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Labor Law's Alter Ego Doctrine: The Role of Employer Motive in Corporate Transformations

For over fifty years, the National Labor Relations Act (NLRA or Act)¹ has provided employees² with the statutory right to choose an exclusive bargaining representative³ (*i.e.*, a labor union) with whom their employer must bargain collectively.⁴ The goal of the bargaining process is a collective bargaining contract agreed to by both the union and the employer.⁵ Unfortunately, some employers attempt to disavow their bargaining obligations and valid labor contracts following, or through, a change in corporate form.

The most blatant disavowal of NLRA responsibilities involves an employer motivated by anti-union animus.⁶ One example of evasion has been described as follows:

The United Auto Workers . . . caustically refers to it as "management's neutron bomb — you eliminate the union workforce, but keep the business intact."

"It" involves a union shop's owners locking the doors, only to move

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1. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)). See generally A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 79-94 (10th ed. 1986) (describing the origins and development of the NLRA).

2. Large segments of the work force are not covered by the NLRA. For example, public employees are exempt from the Act, as are those employed in the agricultural sector. See NLRA §§ 2(2), (3), 29 U.S.C. §§ 152(2), (3) (1982). See generally A. COX, D. BOK & R. GORMAN, *supra* note 1, at 95-104 (discussing scope of National Labor Relations Board's jurisdiction).

3. This right is stated in NLRA § 7, 29 U.S.C. § 157 (1982), which provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." (emphasis added).

4. This obligation is imposed by NLRA §§ 8(a)(5) & 9(a), 29 U.S.C. §§ 158(a)(5) & 159(a) (1982). Section 8(a)(5) provides that "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) in turn provides that

Representatives 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 unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

5. The obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." NLRA § 8(d), 29 U.S.C. § 158(d) (1982). See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970):

One of the[ ] fundamental policies [of the NLRA] is freedom of contract. . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based — private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

See also *NLRB v. Burns Intl. Sec. Servs.*, 406 U.S. 272, 282 (1972) (quoting NLRA § 8(d)).

6. "Anti-union animus" is a broader term than mere "personal dislike" and encompasses all negative labor-related motives (*e.g.*, an employer's desire to escape high labor costs). See note 83 *infra*.

across the street or across the state and reopen a short time later under a non-union umbrella. In what's commonly referred to as an alter-ego transaction, only the names of the company and the workforce change.⁷

An employer cannot, however, evade its responsibilities in such a blatant manner.⁸ In the "neutron bomb" case described above, a union will generally file unfair labor practice charges under sections 8(a)(1), (3), and (5) of the Act.⁹

In considering such charges, the National Labor Relations Board ("NLRB" or "Board") applies a test known as the "alter ego doctrine" — an inquiry into whether the "new" (successor) employer is in fact the same as the "old" (predecessor) employer. An alter ego employer's refusal to bargain with the predecessor's union will at a minimum constitute an unfair labor practice under sections 8(a)(5)¹⁰ and 8(a)(1).¹¹ Additionally, an alter ego employer that discriminatorily fires its workforce commits an unfair labor practice under section 8(a)(3).¹²

The United States Supreme Court established the alter ego doctrine over forty years ago in *Southport Petroleum Co. v. NLRB*.¹³ The test seeks to determine "[w]hether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised contin-

7. Engel, *Name Game: Union-Busting or Good Business?*, *INDUSTRY WEEK*, Apr. 18, 1983, at 19.

8. See Parts I.B and II *infra*.

9. 29 U.S.C. §§ 158(a)(1), (3), & (5) (1982).

10. 29 U.S.C. § 158(a)(5) (1982). See note 4 *supra*.

11. 29 U.S.C. § 158(a)(1) (1982). The § 8(a)(5) unfair labor practice gives rise to a derivative violation of § 8(a)(1). Section 8(a)(1) states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Because actions described in subsections (2), (3), (4), and (5) constitute interference with an employee's § 7 rights, a violation of any of these subsections has been held to be a derivative violation of § 8(a)(1). See A. COX, D. BOK & R. GORMAN, *supra* note 1, at 114. Thus, a complaint alleging alter ego status will always contain a derivative § 8(a)(1) charge, even though the focus is on a § 8(a)(5) refusal to bargain.

12. In a "neutron bomb" case, see text at note 7 *supra*, the firing of the work force usually involves employer discrimination. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982), prohibits any "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." While many employers changing their corporate form do, in fact, attempt to fire some or all of their work force, in many instances the employer attempts to keep the work force, and merely shed itself of the union; thus, while § 8(a)(3) may be implicated in an alter ego case, not all such cases violate the section. Compare *NLRB v. McAllister Bros.*, 819 F.2d 439, 443 (4th Cir. 1987) ("new" employer "did not offer jobs to fifteen of [its predecessor's] Union employees"), and *NLRB v. Bell Co.*, 561 F.2d 1264, 1267 n.3 (7th Cir. 1977) (noting a Board finding that discharge of employees was discriminatorily motivated), with *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 578 (6th Cir. 1986) (involving only a § 8(a)(5) violation for "repudiating the collective bargaining agreement"), and *Amalgamated Meat Cutters & Butcher Workmen Local 576 v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980) (same). In contrast, almost all alter ego cases involve *at a minimum* a § 8(a)(5) charge because the employer is, by definition, repudiating the collective bargaining contract based on its claim of being a "new" employer, regardless of whether it retains the predecessor's work force. But see *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983) (involving only §§ 8(a)(1) & (3) charges).

13. 315 U.S. 100 (1942).

uance of the old employer.”¹⁴ An employer cannot escape liability “[i]f there was merely a change in name.”¹⁵ A subsequent employer found to be the alter ego of its predecessor is not only bound to bargain with its predecessor’s union, but is held to the terms of the prior collective bargaining agreement itself.¹⁶

Although the alter ego doctrine is well-settled in cases where an employer’s change in corporate form is motivated by anti-union animus or an intent to evade its collective bargaining obligations, corporate transformations also occur for reasons unrelated to animus. The Supreme Court’s *Southport* decision did not address the appropriate role of employer motive in such cases. The courts of appeals are divided on the proper role of motive, and no clear majority favors any particular standard.¹⁷ There are, however, three primary approaches to reviewing NLRB alter ego findings.

Some courts argue that animus is “critical”; the court will not enforce an NLRB alter ego order if the Board has not first found an “intent to evade.”¹⁸ A second approach contends that animus is merely “relevant”: “[A] finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, *it is merely one of the relevant factors* which the Board can consider, along with the well-established factors of substantial identity of management, business purpose, operation, equipment, customers, supervision and ownership . . . .”¹⁹ A third approach, espoused by the Fourth Circuit, finds an alter ego relationship only if (1) the same entity controls the old and new employer; and (2) the employer anticipated a “reasonably foreseeable benefit . . . related to the elimination of its labor obligations.”²⁰ The Fourth Circuit based its standard on an analysis of *Textile Workers Union v. Darlington Manufacturing Co.*²¹ The NLRB itself has not taken a clear position on the appropriate standard, with some members arguing that animus is “relevant, but not prerequisite” to imposing alter ego status, while other members imply that it is “critical.”²² The division among the courts of appeals and the Board is not without practical significance. The increasing number of alter ego cases during the past fifteen years underscores the need for a uniform

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14. 315 U.S. at 106.

15. 315 U.S. at 106.

16. See text at note 70 *infra*.

17. See Part II *infra*.

18. See Part II.A *infra*.

19. NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581 (6th Cir. 1986) (emphasis added); see Part II.B *infra*. The “well-established” factors referred to by the Sixth Circuit were formulated by the NLRB in *Crawford Door Sales Co.*, 226 N.L.R.B. 1144 (1976). The Board continues to apply these factors, which are accepted by all of the federal courts of appeals. See Part I.B.2 *infra*.

20. *Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983); see Part II.C *infra*.

21. 380 U.S. 263 (1965); see Part II.C *infra*.

22. See notes 82, 90 & text at 133 *infra*.

standard.²³

This Note examines the differing judicial approaches for reviewing NLRB alter ego findings, and concludes that a fundamental problem with *all* of the current approaches is the unwarranted consideration of motive in varying degrees. This Note proposes a modified “reasonably foreseeable benefit” standard which does not depend in any degree on the employer’s motive for changing its corporate form. Part I discusses the origin and evolution of the alter ego doctrine, including its genesis in *Southport Petroleum*, the well-settled *Crawford Door* factors, and the related “successorship” doctrine. Part II analyzes the conflict among the federal courts of appeals over the role of employer motive and Supreme Court cases in related areas of labor law. This part maintains that the Fourth Circuit’s “reasonably foreseeable benefit” standard provides an excellent foundation for the appropriate standard, and proposes a modified approach in which (1) the Board applies the flexible, seven-factor *Crawford Door* test; and (2) if it finds that the “new” employer is in reality the same as its predecessor, the Board must then inquire whether the old employer anticipated a “reasonably foreseeable benefit” for any reason. Alter ego status is found only if both prongs of the test are met.²⁴

Part III examines the policy considerations attendant to accommodating the tension between legitimate employee expectations and an employer’s freedom to rearrange its business — and to go *out of business* — as it sees fit. The modified “reasonably foreseeable benefit” standard proposed in Part II properly defines the bounds of both legit-

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23. Over the course of a 25-year career with the NLRB (1962-1987), Elliott Moore had an opportunity to observe the progression of alter ego cases. His general impression about trends in the number of such cases is of their infrequent occurrence during the 1960s and early 1970s, and of increasing activity (and importance) during the past fifteen years. Telephone interview with Elliott Moore, former Deputy Associate General Counsel of the NLRB (Mar. 29, 1988). Statistics kept by the NLRB beginning in 1970 bear out Mr. Moore’s impressions. From 1970 through 1974, only four alter ego cases were adjudicated at any level (ALJ, NLRB, and federal courts). CLASSIFIED INDEX OF NLRB DECISIONS & RELATED COURT DECISIONS 375-76 (Employer Obligation to Bargain, § 520(4850 3300)) (June 1974) [hereinafter CLASSIFIED INDEX] (covering decisions issued from July 1970 through June 1974). There were 23 cases during the remainder of the decade. CLASSIFIED INDEX, *supra*, at 347 (Dec. 1976)) (covering July 1974 through Dec. 1976) and CLASSIFIED INDEX, *supra*, at 632-33 (Dec. 1979) (covering Jan. 1977 through Dec. 1979). During the 1980s, there have been 35 cases to date. CLASSIFIED INDEX, *supra*, at 686 (Dec. 1982) (covering Jan. 1980 through Dec. 1982), CLASSIFIED INDEX, *supra*, at 352-53 (Dec. 1984) (covering Jan. 1982 through Dec. 1984), CLASSIFIED INDEX, *supra*, at 373-74 (Dec. 1986) (covering Jan. 1985 through Dec. 1986), and CLASSIFIED INDEX, *supra*, at 121 (June 1987) (covering Jan. 1987 through June 1987). In addition, these statistics do not include the large number of settled cases that never reach trial. For example, from October 1985 through September 1987, approximately 92% of all cases in which the General Counsel issued a complaint were settled. NLRB Internal Memorandum GC-88-3, Summary of Operations for Fiscal Year 1987, at 3 (Mar. 9, 1988) (Copy on file with *Michigan Law Review*). A slightly lower settlement rate of 85% is used as a rule of thumb for any given year. Telephone interview with James Y. Callear, FOIA Officer, NLRB Legal Research & Policy Planning Branch, Division of Advice, Office of the General Counsel (Mar. 30, 1988). These percentages do not include cases that were settled prior to the issuance of a complaint. *Id.*

24. See Part II.C *infra*.

imate employee expectations and employer freedom. Predictability and uniformity are achieved in NLRB decisions without an undue sacrifice in the Board's ability to apply flexibly the *Crawford Door* factors.

I. ORIGIN AND EVOLUTION OF THE ALTER EGO DOCTRINE

A. Congress's Broad Brush: The NLRA

The legislative history, and the language of the NLRA itself, state Congress's two broad labor-law objectives — "to promote industrial peace and equality of bargaining power."²⁵ The way in which Congress sought to accomplish this goal was through "removing certain recognized sources of industrial strife and unrest."²⁶ Two of the NLRA provisions designed for this purpose are applicable to this Note.²⁷ First, section 8(a)(5) requires an employer to bargain collectively with the representative of its employees.²⁸ Second, section 8(a)(3) prohibits discrimination in hiring, tenure, or terms and conditions of employment which encourage or discourage union membership.²⁹ However, neither the legislative history nor the language of the Act addresses the problem of an employer changing its corporate form and potentially escaping from the predecessor employer's NLRA obligations.

Recognizing the impossibility of fashioning a comprehensive set of rules and regulations, Congress gave the NLRB a mandate to carry out its national labor policies and objectives.³⁰ The Board thus has primary responsibility for deciding whether an unfair labor practice

25. S. REP. NO. 573, 74th Cong., 1st Sess. 6 (1935); NLRA § 1, 29 U.S.C. § 151 (1982) (statement of findings and policies); *see, e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 454 (1957); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33, 45 (1937).

