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I. INTRODUCTION

In 1988, Congress passed the Worker Adjustment and Retraining Notification Act, more commonly referred to as "WARN."[1] The primary purpose of WARN is to notify employees of plant closings and mass layoffs.[2] An issue that was not addressed by this statute is what obligations a unionized employer has when it decides to reopen a closed plant.[3] While there are many issues raised by the reopening of a plant, this Article focuses on the employer's duty to recognize a union that formerly represented the plant's employees before the shutdown.[4]

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1. 29 U.S.C. §§ 2101-2109 (1988).

2. *See* H.R. Rep. No. 576, 100th Cong., 2d Sess. 1045 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078.

3. In fact, one administrative law judge noted that Congress intended "that the provisions of WARN should be read together with the provisions of the [National Labor Relations Act (NLRA)] to give maximum effect to each of them." Geiger Ready-Mix Co., No. 17-CA-16244, 1993 N.L.R.B. LEXIS 789, *25 (1993). Therefore, it is appropriate to look to NLRA authority to resolve this issue.

4. This article discusses a shutdown and reopening of the same business at the same location; it does not concern a shutdown and reopening by a successor company. This distinction is important because the respective scenarios demand different standards. *See* Scof, Inc., No. 14-CA-20855, 1991 N.L.R.B. LEXIS 937, *81-84 (1991).

The first part of this Article concentrates on how a union is recognized and the duration of a collective bargaining agreement (CBA).[5] The Article then explores under what circumstances a CBA can bar recognizing a new union.[6] Next, the Article examines when recognizing or failing to recognize a union violates the NLRA.[7] After pointing out the inherent pitfalls of recognizing and failing to recognize unions, this Article proposes a two-step bright-line test to determine when an employer must recognize a former union after a shutdown and reopening.[8]

The Article concludes that whether a CBA should be given effect depends upon the probability that the facility will reopen and the rationale for its closure. As long as the plant closed for legitimate, as opposed to anti-union, reasons and there was not a reasonable expectation of the plant reopening, then there would be no duty to recognize the former union as the exclusive bargaining agent for the new and returning employees working at the reopened plant.

A. Recognition of Unions and Duration of CBAs

There are two primary methods by which a union is granted recognition.[9] An employer can voluntarily extend recognition to a union without a National Labor Relations Board (NLRB or Board) election,[10] or if the employer declines to grant recognition upon a demand by the union, the union may petition the Board for an election to determine by a majority vote if the union shall represent the employees.[11] Once a union is recognized and a CBA is signed, the CBA usually acts as a bar against an election petition if the CBA is for a definite term, not exceeding three years, and contains substantial terms and conditions of employment.[12] Thus, once a CBA is executed, the recognitional status of a union cannot be challenged by a rival union or the employer until the expiration of the CBA.[13]

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5. *See infra* notes 9-16 and accompanying text.

6. *See infra* notes 17-34 and accompanying text.

7. 29 U.S.C. § 151 (1988). *See also infra* notes 35-76 and accompanying text.

8. *See infra* notes 77-124 and accompanying text.

9. A third procedure by which a union can become the recognized bargaining representative for employees is if the employer commits a serious unfair labor practice that interferes with the election process and tends to preclude the holding of a fair election. *See generally* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In such circumstances, the NLRB might order the employer to recognize the union and begin bargaining with it. *Id.*

10. 1 PATRICK HARDIN, THE DEVELOPING LABOR LAW 523 (3d ed. 1992).

11. 29 U.S.C. § 159(c) (1988).

12. HARDIN, *supra* note 10, at 396-99. Because the contract bar doctrine is Board created, it is discretionary and not statutorily mandated. *Id.* at 396.

13. Employees themselves can decertify a union, but a decertification petition can

Most CBAs include an "evergreen clause," which is an automatic renewal provision.[14] These provisions typically provide that a CBA will automatically renew itself unless either party gives notice that it intends to terminate the CBA. Usually between sixty to ninety days before the end of a CBA term, one of the parties to the contract will give such notice that they are terminating the contract so they can negotiate a new agreement.[15] If a plant is closed in the middle of the term of a CBA and no provision in the closedown agreement addresses the automatic renewal provision, then the CBA could continue renewing itself.

Thus, when the employer reopens its facility, it may be bound by the old CBA. Conversely, if a plant is shutdown after the employer gives notice to terminate or addresses the automatic renewal provision in the closedown agreement, then there would be no contract to govern the new work force.

