir. 1985).

Some support for this prediction of increased settlement may be found in the fact that elections are already being proposed in settlement discussions. *See Accretion Survey, infra* app. (mentioning that 55% of the small sample of labor attorneys polled had been involved in cases that either settled for an election or where election was proposed in settlement discussions).

94. *See* *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992); *Towne Ford Sales*, 270 N.L.R.B. 311, 311-12 (1984), *aff'd*, 759 F.2d 1477 (9th Cir. 1985).

95. *See* 29 U.S.C. § 151 (1994); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 512 (5th Cir. 1982).

96. *See* *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994); *Mohenis Servs., Inc.*, 308 N.L.R.B. 326, 332 (1992); *Westinghouse Elec. Corp. v. NLRB*, 440 F.2d 7, 11 (2d Cir. 1971).

of section 7,⁹⁷ one might be inclined to give the additional weight to employee views against accretion. The analysis however, must go farther in order to strike the balance intended by the Act. At least two other concerns must be considered.⁹⁸

First, the section 7 rights of the target employees are not the only rights involved. The unit employees also have rights and interests at stake. Their interests are the flipside of the Board's language in *Melbet Jewelry*. Section 9(b) of the NLRA is intended to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act."⁹⁹ This purpose is accomplished by preventing a parallel group of employees from existing within the same organization, but outside of the bargaining unit and collective bargaining agreement, thereby weakening the unit's scope and bargaining position. By protecting the integrity of the organized employees' bargaining unit and chosen representative, section 9(b) also protects the unit employees' expression of a preference for unionization. It would, therefore, be careless to place the section 7 rights of the target employees above the purpose and intent of section 9(b) without first considering the rights and interests of the bargaining unit employees.

Another consideration relevant to the weight attributable to target employee views is the present distinction between the community of interests showing required under accretion analysis and that used in traditional bargaining unit determinations.¹⁰⁰ By requiring a more rigorous community of interest showing under accretion analysis, courts already account for the risk that the target employees may be accreted against their will.¹⁰¹ Accordingly, no additional weight should be given to target employee views when they oppose accretion because the present accretion framework limits itself in anticipation of

97. *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 107, 109 (1969).

98. Another concern that may be appropriate regarding the appropriate weight to give target employee views against accretion is the size of the unit to be accreted. If the size of the target group is small relative to the organized group, the views of those employees are arguably less important relative to the interests of the bargaining unit employees. Where, as here, the interests of those two groups are adverse, the relative size of the target employee group may reduce the weight afforded its views.

99. *Melbet Jewelry*, 180 N.L.R.B. at 109 (citation omitted).

100. See *supra* notes 26-29 and accompanying text.

101. See *Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994) ("The primary difference between accretion and unit determination analyses is one of degree rather than kind. Accretion requires an overwhelming community of interests between a smaller group of employees and a larger unit, because accretion casts the smaller group, against its will, into the larger unit.").

such opposition.¹⁰² By contrast, when a group of target employees favors accretion, the rationale for restrictively applying the accretion remedy no longer seems appropriate. Such is the case because the situation approximates that of a traditional bargaining unit determination where there is no fear that employees are being placed in a bargaining unit against their will and without having voiced a preference.

One other issue that might arise in this discussion of adding employee views to the factored accretion analysis is the question of calculation and evaluation of these views. How is evidence of employee views to be assessed without first having an election? In *NLRB v. Stevens Ford, Inc.*,¹⁰³ the Second Circuit provided a partial answer to this question, stating that "evidence of the views of the employees subject to accretion is relevant. Such evidence is usually available where two unions are engaged in competing organizing efforts, but may exist in other cases as well."¹⁰⁴ Other areas where such evidence may be found include union card showings, union petitions, and independent petitions from employees.¹⁰⁵

One further caveat must be added to this discussion: Allowing employee views to factor into accretion analysis should not alter the present occasional use of representation elections in those close cases where the community of interests finding falls just short of commanding accretion. Omitting this use of elections would create a gap in the present protection afforded by NLRA sections 7 and 9.¹⁰⁶ As was already mentioned, the

102. *See id.*

103. 773 F.2d 468 (2d Cir. 1985).