26. NLRA § 1, 29 U.S.C. § 151 (1982).

27. A violation of either of these sections also triggers a violation of § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982). *See* note 11 *supra*.

28. *See* note 4 *supra*. In addition, NLRA § 8(d), 29 U.S.C. § 158(d) (1982), defines the phrase "to bargain collectively," providing in pertinent part:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . [W]here there is in effect a collective-bargaining contract covering employees . . . the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification [meets specified terms, such as a 60-day written-notice period]. The duties imposed . . . shall become inapplicable . . . [if] the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees . . .

In an alter ego case, the "new" employer not only terminates the contract, but refuses to bargain with the union altogether, arguing that the union has "ceased to be the representative of the employees." NLRA § 8(d), 29 U.S.C. § 158(d) (1982). If the "new" employer is found to be an alter ego, however, it has failed to bargain collectively as defined in § 8(d), and hence violates § 8(a)(5). *See also* text at note 115 *infra*.

29. *See* note 12 *supra*.

30. NLRA § 6, 29 U.S.C. § 156 (1982), provides in pertinent part: "The Board shall have authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this Act."

violation has occurred under section 8.³¹ A reviewing court must accept "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole."³² Because alter ego determinations have been held to be questions of fact,³³ the NLRB's findings are entitled to judicial deference, although such deference does not leave the courts without a significant role in this area.³⁴ This role, and the interplay of the NLRB and the courts, is the subject of the next section.

B. *Filling in the Details: The NLRB and the Courts*

1. *Genesis: Southport Petroleum*

The alter ego doctrine originated in the early 1940s with the United States Supreme Court's decision in *Southport Petroleum Co. v. NLRB*.³⁵ Given that the lower courts and the NLRB put great weight on the language of the Court's holding,³⁶ and that *Southport* was the first and last pronouncement of the Court on this subject,³⁷ an in-depth review of both the facts and the holding of the case is important. This subpart will show that the language of *Southport* does not support an intent requirement beyond those cases in which an employer clearly intends to evade its bargaining obligations.

Southport Petroleum was a Texas corporation that had engaged in various unfair labor practices.³⁸ The Board found violations of sec-

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31. As noted earlier, the key provision with respect to the alter ego doctrine is NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982). See note 12 *supra*.

32. NLRA § 10(f), 29 U.S.C. § 160(f) (1982). The courts must defer to the Board's expertise where its findings are supported by substantial evidence, even though the reviewing court could "justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The primary justification for this deference is that the Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." 340 U.S. at 488; see also *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979).

33. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942) ("Whether there was a *bona fide* discontinuance and a true change of ownership . . . is a question of fact."); see also *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

34. The characterization of an alter ego finding as a "question of fact" does not mean that the courts of appeals have no role to play in the doctrine. The current division among the courts as to the appropriate *legal* standard the Board must apply in making its *factual* determination, see Part II *infra*, before enforcement will be granted makes clear that this is actually a *mixed* question of law and fact.

35. 315 U.S. 100 (1942).

36. See Part II *infra*.

37. The Supreme Court does, however, discuss the alter ego doctrine as dicta in a related successorship doctrine case. See *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249, 259 n.5 (1974). The Court's alter ego footnote is discussed in Part I.C *infra*.

38. *Southport*, 315 U.S. at 101, 102. The primary violation was the discriminatory discharge of "three employees at [Southport's] Texas City, Texas, oil refinery because of their membership

tions 8(a)(3) and 8(a)(1),³⁹ and ordered Southport to cease and desist from these practices.⁴⁰ Approximately ten months after the Board's order, Southport "entered into a written stipulation . . . that it would obey the order."⁴¹ Only three days later, Southport "distributed all of its assets to its four stockholders as a liquidating dividend; and [the stockholders] conveyed it to a *newly organized Delaware corporation*."⁴² The shareholders then claimed that, because the predecessor company had been dissolved, the Board's remedial order was invalid.⁴³

The Fifth Circuit affirmed the Board's order on a narrow holding based upon Texas law.⁴⁴ The Supreme Court's affirmance was based on a similarly narrow holding. The sole issue before the Court was whether the court of appeals erred in denying Southport's application for leave to adduce additional evidence that the Texas company had dissolved, and was therefore beyond the reach of the Board's remedial order.⁴⁵

The Court rejected the shareholders' contention. Speaking for the Court, Justice Jackson stated that the appropriate test was "Whether there was a *bona fide* discontinuance and a true change of ownership — which would terminate the duty of reinstatement created by the Board's order — or merely a disguised continuance of the old employer . . . ."⁴⁶ Justice Jackson further noted that Southport's business operation "might have continued under the old business form or under a disguise *intended to evade* [the Board's reinstatement] provision. If there was merely a change in name or in apparent control there is no reason to grant [Southport] relief from the Board's order . . . ."⁴⁷

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and activity in [the union] . . . ." Brief for the National Labor Relations Board at 3, *Southport Petroleum Co. v. NLRB*, 315 U.S. 100 (1942) (No. 67); *see also* 315 U.S. at 102-03.

39. The Board did *not* find a violation of § 8(a)(5) for refusing to bargain with the union; rather, it found a violation only for the discriminatory discharge claim. *See Southport Petroleum Co.*, 8 N.L.R.B. 792, 806 (1938), *enforced*, *NLRB v. Southport Petroleum Co.*, 117 F.2d 90 (5th Cir. 1941), *aff'd.*, 315 U.S. 100 (1942). There is no indication from the facts that the "old" or "new" company ever repudiated its collective bargaining contract or duty to bargain with the union. Such facts are present in most current alter ego litigation. *See* note 12 *supra*.

40. 8 N.L.R.B. at 807.

41. 315 U.S. at 102.

42. 315 U.S. at 103 (emphasis added).

43. 315 U.S. at 103.

44. The court stated:

[Southport] has filed . . . for leave to adduce additional evidence to the effect that, subsequent to the entry of the order by the Board, it disposed of all of its assets, and was dissolved. [Southport] is a Texas corporation. Under the laws of that state the corporation, upon dissolution, is continued in existence for a period of three years for the purpose of suing and being sued. Conceding that the dissolution has taken place, it can have no effect upon this proceeding.

NLRB v. Southport Petroleum Co., 117 F.2d 90, 92 (5th Cir. 1941), *aff'd.*, 315 U.S. 100 (1942) (footnote omitted).

45. *See* 315 U.S. 100, 108 (Reed, J., dissenting) (grant of certiorari was limited to the issue of leave to adduce additional evidence). *See also* Brief for NLRB at 2, *Southport* (No. 67) (same).

46. 315 U.S. at 106.

47. 315 U.S. at 106 (emphasis added). Justice Jackson added that, "The additional evidence

The Court's affirmance of the Board's order was directed at a clearly recalcitrant employer. Southport had ignored the Board's order to remedy its unfair labor practices for ten months before entering into a stipulation to carry out the order.⁴⁸ It then liquidated and transferred ownership only three days after stipulating its compliance — an act the Board considered to be an indication of "bad faith."⁴⁹ Given the narrow issue presented to the Court,⁵⁰ and the evasive actions of an employer that clearly continued its business operations, there was no need to rule on whether an *absence* of intent to evade NLRA duties might be a defense to alter ego status. Likewise, there was no need to decide whether the *presence* of animus might nonetheless be irrelevant to determining such status.

2. *The Generally Accepted Factors: Crawford Door*

Following *Southport*, the courts of appeals have differed regarding the intent criterion,⁵¹ but have agreed on the seven objective factors enunciated by the NLRB in *Crawford Door Sales Co.*⁵² In considering whether to apply the alter ego doctrine, the Board determines whether "the two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers, and supervision, as well as ownership."⁵³ The test is flexible — the NLRB does *not* need to find the presence of all seven factors. In addition, the "substantially identical" language provides additional flexibility with respect to each individual factor.⁵⁴

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was immaterial for the further reason that the Board's order ran not only to the petitioner, but also its 'officers, agents, successors, and assigns.' " 315 U.S. at 106 (footnote omitted).

48. 315 U.S. at 102.

49. See Brief for NLRB at 6, *Southport* (No. 67).

50. See notes 44-45 *supra* and accompanying text (leave to adduce additional evidence).

51. See Part II *infra*.

52. 226 N.L.R.B. 1144 (1976).

53. 226 N.L.R.B. at 1144. The *Crawford* factors are cited with approval in, e.g., *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 237 (8th Cir. 1986); *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1321 (7th Cir. 1986); *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 (6th Cir. 1986); *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984); *Alkire v. NLRB*, 716 F.2d 1014, 1018 n.4 (4th Cir. 1983); *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 553-54 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 507-08 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

Although this Note refers to "the Board" as though it were a monolithic entity, the NLRB decisionmaking process begins with an Administrative Law Judge (ALJ), who makes findings of fact, conclusions of law, and rulings based on a hearing. Appeals of the ALJ's decisions are made to the NLRB. The Board's and ALJ's opinions will not be discussed separately unless otherwise noted.

54. For example, in *Dane County Dairy*, the court held that "[f]amilial control constitutes common ownership and control." 795 F.2d at 1322; see also *Advance Elec., Inc.*, 268 N.L.R.B. 1001, 1004 (1984) ("all stock in both corporations was owned by members of the [same] family and all corporate officers and directors also were members of that family"); *E.G. Sprinkler Corp.*, 268 N.L.R.B. 1241, 1244 (citing *Crawford Door*, 226 N.L.R.B. at 1144) ("The Board has held that stock ownership in different corporations by members of the same family constitutes owner-

For example, in *NLRB v. Scott Printing Corp.*,⁵⁵ the Third Circuit enforced the Board's alter ego finding *in spite of* a legal change in ownership. The court provided the following summary of the relevant facts:

[A] decline in the demand for composition work made the composing room unprofitable for Scott. Because he was having difficulty meeting non-union competition, Scott tried unsuccessfully to sell the composing room. After the Union informed . . . employees that Scott intended to sell or to close down the composing room, [the employees], facing unemployment, offered to buy it. . . . [The employees] signed the [sales] contract without making any changes.⁵⁶

The court held that "[a] nominal change in ownership is not dispositive."⁵⁷ It looked at *Crawford Door* factors such as identical customers, operations, equipment, and supplies, but noted that "[t]he crucial element in a decision to apply the alter ego doctrine . . . is a finding that the older company continued to maintain a *substantial degree of control* over the business claimed to have been sold to the new entity."⁵⁸

The Tenth Circuit appears to have added an eighth element to the *Crawford Door* analysis:

Another factor to be considered is the continuity of the work force. If the second employer continues with substantially the same employees, the second employer is more likely to be deemed an *alter ego* of the first. If, however, the second employer has a substantially different work force than did the first employer, the second employer is more likely to be deemed a mere successor.⁵⁹

Continuity of the work force is not, however, a helpful indicator of alter ego status. Although a new work force in an arms-length transaction would not indicate alter ego status, the *lack* of continuity of the work force in the absence of an arms-length change of ownership could provide excellent evidence that the "new" employer is in reality the alter ego of its predecessor. Taking the Tenth Circuit's analysis to

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ship and control which is 'substantially identical.'"), *enforced sub nom.* Goodman Piping Prods., 741 F.2d 10 (2d Cir. 1984).

55. 612 F.2d 783 (3d Cir. 1979).

56. 612 F.2d at 788.

57. 612 F.2d at 786.

58. 612 F.2d at 786 (noting with approval *NLRB v. Bell Co.*, 561 F.2d 1264, 1267-68 (7th Cir. 1977)) (emphasis added). The "control" element, however, is a gloss on the "ownership" factor, rather than a discrete eighth factor. *See, e.g., NLRB v. Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986) (finding that the Board had established "substantially identical ownership *and/or* control"). Also, although the Fourth Circuit's "reasonably foreseeable benefit" test in *Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983), focuses on the control element of *Crawford Door*, *see* text at note 158 *infra*, the court has not rejected the Board's right to weigh all seven criteria. 716 F.2d at 1018 & n.4.

59. *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980) (citing *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249 (1974)) (italics in original).

an extreme, our “neutron bomb” employer⁶⁰ could fire its entire work force out of sheer animus, and then make a bootstrap argument that because there is no “continuity of the work force,” it is at most required to bargain with the union as a successor employer.⁶¹ Therefore, continuity of the work force is a better indicator of an unfair labor practice once the employer is identified as an alter ego employer.⁶²

Additionally, in enunciating its new factor, the Tenth Circuit also skirted the fine line dividing successorship and alter ego doctrines. Indeed, the court’s reliance on *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*⁶³ demonstrates the need for understanding the difference between the alter ego and successorship doctrines.