Employers who decide to reopen facilities often ask if they still have a duty to recognize their former union, or if they may reopen their plant as a nonunion facility, or if they may proceed with a representation election to determine who will represent the new work force. In an attempt to address these issues, the first factor this Article examines is the impact of the CBA in existence at the time of the shutdown. The various obligations of an employer may differ if the plant closes during the term of a CBA as opposed to after the expiration of a CBA. For instance, if the CBA expires, it cannot bar the employer from recognizing a new union.[16]

B. Whether a CBA Acts as a Contract Bar After a Plant Reopens Depends Upon the Length of the Shutdown as Well as the Composition of the Work Force After the Reopening

In *Sheets & Mackey*,[17] the CBA term ran from April 1, 1949, to April 1, 1950, with an automatic annual renewal provision "absent 60 days notice to terminate or modify the contract."[18] In June 1949, the employ-

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only be filed 12 months after the last valid election. *See* 29 U.S.C. § 159(e) (1988).

14. *See* 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 36:61 (1981).

15. *See id.*

16. An employer could be prohibited from recognizing a new union if the new union has not made the requisite showing of interest by a substantial number of employees. *See generally* International Ladies' Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

17. 92 N.L.R.B. 179 (1950).

18. *Id.*

er ceased its operations indefinitely "for business reasons," firing its employees. Due to the unavailability of former employees, new employees were hired when the mill resumed operations eight months later.[19] The union asserted that the CBA was automatically renewed for the 1950-51 term, and that the contract was a bar to any representation election filed with the reopened mill.[20]

The employer's position was that the cessation of mill operations effectively terminated the CBA.[21] The NLRB held that since the mill was shutdown for an indefinite period and operations were resumed with new employees due to the previous workers' unavailability, automatic renewal of the CBA would be inappropriate; consequently, there was no contract bar.[22]

Similarly, in *Decca Records, Inc.*,[23] the employer and the union executed a CBA with a term from August 21, 1948, until August 20, 1950. The CBA covered all of the company's plants.[24] The Richmond, Indiana plant, which closed in June 1948, was included in the schedule of plants covered by the CBA.[25] In April 1949, the parties increased the wage rates in the contract pursuant to a reopener clause, but they did not include the Richmond plant in the supplemental agreement.[26] When the Richmond plant reopened later that month, the union and the employer executed a separate contract for a lesser wage rate for the employees at the Richmond plant.[27]

In July 1949, the Richmond plant closed again.[28] In February 1950, the parties amended the CBA to extend the original 1948 contract term until August 1, 1951.[29] All of the employer's other plants were specifically noted, but the newly amended CBA remained silent as to the Richmond plant.[30] In September 1950, the Richmond plant again reopened, however, the employer would not recognize any union.[31] The union al-

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 180.
23. 93 N.L.R.B. 819 (1951).
24. *Id.* at 820.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Decca Records*, 93 N.L.R.B. at 820.
30. *Id.*
31. *Id.*

leged that the 1948 agreement was a bar to any representation election to be held at the Richmond plant.[32]

The Board held that by omitting the Richmond plant from the supplemental and amended CBAs, the parties manifested an intention that the 1948 contract no longer applied to the Richmond plant.[33] The Board further noted:

> Moreover, assuming, *arguendo*, that the Richmond plant was intended to be covered by the 1948 master contract and the current extension thereof, we would still not find the instant petition to be barred thereby.
>
> The Board has heretofore held that a contract does not bar a petition filed after the automatic renewal date of the contract, where on such date the plant had suspended operations, and operations were later resumed with new employees.[34]

Thus, it appears that if the cessation of business was for an indefinite period and the company upon reopening hires new employees, then the CBA would not bar holding a representation election or voluntarily recognizing another union that has manifested its majority status at the reopened facility.

II. PREMATURE RECOGNITION AS WELL AS NONRECOGNITION OF A UNION MAY RESULT IN A VIOLATION OF THE NLRA

When a union does not represent a majority of employees, it is improper to recognize it as the collective bargaining agent. Conversely, in some circumstances, refusing to recognize a union that is the certified bargaining representative of employees violates the NLRA. The following subsections discuss the potential hazards that await an employer when it reopens a plant and is faced with a demand for recognition by a union, whether it be the former union or a new union.

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32. *Id.*

33. *Id.* at 821.

34. *Id. See also* General Extrusion Co., 121 N.L.R.B. 1165, 1167 (1958) (explaining that "a contract does not bar an election after an indefinite period of closing" where an employer resumes operations with new employees); Slater System Md., Inc., 134 N.L.R.B. 865, 866 (1961) (noting that an amended contract which makes it applicable to a new location does not bar an election where the original location closed for 26 months and the company hired none of the employees from the original cafeteria at the new location); NLRB v. Dominick's Finer Foods, Inc., 28 F.3d 678, 684 (7th Cir. 1994) (citing El Torito-LaFiesta Restaurants, Inc. v. NLRB, 929 F.2d 490, 493 (9th Cir. 1991) (recognizing an exception to contract bar rule where an employer resumes operation with new employees after an extended period of closing)).