104. *Id.* at 474 (citations omitted).

105. While this last indication of employee views may seem unlikely, the target employees in one recorded case did submit their own independent petition against representation and accretion to the Administrative Law Judge hearing their case. *See Honeywell, Inc.*, 307 N.L.R.B. 278, 282-83 (1992).

106. As mentioned above, there is a tension under accretion doctrine between the protected rights of choice among the employees to be accreted and the bargaining exclusivity and unit appropriateness protections afforded organized employees. *See Boire v. International Bhd. of Teamsters*, 479 F.2d 778, 796-97 (5th Cir. 1973); *Melbet Jewelry Co., Inc.*, 180 N.L.R.B. 107, 109 (1969). This tension results in the more constrained and narrow application of accretion relative to traditional unit appropriateness determinations. *See Staten Island Univ. Hosp. v. NLRB*, 24 F.3d 450, 455 (2d Cir. 1994). Where the narrower doctrine of accretion is not satisfied and, thus, cannot be applied out of a concern for placing the group of target employees "against its will" into an organized unit, *see id.*, the Board will order an election. The election satisfies the section 7 concerns relating to the target employee choice, and it allows for a traditional unit determination to protect section 9(b) interests. *See infra* notes 108-10 and accompanying text. If this option is removed, the Board would lose its most effective mechanism for protecting the different parties' interests under sections 7 and 9.

determination of the appropriateness of a particular bargaining unit is judged by a community of interests standard based on factors similar to those used in accretion analysis. In order to justify accretion, however, courts and the Board apply the tougher *overwhelming* community of interests standard. The reason for the difference in the strictness of these two standards is that employees in an accretion situation are not allowed to express their views as to representation, whereas an election generally follows a bargaining unit determination.¹⁰⁷ Because the facts of a particular case may fall short of justifying accretion while at the same time indicating that a single unit would be appropriate, the NLRB sometimes denies a standard accretion but orders or recommends an election to resolve the issue of merging the two groups into one unit.¹⁰⁸ Such a decision can result when the court finds the combined unit to be an appropriate unit but still not the most appropriate unit as is required for a standard accretion order.¹⁰⁹

This election option should be maintained even after the proposed addition of an employee views factor to the standard accretion analysis. Situations may still arise where there is no evidence as to employee views or where the evidence as to employee views is contradictory. In such cases where the accretion determination remains close, the election option should remain to fill gaps in the analysis and perhaps permit accretion where it is needed but not mandated by the initial legal analysis. Such a result can work to ensure the narrower application of accretion where employee views are not clear, while still allowing the NLRB to protect the interests of bargaining unit exclusivity and unit appropriateness under sections 9(a) and (b) where the community of interests finding falls just short of justifying accretion.

107. See *Staten Island*, 24 F.3d at 455.

108. See, e.g., *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1036, 1041-42 n.16 (9th Cir. 1978) (describing the NLRB's use of an election order to resolve a close accretion case).

109. See *Pacific Southwest Airlines*, 587 F.2d at 1041-42 n.16 ("It follows that accretion may be initially rejected as a legitimate alternative, though the employees are subsequently added to the existing unit once they have elected to do so.")

III. CONSIDERING EMPLOYER MOTIVE

In addition to adding employee views to the accretion analysis, this Note also examines the possibility of adding employer motive as an accretion factor. This Part will look at reasons for considering employer motive and will discuss how this factor should be considered in the accretion analysis.

A. Why Worry About Employer Motive?

One does not have to look far to find examples of large American employers that have established new plants and facilities with the goal of reducing their reliance on unionized employees. While this goal alone may sufficiently demonstrate an illegal union animus, the intended effect could be aimed at a more insidious outcome. Such employer action may be geared toward the eventual deunionization of the employer's complete workforce. This process is described by John Lawler as follows:

[One] means of deunionization through the elimination of union jobs is related to plant relocation but is effected through a longer-term process of simultaneously expanding nonunion facilities while allowing unionized facilities to decline. . . . The flip side of developing nonunion "greenfield" sites is likely to be disinvestment, either rapid or gradual, in unionized facilities, as work shifts to the nonunion plants. In the long term this results in a lessened dependence of the firm on organized workers and sets the stage for phasing out increasingly inefficient unionized facilities.¹¹⁰