C. *The Successorship Doctrine*

“Successorship,”⁶⁴ “alter ego,” and “single employer,” are three related, yet distinct, doctrines that address whether, and to what extent, “one business entity [will be held] to the labor obligations of another.”⁶⁵ An examination of the single employer doctrine,⁶⁶ and of

60. See text at note 7 *supra*.

61. See Part I.C. *infra*.

62. Assuming the *Crawford Door* factors are met, both the “critical” and “relevant” approaches would find alter ego status based on the discriminatory firing of the work force. Likewise, an objective “reasonably foreseeable benefit” approach would use the discriminatory firing as evidence that there was a reasonably foreseeable benefit to the old employer which did not actually go out of business. (The distinction between a motive-based and objective standard is that a different result is reached under the motive-based standard when the motive is legitimate.) See Part II *infra*.

63. 417 U.S. 249 (1974).

64. The successorship doctrine is relatively well settled, having been addressed by the United States Supreme Court three times in the past two decades. *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249 (1974); *NLRB v. Burns Intl. Sec. Servs.*, 406 U.S. 272 (1972); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964).

The literature concerning the successorship doctrine is extensive. For commentary in addition to the brief coverage in Part I.C, see, e.g., Severson & Willcoxon, *Successorship Under Howard Johnson: Short Order Justice For Employees*, 64 CALIF. L. REV. 795 (1976); Morris & Gaus, *Successorship and the Collective Bargaining Agreement: Accommodating Wiley and Burns*, 59 VA. L. REV. 1359 (1973); Slicker, *A Reconsideration of the Doctrine of Employer Successorship — A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051 (1973); St. Antoine, *Judicial Caution and the Supreme Court’s Labor Decisions, October Term 1971*, 6 U. MICH. J.L. REF. 269, 269-77 (discussing *NLRB v. Burns Intl. Sec. Servs.*, 406 U.S. 272 (1972)); Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 NW. U. L. REV. 735 (1969); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759 (1975); Note, *Contract Rights and the Successor Employer: The Impact of Burns Security*, 71 MICH. L. REV. 571 (1973).

65. Note, *Bargaining Obligations After Corporate Transformations*, 54 N.Y.U. L. REV. 624, 625 (1979) [hereinafter Note, *Bargaining Obligations*].

66. The NLRB uses four criteria to determine whether two coexisting employers actually constitute a single employer: interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Radio & Television Broadcast Technicians Local Union No. 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam). Although the alter ego doctrine may also be applied to coexisting employers, alter ego and suc-

the "double-breasting" aspects⁶⁷ to which both single employer and

cessorship cases generally arise when a new legal entity has replaced a predecessor entity (the entities are *sequential in time*).

Single employer and alter ego charges often arise in the same case. *See, e.g.,* NLRB v. Al Bryant, Inc. 711 F.2d 543 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984); Penntech Papers, Inc. v. NLRB, 706 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983); Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305 (8th Cir. 1984), *cert. denied*, 469 U.S. 1088 (1984). Also, Professor Stephen Befort has pointed out that "the Board and the courts have recently begun to commingle the strands of the two doctrines. Three recent Board decisions describe the alter ego doctrine as 'an extension of the concept of single employer.'" 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, 92 (footnote omitted). One of the three cases he describes states:

We discuss "single employer" and "alter ego" . . . as though they were two separate ideas. In doing so, we adopt the approach of text-writers and digesters, to whose hearts such neat categories are dear. In fact, what is really happening . . . is that a number of factors . . . are being treated as relevant to the question whether an employer, formally separate, should be viewed as legally the same as another.

Id. at 92-93 (quoting *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 236 n.1 (8th Cir. 1986)). This Note adopts those "neat categories," which is appropriate given its focus on corporate transformations, which are sequential in time, rather than on the "double-breasting" context, involving coexisting entities. For additional discussion of the single employer doctrine, see generally *id.* at 75-89 (discussing the development and application of the single employer doctrine to "double-breasted" cases); *Carpenters Local No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 504-07 (5th Cir. 1982) (discussing application to double-breasted contractors), *cert. denied*, 464 U.S. 932 (1983).

67. "Double-breasting" originated in the construction industry to allow contractors to bid for both union and nonunion jobs. The employer establishes a "subsidiary compan[y]" to work non-union jobs and compete in this market." Penfield, *The Double-Breasted Operation in the Construction Industry*, 27 LAB. L.J. 89, 89 (1976). *See also* Befort, *supra* note 66; Comment, *Double-Breasted Operations in the Construction Industry: A Search for Concrete Guidelines*, 6 U. DAYTON L. REV. 45 (1981) [hereinafter Comment, *Double-Breasted Operations*]; Comment, *Dual Companies — When Does a Union Have the Right to Expanded Representation?*, 12 U.S.F. L. REV. 89 (1977). *See generally* A. COX, D. BOK & R. GORMAN, *supra* note 1, at 852-53 (discussing "double-breasted" employers). Professor Befort has written an excellent and comprehensive article on the subject. He points out the "failure of the single employer and alter ego doctrines as theoretical bases for evaluating double-breasted operations . . ." Befort, *supra* note 66, at 101. Befort proposes a four-part "double-breasting" test addressing "common ownership or continued financial benefit, diversion of unit work, appropriate bargaining unit, and motive." *Id.* He views the motive element as a relevant, but not prerequisite, factor. *Id.* at 104. Professor Befort's proposed test would help bring coherence to the traditional "double-breasting" cases, and might alleviate some of Congress's current concerns — in 1987 the House of Representatives passed legislation that "would prevent unionized construction companies from setting up separate, nonunionized divisions," Wall St. J., Dec. 28, 1987, § 2, at 15, col. 1, although the legislation died in the Senate. *Id.*

Although this Note does not address the "double-breasting" aspects of the alter ego doctrine, it *does* discuss and analyze "double-breasting" cases that fall outside of the traditional construction industry context. For example, in *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), the predecessor employer, a moving company working both as an independent and as an Atlas Van Lines agent split into two successor companies — one union and one nonunion — allegedly in response to an Atlas policy change prohibiting its agents from simultaneously operating independently. *See text* at notes 136-39 *infra*. As the ALJ correctly pointed out, however:

While these circumstances may explain the decision to create [the nonunion company] as a separate corporation, they do not explain a totally separate and subsequent decision on [the employer's] part in refusing to apply to [the new company's] employees the terms and conditions of employment which governed their performance of Atlas work prior to the change in corporate structure.

Allcoast Transfer, 271 N.L.R.B. 1374, 1379, *enforced*, 780 F.2d 576 (6th Cir. 1986). Unlike the motive-based justification (which is nonetheless suspect) of construction employers who must bid on both union and nonunion jobs, there is *no* motive-based justification in the nontraditional

alter ego concepts are often applied, are beyond the scope of this Note. This subpart instead focuses on the "absolute distinction between *alter ego* concepts . . . and so-called successorship cases."⁶⁸ The Tenth Circuit's use of "continuity of the work force"⁶⁹ as an alter ego criterion provides a reason for discussing the Supreme Court's own distinction between successorship and alter ego concepts and for reviewing the different policy concerns underlying the two doctrines.

The different factual settings and legal consequences of successorship and alter ego cases are summarized as follows:

[T]he issue of successorship arises only when there is a *bona fide* purchase or sale, meaning an arm's length relinquishment of control between two independent entities. If the purchaser in a transaction is found to be an alter ego of the selling party, the seller's contractual obligations will be applied to the purchaser/alter ego in their entirety.⁷⁰

While an alter ego employer is bound to the terms of its predecessor's collective bargaining contract, an arms-length successor employer⁷¹ is normally subject *at most* to an obligation to recognize and bargain with the predecessor's union.⁷² The different legal consequences illus-

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case. As long as there is at least a partial cessation of business by the predecessor company, the "foreseeable benefit" approach proposed by this Note, *see* Part II.C *infra*, adequately protects employees without resort to Professor Befort's proposed test. The Sixth Circuit itself based its decision entirely on traditional alter ego analysis without reference to the "double-breasting" aspects of the case.

68. *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421, 424 (1977) (statement of ALJ).

69. *See* text at notes 59-63 *supra*.

70. P. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION*, 181 (Labor Rel. & Public Poly. Series, No. 24, 1983). *See also* *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249, 259 n.5 (distinguishing successor cases in which there is a "substantial change in . . . ownership or management" from alter ego cases lacking such a change); *Dee Cee*, 232 N.L.R.B. at 424 (successor employer is "always a stranger to the first . . . employer"); Befort, *supra* note 66, at 73 ("The absence of an arm's length relationship distinguishes the single employer and alter ego situations from that of the normal successorship setting.").

71. There is a dispute over the proper definition of "successor employer." *See, e.g., Howard Johnson*, 417 U.S. at 262 n.9 ("There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer . . . may be a successor for some purposes and not for others."); Note, *Bargaining Obligations*, *supra* note 65, at 643 n.129 (" 'Successor' is a term of art, although many cases use it as a generic term for all new enterprises."); Note, *The Bargaining Obligations of Successor Employers*, 88 HARV. L. REV. 759, 759 n.1 (1975) ("The term 'successor' has often been used to express a legal conclusion that the new employer should be held to certain of the obligations of its predecessor. . . . For clarity, the term as used [here] will not imply that the new employer is held to any obligations, but will be used merely to refer to the new employer."). This Note adopts the *Harvard Law Review* Note's use of the term as merely referring to the new employer. Where it is not clear from the context of the discussion, the term "arms-length successor" will be used to indicate a successor employer who is not bound to the terms of the collective bargaining contract of its predecessor.

72. *See NLRB v. Burns Intl. Sec. Servs.*, 406 U.S. 272, 281-82 (holding that an employer is not automatically held to the substantive terms of its predecessor's collective bargaining contract, even if it hires a majority of the predecessor's employees). It can be argued, however, that *Burns* did not involve a "true" successorship case. Justice Rehnquist (joined by Chief Justice Burger and Justices Brennan and Powell) argued in dissent that the successorship doctrine is based on "the need to grant some protection to employees from a sudden transformation of their em-

trate the danger of commingling the two doctrines.

The Tenth Circuit's adoption of "continuity in the work force" as an alter ego criterion erroneously relies on the successorship cases. The court cites *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*,⁷³ which held that an arms-length successor is not required to arbitrate⁷⁴ the predecessor employer's collective bargaining contract unless there is substantial continuity of the work force.⁷⁵ There are important distinctions, however, between the arms-length successorship and alter ego cases. The

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ployer's business that results in the substitution of a new legal entity, not bound by the collective-bargaining contract . . . but leaves intact significant elements of the employer's business." 406 U.S. at 301. Such a need is not present when the successor employer acquires none of the predecessor's "tangible or intangible assets," 406 U.S. at 305, and the new employer's "only connection with the old employer [was] the hiring of some of the latter's employees." 406 U.S. at 306.

Shortly after *Burns* was decided, Professor Theodore St. Antoine wrote, "the door has been left open for the Court to distinguish *Burns* in some of the more typical successorship situations of sale or merger, and to find the predecessor's contract binding on a true successor." St. Antoine, *supra* note 64, at 276. The Court's *Howard Johnson* decision in 1974 did not close the door on Professor St. Antoine's contention. The Court held that an employer is not required to bargain with its predecessor's union if there is not "continuity of identity in the business enterprise [which] necessarily includes . . . substantial continuity in the identity of the work force." *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249, 263 (1974). Because the successor employer in *Howard Johnson* did not hire a majority of its predecessor's work force, the Court did not need to address the duty to bargain and contract enforceability issues in the event of continuity. It specifically found it "unnecessary . . . to decide . . . whether there is any irreconcilable conflict between *Wiley* and *Burns*." 417 U.S. at 256. Finally, the Court notes: "Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." 417 U.S. at 256.

It is thus possible that Professor St. Antoine's distinction of *Burns* is still valid, and that a contract might be binding on a "true" successor. He maintains that this possibility continues to exist. Interview with Theodore J. St. Antoine, James E. and Sarah A. Degan Professor of Law, University of Michigan Law School (Jan. 20, 1988). If the distinction does exist, this Note's argument for an objective standard is strengthened, because if an arms-length successor can be bound to the terms of its predecessor's contract, *a fortiori* an alter ego employer with the same ownership and control should be bound to its predecessor's contract regardless of its motive for changing corporate form.

73. *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980) (citing 417 U.S. 249 (1974)). See text at note 59 *supra*.

74. *Howard Johnson*, as well as the earlier successorship case of *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964), arose under § 301(a) of the Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 185(a) (1982). Section 301 gives United States district courts jurisdiction to hear suits to enforce collective bargaining contracts. The *Howard Johnson* Court stated, however:

It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims. 417 U.S. at 256. See also *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 511 (5th Cir. 1982) (alter ego and single employer case recognizing same principle).

For the purposes of this Note, it is sufficient to recognize that suits arise in two different forums — § 301 arbitration suits initiated in federal district court and unfair labor practice suits initiated in NLRB agency proceedings — and that both are appealable to United States courts of appeals. The forum is not, however, outcome-determinative.

75. 417 U.S. at 262-64.