A. *Recognition of any Union After a Hiatus May Be a Violation of Section 8(a)(2)*

As discussed previously, an indefinite shutdown coupled with the hiring of a new workforce nullifies a CBA. At least one Board decision held that the mere length of a hiatus will make a CBA unenforceable.[35] Thus, recognizing a union as the exclusive bargaining agent of a reopened facility could potentially violate section 8(a)(2) of the NLRA, which provides that it is "an unfair labor practice . . . to dominate or interfere with the formation or administration of any labor organization."[36]

In *Cen-Vi-Ro Pipe Corp.*,[37] a company and a union, upon the reopening of a steel and concrete pipe manufacturing plant in 1968, after a four-year shutdown, violated the right of employees to an uncoerced selection of their bargaining representatives by adopting provisions of the 1964 union contract containing a union security clause.[38]

The company and the union argued that, although the plant shut down for an indefinite period of time, a CBA was in effect and it renewed itself annually.[39] The Board found that the CBA cannot renew itself if the employer has no employees, and any alleged CBA covering non-existent employees or employees with no reasonable expectancy of recall, is a nullity.[40]

The Board concluded that the employer violated section 8(a)(2) of the NLRA when it "gave unlawful assistance and support to the unions by granting them recognition before it had a representative work force."[41] Thus, if a plant closes for an indefinite period of time, then it cannot unilaterally recognize its former union, or any union, before employees are hired at the newly reopened facility.[42]

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35. Cen-Vi-Ro Pipe Corp., 180 N.L.R.B. 344, 346-47 (1969), *enforced*, 457 F.2d 775 (9th Cir. 1972).

36. 29 U.S.C. § 158(a)(2) (1988).

37. 180 N.L.R.B. 344 (1969), *enforced*, 457 F.2d 775 (9th Cir. 1972).

38. *Id.* at 345-46.

39. *Id.* at 346.

40. *Id.*

41. *Id.* at 347.

42. *Cf.* Hydro-Air Equip., Inc., 277 N.L.R.B. 85, 86 (1985) (addressing the issue of whether the CBA between the company and the Sheet Metal Workers' Union survived the relocation of the company's operations). The Board held that the analysis "depends on whether operations and equipment remained the same after the move and on whether a substantial percentage of employees" transferred to the new location. *Id.* at 94. The Board concluded that "the lack of any meaningful change in the [company's] business operations upon . . . relocation . . . , the transfer of at least 46[%] . . . of the workforce, and a CBA" in effect mandated the finding that the company recognize and bargain with the Sheet Metal Workers' Union. *Id.* at 95-96. Consequently, the company's extension of recognition to the Teamsters violated §§ 8(a)(1) and (5) of the NLRA for bad faith bargaining with the Sheet Metal Workers'

B. Failure to Recognize the Former Union After a Hiatus May Be a Violation of Section 8(a)(5)

While in some circumstances recognizing a former union violates the NLRA, in other circumstances, failure to recognize one also violates it.[43] *El Torito-La Fiesta Restaurants, Inc.*[44] reached the latter result. In that case, the Howard Johnson Company ran a restaurant, and it entered into a CBA with the union for restaurant workers effective from May 16, 1981, to January 15, 1986.[45] Howard Johnson sold the restaurant to Exeter who assumed the obligations under the CBA.[46] On May 6, 1983, Exeter sold the restaurant to El Torito.[47] El Torito continued to operate the restaurant until December 31, 1983, when it shut down the restaurant for remodeling and laid off all of its employees.[48]

The remodeling took fourteen months and when the restaurant reopened on March 4, 1985, El Torito hired only eight of the seventy-two laid-off employees.[49] On March 5, 1985, the union demanded that El Torito "continue to recognize it as the bargaining representative."[50]

The NLRB concluded that the closing and reopening of the facility did not justify the "withdrawal of recognition," and it specifically noted "the employees had a reasonable expectation of reemployment and therefore the temporary hiatus did not serve to break the continuity of the enterprise or affect the Respondent's bargaining obligation to its work force."[51] The Board further held that although El Torito hired only eight

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Union, and also violated § 8(a)(2) of the NLRA for giving unlawful support and assistance to the Teamsters. *Id.* at 97. *Cf.* Metropolitan Teletronics Corp., 279 N.L.R.B. 957, 970-71 (1986), *enforced*, 819 F.2d 1130 (2d Cir. 1987) (recognition of same union in newly relocated plant as in former plant, anticipating that a majority of employees would "opt to transfer," did not violate § 8(a)(5) of the NLRA). Although this case concerned a relocating company, the Board could hold a company liable for a violation of § 8(a)(5) or § 8(a)(2) if it reopens the same facility, with the same employees, doing the same tasks, and not concurrently recognizing the former union as the representative of the employees rather than some new independent union.

43. Failing to recognize the certified bargaining representatives of employees and subsequently refusing to bargain with such representatives violates § 8(a)(5) of the NLRA. *See* 29 U.S.C. § 158(a)(5) (1988).

44. 295 N.L.R.B. 493 (1989), *enforced*, 929 F.2d 490 (9th Cir. 1991).

