Double-Breasted Operations: Best Of Both Worlds?

CONSTRUCTION FIRMS SPLIT INTO TWO ENTITIES TO WIN MORE BUSINESS

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The higher cost of union labor puts union contractors at competitive disadvantage when bidding on many privately owned construction projects. In an effort to remain competitive in a stagnant economy that continues to plague the construction industry, many union shop contractors are considering becoming a “double-breasted” or “dual shop” entity in order to win more bids.

A double-breasted construction firm maintains two separate and distinct entities. One entity is a signatory to the collective bargain agreements of the various unions who maintain work jurisdiction over the type of work the contractor performs. The other entity is not a signatory to those agreements and therefore not covered by the bargaining agreements restrictions.

The National Labor Relations Act does not prohibit double-breasted operations outright. However, the NLRA does prohibit an employer from interfering with employees’ collective bargaining rights and refusing to collectively bargain with the union representing the employees. If the double-breasted operation is not properly established, the National Labor Relations Board will treat the two entities as the same and, accordingly, the NLRB will impose liability on the union entity for violating the NLRAs prohibitions on interfering with collective bargaining rights. The NLRB and the courts use two theories to determine whether a contractor has validly established a double breasted contracting operation: 1) the “single employer” theory; and 2) the “alter ego” theory.

Single Employer Test

Most courts use the single employer test in order to determine whether a double-breasted operation is valid. The single employer approach generally applies in situations where two entities concurrently perform the same function and one entity recognizes the union and the other does not. Stardyne Inc. v. NLRB, 41 F.2d 141 (3rd Cir.1994). The NLRB uses four criteria in determining whether the entities are legitimately separate or whether they are actually a “single employer”: (a) interrelation of operations; (b) centralized control of labor relations; (c) common management; and (d) common ownership of financial control. No one of these factors has been held to be controlling. But the board has stressed the first three factors, which go to show ‘operational integration,’ particularly centralized control of labor relations, are the most important. NLRB v. Al Bryant Inc., 711 F.2d 543 (3d Cir.1983). Therefore, even if both entities of the double breasted operation are commonly owned, an operation may not violate the single employer test if operations, labor relations, and management are kept separate. In fact, both the NLRB and the courts have repeatedly held that common ownership alone is not dispositive of whether a single employer exists.

Moreover, if the single employer test’s factors are met, the board still must determine whether the employees of both entities constitute a single bargaining unit before it will impose liability on the union entity. A common bargaining unit exists where the employees of both entities share common skills, duties, and working conditions. NLRB v. Don Burgess Construction Corp., 596 F.2d 378 (9th Cir. 1979). Thus, where the two entities are performing distinct work and the non-union entities work is outside the work jurisdiction of the collective bargaining agreement, a single employer may not be found although all four factors are met.

Even if a contractor establishes an operation which it believes passes the single employer test, it should also make sure it passes the “alter ego” test. Although they employ different criteria, the single employer
and alter ego test are closely related and are often used interchangeably. Most often the alter ego test will be employed when there is some change in the structure or identity of the employing entity, such as a spin off, merger, or sale of the employer.

A non-union entity will be found to be the alter ego of the union entity when they have "substantially identical management, business purpose, operation, equipment, customers, and supervision, as well as ownership. Crawford Door Sales Co., 226 NLRB 1144 (1976). Like with the single employer test, none of these factors taken alone is dispositive on whether one entity is the alter ego of another. Also relevant is "whether the purpose behind the creation of the alleged alter ego was legitimate or, whether, instead, its purpose was to evade responsibilities under the Act." "NLRB Guide for Hearing Officers" (Section IV) The requirement that the board find this additional "malice" factor is controversial with non consensus among the circuits that have considered it.

Anti-Dual Shop Clauses

The analysis of a valid double-breasted operation does not end with the single employer and alter ego tests. A union contractor that sets up double-breasted operation that passes both the single employer and alter ego test may still be face liability based upon the language of its collective bargaining agreements.

So called, anti-dual shop clauses appear in many collective bargaining agreements and aim to prevent a contractor from “double breathing” even when it would be permitted under case law. Anti dual shop clauses are valid if they are lawful "work preservation" clauses. Painters District Council 51, 321 NLRB 158 (1996). The lawfulness of a work preservation clause hinges on the amount of control the union contractor has over the non-union contractor’s employees.

Courts apply a two-pronged test to determine whether an anti-dual shop clause is valid. First, the agreement must seek to preserve work traditionally performed by employees represented by the union. NLRB v. Central Pennsylvania Regional Counsel of Carpenters, 352 F.3d 831 (3d.Cir.2003). Second, the contracting employer must have the power to give the employees the work in question, which is known as the “right of control” test. As with the single employer test, control of labor is a key. If the union entity has no control over the labor of the non-union entity, the anti dual shop clause is invalid on its face against the non-union entity.

Furthermore, because the contracting employer must be able to control the employees in question for an anti-dual shop clause to apply, any operation that passes muster under the single employer test would in theory not be subject to the anti-dual shop clause.

Double-breasted operations are obviously attractive because they give a contractor the best of both worlds. Union contractors wishing to establish a double-breasted must tread carefully. First, they must first establish a company that meets that does not run afoul of the NRLA. Second, they must not run afoul of their current collective bargaining agreement. If they do not, they are certain to face legal challenges from unions for unfair labor practice claims, ERISA actions, and a ruling by the Court that both the non-union and union entity be treated as one and the collective bargaining agreement applied to both.