Court's own language distinguishes the concepts; in *Howard Johnson*, Justice Marshall writes:

[T]his is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely the disguised continuance of the old employer." *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, *frequently to avoid the effect of the labor laws*, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor *is in reality the same employer* and is subject to all the legal and contractual obligations of the predecessor.⁷⁶

It is important to understand that the two doctrines are based on different underlying policies. The Court's policy concern in the arms-length successorship cases is that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision."⁷⁷ In contrast, the alter ego doctrine focuses on whether the successor "is in reality the same employer."⁷⁸ "The same employer," in terms of the *Crawford Door* criteria,⁷⁹ cannot be allowed to escape its contractual obligations by eliminating its union employees and then claiming "no substantial continuity of identity in the work force."⁸⁰

Although the following point is unrelated to analyzing the validity of "work force" as an alter ego criterion, one final observation should be made about Justice Marshall's description of the alter ego doctrine in *Howard Johnson*. He explains that in alter ego cases an employer may "frequently" change its structure to avoid its NLRA duties. This suggests that there may be circumstances involving a corporate transformation not motivated by a desire to avoid labor commitments that should nonetheless result in alter ego status.

The terms "frequently" and "in reality the same employer" both suggest that an objective inquiry into the alter ego status of a successor employer is appropriate. A motive-based standard cannot, however, be so easily dismissed. The uncertainty over the role of motive is illustrated both by the fact that the courts and the Board have not ac-

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76. 417 U.S. at 259 n.5 (emphasis added).

77. 417 U.S. at 261 (quoting *NLRB v. Burns Intl. Sec. Servs.*, 406 U.S. 272, 287-88 (1972)). The policy considerations attendant to successorship vis-à-vis alter ego are discussed at greater length in Part III.B *infra*.

78. 417 U.S. at 259 n.5.

79. See Part I.B *supra*.

80. 417 U.S. at 264. For example, in *NLRB v. McAllister Bros.*, the "new" employer used its "imagination and talent to initiate an unusual but effective operational change" which basically consisted of eliminating a large number of union employees. 819 F.2d 439, 443 (4th Cir. 1987). (Technically, the argument would be that the "new" employer did not hire the predecessor's union employees.) The court had no trouble finding an alter ego relationship between the old and new employers; however, if work force were a factor, the task would be unjustifiably more difficult.

cepted (nor have they considered) the above interpretation of Justice Marshall's dicta and by their divergent approaches to a motive-based standard. Part II provides an examination of this role.

II. DISAGREEMENT OVER THE ROLE OF EMPLOYER MOTIVE

Despite agreement among the courts of appeals and the NLRB on the *Crawford Door* criteria,⁸¹ disagreement persists over the role of employer motive in determining alter ego status.⁸² This Note places the various positions taken on motive⁸³ by the courts and the Board into three broad categories — "critical," "relevant, but not prerequisite," and "reasonably foreseeable benefit." Within each category, the underlying rationale and possible arguments for and against the approach are discussed. Ultimately, *all* of the current approaches are rejected based on the conclusion that motive is an inappropriate consideration — whether a "successor employer is in reality the same employer"⁸⁴ (*i.e.*, an alter ego) should depend on the identity of the entity itself, not on its reason for becoming that entity. An objective test based on a modified "reasonably foreseeable benefit" standard is proposed to accomplish this result.

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81. See Part I.B *supra*.

82. "Disagreement" is an understatement — almost every court of appeals has considered the role of motive in determining alter ego status, and even though this Note groups the courts into three broad categories, there are several discrete positions within those categories. See Befort, *supra* note 66, at 95-98 (grouping the courts into slightly different, but equally fractured, categories).

The NLRB's position is also inconsistent:

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

Id. at 98 (footnotes omitted).

83. This Note uses the terms "motive," "intent to evade," and "anti-union animus" interchangeably. These terms encompass more than just a personal dislike of the union — motive refers to *any labor-related reason*. For example, in *Advance Elec., Inc.*, 268 N.L.R.B. 1001 (1984), the Board rejected the employer's defense that its change in corporate form was motivated by "economic reasons," equating "the purpose of eliminating the high costs associated with operating Advance as a union contractor" with "evad[ing] Advance's responsibility under the Act to honor its collective bargaining agreement." 268 N.L.R.B. at 1004. See also *Watt Elec. Co.*, 273 N.L.R.B. 655, 658 (1984) (ALJ stated, "Although Watt did not . . . harbor any personal dislike, animus, or hate for the Union, the absence of such a motivation is not determinative"); *Samuel Kosoff & Sons*, 269 N.L.R.B. 424, 429 (1984) (The element of motivation was established where Kosoff admitted to attempting to achieve a competitive position by operation a nonunion firm.); *Hageman Underground Constr.*, 253 N.L.R.B. 60, 68 (1980) ("The new company is considered an *alter ego* or disguised continuance of the old one when it is set up to enable a company to continue operating while ridding itself of a union . . . even though motivated by economic considerations."); Befort, *supra* note 66, at 86 & n.125 (discussing *Watt*). Cf. note 110 *infra* and accompanying text. The motive-based terms used herein should thus be read as *labor-related* (motivated by, *e.g.*, high union costs) and *nonlabor-related* (*e.g.*, Atlas's policy change in *Allcoast*, note 137 *infra*).

84. *Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel & Restaurant Employees*, 417 U.S. 249, 259 n.5 (1974).

A. *The "Critical" Standard*

Three federal courts of appeals have arguably adopted an examination of "[u]nlawful motive or intent [as the] critical inquir[y] in an alter ego analysis."⁸⁵ The First and Eighth Circuits have explicitly ruled to this effect,⁸⁶ while the Third Circuit *probably* falls into this category.⁸⁷ The NLRB itself has not taken a clear position,⁸⁸ while most of the Board's decisions apply a "relevant" standard,⁸⁹ two recent cases indicate that some NLRB members consider motive to be critical.⁹⁰ However, examination of the merits of the "critical" standard demonstrates that it is the least justifiable of the positions currently taken.

As an initial observation, the cases are almost devoid of discussion justifying the "critical" standard. The courts adhering to this standard generally refer to commentators and sister courts for support,⁹¹

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

86. *Penntech*, 706 F.2d at 24; *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 237 (8th Cir. 1986) ("A critical part of the inquiry into alter ego status . . . is whether the employers acted out of anti-union sentiment or to avoid a labor contract."). *See also* *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1311 (8th Cir.) (same), *cert. denied*, 469 U.S. 1088 (1984).

The First and Eighth Circuits have both cited the Tenth Circuit as also supporting intent as a critical element. *See Penntech*, 706 F.2d at 24 (citing *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980)); *Iowa Express*, 739 F.2d at 1311 (same). *But see* *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 & n.6 (6th Cir. 1986) (interpreting *Tricor* as holding intent "relevant, but . . . [not] essential"). The Sixth Circuit would seem to have the better argument, given the Tenth Circuit's statement that "[t]here is no hard-and-fast rule." *Tricor*, 636 F.2d at 270.

87. The Third Circuit uses "fence-sitting" language such as "[a]ssuming without deciding that in this case the General Counsel must prove . . . inten[t] to evade," *NLRB v. Scott Printing Corp.*, 612 F.2d 783, 787 (3d Cir. 1979), and "it is significant, if not crucial, that [the new employer] was created after the filing of unfair labor practice charges." *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 554 (3d Cir. 1983).

88. A precise understanding of each of the standards being applied by the Board and the courts is actually less important than the fact that no consistent and justifiable standard is currently being applied. One commentary on double-breasting is equally appropriate in traditional alter ego cases: "[I]n an area where concrete standards, applied with uniformity, are crucial to unions and employers alike, the law remains largely unascertainable." Comment, *Double-Breasted Operations*, *supra* note 67, at 48.

89. *See* note 133 *infra*.

90. In *Apex Decorating Co.*, 275 N.L.R.B. 1459 (1985), the Board's members could not agree on what standard they were applying to the case. The Board's opinion states:

In adopting the [ALJ's] findings, we have relied on all the factors set forth in his decision, including employer motivation . . . [Member Dennis] declines to join us in this paragraph because in her view antiunion motivation is not a *sine qua non* for a finding of alter ego status. *However, we have made no such assertion in stating our reasons for finding [alter ego status].*

275 N.L.R.B. at 1459 n.3 (emphasis added). Similar confusion over the appropriate standard is apparent in *Leslie Oldsmobile, Inc.*, 276 N.L.R.B. 1314, 1314 n.1 (1985) (Board upheld ALJ's alter ego finding despite lack of intent; one member agreed on the ground that employer had not "rebutted the General Counsel's prima facie case of union animus"). *See also* *Befort*, *supra* note 66, at 98 (discussing *Leslie Oldsmobile*).

91. *See, e.g.*, *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 238 (8th Cir. 1986) (citing *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1310 (8th Cir.) *cert. denied*, 469 U.S. 1088 (1984), which in turn quotes *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18,

but these sources themselves fail to provide a rationale for the position,⁹² and predate the alter ego cases decided in the 1980s that address the role of motive. Three of the strongest arguments supporting the standard, all of which ultimately fail, are the courts' reliance on the language of *Southport Petroleum Co. v. NLRB*,⁹³ a statement by the Eighth Circuit that appears to "temper" its position, and a possible analogy to the "runaway shop" context in which some courts of appeals allow a "business necessity" defense to a finding that a plant removal or relocation violates section 8(a)(3).⁹⁴

At first glance it seems that those courts employing a "critical" standard most closely follow the language and holding of *Southport*. The Supreme Court explicitly stated the question as "[w]hether there was a *bona fide* discontinuance and a true change of ownership — which would terminate the duty of reinstatement created by the Board's order — or merely a *disguised continuance* of the old employer . . . ."⁹⁵ The courts following the "critical" standard have extended this language in stating that the purpose of the test is to prevent a "sham transfer of assets."⁹⁶

Although the language of *Southport* might seem to support this extension, the Court's holding was limited to much narrower grounds in which the intent to evade was clear.⁹⁷ In addition, the array of court and Board opinions examined in this Part demonstrates that there is no clear agreement as to what the language of *Southport* requires. Finally, the Supreme Court itself has cast doubt on the limiting language of *Southport* in the successorship case of *Howard Johnson Co. v. Detroit Local Joint Executive Board Hotel & Restaurant Employees*.⁹⁸ Justice Marshall's description of alter ego cases as involving "mere technical change[s] . . . frequently to avoid the effect of the labor

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24 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983)). *Iowa Express* also cites Note, *Bargaining Obligations*, *supra* note 65, at 638-39; *Penntech Papers*, 706 F.2d at 24 (citing *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980), and quoting Note, *Bargaining Obligations*, *supra* note 65, at 638); *NLRB v. Scott Printing Corp.*, 612 F.2d 783, 790 (3d Cir. 1979) (quoting *Slicker*, *supra* note 64, at 1064 and T. KHEEL, *LABOR LAW* § 17.02[3] (1972)).

92. *E.g.*, Note, *Bargaining Obligations*, *supra* note 65, at 639 (stating that an "employer must act from anti-union animus"). The Note does not give a reason for the requirement, and simply cites a Sixth Circuit case from 1963, *NLRB v. Herman Bros. Pet Supply*, 325 F.2d 68 (6th Cir. 1963), which is no longer valid law in that jurisdiction. See *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986) (intent is "relevant").

93. 315 U.S. 100 (1942).

94. 29 U.S.C. § 158(a)(3) (1982).

95. *Southport*, 315 U.S. at 106 (emphasis added).

96. *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 238 (8th Cir. 1986) (citing *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1310 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984), which in turn quotes *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 24 (1st Cir.), *cert. denied*, 464 U.S. 892 (1983)).

97. See Part I.B.1 *supra*.

98. 417 U.S. 249 (1974).

laws,”⁹⁹ and his statement that the purpose of the alter ego inquiry is to determine whether the successor employer “is *in reality* the same employer,”¹⁰⁰ suggest intent is not *required*. At most, intent should be a “relevant” consideration in those “frequent” cases described by the Court. This Note maintains, however, that it is better to concentrate on the “same employer” language — inquiring as to whether an entity is objectively unchanged — rather than asking the reason for a technical change in corporate form.¹⁰¹

Proponents of the “critical” standard may attempt to justify it as simply a stronger form of the “relevant” standard. In *Crest Tankers, Inc. v. National Maritime Union*,¹⁰² the Eighth Circuit stated:

The Sixth Circuit has recently accepted an argument that a finding of anti-union animus or “employer intent [to evade obligations under the NLRA] is not essential or prerequisite to imposition of alter ego status.” *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986) . . . . A requirement that employer intent be demonstrated could hinder the goals of the doctrine, the *Allcoast* Court said: “[A]n employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporations’s structure based on some legitimate business reason, retaining essentially the same business and utilizing the change to escape the unwanted obligations.” 780 F.2d at 582. *We consider the difference between this statement and our position . . . to be largely one of degree*, and note that the mere existence of “some legitimate business reason” for a change in corporate organization should not alone prevent a finding of alter ego status.¹⁰³

This argument is deficient in two respects. First, it has little force unless one accepts the proposition that intent has *some* role in an alter ego analysis.¹⁰⁴ Second, the “difference . . . of degree” is vast — the Eighth Circuit reads *Allcoast* too narrowly. Although the *Allcoast* court is concerned with the danger of pretext in that case, it states the alter ego test in broader terms: “[A] finding of employer intent . . . is merely *one of the relevant factors* the Board *can* consider . . . . [T]he alter ego analysis should be *flexible*.”¹⁰⁵ The test does not rule out finding alter ego status without considering intent — the Board could even find alter ego status if an employer’s sole justification for its corporate transformation was a legitimate business reason.¹⁰⁶ In contrast,

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99. 417 U.S. at 259 n.5 (emphasis added). See Part I.C *supra*.