45. *Id.* at 493.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *El Torito*, 295 N.L.R.B. at 493.

51. *Id.*

of the former employees, the mere occurrence of work force expansion and turnover does not invalidate an existing CBA.[52]

The Board announced the following principle to be applied in the case of a shutdown and resumption of operations: "In each case, a key factor in applying the contract-bar rule or the exception was whether the employer's shutdown of operations was indefinite. An indefinite shutdown indicates that employees have no reasonable expectation of reemployment and that the continuity of the bargaining unit no longer exists."[53] In *El Torito*, the restaurant was temporarily closed and reopened at the same location with substantially the same business. Therefore, the Board held that the restaurant must honor the existing CBA.[54]

In *Morton Development Corp.*,[55] the Board downplayed the importance of the length of the hiatus between closing and reopening relying on a successor employer case decided by the Supreme Court.[56] Instead, the Board focused upon whether there was a substantial continuity between the enterprises.[57] In reaching this determination, the Board examined such factors as "whether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervi-

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52. *Id.* at 493-94.

53. *Id.* at 494. The Board recently considered this key factor, the nature of the shutdown of operations, in Coastal Cargo Co., 286 N.L.R.B. 200 (1987). In that case, an employer with a CBA ceased operations at two ports and terminated its employees due to lack of work. *Id.* at 201-02. Approximately nine months later, during the term of the CBA, the employer began performing essentially the same type of work for a new customer at one of the two ports. *Id.* The Board rejected the contention that the CBA became a nullity when the company released the unit employees. *Id.* at 203. Emphasizing the fact that the employer continued to seek unit work during the shutdown period, the Board found that the termination of operations was only temporary and the employees were not discharged. *Id. See also* Sterling Processing Corp., 291 N.L.R.B. 208, 208 (1988) (noting that the employer closed its operations due to economic hardship during the term of a CBA). Although in *Sterling* the employer and the union were in substantial contact during the closedown, the employer never guaranteed the reopening of the facility. The Board found that when the employer closed its facility indefinitely, the employees did not have a reasonable expectation of reemployment. *Id.* at 210. Thus, the employer had no obligation to bargain with the union prior to reopening the facility. Only when the employer rehired substantially the same work force after the hiatus did the Board determine that the employer had a bargaining obligation. *Id.*

54. *El Torito*, 295 N.L.R.B. at 496.

55. 299 N.L.R.B. 649 (1990).

56. In Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27 (1987), the Court held that the existence of a hiatus between the shutdown and reopening of an operation is a factor, but not the only factor, in determining whether there is "substantial continuity" between the employing enterprises. *Id.* at 45.

57. *Morton Development Corp.*, 299 N.L.R.B. at 650.

sors, and whether the new entity has the same products, and . . . customers."[58]

In *Morton*, the respondent operated an intermediate care facility for mentally retarded adults from 1979 until June 1985.[59] In June 1983, the Board certified a union as the exclusive bargaining agent for sixty-five maintenance employees.[60] The union entered into a one-year CBA on March 30, 1984, which was extended until June 30, 1985.[61] On June 27, 1985, respondent closed the facility and bargained with the union regarding the impact on employees of the closure.[62] After an attempted sale failed, respondent reopened the facility as a nursing home in November, 1985.[63] The reopened facility employed eleven maintenance people, all of whom had previously worked at respondent's intermediate care facility.[64] The Board held that the respondent violated section 8(a)(5) of the NLRA when it refused to recognize and bargain with the union because there was a substantial continuity between the two enterprises.[65]

In *O'Neill, Ltd.*,[66] the Board wholly ignored a three week hiatus in determining that a new entity had failed to recognize the union. The Board found that the former employer had designed an elaborate scheme to evade contractual obligations with employee bargaining representatives.[67] As part of this scheme, the O'Neill entities[68] purported to close a plant and reopen it through "fronts" still actually controlled by the O'Neill entities.[69] Because the new fronts were nothing but a facade, management's failure to recognize the union violated section 8(a)(5) of the NLRA.[70] In making this determination, "the Board applied an alter ego analysis."[71] As noted by the Board in *Crawford Door Sales Co.*,[72]

58. *Id.* (quoting *Fall River Dyeing*, 482 U.S. at 43).
59. *Id.* at 649.
60. *Id.*
61. *Id.*
62. *Morton*, 299 N.L.R.B. at 649.
63. *Id.*
64. *Id.*
65. *Id.* at 652.
66. 288 N.L.R.B. 1354 (1988).
67. *Id.* at 1356.
68. The O'Neill entities, for purposes of this case, included Edwin R. O'Neill, O'Neill, Ltd., Amalgamated Meat Company, and Food Equipment Leasing Company. *Id.* at 1354.
69. *Id.* at 1356.
70. *Id.* at 1356 n.16.
71. *Id.* at 1355 n.6.
72. 226 N.L.R.B. 1144 (1976).

the focus of an alter ego analysis is whether "the two enterprises have 'substantially identical' management, business purpose[s], operation[s], equipment, customers, and supervision, as well as ownership."[73]

Hence, it appears that the Board does not utilize one definitive test to determine when an employer must recognize a union after a closure. Some NLRB decisions apply an "indefinite period of closure" test,[74] others utilize the "substantial continuity" test,[75] and yet other decisions rely on an alter ego analysis.[76] Some uniformity is necessary so that the Board can better achieve its goal of promoting industrial peace and stability. Board adoption of a single test would better align the expectations of employers, unions, and employees.

