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May vs. Can: Formation of Double- Breasted Operations

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May vs. Can

May (mā/) *verb*
expressing permission.

Can (kan/) *verb*
be able to.

Formation of Double-Breasted Operations

“Double-Breasting”

- The establishment and operation of two companies, one union and the other non-union
 - Union firm works on union jobs
 - Non-union firm operates non-union
 - Not obligated to apply CBA (wages, pension, etc.)
 - Not liable for ULPs of union firm
 - Can claim protection for secondary boycott

Formation of Double-Breasted Operations

A Two-Step Approach

- Part I: Are the two entities a “single employer”?
- Part II: If so, are they a single or separate bargaining unit?
 - If not, no duty to apply existing CBA
 - If so, existing CBA applies to non-union firm

Formation of Double-Breasted Operations

Part I: The “Single Employer” test:

- (1) Interrelation of operations
- (2) Common management
- (3) Centralized control of labor relations
- (4) Common ownership
- No one factor is controlling, “totality of the circumstances” in each case . . . but
- Centralized control of labor relations is most important

Formation of Double-Breasted Operations

(1) Interrelation of Operations

- Shared bank accounts, accounting records
- Financial interdependence – start-up money, shared lines of credit, loans not at FMV, paying each others bills, not invoicing for services or not charging actual costs for services
- Use of other entity's name
- Shared or transferred employees (particularly covered e'ees)
- Shared office personnel
- Shared offices, phones, stationery, etc.
- Shared tools and equipment, or loaning equipment not at FMV
- Bidding on same jobs
- Reliance on work from one to the other – referral, subcontracting, etc.
- Loss of work from union firm to non-union firm

Formation of Double-Breasted Operations

(2) Common Management

- Some may be allowed at the very top
- Day-to-day management most important
- Actual control (yes) vs. potential control (not so much)
- If the same people run the day-to-day affairs of both, more likely to be single employer

Formation of Double-Breasted Operations

(3) Centralized Control of Labor Relations

- May be most significant factor “because it tends to demonstrate ‘operational integration.’”
- Who dictates wages, hours, and benefits?
- Who handles labor relations?
- Who has overall control of critical matters at policy level – not just day-to-day labor decisions?
- Common policies and procedures?

Formation of Double-Breasted Operations

(4) Common Ownership

- Not fatal by itself, somewhat expected, but still important to separate if possible
- Separate corporate entity or subsidiary?

Formation of Double-Breasted Operations

Part II – Appropriate Unit for Bargaining

- If found to be a “single employer,” still not enough to apply CBA
- The employees of both firms, when combined, must constitute an appropriate unit for bargaining
- “Community of interests” analysis

Formation of Double-Breasted Operations

Community of Interests

- Bargaining history
- Functional integration of operations
- Differences in type of work and skills of employees
- Extent of centralization of management and supervision
- Hiring, discipline, and control of day-to-day operations
- Extent of interchange and contact between groups
- Similarity in conditions of employment

Formation of Double-Breasted Operations

Community of Interests (cont.)

- Similar to multi-plant/establishment unit determination
- Analogous to accretion:
 - The need to ensure stability of collective bargaining
 - vs.
 - The need to allow a new group of employees to choose freely their bargaining representative
- Local 627, Intern. Union of Operating Engineers, AFL-CIO v. NLRB, 595 F.2d 844 (5th Cir., 1979)

Formation of Double-Breasted Operations

Alter-Ego Status Distinguished

- Concepts evolved along similar lines, use similar analyses
- But now considered separate concepts
- Single employer: open and concurrent union/non-union businesses
- Alter-ego: a “disguised continuance”

Formation of Double-Breasted Operations

Alter-Ego Status Distinguished (cont.)

- Similar factual analysis
 - Management
 - Business purpose
 - Operations
 - Equipment
 - Customers
 - Supervision
 - Ownership

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Alter-Ego Status Distinguished (cont.)

- BUT, if alter-ego status is conferred there is no second step in the analysis
- The CBA is automatically applied to the non-union entity, without a determination of unit appropriateness

Formation of Double-Breasted Operations

Duty to Furnish Information

- Where union has reason to believe double-breasted operation is established, union employer has duty to respond to requests for information
- Union is entitled to information if it has an objective, factual basis for request
- Refusal is violation of 8(a)(1) and 8(a)(5)

Formation of Double-Breasted Operations

Duty to Furnish Information

- Appendix A – what to expect and CAN you comply?

QUESTIONS?

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