100. 417 U.S. at 259 n.5 (emphasis added).

101. See Parts II.C and III *infra*.

102. 796 F.2d 234 (8th Cir. 1986).

103. 796 F.2d at 238 n.2 (bracketed material in original, selected citations omitted, emphasis added).

104. This Note rejects *all* of the motive-based standards in favor of an objective test. See Parts II.B, II.C & III *infra*.

105. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 581 (6th Cir. 1986) (emphasis added).

106. However, this interpretation of *Allcoast* may itself be too broad. The court states that “[a]n inquiry into employer intent may be appropriate in other situations involving application of

the Board has no such flexibility under the Eighth Circuit's test — it can consider the *Crawford Door* factors “‘til the cows come home,” but ultimately it cannot find alter ego status without first finding an intent to evade.

A third potential justification for the “critical” standard turns on an analogy to the “runaway shop” cases, in which the employer relocates, or shifts work from a union to a nonunion plant. While “[t]here is general agreement that if the employer’s move is motivated by hostility toward and a desire to escape the union, the action violates Section 8(a)(3),”¹⁰⁷ the Supreme Court has not spoken on whether animus is required,¹⁰⁸ and some courts of appeals have allowed a “business necessity” defense.¹⁰⁹ Considering intent to be a “critical” requirement in alter ego cases likewise implies that a “business necessity” defense¹¹⁰ would negate an alter ego finding.

The analogy between the use of intent in “runaway shop” cases and its use in alter ego situations does not survive close examination. First, the factual context and legal consequences in which “runaway shop” and alter ego cases arise implicate different policies. In an alter ego case, the employer’s argument is that the reason it is neither obli-

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the alter ego doctrine but here it simply is not necessary.” 780 F.2d at 583. It notes that “the record shows some evidence of anti-union animus.” 780 F.2d at 583 n.9.

107. A. COX, D. BOK & R. GORMAN, *supra* note 1, at 246. See Local 57, Intl. Ladies’ Garment Workers’ Union v. NLRB (Garwin Corp.), 374 F.2d 295, 298 (D.C. Cir. 1967) (citation omitted) (“While an employer may terminate his business for any reason, it is equally well-settled that he may not transfer its situs to deprive his employees of rights protected by Section 7.”), *cert. denied*, 387 U.S. 942 (1967).

108. Although the Court has ruled that “an employer has the absolute right to terminate his entire business for any reason,” *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965), it specifically stated in that case that it was “not presented . . . with a case of a ‘runaway shop,’ whereby Darlington would transfer its work to another plant or open a new plant in another locality to replace its closed plant.” 380 U.S. at 272.

109. See, e.g., *NLRB v. Rapid Bindery, Inc.*, 293 F.2d 170, 175 (2d Cir. 1961) (“Though there may have been animosity between the Union and Rapid, animosity furnishes no basis for the inference that this was the preponderant motive for the move when convincing evidence was received demonstrating business necessity.”); *NLRB v. Lassing*, 284 F.2d 781, 783 (6th Cir. 1960) (“[T]he change was made because of reasonably anticipated increased costs, regardless of whether this increased costs [sic] was caused by the advent of the Union or by some other factor . . .”), *cert. denied*, 366 U.S. 909 (1961). It could be argued, however, that the alter ego cases themselves militate against considering intent as “critical,” because the courts involved — the Second and Sixth Circuits — have both *rejected* intent as “critical” in an alter ego context.

The economic motive/animus distinction is itself open to criticism. Some questions raised in the “runaway shop” context are:

Is it practical, or even possible, to authorize relocations or plant removals motivated by the anticipation of increased costs which a union will bring, but to hold illegal such action when motivated by “anti-union animus”? What is anti-union animus, if not a resistance to the union because of the economic burdens it will impose . . . ? Are not these added labor-related costs exactly what engenders employer antipathy toward the union? How often is it that the employer nurtures “anti-union animus” which is not economically based? If such is rare indeed, then what is left of Section 8(a)(3) in these kinds of cases?

A. COX, D. BOK & R. GORMAN, *supra* note 1, at 247.

110. A “business necessity” defense was in essence asserted by the employer in *Allcoast*. See Part II.B *infra*.

gated to bargain nor bound to its predecessor's collective bargaining contract is because it is an entirely "new" corporation. In contrast, a "runaway shop" involves the same employer — there is no contention that the employer is free of *all* obligations due to the relocation. Even though an employer may not have the duty to bargain with the union over its decision to shift work, it will still be bound to bargain over the effects of its decision, and may also be required to continue recognizing the union.

Second, "runaway shops" generally involve some finding of discrimination under section 8(a)(3).¹¹¹ Alter ego cases, in contrast, almost always focus on refusal-to-bargain charges under section 8(a)(5), and only sometimes involve discrimination charges under section 8(a)(3).¹¹² The Supreme Court set out the appropriate section 8(a)(5) standard in *NLRB v. Katz*.¹¹³ In that case, the employer unilaterally changed several terms that were the subject of upcoming negotiations with the union.¹¹⁴ The Court rejected the employer's argument that it had changed the terms in "good faith," stating:

A refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. . . . [I]t is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.¹¹⁵

Nothing circumvents an alter ego employer's duty to negotiate more than a flat refusal to bargain with the union on *any* subject. Unlike the "runaway shop" cases, in which the union continues to be recognized and bargained with, the alter ego employer — claiming to be entirely "new" — refuses to recognize the union, to bargain, and to honor its collective bargaining agreement.

Finally, even conceding that section 8(a)(3) has general applicability to alter ego cases, this does not justify the "critical" standard. The Supreme Court's holding in *NLRB v. Erie Resistor Co.*¹¹⁶ supports the proposition that some employer actions do not require a specific find-

111. A. COX, D. BOK & R. GORMAN, *supra* note 1, at 246.

112. See note 12 *supra*. See also Cox, *A Reexamination of the Role of Employer Motive under Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act*, 5 U. PUGET SOUND L. REV. 161, 170 (1982) (footnotes omitted) ("The standard wisdom has been and continues to be that motive . . . is an element of Section 8(a)(3).").

113. 369 U.S. 736 (1962).

114. 369 U.S. at 737.

115. 369 U.S. at 743 (emphasis added).

116. 373 U.S. 221 (1963). The *Erie Resistor* analysis is also applied in "lockout" cases. See *American Shipbldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). "Lockouts" are the counterpart to an employee strike — the employer "locks out," *i.e.*, withholds work from, the employees as an economic weapon/response to the employees' concerted activities. Although a discussion of these cases is beyond the scope of this Note, the literature concerning "lockout" cases is extensive. See Cox, *supra* note 112, at 163 n.4 (listing 14 sources).

ing of intent because they are *inherently* destructive of employee rights. In *Erie Resistor*, the employer decided to continue operations after its union employees went on strike.¹¹⁷ It hired replacement workers, giving them "super-seniority" (by adding twenty years to the length of service) for purposes of future layoffs and recalls.¹¹⁸ Nine months after the strike ended, Erie's work force was half its prestrike size, and many of the union workers without "super-seniority" had been laid off.¹¹⁹ The union filed unfair-labor-practice charges under sections 8(a)(1) and (3), challenging the super-seniority plan and the resulting layoffs.¹²⁰ The NLRB's holding that specific evidence of discriminatory intent was not required was reversed by the Third Circuit.¹²¹ The Supreme Court, however, agreed with the Board, stating:

We think the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge. . . . "Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. . . ."

. . . .

The outcome may well be the same [as when specific evidence of subjective intent is shown] when intent is founded upon the *inherently discriminatory or destructive nature of the conduct itself*. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions . . . .¹²²

The destructive effect of a corporate transformation on employee rights is equally evident in an examination of the policy considerations attendant to alter ego cases.¹²³ Thus, whether the problem is approached from a section 8(a)(3) discrimination perspective, or from that of a section 8(a)(5) refusal-to-bargain,¹²⁴ the "critical" standard (as well as the standards below that consider intent in some lesser degree) cannot be justified.

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117. 373 U.S. at 222-23.

118. 373 U.S. at 223.

119. 373 U.S. at 224.

120. 373 U.S. at 224.

121. 373 U.S. at 225-26.

122. 373 U.S. at 227-28 (citations omitted; emphasis added). The Supreme Court reiterated this position in the "lockout" cases. *See American Shipbldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965) ("[S]ome practices . . . are inherently so prejudicial to union interests and so devoid of significant economic justification that no specific evidence of intent to discourage union membership or other antiunion animus is required."); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) ("[I]f it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.").

123. *See* Part III *infra*.

124. *See* text at notes 111-15 *supra*.

B. The "Relevant, but Not Prerequisite" Standard

In contrast to the "critical" standard, seven federal courts of appeals — the Second,¹²⁵ Fifth,¹²⁶ Sixth,¹²⁷ Seventh,¹²⁸ Ninth,¹²⁹ Tenth,¹³⁰ and District of Columbia¹³¹ Circuits — have in varying degrees adopted a standard in which "employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors the Board can consider . . . ."¹³² Most of the NLRB's members have also apparently adopted this approach.¹³³ Although there are several discrete "variations on a theme" among the courts in stating the "relevant" standard,¹³⁴ the differences are not significant to analyzing the merits of this approach. The focus in this discussion will therefore center on the Sixth Circuit's thoughtful reflection on the "relevant" standard in *NLRB v. Allcoast Transfer*,

125. *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984).

126. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

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

128. *NLRB v. Bell Co.*, 561 F.2d 1264, 1268 n.4 (7th Cir. 1977). The Seventh Circuit appeared to require intent in a more recent case by including "unlawful motivation" in its recitation of the elements proven by the General Counsel. *NLRB v. Dane County Dairy*, 795 F.2d 1313, 1322 (7th Cir. 1986). However, the employer was "openly hostile," 795 F.2d at 1322, and the court makes no mention of *Bell*. It is safe to assume that the Seventh Circuit still adheres to the "relevant" standard.

129. *Tanaka Constr. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982).

130. *NLRB v. Tricor Prods.*, 636 F.2d 266, 270 (10th Cir. 1980).

131. *Fugazy Continental Corp. v. NLRB*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

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

133. *See, e.g.*, *Apex Decorating Co.*, 275 N.L.R.B. 1459, 1459 n.2 (1985); *Advance Elec., Inc.*, 268 N.L.R.B. 1001, 1002 (1984); *Fugazy Continental Corp.*, 265 N.L.R.B. 1301, 1302 (1982), *enforced*, 725 F.2d 1416 (D.C. Cir. 1984); *Watt Elec. Co.*, 273 N.L.R.B. 655, 658 (1984) (statement of ALJ); *Samuel Kosoff & Sons*, 269 N.L.R.B. 424, 429 (1984) (statement of ALJ).

134. For example, both the Second and Sixth Circuits stress a "flexible approach . . . allowing the Board to weigh all the relevant factors instead of requiring it to always show the employer's intent to evade." *Allcoast*, 780 F.2d at 582; *Goodman Piping Prods. v. NLRB*, 741 F.2d 10, 11 (2d Cir. 1984). The D.C. Circuit has assigned a slightly greater role to motive, giving it "substantial weight." *Fugazy*, 725 F.2d at 1419.

Although there is some dispute about the Tenth Circuit's position, *see* note 86 *supra*, the court's language positions it most comfortably with the "relevant" standard. In *Tricor*, the court states:

There is no hard-and-fast rule. If an employer makes changes in its business operation to deliberately get rid of the union, the employer is more likely to be an alter ego. If, however, the employer has legitimate economic reasons for the changes, and is not motivated by anti-union sentiment, the second employer is more likely to be deemed a mere successor . . . . [W]e think evidence of anti-union sentiment by an employer . . . is germane.

636 F.2d at 270 (emphasis added).

Finally, the Ninth Circuit's position on the role of motive is unclear. While it has stated that "[n]o factor is controlling and all need not be present," *Tanaka Constr. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982), seemingly placing it in the "relevant" category, it cites the *Radio Union* "single employer" factors as its alter ego test. *See* note 66 *supra*. The Fifth Circuit has pointed out the Ninth Circuit's failure to see that "the doctrines are conceptually distinct." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 n.7 (5th Cir. 1982). *See also* *Befort*, *supra* note 66, at 100 & n.233 (same).

*Inc.*¹³⁵ This subpart will show that although *Allcoast* overcomes many of the shortcomings of the “critical” standard, the “relevant” standard still retains the potential of failing at both extremes — erroneously *failing to find* alter ego status by allowing a legitimate business justification defense, and *finding* alter ego status by considering animus even though the predecessor employer received no foreseeable benefit.