III. THE TWO-STEP PROPOSAL

This article asserts the need for a standard to determine when an employer must recognize a union after a cessation and resumption of business. In fashioning such a test, one must delve into the foundational principle of such a policy. To encourage industrial peace, it behooves both labor and management to progress forward and not become mired in rehashing issues once a resolution has been attained. Once recognition is resolved through an election, there should be a strong presumption that a union represents a majority of employees. This presumption should not be disturbed unless, due to changed circumstances, it is likely that current employees no longer desire the union's representation.

To achieve this goal of industrial peace and stability, a more definite test must be articulated to determine when the presumption favoring recognition is lost. The substantial continuity test used for successor employers is ambiguous because it involves weighing a multitude of factors. Similarly, the alter ego[77] test involves balancing a variety of criteria. Thus, these standards do not provide the bright-line test needed to guide employers, unions, and employees.

In a successor employer situation, a new employer acquires the former, continuing the business in some format. In an alter ego case, there is a change in the corporate structure while the business continues. In both cases the court focuses on a variety of factors to determine if it is actually the same business, and thus, should continue to recognize and

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73. *Id.* at 1144.

74. *See supra* notes 36-42 and accompanying text.

75. *See supra* notes 43-65 and accompanying text.

76. *See supra* notes 66-73 and accompanying text.

77. An alter ego is merely a disguised continuance of the former employer. Typically, alter ego cases involve a technical change in the structure or identity of the employing entity, without any substantial change in its ownership or management. *See* O'Neill, Ltd., 288 N.L.R.B. 1354, 1355 (1988).

bargain with the same union. This set of issues does not necessarily arise when the same owner reopens the same or similar business after an indefinite shutdown.

A. Step One: Reasonable Expectation of Reopening

Therefore, the focus of a workable standard should not be on the nature of the new entity formed after the closedown, but on the nature of the dormant period. If a business is closed with no potential for reopening, then employees have no reasonable expectation of reemployment. Thus, in a case like *Decca Records, Inc.*,[78] where there is no expectation of reopening, the reopened employer should be free to not recognize the former union. Conversely, as in *El Torito*,[79] because employees knew that the restaurant would reopen at some point in the future, albeit indefinite, they should be permitted to retain their union's representation. Consequently, it is the nature of the hiatus, not its length, that should determine an employer's obligation. Applying this new rule to *Morton*[80] would result in a reversal of the Board because the parties harbored no expectation of the facility's reopening.

There are a variety of considerations a trier of fact can examine to determine the existence of a reasonable expectation of reopening. Preferential rehire lists, updates to employees, and continued communications with the union are indicia of such an expectation.[81] An employer's statement that the business will resume at some indefinite point in the future after a remodeling or reorganization also indicates that the business will reopen. Alternatively, closing due to economic conditions with no prospect of being able to continue should signal to employees that the business will not reopen.

Moreover, employer action during the hiatus directly bears on the reasonable expectation of reopening.[82] An attempt to sell the business or

78. 93 N.L.R.B. 819 (1951).

79. 295 N.L.R.B. 493 (1989), *enforced*, 929 F.2d 490 (9th Cir. 1991).

80. 299 N.L.R.B. 649 (1990).

81. In 1989, the Sheraton Palace Hotel in San Francisco closed for remodeling. After bargaining with eight separate unions, the Hotel offered its 425 employees the choice of a severance package or recall rights once the hotel reopened. The Hotel sent employees a monthly newsletter during the renovation to keep them informed of any progress. *See generally* Laabs, *Sheraton Remodels a Hotel and a Service Plan*, PERSONNEL J. 86 (Aug. 1991). Therefore, even if there is a two year hiatus like there was for the Sheraton employees, the other indicia create a reasonable expectation of reopening.