Given the potentially extreme consequences of this kind of employer restructuring, the accretion doctrine should be reformed to limit employers' ability to weaken organized unit integrity through the establishment of nonunion sites. Even if an employer's goals are more modest ones of limiting union bargaining power or reducing reliance on union facilities, the problem only changes in its scope. An employer can create new

110. JOHN J. LAWLER, *UNIONIZATION AND DEUNIONIZATION: STRATEGY, TACTICS, AND OUTCOMES* 177 (1990).

job classifications or new plants and facilities with the intent of removing work and employees from an established bargaining unit.¹¹¹ While such action by an employer may violate its duties under section 8(a) of the NLRA, the employer's action also can affect the accretion analysis by influencing the various factors. In light of such a possible effect, a consideration of employer motive needs to be incorporated into the present accretion framework.

When an employer alters its production facilities to reduce reliance on unionized workers, the employees who are hired into new classifications, plants, or facilities may be doing exactly the same jobs as their unionized colleagues in older classifications, plants, or facilities. The interests of these two sets of employees are likely to be the same but for the artificial changes made by the employer to avoid unionization of the new workers. Therefore, accretion of these two groups would appear to be appropriate.

An accretion finding in such a situation, however, may be adversely affected by the employer's actions. For example, an employer's shift to a new job classification, plant or facility may have been paired with additional (intended, or merely incidental) changes that could possibly manipulate a later accretion finding. The employers' deunionization strategy could place employees into a new classification or facility and do so under different supervision, under different compensation terms, with no employee interchange, and a distance away from the unionized unit. Such slight changes would impact directly on key factors in the accretion analysis.¹¹²

B. Organizational Gerrymandering and Analogizing to the Alter Ego Doctrine

As shown above, an employer can manipulate its production and management systems to avoid unionization and influence the accretion factors in favor of management's interests. I refer

111. See, e.g., *Universal Sec. Instruments, Inc. v. Industrial Union of Marine & Shipbuilding Workers*, 250 N.L.R.B. 661 (1980) (mentioning a finding that the employer "seized upon the establishment of its new plant at Owings Mills to rid itself of the Union").

112. Such changes would have an impact on the following factors respectively: common management and supervision, conditions of employment, employee interchange, and geographic proximity.

to this process as organizational gerrymandering because the employer, in essence, redistricts its production staff so as to reduce the number of employees in a chosen bargaining unit.

To address the problems organizational gerrymandering can create under accretion analysis, the analysis needs to be reformed to take employer motive into consideration. Under such a reform, the present accretion factors would be reweighted once an employer's union animus was established. This reweighting of the factors would guard against an employer's ability to manipulate an accretion determination. To explain this approach, it is useful to analogize to the NLRB's treatment of a problem that yields similar results—that of double-breasted employers.

"A unionized employer that creates an ostensibly separate firm with a nonunionized work force is said to engage in the practice of 'double-breasting.'"¹¹³ The practice of double-breasting poses a significant threat to organized workers, in that it allows "an employer to shed bargaining and contractual responsibilities" with respect to its unionized employees and divert work to its separate non-union workforce.¹¹⁴ If this practice appears similar to the scenarios mentioned above regarding employer motive, it is no wonder. The double-breasted employer manipulates its workforce in the exact same manner as in organizational gerrymandering, yet it goes one step further by placing the non-union workforce in a superficially separate firm.¹¹⁵ Despite the similarity, however, these two employer actions can receive different treatment under present law.¹¹⁶

Unlike the situation where the employer does not take the additional step of establishing a separate non-union firm, in the context of double-breasting the NLRB has addressed the problem of an employer manipulating the legal analysis when it manipulates its workforce into unionized and non-unionized groups.¹¹⁷ This problem is addressed through the alter ego doctrine, which restructures the traditional legal

113. Befort, *supra* note 38, at 67.

114. *See id.* at 69.

115. *See id.* at 73-74.

116. Double-breasting is addressed by application of either the single employer or alter ego doctrine; however, accretion is applied where two groups of employees are separated inside a commonly owned organization.