A brief recitation of *Allcoast*’s facts will help in understanding the court’s analysis of the “relevant” standard. The employer originally operated in the moving business under both its own Interstate Commerce Commission (ICC) license and as an agent for Atlas Van Lines under Atlas’s ICC license.¹³⁶ Atlas subsequently adopted a new policy prohibiting its agents from operating concurrently under their own and Atlas’s licenses; however, Atlas suggested that operating the licenses under two separate corporations would be acceptable.¹³⁷ Mr. Harris, the owner, took Atlas’s advice and split the predecessor corporation into *two* successor companies.¹³⁸ While he conceded that one of the new entities (*Allcoast Transfer*) was bound to the predecessor’s collective bargaining agreement, he claimed that the second entity (*Ward Moving*) was a “new” corporation and was free from all collective bargaining obligations.¹³⁹

There was no dispute that the *Crawford Door* factors were met.¹⁴⁰ Harris’s sole contention was that intent to evade “is a prerequisite for imposition of alter ego status,”¹⁴¹ and that the “change in corporate form was necessitated solely by Atlas’ policy change.”¹⁴² After thoroughly examining the existing standards — “critical,” “relevant, but not prerequisite,” and “foreseeable benefit” — Judge Contie, speaking for a unanimous court, concluded that “a finding of employer intent is not essential or prerequisite to imposition of alter ego status. Instead, it is merely one of the relevant factors . . . .”¹⁴³

Judge Contie’s arguments against adopting a “critical” standard were based on the danger of pretext and on the need for flexibility:

If we were to require a finding of employer intent, an employer who

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135. 780 F.2d 576 (6th Cir. 1986).

136. 780 F.2d at 577.

137. 780 F.2d at 577-78.

138. 780 F.2d at 578.

139. 780 F.2d at 578. As discussed earlier, *Allcoast* is a nontraditional “double-breasting” case. See note 67 *supra*.

140. See Part I.B *supra*. For example, the Board found identical ownership of the corporations. 780 F.2d at 582. Mr. Harris admitted, “I own both companies . . . .” Brief for NLRB at 14, *Allcoast* (No. 84-591). As was noted earlier, however, neither the Board nor the courts require absolute identity of ownership. See note 54 *supra*. Mr. Harris also managed both companies and made all major policy decisions. 780 F.2d at 582. In addition, both companies used their equipment interchangeably and operated out of the same facility. 780 F.2d at 578.

141. 780 F.2d at 579.

142. 780 F.2d at 579.

143. 780 F.2d at 581.

desired to avoid union obligations *might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason*, retaining essentially the same business, and utilizing the change to escape unwanted obligations. Our *flexible approach* will discourage such attempts at circumvention by allowing the Board to weigh all the relevant factors . . . . Accordingly, even when *purportedly legitimate reasons* support an alteration in structure, the Board can prevent an employer from avoiding obligations under the Act.¹⁴⁴

The court's pretextual argument is a valid criticism of the "critical" standard, given that employers with evasive intent have in fact made this contention.¹⁴⁵ Unfortunately, the "flexibility" given to the Board to prevent circumvention by "*purportedly* legitimate reasons" leaves open the possibility of a defense to alter ego status when there actually is a legitimate business justification.¹⁴⁶ As Part III maintains, legitimate employee expectations will be defeated if an entity that is "in reality the same employer,"¹⁴⁷ determined on an objective basis, can avoid its collective bargaining obligations for any reason — including a nonlabor-related reason.¹⁴⁸

At the other extreme, the "flexibility" provided by the *Allcoast* decision could potentially result in the Board's overvaluing the presence of animus — finding an alter ego relationship where there is no foreseeable benefit to the predecessor employer — contravening *Textile*

144. 780 F.2d at 582 (emphasis added).

145. Harris in *Allcoast* may have had such evasive intent. The court noted: "[E]ven though the Board made no finding regarding Harris' intent, the record shows some evidence of anti-union animus. At the hearing before the ALJ, Harris testified 'I don't want it [the union], I'll be honest with you, who needs it, who wants it.'" 780 F.2d at 583 n.9 (brackets in original). See also note 146 *infra*; notes 207-14 *infra* and accompanying text.

146. Judge Contie states, "An inquiry into employer intent may be appropriate in other situations involving application of the alter ego doctrine . . . ." 780 F.2d at 583. He continues, "Harris viewed a change in corporate structure as the opportunity to evade unwanted obligations under the Act." 780 F.2d at 583 n.9. The general tenor of the court's discussion leaves open the possibility that an alter ego relationship might not be found if there were a corporate transformation in response to a legitimate business reason, even if the "new" employer were "in reality the same employer."

The Board's decision not to find alter ego status might go something like this: "Animus is relevant; there is no animus present in this case, so the employer's good faith transformation outweighs the other *Crawford Door* criteria which are admittedly present." But see Reply Brief for Respondent at 5, *Allcoast* (No. 84-5961) ("It is undoubtedly true that intent *alone* cannot give rise to a Section 8(a)(5) violation: an employer may unabashedly hope to 'evade his obligations under the Act' but, in the absence of sufficient organizational similarity, the employer presumably could not be deemed to be an *alter ego*." (emphasis in original)).

147. See text at note 76 *supra*.

148. To argue that the successor employer who is "in reality the same employer" should be allowed to avoid its union obligations because of a change for a nonlabor-related reason is a non sequitur. As the ALJ pointed out in *Allcoast*:

While these circumstances may explain the decision to create Ward Moving as a separate corporation, they do not explain a totally separate and subsequent decision on Harris' part in refusing to apply . . . the terms and conditions of employment which governed their performance of Atlas work prior to the change in corporate structure.

Allcoast Transfer, 271 N.L.R.B. 1374, 1379 (1984) (statement of ALJ), *enforced*, *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986).

*Workers Union v. Darlington Manufacturing Co.*¹⁴⁹ The Eighth Circuit's explanation of the relevance of motive, although in the context of the "critical" standard, provides a glimpse of this danger:

[A] number of factors, including anti-union motivation, are being treated as relevant to the question whether one employer, formally separate, should be viewed as legally the same as another. When the requisite degree of anti-union motivation is present, this question is answered "yes," even though the other factors considered might not suffice to produce this result.¹⁵⁰

One example of animus overvaluation is the NLRB's decision in *Denzil S. Alkire*.¹⁵¹ In that case, the Board overruled the ALJ's finding that, despite animus evident by both the employer and union,¹⁵² the Supreme Court's holding in *Darlington* allowed the employer to go out of business.¹⁵³ The Fourth Circuit rejected the Board's finding of alter ego status based on the lack of a foreseeable benefit to the predecessor employer.¹⁵⁴ The Fourth Circuit's "reasonably foreseeable benefit" approach — which prevents the overvaluation of animus displayed by the Board in *Alkire* — was rejected out of hand by Judge Contie as falling within the "critical" rubric.¹⁵⁵ If the Fourth Circuit's test unambiguously fell within this rubric, Judge Contie's rejection of the test would be appropriate; however, the test can also be applied on an objective basis, and thus deserves additional scrutiny.

C. The "Reasonably Foreseeable Benefit" Standard

The Fourth Circuit's approach to the alter ego test is based on the concept of a "reasonably foreseeable benefit." In *Alkire v. NLRB*,¹⁵⁶ Judge Gordon, speaking for a divided court, stated the two-step analysis:

When business operations are transferred, the initial question is whether substantially the same entity controls both the old and new employer. If this control exists, then the inquiry must turn to whether the transfer resulted in an expected or *reasonably foreseeable benefit* to the old employer related to the elimination of its labor obligations.¹⁵⁷

149. 380 U.S. 263, 268 (1965) ("an employer has the absolute right to terminate his entire business for any reason he pleases").

150. *Crest Tankers, Inc. v. National Maritime Union*, 796 F.2d 234, 236 n.1 (8th Cir. 1986).

151. 259 N.L.R.B. 1323 (1982), *enforcement denied*, *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983). For a detailed discussion of the case, see notes 160-69 *infra* and accompanying text.

152. "When Alkire [the employer] told the assembled employees that he could not afford to operate under union scale, they responded with applause." 259 N.L.R.B. at 1329.

153. See text at notes 164-67 *infra*.

154. *Alkire*, 716 F.2d at 1021. The Fourth Circuit's "foreseeable benefit" approach is discussed at length in Part II.C *infra*.

155. See *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579 n.4 (6th Cir. 1986) ("A similar, but purportedly broader [than the 'critical' standard], approach was adopted by the Fourth Circuit . . .").

156. 716 F.2d 1014 (4th Cir. 1983).

157. 716 F.2d at 1020 (emphasis added).

The “reasonably foreseeable benefit” test provides an excellent foundation for overcoming the problems of both the “critical” and “relevant” standards. This section explores the court’s rationale for the approach, its advantages relative to the previously discussed standards, and two ways in which it can be strengthened — first, through the explicit retention of the *Crawford Door* factors;¹⁵⁸ and second, by considering whether the change “resulted in”¹⁵⁹ a foreseeable benefit, *regardless of the motive for that change*.

In *Alkire*, the employer informed his employees that he was going out of business, and subsequently entered a sale-lease agreement with a successor corporation (Mountaineer) formed by a former employee for the purpose of taking over the business.¹⁶⁰ The sales agreement provided that, until financing was attained to complete the sale, the former owner (Alkire) would receive the net profits from the business, as well as a weekly consulting fee.¹⁶¹ After a coal strike that had caused the lay-off of most of Alkire’s coal-hauling truckers ended, the “new” employer, Mountaineer, refused to rehire many of the former Alkire employees,¹⁶² resulting in section 8(a)(1) and 8(a)(3) charges.¹⁶³

The Administrative Law Judge found that

Alkire terminated his employees for a nondiscriminatory and lawful reason; namely, because he was going out of business. An employer has an absolute right, under the Act, to go out of business regardless of the motivation. *Textile Workers Union v. Darlington Manufacturing Co.*, 380 U.S. 263, 268 (1965).¹⁶⁴

The NLRB disagreed with the ALJ’s characterization of the case as “involving, simply, an employer’s right to go out of business.”¹⁶⁵ It found “that the Administrative Law Judge failed to analyze properly the complaint . . . . Central to [this action is] whether an *alter ego* relationship existed . . . .”¹⁶⁶ The Board proceeded to focus on the *Crawford Door* factors, rejecting the ALJ’s finding that Alkire had gone out of business, and finding the existence of an alter ego relation-

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158. The discussion in Part I.B *supra* addresses the *Crawford Door* factors in detail; therefore, the factors will not be reviewed in this Part.

159. See text at note 157 *supra*.

160. 716 F.2d at 1016.

161. 716 F.2d at 1017.

162. 716 F.2d at 1017.

163. 29 U.S.C. § 158(a)(1), (3) (1982). The § 8(a)(3) discrimination charge rested upon Mountaineer’s “requiring the employees to file new employment applications . . . and by . . . [denying or delaying the recall of] economic strikers . . . who had made unconditional offers to return to work.” Denzil S. Alkire, 259 N.L.R.B. 1323, 1323 (1982), *enforcement denied*, Alkire v. NLRB, 716 F.2d 1014 (4th Cir. 1983). For the text of § 8(a)(3), see note 12 *supra*. For a discussion of the derivative nature of § 8(a)(1), see note 11 *supra*.

164. 259 N.L.R.B. at 1331 (statement of ALJ).

165. 259 N.L.R.B. at 1325.

166. 259 N.L.R.B. at 1324.

ship.¹⁶⁷ The Fourth Circuit, however, denied enforcement of the Board's decision, agreeing with the ALJ's *Darlington* analogy. Judge Gordon compared the competing policies of an employer's right to go out of business with the successor doctrine's pronouncement that

[s]urrounding circumstances . . . viewed in light of national labor policy, may "require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964).¹⁶⁸

The court concluded that the addition of a "reasonably foreseeable benefit" requirement set the proper bounds of these competing policies.¹⁶⁹

Regardless of whether the Fourth Circuit's test is viewed as objective or motive-based, the "reasonably foreseeable benefit" approach has certain advantages over the other standards. For example, unlike the "critical" standard, the "reasonably foreseeable benefit" approach comports more closely with the Supreme Court's description of the alter ego doctrine in *Howard Johnson*. Justice Marshall there described the doctrine as applicable to transformations designed "*frequently* to avoid the effect of the labor laws."¹⁷⁰ The "critical" standard will allow an employer to escape alter ego status unless intent to evade is shown; yet, Justice Marshall did not describe such transformations as being designed "*always*" to avoid the effect of the labor laws. Likewise, a "reasonably foreseeable benefit" approach is superior to the "relevant" standard because it provides a safeguard against Board overvaluation of animus in contravention of the Supreme Court's holding in *Darlington*.¹⁷¹

Unfortunately, it is unclear whether the Fourth Circuit would allow an employer to escape alter ego status if the employer had a legitimate business reason for making a change in corporate form that also *resulted in* a benefit related to eliminating labor obligations. Although the *Alkire* test's objective language appears to prevent exactly this situ-

167. 259 N.L.R.B. at 1324-26.