82. The actions of a union during a hiatus may also affect the reasonable expecta-

its assets by the employer, is also a clear sign that the closure is not temporary.[83] In *Rockwood Energy and Mineral Corp.*,[84] the Board noted that the length of a hiatus alone is not determinate in assessing employer obligations.[85] In *Rockwood*, the plant lay dormant for approximately five years.[86] Despite this significant lapse, the Board held that the employer's bargaining obligation was intact.[87] The court evaluated the following factors: plant equipment was preserved for production, "one unit employee worked throughout the hiatus, . . . other employees were on layoff status thus having some expectation of recall, . . . and the Union communicated with the employees and with management" during the hiatus.[88] All of these predict a future resumption of business.[89]

Thus, any shutdown which engenders a reasonable expectation of reopening will not release an employer from its collective bargaining obligations. While companies experiencing temporary shutdowns might still be bound by a CBA, indefinite closings creating no expectation of reemployment should strip the CBAs of effect even if a CBA had been automatically renewed. In these circumstances, the better method for

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tion of reopening. In *Nephi Rubber Product Corp.*, 303 N.L.R.B. 151 (1991), *enforced*, 976 F.2d 1361 (10th Cir. 1992), the Board applied a successor employer analysis to a company that had closed due to economic conditions and emerged 16 months later as a new company after a bankruptcy. *Id.* at 152. The Board downplayed the 16 month hiatus citing, among other things, the continued union efforts to reopen the plant, the union's regular meetings with employees, the continued union newsletters, and the union's pursuit of pension obligations on behalf of the employees. *Id.* at 152 n.11.

83. *See Molded Fiber Glass Body Co.*, 182 N.L.R.B. 400 (1970) (finding that closure was intended to be permanent based on the employer's attempt to sell the closed plant).

84. 299 N.L.R.B. 1136 (1990), *enforced*, 942 F.2d 169 (3d Cir. 1991).

85. *Id.* at 1138, 1139 n.11.

86. *Id.* at 1136-38.

87. *Id.* at 1139 n.11.

88. *Id.*

89. *See also* Scof, Inc., No. 14-CA-20855, 1991 N.L.R.B. LEXIS 937 (1991), wherein the Administrative Law Judge held:

> The lack of permanency of the closing is demonstrated by the fact that at no time after the April "permanent" closing did Respondent seek to lease the factory to a third party nor did it attempt to transfer the machinery elsewhere or to sell off any of the woodworking or other machinery in the plant. Rather, it took the opposite course: it obliged its maintenance employee, William Taylor, to keep the plant in constant readiness for resuming production. It paid this maintenance man $17 per hour to oil the machinery, run the machinery from time-to-time to have it capable of operation, and to oil the cutting tables to prevent rusting. This is further evidence that the shut down of April 18 was not a bona fide permanent closing of the plant.

Id. at *95.

establishing the support of labor is for the union to file a petition for an election after the plant reopens.[90]

B. Step Two: Legitimate Rationale for Closure

If a company closes a plant to avoid its obligations under a CBA, then it may have unlawfully refused to bargain and discriminatorily failed to reemploy bargaining unit employees.[91] As the Supreme Court noted in *Textile Workers Union of America v. Darlington Manufacturing Co.*,[92] an employer may shutdown its entire business even if motivated by the most egregious anti-unionism; however, the employer cannot close its business temporarily and then reopen in order to oust the union.[93] By simply focusing on the reasonable expectation of reopening, an employer can circumvent a CBA by closing down with no intention of reopening and then six months later reopen the business and hire new employees. Because the old workforce would have no reasonable expectation that the plant would reopen, the employer would not be bound to recognize the union. To ensure this result does not occur, a second prong must be added onto the proposed new standard.

In *Pecrete, Inc.*,[94] the Board found no discriminatory intent in closing a plant and reopening it six days later without union employees.[95] The Board found the terminations were based on a legitimate lack of work.[96] The Board further concluded that "economic reasons and not any unlawful motive to encourage or discourage union membership" motivated the failure to rehire union employees.[97] The Board based its analysis on whether the employer shutdown the facility in good faith.[98] Thus, if a

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90. *See* Monfort, Inc. v. N.L.R.B., 965 F.2d 1538 (10th Cir. 1992) (election held to determine representation status).

91. 29 U.S.C. §§ 158(a)(3), 158(a)(5) (1988).

92. 380 U.S. 263 (1965).

93. *Id.* at 271-74.

94. 132 N.L.R.B. 986 (1961).

95. *Id.* at 992.

96. *Id.*

97. *Id.*

98. *Id.* at 993. The NLRB adopted the Administrative Law Judge's finding:

> I have found . . . that the Respondent was not motivated by discriminatory motives in discharging them and not recalling them in that the Respondent thereby practiced no discrimination to encourage or discourage membership in a union and accordingly did not violate Section 8(a)(3). Similarly here in discharging them and not recalling them thereafter, the Respondent's reason was entirely economic and Respondent's motive was not to undermine Local

company closes a plant in good faith, regardless of the amount of time the facility lies dormant, the company would not violate section 8(a)(5) based on changed circumstances, even if it chose to later reopen the facility without recognizing the union.[99] Consequently, when examining the propriety of a shutdown, the key element in determining the occurrence of an 8(a)(5) violation is the motivation for a closedown.