117. *See* Befort, *supra* note 38, at 71 (discussing the consideration of employer manipulation as a policy behind the alter ego approach to double-breasted employers).

analysis in double-breasting cases by considering the employer's intent to avoid labor obligations.¹¹⁸

The alter ego doctrine originated, and is most frequently used, to address problems of successorship where an employer purportedly discontinued its operations but now maintains a disguised continuing operation under another name.¹¹⁹ The doctrine later came to be routinely applied to double-breasted operations¹²⁰ along with the traditionally applied doctrine known as the single employer test.¹²¹

The alter ego doctrine functions through "a seven factor test requiring substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership between" the two firms.¹²² "In practice, the alter ego standard is a flexible test that focuses on three principal issues—(1) ownership, (2) integrated operations and control, and (3) motive."¹²³ By contrast, the single employer test consists of four factors: "1. Interrelation of operations; 2. Centralized control of labor relations; 3. Common management; and 4. Common ownership or common control."¹²⁴ The key difference between the application of the single employer and alter ego doctrines is the consideration of employer motive under the alter ego analysis.¹²⁵

118. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982) ("However, the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations.").

119. See Befort, *supra* note 38, at 89–90.

120. See *id.* at 91–92; cf. Earl R. Pfeffer & Lisa Imbrogno, *Important Bargaining Unit Issues and Election Misconduct Developments: A Review and Update*, in *FUNDAMENTALS OF LABOR LAW UNDER THE NATIONAL LABOR RELATIONS ACT 1993*, at 177 (PLI Litig. & Admin. Practice Course Handbook Series No. 470, 1993) ("Whereas early alter ego cases required that the union entity cease operations entirely, this requirement no longer exists. As explained by the Eighth Circuit: 'To limit the doctrine's applicability to companies which have shut down entirely would allow anti-union employers a complete escape from alter ego liability, simply by keeping a small aspect of the predecessor operation alive.'" (quoting *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 238 (8th Cir. 1986))).

121. See Befort, *supra* note 38, at 92. Like the alter ego doctrine, the single employer doctrine is an import to the context of double-breasted employers. See *id.* at 70. The single employer doctrine was previously used as a jurisdictional device to aggregate the many parts of an enterprise in order to establish the minimum dollar value of business required for coverage under the NLRA. See *id.* at 75.

122. *Id.* at 93.

123. *Id.* at 94.

124. *Id.* at 75.

125. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507–08 (5th Cir. 1982).

This added consideration of employer motive under alter ego analysis takes on a particular significance in light of the different effect an alter ego determination can yield. Once the alter ego test has been satisfied, the Board will not then require a separate determination of unit appropriateness under a community of interests test.¹²⁶ The two groups will simply be treated as one unless the court finds some aspect of the merged unit repugnant to the NLRA.¹²⁷ By contrast, under the single employer doctrine, where motive is not considered, a full bargaining unit determination must follow any finding of single employer status.¹²⁸

Given the different treatment of these two doctrines, one can safely surmise that the finding of an unlawful employer motive somehow alleviates the need to study unit appropriateness at any depth. While the rationale for dismissing the need for a traditional unit determination is not fully clear, it seems to emanate from two separate policies. The first is a general intolerance of employer discrimination.¹²⁹ The second policy appears to be founded in the fear that without a separate consideration of motive, the employer could manipulate the traditional components of the single employer inquiry and thereby avoid any action or sanction from the NLRB.¹³⁰ As should be apparent, this is the exact same concern that was voiced above when discussing the need to address organizational gerrymandering under the accretion doctrine. Insofar as the same policies can be found to apply to accretion disputes, this alter ego approach to employer motive needs to be imported to the accretion context.

The policy of discouraging employer discrimination is a key concern under the NLRA,¹³¹ which contains language effectuating that concern in section 8.¹³² The consideration of antiunion discrimination comes into the alter ego doctrine through its inquiry concerning the presence of an intent to

126. See Pfeffer & Imbrogno, *supra* note 120, at 177.

127. See *id.*; see also *Carpenters Local*, 690 F.2d at 509.

128. See *Carpenters Local*, 690 F.2d at 505, 509; see also Joseph H. Bucci & Brian P. Kirwin, *Double Breasting in the Construction Industry*, CONSTRUCTION LAW., Jan. 1990, at 29-30.