168. *Alkire v. NLRB*, 716 F.2d 1014, 1018 (4th Cir. 1983) (parallel citations omitted).

169. 716 F.2d at 1020. The court's stated rationale was this:

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

716 F.2d at 1020 (emphasis added). For a discussion of the competing policy considerations, see Part III *infra*.

170. See text at note 76 *supra*.

171. *Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees*, 417 U.S. 249, 259 n.5 (1974) (emphasis added); see also text at notes 149-55 *supra*.

ation,¹⁷² Judge Gordon appears to let motive in through the back door, stating, "Linking employer motivation for the transfer of its business to obtaining a future benefit represents a broader standard than does requiring '[a]nti-union animus or intent to evade labor obligations'. . . ."¹⁷³ The Sixth Circuit,¹⁷⁴ scholarly commentary,¹⁷⁵ and the *Alkire* dissent itself,¹⁷⁶ view this language as supporting the proposition that motive is a relevant or even a critical consideration in the Fourth Circuit's "reasonably foreseeable benefit" test. The Fourth Circuit recently reiterated this motive-based language in *NLRB v. McAllister Bros.*¹⁷⁷

There are two possible approaches to reconciling the Fourth Circuit's apparently motive-based "foreseeable benefit" test with this Note's position that motive is not relevant. One approach is to analyze the circumstances in *Alkire* and *McAllister*, as well as the *Darlington* analogy on which the court's test is based. Neither *Alkire* nor *McAllister* involved an employer that changed its corporate form for a legitimate business reason while casting off its labor obligations as a secondary consideration.¹⁷⁸ No legitimate business reason validated *Alkire*'s transformation; rather, the predecessor employer was found to have gone out of business while receiving no foreseeable benefit from the successor employer¹⁷⁹ — a situation in which the *Darlington* analogy holds motive to be irrelevant.

Likewise, *McAllister* did not involve an employer changing its corporate form for a legitimate business reason. Judge Sprouse, speaking

172. See text at note 157 *supra*.

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

174. See note 155 *supra* and accompanying text.

175. See Befort, *supra* note 66, at 97 (The Fourth Circuit "recast[s] the alter ego test by requiring a finding of intent but in a purportedly more lenient form.").

176. Judge Sprouse's dissenting opinion in *Alkire* focused on his disagreement with the majority over the role of motive:

My principal disagreement . . . is with the majority's conclusion that "employer motivation" is central to determining alter ego status. As the majority concedes, [*Southport*] does not require the NLRB to show that the employer intended to evade the purposes of the NLRA, in order to find alter ego status. Nor has such a requirement been imposed by the many courts which have discussed Board findings of alter ego status. . . .

Employer motivation may be relevant to this inquiry, but it is certainly not, as the majority apparently believes, determinative.

716 F.2d at 1022 (Sprouse, J., dissenting) (citations omitted; emphasis added). He thus viewed the Fourth Circuit as adopting the "critical" standard. But see *NLRB v. McAllister Bros.*, 819 F.2d 439, 445 n.14 (4th Cir. 1987) (Judge Sprouse's majority opinion, although supposedly following the *Alkire* precedent, states: "imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws.").

177. 819 F.2d 439, 445 (4th Cir. 1987) ("[T]he elimination of . . . [the predecessor employer's] bargained-for employee commitments was the instrumental purpose motivating the transfer to . . . [the successor employer]."). The court's language is softened by its footnote stating that intent is not always required, and also by the fact that the *McAllister* court found clear evidence of animus. 819 F.2d at 445 n.14.

178. See notes 160-69 & 177 *supra* and accompanying text.

179. See notes 168-69 *supra* and accompanying text.

for a unanimous court, found that the predecessor employer's "elimination of . . . bargained-for employee commitments was the instrumental purpose motivating the transfer to [the successor employer]." ¹⁸⁰ Judge Sprouse's statement that "imposition of alter-ego status under *Alkire* does not hinge on proof that the employer intended to evade the labor laws," ¹⁸¹ while dicta, demonstrates that the court might be willing to find alter ego status in spite of a transformation motivated by a nonlabor-related reason. The language of the test itself — which uses the term "resulted in," ¹⁸² rather than "motivated by," a reasonably foreseeable benefit — supports this interpretation.

Finally, the Fourth Circuit's *Darlington* analogy must be viewed in light of the *Darlington* case itself. *Darlington* Manufacturing Company owned and operated one textile mill. ¹⁸³ A majority of its stock, however, was held by the Milliken family (headed by Roger Milliken), which controlled seventeen textile manufacturers and twenty-seven mills. ¹⁸⁴ After the union won representation at *Darlington* in a bitterly contested election, Milliken decided to liquidate the company. ¹⁸⁵

The NLRB found that the closing was motivated by anti-union animus in violation of section 8(a)(3). ¹⁸⁶ The Fourth Circuit, however, denied enforcement of the Board's order, finding an absolute right to close all *or part* of a business for any reason, including animus. ¹⁸⁷ Justice Harlan, speaking for the Court, agreed that an employer has the right to close *all* of its business for any reason; however, he did *not* agree with the Fourth Circuit's assertion that such a right exists for a partial closure, stating, "[A]n employer has the absolute right to terminate his entire business for any reason he pleases, but . . . such right [does not] include [ ] the ability to close part of a business no matter what the reason." ¹⁸⁸

Darlington should be viewed as a section 8(a)(3) discrimination case, in which motive is an important inquiry *unless* an employer closes the entire business. This principle is equally important in setting the outer bounds of finding an alter ego relationship; however the

180. *McAllister*, 819 F.2d at 445.

181. 819 F.2d 445 n.14; *see also* note 176 *supra*.

182. *Alkire*, 716 F.2d at 1020; *see also*, text at note 157 *supra*.

183. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 265 (1965).

184. 380 U.S. at 265.

185. 380 U.S. at 265-66.

186. 380 U.S. at 267.

187. 380 U.S. at 268.

188. 380 U.S. at 268. The Court remanded *Darlington* to the Board to consider whether § 8(a)(3) was violated:

[A] partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and *if the employer may reasonably have foreseen* that such closing would likely have that effect.

380 U.S. at 275 (emphasis added).

“discrimination” focus of section 8(a)(3), appropriate in *Darlington*, is not necessary in the typical alter ego case, which involves an objective section 8(a)(5) inquiry.¹⁸⁹

A second possible approach to reconciling the Fourth Circuit’s apparently motive-based standard and an objective standard is simply to accept that the court will consider motive in some degree.¹⁹⁰ However, the analysis up to this point has shown the need for an objective inquiry, and the *language* of the “reasonably foreseeable benefit” test supports such an inquiry.¹⁹¹ This Note suggests rewording the Fourth Circuit’s “foreseeable benefit” test as follows, in order to include the *Crawford Door* factors explicitly and to state the objective nature of the test:

When business operations are transferred, the initial question is whether the old and new employer are the same employer in fact, given the Board’s consideration of the following factors: substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership. If the employers are determined by the Board to be in reality the same employer, then the inquiry must turn to whether the transfer resulted in an expected or *reasonably foreseeable benefit* to the old employer related to the elimination of its labor obligations, regardless of the motivation for the change in corporate form.¹⁹²

Policy considerations lend further support to this modified approach.

III. POLICY CONSIDERATIONS: ACCOMMODATING EMPLOYEE EXPECTATIONS AND EMPLOYER FREEDOM

Beyond Congress’s broad mandate to “promote industrial peace and equality of bargaining power”¹⁹³ by “removing certain recognized sources of industrial strife,”¹⁹⁴ the NLRB and the courts are given little legislative guidance. The task of reconciling “[t]he inherent tension between entrepreneurial prerogative and employee security”¹⁹⁵ is thus left to the Board,¹⁹⁶ with judicial oversight.¹⁹⁷ The policy considerations discussed in this Part — protecting legitimate employee ex-

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189. See notes 12 & 113-15 *supra* and accompanying text.

190. The court clearly considers motive to be, at a minimum, “relevant.” See text at notes 173 & 176 *supra*. It is possible, however, to consider intent as relevant to proving whether the employer gained a foreseeable benefit, rather than viewing intent as an end in itself. The advantage of the former approach over the latter is the guidance given to the NLRB on the *purpose* for which it is considering intent, rather than some vague notion about “relevance,” and the various possible degrees that it can, or must, be considered.

191. See text at note 157 *supra*.

192. Cf. text at notes 53, 76 & 157 *supra*.

193. See note 25 *supra* and accompanying text.

194. See note 26 *supra* and accompanying text.

195. Slicker, *supra* note 64, at 1051.

196. See NLRA § 6, 29 U.S.C. § 156 (1982), *supra* note 30.

197. See NLRA § 10(f), 29 U.S.C. § 160(f) (1982), *supra* note 32.

pectations and delimiting employer freedom — strengthen the argument for an objective “reasonably foreseeable benefit” standard.

A. *Protecting Legitimate Employee Expectations (Pigs Is Pigs)*¹⁹⁸

The fundamental proposition on which this Note is based is this: determining whether an old and a new employer are “in reality the same employer” should depend on the identity of the entity, not on its reason for becoming that entity.¹⁹⁹ As Professor Roger Abrams has noted,

[M]anagement can try to justify anything by citing economic necessity. [But] they can't get away from their legal responsibilities by changing the name over the door to *something that looks like, sounds like, and smells like the old firm*. Companies can't get rid of unions if employees want them, just as a union can't force itself on workers.²⁰⁰

Preventing “industrial strife” through the protection of legitimate employee expectations can be achieved in two ways — ensuring fairness and avoiding the danger of pretext — both of which are advanced by an objective “reasonably foreseeable benefit” test.

It is fundamentally unfair if an employer can use a change in its corporate form — for any reason — to gain an unfair advantage over its employees.²⁰¹ There is no difference, from an employee's point of view, whether the employer changed its form for labor or nonlabor-related reasons. Thus, the equitable principle that substance should prevail over form,²⁰² should be invoked in spite of the normal assumptions about limited corporate liability.²⁰³ The “critical,” “relevant,”

198. This phrase is borrowed from E.P. BUTLER, *PIGS IS PIGS* (1906). The book has nothing to do with law, and little to do with anything else; however, the title cogently states this subpart's thesis.

199. The definition of “alter ego” itself is objective in nature, focusing on a state of being rather than the reason for becoming that being: “[L, lit., second I]: a second self . . .” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 63 (1981) (brackets in original).

200. Engel, *supra* note 7, at 20 (quoting Professor Abrams based on an interview for the article) (brackets in original; emphasis added).

201. See *Alkire v. NLRB*, 716 F.2d 1014, 1018 (4th Cir. 1983).

202. See, e.g., *Dee Cee Floor Covering*, 232 N.L.R.B. 421, 426 (1977) (statement of ALJ) (“The labor law is concerned with substance, not with form. Constantly changing corporate titles, or any other names, may serve a purpose under other laws, but they are meaningless insofar as the employees are concerned . . .”) See also P. MISCIMARRA, *supra* note 70, at 181-82; Slicker, *supra* note 64, at 1063-64. Cf. *Denzil S. Alkire*, 259 N.L.R.B. 1323, 1325 (1982), *enforcement denied*, 716 F.2d 1014 (4th Cir. 1983). In *Alkire*, the NLRB claimed to review the “economic realities of the relationship.” However, the Fourth Circuit declined to enforce the Board's order because “it made no findings concerning an economic benefit obtained or reasonably expected.” 716 F.2d at 1021.

203. As the Fourth Circuit noted in *Alkire*:

This analysis for imposition of *alter ego* status is similar to the standard employed to pierce the corporate veil of a subsidiary corporation and hold its owner(s) liable for the debts of that subsidiary. In corporate law, as in the labor field, the *alter ego* doctrine is an equitable principle designed to prevent an entity from doing injury and then escaping responsibility by hiding behind a corporate shield.

716 F.2d at 1021 n.5.

and motive-based “foreseeable benefit” tests all fail, from a fairness-to-the-employee viewpoint, in cases where the employer’s change is motivated by nonlabor-related reasons, but the employer nonetheless changes the employee-employer relationship by rejecting its NLRA duties.

The basic issue of fairness was used by Professor Befort as an argument for rejecting the “critical” standard in his discussion of *Allcoast* as a “double-breasting”²⁰⁴ case:

The *Allcoast* case illustrates the basic unfairness of predicating alter ego status upon proof of an employer’s evasive intent. . . . [T]he employer . . . established a new firm performing the same work in the same market but without adherence to the labor agreement. Many, if not most, of the circuit courts nonetheless would not apply the labor agreement to the new firm because of the alleged business justification for the firm’s creation. *Such a result ignores the legitimate contract expectations of the employees* and the Board’s traditional preference for contract enforcement. . . . The employer’s contractual responsibilities should accompany this benefit regardless of whether the new firm was created to avoid the union or merely to comply with Atlas’ change in policy.²⁰⁵

Allowing an employer to escape its obligations merely because its transformation was motivated by a legitimate reason not only defeats its employees’ legitimate expectations, it also allows the employer to *exceed its own expectations*. As a signatory to the collective bargaining contract,²⁰⁶ the employer could not have expected to escape the terms of its contract.