Even if a closedown is for legitimate reasons, the reopening of a facility may incur liability. In *Cumberland Shoe Corp.*,[100] the Chapel Hill plant was fully closed on April 1, 1964.[101] The Board found the Chapel Hill plant discontinued operations for compelling economic reasons, and not as "an attempt to revive [it] as a nonunion plant."[102] Hence, the Board concluded that the closedown of the plant was not a sham, and that the closedown did not violate sections 8(a)(1) and (3) of the NLRA.

Approximately six months later, Cumberland Shoe Corp. reopened the plant without notifying the union.[103] The Board held that "the Respondent violated Section 8(a)(5) by its failure to notify the Union of the reopening and its refusal to bargain with the Union upon request."[104]

46's majority or to avoid bargaining with Local 46 as the exclusive representative of its metal lather employees. I therefore conclude and find that the Respondent did not violate Section 8(a)(5) as alleged in the complaint.

Id.

99. *See* Molded Fiber Glass Body Co., 182 N.L.R.B. 400, 401 (1970) (finding no violation of §§ 8(a)(5) and (1) by reopening and refusing to bargain with the union because of respondent's "lack of union animus, the good faith efforts made by the parties to reach some type of agreement even after the plant was apparently permanently closed, and the economic considerations which admittedly were the sole factors which caused the plant's closing and subsequent reopening"). *But see* Swift Indep. Corp., 289 N.L.R.B. 423, 430 (1988), *enforcement denied*, 887 F.2d 739 (7th Cir. 1989) (holding that closures violated the NLRA because closures of two plants "were not genuine closures, but were merely maneuvers designed to achieve indirectly what the [employer] could not directly obtain from the Union" in concessions and because "the 'closures' were effectuated with the preconceived intent to reopen the plants shortly thereafter"); Schmutz Foundry and Machine Co., 251 N.L.R.B. 1494, 1496, 1501 (1980), *enforced*, 678 F.2d 657 (6th Cir. 1982) (holding that respondent's withdrawal of recognition after a hiatus was a violation of §§ 8(a)(5) and (1) because the "'closing' of the foundry and its subsequent reactivation were part of a coordinated plan to be free of the Union"); Circle T Corp., 238 N.L.R.B. 245, 249-50 (1978), *enforced*, 614 F.2d 777 (9th Cir. 1980) (holding that the company violated sections 8(a)(5) and (1) by closing and reopening a business where such actions "were designed and implemented as a 'maneuver' to eliminate the Union as the bargaining representative" because "[s]uch a motive is inconsistent with the principles of collective bargaining").

100. 156 N.L.R.B. 1130 (1966).

101. *Id.* at 1132.

102. *Id.*

103. *Id.* at 1132-33.

104. *Id.* at 1134.

The Board based its decision on the trial examiner's finding that the respondent refused to bargain even though it did not have a bona fide doubt about the Union's majority status.[105] Thus, under present Board precedent, if a company does not hire new employees when it reopens and it refuses to bargain with its old union regarding the reopening, the company risks an 8(a)(5) violation.[106]

This analysis is also supported by *HLH Products*.[107] In that case, the respondent closed its plant, but then resumed operations six months later.[108] The Board held that the reopening of the plant without bargaining with the union was unlawful.[109] In a footnote, the trial examiner admonished the respondent: "I have found that the plant was shut down temporarily on February 4, 1965, as an antiunion stratagem. The workers in the certified bargaining unit therefore retained their status as employees of Respondent. I would reach the same result even if the shutdown was intended to be permanent . . . ."[110] Consequently, even if the shutdown was indefinite rather than temporary, a company can be held liable for violation of section 8(a)(5) if the closedown was a sham.[111]

In *Sterling Processing Corp.*,[112] the employer closed its facility due to economic conditions.[113] Nineteen months later the employer reopened the plant and rehired a significant number of the former employees.[114]

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105. *Id.*

106. It is also interesting to note from this case that the employer is not only liable for violations regarding the reopening of the facility, but if the reopening of the facility leads to the conclusion that the closedown was a sham, then the employer may additionally be responsible for the violations concerning the closedown. *Id.*

107. 164 N.L.R.B. 325 (1967), *enforced*, 396 F.2d 270 (7th Cir.), *cert. denied*, 393 U.S. 982 (1968).

108. *See id.*

109. *Id.* at 329. The NLRB specifically held:

> In these circumstances, and as the closing of the plant approximately 6 months after the Union won a Board election was preceded by antiunion threats predicting such action and was followed upon reopening by a hiring procedure which ignored the Union's bargaining rights and eliminated a majority of employees who voted in the election, I find, as alleged by the General Counsel, that Respondent "feigned" a permanent closing of the plant on February 4, 1965, as a device to get rid of the Union and its supporters.

Id. at 328.

110. *Id.* at 329 n.16.

111. *See id.*

112. 291 N.L.R.B. 208 (1988).