129. See Befort, *supra* note 38, at 103 ("One of the core objectives of the NLRA is to deter conduct designed to avoid labor obligations.")

130. See *id.* at 71 (commenting that the single employer formula "can easily be manipulated through planned union avoidance techniques").

131. See *supra* note 129 and accompanying text.

132. See 29 U.S.C. § 158 (1994).

avoid labor obligations.¹³³ That inquiry is based on the general policy that “[t]he Board will not tolerate an employer’s use of a corporate fiction in order to avoid its obligations under the Act.”¹³⁴ This policy can be applied with equal force to organizational gerrymandering in the accretion context. If the employer establishes a separate job classification, plant, or facility with the intent of avoiding labor obligations, the only difference from the double-breasted employer is the lack of establishment of an ostensibly separate firm. Neither the effect on the employees in the two segregated groups nor the employer’s intent is any different. In light of these similar effects, it seems anomalous to afford the two situations different treatment.

The second concern underlying the employer motive inquiry involves the possibility that of employers could manipulate the outcome of a formula if employer motive were not considered. It is partly for this reason that courts and the Board so frequently use alter ego analysis to supplement the motive-neutral single employer test. Because the single employer test ignores employer motive, that test is susceptible to manipulation by crafty employers.¹³⁵ As one commentator explains:

The Board’s use of [the single employer] formula in the double-breasted context, however, fails to recognize the very real possibility for an employer to establish a double-breasted operation for the purpose of avoiding existing labor obligations. By failing to address this potential, the Board’s single employer test provides employers with a powerful temptation to manipulate that mechanistic formula to their own advantage.¹³⁶

A parallel exists between the motive neutral single employer test and the present accretion analysis—both are equally subject to manipulation because neither addresses the question of employer motive. Indeed one factor common to both of these analyses, labor relations control, has been specifically criticized as being too easily subjected to unchecked manipulation. “The incentive to manipulate is most apparent with respect to the criterion of labor relations control. . . . [A] double

133. See Befort, *supra* note 38, at 95.

134. Pfeffer & Imbrogno, *supra* note 120, at 177.

135. See Befort, *supra* note 38, at 86.

136. *Id.*

breasted employer may avoid a single employer determination by establishing separate layers of supervision for the two firms, despite the presence of a centrally conceived labor relations policy.¹³⁷ In the accretion context, the same manipulation could be achieved if the employer applied superficially different supervision to its new non-union job classifications, plants, or facilities. With no consideration of employer motive to guard against such manipulation, accretion analysis would become a mere obstacle that an employer could maneuver around on its way to avoiding union obligations. For this reason, as well as for the general deterrence of employer discrimination, courts should expand the present accretion formula to include an employer motive element similar to that used in the alter ego test.

C. Reforming Accretion to Add an "Alter Ego" Motive Component

If consideration of employer motive is added to the accretion doctrine, it should merely supplement and not supplant the present accretion analysis. Just as under alter ego analysis, "[a]n evasive intent . . . should not be construed as an absolute prerequisite to the extension of the collective bargaining agreement."¹³⁸ Accordingly, the traditional multi-factor approach to accretion analysis¹³⁹ should remain a part of any reformed analysis to safeguard the interests of employees and their representatives in situations where employer intent to manipulate is absent or cannot be proved.¹⁴⁰

Once it has been resolved that an employer motive factor should be added to the present accretion analysis, questions of form arise. For example, how should the employer motive factor fit into the accretion doctrine? There are numerous possibilities: An employer motive factor could be added to the present list of accretion factors; employer motive could also be

137. *Id.* at 86–87.

138. *Id.* at 103.

139. *See supra* notes 30–32 and accompanying text.

140. By treating the employer's evasive intent in a manner that is uniform with the alter ego analysis, the proposed accretion reform would improve consistency under the law and give practitioners better guidance as to what is required of them.

added as a weighted factor;¹⁴¹ an evasive motive finding could trigger an automatic accretion similar to the treatment under alter ego analysis;¹⁴² or an evasive motive finding could trigger a modified accretion analysis that would control for potential manipulation. Based on the need to balance the various policies involved, the last approach seems preferable. For ease of reference, this approach will be referred to as the two-tiered approach.