A second way of protecting legitimate employee expectations is by avoiding the danger of pretext. Except for the “critical” standard, all of the approaches discussed in Part II achieve this goal.²⁰⁷ The danger of adopting intent as a prerequisite to alter ego status is the possible evasion by some employers of their collective bargaining obligations through a nonlabor-related pretext. As Judge Contie stated in *Allcoast*:

If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation’s structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape unwanted obligations.²⁰⁸

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204. See note 67 *supra*.

205. Befort, *supra* note 66, at 99 (footnote omitted; emphasis added).

206. The essence of alter ego status is a finding that the old and new employers are one and the same. See notes 70 & 76 *supra* and accompanying text.

207. Unfortunately, *all* of the motive-based standards fail to achieve the other policy considerations discussed in Part III.

208. *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576, 582 (6th Cir. 1986). The Sixth Circuit was not discussing a hypothetical problem in *Allcoast*; as the owner of Allcoast admitted to the ALJ, “I don’t want it [the union], I’ll be honest with you, who needs it, who wants it.” 780 F.2d at 583 n.9 (brackets in original). See also 780 F.2d at 578 n.2 (owner originally changed location of “new” employer “to look good and play the game”).

Nor is *Allcoast* an isolated instance of an employer seizing upon a non-labor-related motive to rid itself of unwanted labor obligations. For example, in *NLRB v. Tricor Products*,²⁰⁹ the change in corporate form was "motivated by economics."²¹⁰ However, the owner "candidly admitted his anti-union sentiment" and "seized on the opportunity to rid himself of the Union."²¹¹ Likewise, in *The Bell Co.*,²¹² the employer attempted to justify its corporate transformation on its "economic plight."²¹³ The ALJ rejected the employer's argument, stating, "The assertion that [the employer] was suffering economic reversals and that its inability to make a profit was what prompted the discharge was mere pretext."²¹⁴

Even though the noncritical, motive-based standards are flexible enough to prevent an employer from escaping its labor obligations through a pretext, they are nonetheless transcended by an objective "reasonably foreseeable benefit" test. Under an objective standard, an employer cannot escape its labor obligations *regardless* of the motivation; thus, the Board is not left the difficult task of differentiating legitimate and pretextual reasons. This better preserves the legitimate expectations of employees. While this subpart has focused on employee expectations, a discussion of policy arguments would not be complete without considering the proper boundaries of *employer* freedom, the next subject of this Note.

B. *Delimiting Employer Freedom: The Supreme Court Cases Revisited*

One labor-relations attorney has asserted, " 'Shifting assets and responding to competitive pressures should remain a management prerogative.' He argues that 'labor may be creating a problem where none exists.' "²¹⁵ However, in *NLRB v. Scott Printing Corp.*,²¹⁶ Judge Sloviter stated that the alter ego doctrine

represents a departure from the generally accepted principle that an employer's freedom to contract includes the right to transfer assets, reorganize its business or close a portion thereof without imposing on its vendee the obligation to adopt its labor contract. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 282-84 (1972); *Textile*

209. 636 F.2d 266 (10th Cir. 1980).

210. 636 F.2d at 271.

211. 636 F.2d at 271.

212. 225 N.L.R.B. 474 (1976) (statement of ALJ), *enforcement denied on other grounds*, *NLRB v. Bell Co.*, 561 F.2d 1264 (7th Cir. 1977).

213. 225 N.L.R.B. at 478 (statement of ALJ).

214. 225 N.L.R.B. at 482 (statement of ALJ). *See also* *NLRB v. Lewis*, 246 F.2d 886, 888 (9th Cir. 1957), *aff'd*, 357 U.S. 10 (1958) (employer used what had initially been a legitimate change in its business arrangement to "shake the union").

215. Engel, *supra* note 7, at 19 (quoting Arthur Rosenfeld, labor-relations attorney with the United States Chamber of Commerce, based on an interview for the article).

216. 612 F.2d 783 (3d Cir. 1979).

Workers Union v. Darlington Manufacturing Co., 380 U.S. 263, 268-69 (1965).²¹⁷

Although Judge Sloviter's position on the role of motive is diametrically opposed to the thesis of this Note,²¹⁸ her citation of *Darlington* and the successorship cases provides the appropriate framework in which to analyze the proper bounds of employer freedom vis-à-vis employee expectations. A review of these cases demonstrates that an objective "reasonably foreseeable benefit" test properly delimits employer freedom.

The Supreme Court has decided three successorship cases in which the NLRB was faced with "reconcil[ing] the tension between the collective bargaining rights of the employees and the employer's right to make use of his property as he sees fit."²¹⁹ One of the Court's observations in the first of those cases, *John Wiley & Sons v. Livingston*,²²⁰ is equally applicable to alter ego policy considerations. Justice Harlan, speaking for the Court, stated:

The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.²²¹

The Court provided employees with a fair amount of protection in *Wiley*. The case involved a *bona fide* merger between two publishing companies (Interscience was merged into Wiley).²²² Interscience's union sued under section 301 of the Labor Management Relations Act²²³ to compel arbitration of disputes arising under Interscience's collective bargaining contract. The Court agreed with the union, based on the "impressive policy considerations favoring arbitra-

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217. 612 F.2d at 783 (Sloviter, J., dissenting). In *Allcoast Transfer*, 271 N.L.R.B. 1374 (statement of ALJ), enforced, *NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986), the predecessor and successor employers went so far as to assert that the alter ego doctrine represented "a deprivation of their Federal constitutional right to do business as they please." 271 N.L.R.B. at 1375. The ALJ rejected this constitutional argument, stating:

Since [the alter ego and single employer] doctrines are an integral part of the enforcement of the Act, the Respondents are necessarily arguing that the Act is unconstitutional . . . . The essence of Harris' argument is that the Act is invalid because it unconstitutionally prevents him from doing what he want [sic] to do. I know of no such constitutional right.

The constitutional attack leveled herein on the National Labor Relations Act . . . comes late in the day.

271 N.L.R.B. at 1379 (citations & footnotes omitted). The ALJ's ruling on the constitutional issue was not appealed. *Allcoast* is apparently the only attempt to make such a constitutional argument.

218. See 612 F.2d at 789 ("[N]o policy reason has been advanced by the majority in support of the extension of [the alter ego] doctrine to a situation where no evidence of any antiunion animus appears on the record.").

219. Note, *Bargaining Obligations*, *supra* note 65, at 625.

220. 376 U.S. 543 (1964).

221. 376 U.S. at 549.

222. 376 U.S. at 544-45.

223. 29 U.S.C. § 185 (1982); see note 74 *supra*.

tion,"²²⁴ and the "substantial continuity of identity in the business enterprise."²²⁵

In *NLRB v. Burns International Security Services*,²²⁶ however, the Court declined to extend the broad protection of its arbitration principle to the unfair-labor-practice context. In *Burns*, the successor employer hired a majority of the predecessor's work force in an arms-length transaction.²²⁷ After ruling that in such a case the successor may be bound to recognize and bargain with the union, Justice White, speaking for the Court, stated, "It does not follow, however, from *Burns*' duty to bargain that it was bound to observe the substantive terms of the collective-bargaining contract . . . ."²²⁸

Justice White's refusal to bind an arms-length successor was based on policy considerations wholly inapposite to the alter ego context. He noted, "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure [and] composition of the labor force . . . ."²²⁹ In an alter ego case, the successor employer *is* the predecessor employer, regardless of the reason for the change in corporate form. This is not a case of "having contract provisions imposed upon them against their will";²³⁰ rather, the alter ego employer is a signatory to the collective bargaining contract, achieving the *Burns* Court's desire that "the balance of bargaining advantage . . . be set by economic power realities."²³¹

Naturally, there must be some way of distinguishing an alter ego case, involving "in reality the same employer," and an arms-length successorship case. The line between the two doctrines is drawn by the Supreme Court's decision in *Textile Workers Union v. Darlington Manufacturing Co.*,²³² which held that "an employer has the absolute right to terminate his entire business for any reason he pleases."²³³ If

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224. 376 U.S. at 550.

225. 376 U.S. at 551.

226. 406 U.S. 272 (1972).

227. 406 U.S. at 275.

228. 406 U.S. at 281-82.

229. 406 U.S. at 287-88.

230. 406 U.S. at 287.

231. 406 U.S. at 288. Ultimately, the issue returns to that of legitimate employee expectations. This is apparent in Justice Marshall's opinion in the most recent successorship case — *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249 (1974). He refers to an alter ego transaction as "a paper transaction without meaningful impact on the ownership or operation of the enterprise," specifically noting "that Howard Johnson [did not have] any previous dealings with the Union, [nor had it] participated in any way in negotiating or approving the collective-bargaining agreements." 417 U.S. at 259 n.5. In stark contrast, an alter ego employer has *both negotiated and approved* the contract. To borrow from the Supreme Court's language in the super-seniority and "lockout" cases, allowing the employer to escape its contractual obligations ignores "the inherently discriminatory or destructive nature of the conduct itself." 373 U.S. at 228. For the complete quote, see note 122 *supra*.

232. 380 U.S. 263 (1965).

233. 380 U.S. at 268. See text at note 188 *supra*.

business operations have actually ceased, there will be no foreseeable benefit to the predecessor employer.²³⁴ It is at this point that the *Burns* Court's concerns about inhibiting a *bona fide* new employer from taking over a "moribund business" and bargaining according to "economic power realities" are appropriate. *Darlington* thus describes an employer's right to go out of business for any reason, and the foreseeable benefit test indicates at what point the employer in fact *has* gone out of business. In the final analysis, the Board's inquiry into whether there was an objective "reasonably foreseeable benefit" to the old employer constitutes a safeguard — verifying that the *Crawford Door* factors were properly applied in determining alter ego status.

CONCLUSION

One of the most serious criticisms of the alter ego doctrine has been that "[t]he many cases in this area demonstrate that alter ego determinations — critical in many management rights contexts — are apt to differ unpredictably from case to case, depending not only upon controlling facts but also on the predication of the adjudicating body."²³⁵ Thus, the very flexibility that the Sixth Circuit views as a strength in arguing for the "relevant" standard²³⁶ can also be viewed as a weakness.²³⁷

An objective "reasonably foreseeable benefit" test provides the NLRB with flexibility by retaining discretion to weigh the seven *Crawford Door* factors. This captures the benefits of the flexible approach espoused by those supporting the "relevant standard." It also avoids the pitfalls of the "critical" standard, which cannot be supported on the language of *Southport*, on an interpretation of the standard as a

234. This statement should be interpreted as meaning "business operations have ceased in a particular line of business." For example, an employer in the textile business may decide to cease textile operations and to redeploy its capital in, e.g., computer technology or agriculture. In such a case, the Board should not find any foreseeable benefit related to the elimination of the employer's labor obligations — the employee bargaining unit no longer reflects the same "community of interests." See NLRA § 9(a), 29 U.S.C. § 159(a) (1982), quoted at note 4 *supra*. See generally A. COX, D. BOK & R. GORMAN, *supra* note 1, at 282-83 (discussing criteria for determining an appropriate bargaining unit). If the NLRB has properly applied the *Crawford Door* and foreseeable-benefit criteria, the characteristics of the appropriate bargaining unit should be unchanged, since the same employer in fact will be in the same line of business. See Part I.B *supra*. (It should be noted that the NLRA does not apply at all in the field of agriculture. See note 2 *supra*.)

235. P. MISCIMARRA, *supra* note 70, at 183 (footnotes omitted). See also Comment, *Double-Breasted Operations*, *supra* note 67, at 48 ("[I]n an area where concrete standards, applied with uniformity, are crucial to unions and employers alike, the law remains largely unascertainable.")

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

237. As one commentator has noted in the successorship context:

[T]he Court reaffirmed the existing policy of *ad hoc* evolution of general criteria . . . . Therein lies *Burns'* greatest wisdom and, perhaps, its most telling weakness, for it permits the widest possible flexibility in the face of constantly changing factual patterns, but at the same time it diminishes predictability in an area of the law where predictable consequences are exceedingly desirable.

Slicker, *supra* note 64, at 1104.

variation on the “relevant” theme, by analogy to the “runaway shop” cases, or on policy grounds.

Yet, at the same time, the objective “reasonably foreseeable benefit” standard maintains predictability and uniformity by articulating an approach that safeguards an employer’s absolute right to go out of business for *any* reason, including animus. This conforms with the Supreme Court’s holding in *Darlington*. Employer motive is thus viewed as a means to an end in determining whether the old employer anticipated a foreseeable benefit, rather than as an end in itself. Finally, the language of the Fourth Circuit’s “reasonably foreseeable benefit” test, which in its own right is capable of supporting an objective interpretation, is strengthened by the explicit rejection of “legitimate business reasons” as a ground for avoiding alter ego status — providing an additional safeguard for the protection of legitimate employee expectations. The National Labor Relations Act’s goal of promoting industrial peace — not to mention a basic sense of fairness — demands no less.

— Gary Alan MacDonald