113. *Id.*

114. *Id.*

The Board found that upon "reopening, the Respondent had the same ownership, corporate form, plant location, and telephone number."[115] Likewise, the "labor-intensive segment of the . . . facility [was] basically unaltered."[116]

The Board held that the company did not have "an obligation to bargain with the Union before it modified the preexisting wages and working conditions prior to reopening its facility."[117] The Board also stated that "[t]he Respondent's ultimate hiring of a majority of its prehiatus work force is not relevant in determining whether the employer is obligated to bargain with Unions concerning terms and conditions set prior to the hiring of that work force."[118]

Upon resuming production under the same ownership, corporate form, and management, in the same location utilizing the same process, an employer is obligated to recognize and bargain with the union.[119] The Board concluded: "[W]here the employing entity remains the same after the hiatus as it was before, we find that the hiatus, standing alone, does not relieve the Respondent from its bargaining obligations."[120]

The Board in *Sterling* further noted that the successorship doctrine is not applicable to the facts to create a bargaining obligation because "no logical or legal basis exists for treating the Respondent as a new employer when it reopened."[121] Thus, based on this case, a company runs a significant risk that it will be required to bargain with its old union if it reopens its plant in the same location, owned by the same people, ex-

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115. *Id.* at 209.
116. *Id.*
117. *Sterling*, 291 N.L.R.B. at 209.
118. *Id.* at 210.
119. *Id.*
120. *Id.*
121. *Id.* at 210 n.10. *See also* Coastal Cargo Co., 286 N.L.R.B. 200, 203 (1987) (holding that the Respondent was a continuation of the employer that signed the CBA because it had "substantially identical form without significant alteration of its supervision, management, ownership, location, organization, or business purpose"). The Board concluded that the case was not "one of initial recognition of a union by a newly formed employer." *Id.* Instead, the Board found the same employer ceased and also resumed operations. *Id.* The Board imposed bargaining obligations on the resumed operations not because it was an alter ego or a successor, but because the shutdown had been temporary rather than indefinite. *Id.* at 203-04. *Cf.* Scott Manufacturing Co., 133 N.L.R.B. 1012, 1013-16 (1961), *enforced* 302 F.2d 280 (1st Cir. 1962) (holding that a parent corporation, its subsidiary which closed its doors and fired its personnel, and a third company allegedly leasing space and operating in subsidiary's plant all constituted a single employer or joint enterprise accountable for unfair labor practices stemming from the temporary shutdown of the subsidiary's plant and discharging employees and the reopening the subsidiary as the third company in order to avoid dealing with the union and to evade contract benefits obtained by the union for the subsidiary's employees).

isting in the same corporate form, with the same management, in the same business, and using the same production methods.[122]

The result in *Sterling* is nonsensical. The Board concluded that the employer has no duty to bargain about wage rates and working conditions before reopening, but that it does have an obligation to recognize the former union after the company rehires a number of former employees.[123] A better result would be to examine whether the employees had any reasonable expectation of the company reopening at the time of closing. If not, this fact in conjunction with the legitimate reason for the employer's closedown would create no obligation for the employer to recognize or bargain with the union.[124]

IV. CONCLUSION

Because of the various standards applied to employers in determining when they need to recognize and bargain with a union after reopening following a closedown, this article presents an overview of the various methods and recommends a two-step analysis. The first prong of the test is whether there is a reasonable expectation of reopening at the time of the closedown. If there is a reasonable expectation, then an employer must recognize and bargain with its former union. If there is not a reasonable expectation of reopening, then one must examine if the closedown was for a legitimate reason. If there is no reasonable expectation of reopening and the closedown was not a sham, then the employer has no duty to recognize the former union even if the employer hires substantially the same work-force performing substantially similar jobs.

Application of this two-step standard better achieves industrial peace and stability than using a multi-factored balancing test similar to the one used in successor employer and alter ego cases. Because an employer can violate the NLRA by either recognizing a former union or by failing

122. *Sterling*, 291 N.L.R.B. at 210-11.

123. *Id.* at 209-11.

124. Although the case was decided on statute of limitations grounds, the Regional Office of the NLRB in John Morrell & Co., 304 N.L.R.B. 896 (1991), *enforced*, 998 F.2d (D.C. Cir. 1993) utilized a similar standard when recommending that a complaint issue for violation of § 8(a)(5). The Regional Office noted that the plant closing was temporary because of the employer's "unsuccessful attempts to negotiate lower labor costs" before the closure, and the employer's "intent to reopen the plant" if it could without being bound by the CBA. *Id.* at 900. Although this standard articulated only a temporary closure prong, it also took into account whether the closure was a sham. *Id.*

to recognize a former union, a clearer standard is necessary. The proposed test ensures that an employer cannot circumvent its obligations by a sham closure. Likewise, the employer is not saddled with a union obligation after a legitimate closure with no reasonable expectation of reopening, which is followed by an actual reopening due to changed circumstances.