The proposed two-tiered approach controls for more adverse effects than do the other options. The first two options—adding employer motive to the list of factors and adding it as a weighted factor—fall short because simply considering employer motive as a factor among others continues to neglect the risk of employer manipulation of the other factors. However, the third option, ordering an automatic accretion once an employer's evasive intent is established, goes too far in the opposite direction. Such an approach completely neglects the need to consider unit appropriateness and, thus, subjugates the interests protected by sections 7 and 9 to concerns for employer antiunion discrimination under section 8. The last of the options, the two-tiered approach, offers the best solution. The two-tiered approach considers both employer discrimination and manipulation while maintaining a concern for unit appropriateness. It controls for employer discrimination by taking employer motive into consideration as a threshold inquiry, and then, once an anti-union motive has been established, it modifies the traditional accretion analysis in order to control for manipulation. This approach addresses the concern for unit appropriateness by keeping some form of the traditional accretion analysis alive even after a finding of evasive intent has been established.

D. Application of the Two-Tiered Motive Approach

The proposed two-tiered motive inquiry must begin early in the accretion process. Before even considering the standard accretion factors, a court should determine whether the

141. Adding employer motive as a weighted factor is similar to the treatment some courts afford interchange of employees and common control and management. See *Gitano Group, Inc.*, 308 N.L.R.B. 1172, 1174 (1992).

142. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 509 (5th Cir. 1982); Pfeffer & Imbrogno, *supra* note 120, at 177.

employer intended to establish two separate groups of employees in order to avoid its union obligations. If the court failed to find an evasive motive, it should apply the overwhelming community of interests test that is standard in accretion cases.¹⁴³ However, where the court found an evasive intent it should apply a modified version of the community of interests test. Under this modified test, the court would consider only those factors that the employer cannot easily alter for the purpose of union avoidance. The factors that must drop out of the analysis include: geographic proximity, similarity of employment conditions, centralization of administrative, managerial, and supervisory control, and employee interchange. All of these factors can be manipulated by an employer who wants to evade the process of unionization.¹⁴⁴ This modification would leave only the factors that are less subject to manipulation: similarity of skills and functions, functional integration of the employer, and employee views. Although these three factors do not provide as complete a unit appropriateness determination as would the full set of factors, they are the only reliable indicators that can be considered after a finding of evasive motive because the other factors were possibly subjected to employer manipulation. While limited in number, these remaining factors provide more information than one might think.

Comparisons of common skills and functions among the two groups of employees under consideration can show a great deal about their similarity in other respects.¹⁴⁵ For example, if the two groups of employees make the same product, perform the same task, or utilize exactly the same skills in performing their jobs, it is likely that the two groups share common interests. In part these shared interests are due to the fact that the two groups of employees represent the same type of labor inputs—the same skills being used for a similar function—and

143. This community of interests test should, of course, consider employee views consistent with this Note's other proposal. See *supra* Part II.

144. Geographic proximity can be manipulated where the employer gets to choose the location of its new plant or facilities. Similarity of employment conditions can be manipulated by an employer and, as mentioned earlier in this Note, variances in employment terms and conditions are among the evils accretion analysis is meant to prevent. See *supra* note 49 and accompanying text. Centralization of management and supervision is also subject to manipulation by the employer dedicated to avoiding labor obligations. See Befort, *supra* note 38, at 86–87. Employee interchange can be limited by an employer as well.

145. Cf. *Gitano Group*, 308 N.L.R.B. at 1174 (discussing dissimilarities in the work performed by two groups of employees that disfavored accretion).

as such, the bargaining power of the one group can affect the bargaining power of the other. Thus, the weaker bargaining power of the target group of non-unionized employees may adversely affect the strength of the unionized group in its demands for terms and conditions. This effect naturally occurs because the employer always has the option of turning to the functionally similar unorganized employees with its work when the similarly skilled organized workers demand extra pay.

Functional integration of the employer can demonstrate whether the two groups of employees work in the same process for the employer, or perform discrete tasks that would reduce the number of shared interests.¹⁴⁶ While this factor is more within the control of the employer, it is not as subject to manipulation because certain functions are necessarily required in order to keep a business productive. Only so much manipulation can be done in this context without affecting the success and effectiveness of the employer's underlying business.

Employee views are, of course, not within the direct control of employers. Although employee views can be manipulated by employer threats and discrimination, such employer action would constitute an unfair labor practice under section 8(a) of the NLRA.¹⁴⁷ Because there are already safeguards on such manipulation, this factor can be maintained even after a positive motive showing. The relevance of employee views has been explained above.¹⁴⁸

With the addition of the two-tiered motive inquiry, the accretion analysis will be able to consider employer evasive intent and still maintain its concerns for bargaining exclusivity and unit appropriateness under sections 9(a) and (b). Furthermore, this method should address problems of employer manipulation of the accretion analysis, while giving unions, employees, and the Board the ability to prevent employer tactics geared at avoiding labor obligations.

146. See *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 475-76 (2d Cir. 1985) (applying the functional integration factor).

147. See 29 U.S.C. § 158(a)(1), (3) (1994).

148. See *supra* notes 55-87 and accompanying text.

CONCLUSION

Accretion analysis as presently formulated neglects to account for two of the NLRA's key concerns—preventing employer discrimination and fostering uncoerced employee action and choice.¹⁴⁹ These omissions adversely affect the accretion doctrine in that courts restrain their actions out of deference to the unknown employee views,¹⁵⁰ and because no thought is given to potential employer manipulation of the legal analysis.¹⁵¹

These shortcomings of the accretion doctrine can be remedied by adding considerations of employee views and employer motive to the present analysis. Employee views should be considered along with the other accretion factors to bring a discussion of section 7 concerns into the process. Employer motive should also be considered because an employer's separation of two groups of employees might be motivated by an intent to avoid labor obligations. This consideration of employer motive must be paired with a restructuring of the accretion analysis where an evasive intent is found. Such a restructuring will guard against calculated employer manipulation of the factored analysis. By adding these concerns, courts and the Board can add necessary policy to the present accretion doctrine's borrowed analysis.

149. See *supra* notes 6–7 and accompanying text.

150. See *supra* note 17 and accompanying text.

151. See *supra* notes 112, 130 and accompanying text.

APPENDIX

Accretion Survey Results

The survey referenced in this Appendix was sent to senior labor partners in 89 different management and union side law firms. Only 22 firms responded (11 for each side). Different survey instruments were used for management and union law firms and those surveys were, for the most part, similar in all but technical respects. The one significant difference in the surveys is the inclusion of a question on organizational gerrymandering in the union survey instrument. Examples of the survey instruments used are included in this Appendix.

The purpose of this survey was to gather an indication of views among labor law practitioners as they related to the topic of this Note. The sample size is small and the results should not be relied upon for anything more than proof that some labor law practitioners share the respondents' beliefs on the questions posed. The point of these results is to demonstrate that some support exists for certain general statements made in the text and footnotes of this Note. The degree of this support, however, cannot be derived from this small sample. Only the survey questions relied upon in this Note have their results tabulated below.

FIRMS INDICATING THAT THEY HAVE EITHER CONTEMPLATED OR SETTLED AN ACCRETION CASE FOR AN ELECTION							
Management			Labor			Combined Yes	Combined % Yes
Yes	No	Other	Yes	No	Other		
5	6	0	7	4	0	12	55%

FIRMS INDICATING THAT ACCRETION FACTORS AT PRESENT ARE CLEAR OR PROVIDING OF ADEQUATE GUIDANCE							
Management			Labor			Combined Yes	Combined % Yes
Yes	No	Other	Yes	No	Other		
3	5	3	9	1	1	12	55%

FIRMS INDICATING THAT THEY FEEL IT ODD THAT EMPLOYEE INTEREST IS NOT FREQUENTLY CONSIDERED AS A FORMAL ACCRETION FACTOR								
Management			Labor			Combined Yes	Combined % Yes	Management % Yes
Yes	No	Other	Yes	No	Other			
5	6	0	4	7	0	9	41%	45%

UNION FIRMS BELIEVING THAT ACCRETION ANALYSIS SHOULD PAY MORE ATTENTION TO ORGANIZATIONAL GERRYMANDERING				
Yes	No	Other	Percentage Yes	Percentage No
10	0	1	91%	0%

HOW FIRMS FEEL ABOUT THE PREDICTABILITY OF CASE OUTCOMES UNDER ACCRETION CASELAW			
MANAGEMENT			
Predictable	Somewhat Predictable	Somewhat Inconsistent	Random or Worse
0	6	4	1
Percent Predictable		Percent Inconsistent	
55%		45%	
Combined Predictable			
41%			
LABOR			
Predictable	Somewhat Predictable	Somewhat Inconsistent	Random or Worse
0	3	7	1
Percent Predictable		Percent Inconsistent	
27%		73%	
Combined Inconsistent			
59%			

Accretion Survey
(Union)

1. How frequently does your firm/department see a potential accretion case?

- (a) very frequently (every 3 months)
- (b) somewhat frequently (every 6 months)
- (c) routinely (every 6 to 18 months)
- (d) infrequently (18 months to 36 months)
- (e) rarely (takes years to see one)

2. How many accretion cases has your firm/department taken all the way through to an NLRB determination in the last 5 years?

3. How many accretion claims has your firm/department settled or abandoned in the last five years?

4. Has your firm/department ever contemplated, or has a management attorney ever offered to settle an accretion case for an election?

5. Do you find the accretion factors at present to be clear or providing of adequate guidance?

(General factors: geographic proximity of two groups, common day-to-day supervision, collective bargaining history, similarity of employment terms & conditions, interchange of employees, common facilities, similarity of skills and functions, administrative integration, and functional integration)

6. Which factor(s) do you find to be the most useless?

7. Which factor(s) do you find to be the most purposive?

8. Do you find it odd that employee interest is only infrequently considered as a formal accretion factor given that Section 7 rights are one basis of the accretion remedy?

9. Generally, when viewing a new accretion case, do you find the potential result under accretion caselaw to be:

- (a) predictable
- (b) predictable enough to give clients a picture of a probable outcome
- (c) somewhat inconsistent
- (d) random
- (e) a small step away from a hocus-pocus ritual

10. Do you find the present distinction between spin off claims and accretion claims to be useful (not only the basic conceptual distinction, but also that under spin off the employer has the burden, while under accretion the union has the burden)?

11. Do you believe that accretion/spin off analysis should pay more attention to the problem of "organizational gerrymandering" by employers (i.e. shifting around their facilities and workforce to avoid unionized employees)?

Accretion Survey
(Management)

1. How frequently do accretion cases arise among your client base?

- (a) very frequently (every 3 months)
- (b) somewhat frequently (every 6 months)
- (c) routinely (every 6 to 18 months)
- (d) infrequently (18 months to 36 months)
- (e) rarely (takes years to see one)

2. How many accretion cases has your firm/department taken all the way through to an NLRB determination in the last 5 years?

3. How many accretion claims has your firm/department settled or has the union abandoned in the last five years?

4. Has your firm/department ever contemplated, or has the union ever offered to settle an accretion case for an election?

5. Do you find the accretion factors at present to be clear or providing of adequate guidance?

(General factors: geographic proximity of two groups, common day-to-day supervision, collective bargaining history, similarity of employment terms & conditions, interchange of employees, common facilities, similarity of skills and functions, administrative integration, and functional integration)

6. Which factor(s) do you find to be the most useless?

7. Which factor(s) do you find to be the most purposive?

8. Do you find it odd that employee interest is only infrequently considered as a formal accretion factor given that Section 7 rights are one basis of the accretion remedy?

9. Generally, when viewing a new accretion case, do you find the potential result under accretion caselaw to be:

- (a) predictable
- (b) predictable enough to give clients a picture of a probable outcome
- (c) somewhat inconsistent
- (d) random
- (e) a small step away from a hocus-pocus ritual

10. Do you find the present distinction between spin off claims and accretion claims to be useful (not only the basic conceptual distinction, but also that under spin off the employer has the burden, while under accretion the union has the burden)?