THE GM-TOYOTA JOINT VENTURE AND ITS IMPLICATIONS UNDER THE NATIONAL LABOR RELATIONS ACT

INTRODUCTION

In efforts to pump renewed vigor into a deflated industry, world automobile manufacturers have found one way to absorb the shock of recent travels over bumpy roads. In the past five years, auto manufacturers have begun more than thirty new joint projects to share technology, engineering and the costs of manufacturing new model cars.¹ Now, two automobile manufacturers have decided to share more: an auto assembly plant.

On February 17, 1983, executives of General Motors Corporation (GM) and Japan's largest auto maker, Toyota, signed an agreement proposing a joint venture to manufacture a new model car at GM's now idle Fremont, California auto plant.² The GM-Toyota venture would be the first of what may prove to be numerous American-foreign auto manufacturing plants located in the United States.³

². National L.J., Mar. 14, 1983, at 3, col. 2. After scrutiny for possible antitrust violations, the joint venture has been tentatively approved by a 3-2 consent vote of the Federal Trade Commission. Wall St. J., Dec. 23, 1983, at 3, col. 2. The FTC's final approval must await a 60-day public comment period. Id. The tentative FTC consent agreement stipulates a 12 year time limit on the joint venture. Id. GM-Toyota will be permitted to produce 250,000 autos annually for the American market and also allowed to produce an unspecified amount of autos for sale to Toyota. Id. The consent agreement prohibits any exchange of information between the two companies which is unrelated to the joint venture. Id. Two members of the FTC view the joint venture as a "clear violation of antitrust law" and, as might have been expected, other American auto makers have denounced the joint venture as "contrary to law." Id. Chrysler Corporation has filed a lawsuit against GM and Toyota in federal court in Washington, D.C. charging that the joint venture violates antitrust laws. The suit seeks a court order to block the venture. Wall St. J., Jan. 3, 1984, at 4, col. 2.

³. See Wall St. J., July 29, 1983, at 3, col. 2. Chrysler Corporation's Chairman Lee Iacocca has conceded that Chrysler is discussing with Mitsubishi of Japan the possibility of a joint venture to produce Mitsubishi's mini-compact Colt auto in the United States. Id.

Prior to Toyota's negotiations with GM, Toyota negotiated with the Ford Motor Company over an American joint venture. Schnapp, Behind the GM-Toyota Pact, Wall St. J., Sept. 16, 1983, at 24, col. 5. Ford negotiators asserted that the talks collapsed "because of Toyota's imperious demands." Id. Toyo Kogyo Company, Japan's fourth largest auto manufacturer, is considering the possibility of a joint...
The GM-Toyota agreement, however, presents certain basic labor law issues in a novel context. Generally, these issues center on the relationship, if any, between the joint venture and the approximately 6,000 laid-off United Auto Workers Union (UAW) members previously employed by GM at the Fremont plant. Toyota Chairman, Eiji Toyoda, has expressed that he does not want a unionized shop at Fremont. The UAW, on the other hand, has acknowledged that it will seek to force the joint venture to hire its anticipated 3,000 employee “start-up” workforce from the seniority lists of laid-off Fremont UAW members. GM and Toyota have maintained that resolution of any potential labor problems is essential before the proposed joint venture becomes a reality.

Union organizers and Japanese manufacturers are not unfamiliar foes on the American labor front. “Only about one-fourth of the approximately 300 Japanese-owned manufacturing facilities in the . . . [United States] are unionized.” With one insignificant exception, the UAW’s success at organizing workers at Japanese-owned auto plants located in the United States has been negligible.

Notwithstanding these unsuccessful UAW organizing efforts, and Eiji Toyoda’s apparently adamant objection to a unionized shop at Fremont, it is possible that the GM-Toyota joint venture could be compelled to recognize and bargain with the UAW.

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5. Id.
6. Id.
7. Id.
8. UAW vs. Japanese: An Uphill Battle, U.S. NEWS & WORLD REP., Vol. 95, No. 1, July 4, 1983, at 75. Most of the unionized Japanese facilities are in the Alaska seafood processing industry where unionization is traditional. Id. Most of the Japanese plants located in California and the Southeast are union free. Id.
9. Id. After four years of effort, the UAW has been able to organize only four powerhouse employees at Honda’s auto assembly plant and motorcycle facility in Marysville, Ohio. Id. The UAW has had no success in organizing any workers at the Nissan truck plant in Smyrna, Tennessee or at Kawasaki’s motorcycle plant in Lincoln, Nebraska. Id.

It is 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).

The National Labor Relations Act, § 9(a), 29 U.S.C. § 159(a) (1976) provides:

Representatives designated or selected for the purpose 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: Pro-
Under the National Labor Relations Act\textsuperscript{11} (NLRA), the joint venture may not discriminate against hiring applicants solely because of their union memberships or activities.\textsuperscript{12} If a majority of the “new” employees hired are former Fremont UAW members, a labor law theory known as the “successorship doctrine” might be invoked to require the joint venture to bargain with the UAW for a new labor contract.\textsuperscript{13} Whether or not the successorship doctrine is applicable will also depend on other factors such as the degree of continuity of business operations between the new joint venture and the old exclusively GM plant, and the continued appropriateness of the UAW bargaining unit.\textsuperscript{14}

At least two other labor law theories, the “joint employer” doctrine and the “alter ego” doctrine, might also be invoked in attempts to extract labor duties from the joint venture.\textsuperscript{15} Basically, under these theories, certain contractual obligations of the “old” company also become the obligations of the “new” company.\textsuperscript{16}

From the UAW’s standpoint, the potential impact of auto manufacturing coalitions on its membership may be considerable.\textsuperscript{17} The UAW has not received any guarantee that the joint venture will hire exclusively from among the ranks of laid-off Fremont auto workers\textsuperscript{18}—nor is GM-Toyota required to make such a guarantee.\textsuperscript{19} With its current membership roles down 500,000 from its 1979

\textsuperscript{12} The National Labor Relations Act, § 8(a) (3), 29 U.S.C. § 158(a) (3) (1976) provides in relevant part:
It shall be an unfair labor practice for an employer—by 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.
\textsuperscript{14} See notes 108-25 and accompanying text infra.
\textsuperscript{15} See notes 170-235 and accompanying text infra.
\textsuperscript{16} Id.
\textsuperscript{17} See Wall St. J., July 29, 1983, at 3, col. 2. Despite Chrysler's plans to form a joint venture with Mitsubishi, (see note 3 supra), Chrysler's Chairman predicts that the GM-Toyota joint venture will influence small and large car prices in the United States, might reduce competition between GM and Toyota and cost approximately 40,000 U.S. auto workers their jobs. Id.
\textsuperscript{19} Cf. Packing House & Indus. Serv., Inc. v. NLRB, 590 F.2d 688, 694 (8th Cir. 1978) (firm operating meat packing plant under contract with new owner was under
the UAW badly needs to recruit members from employees of auto makers as they set up new operations in the United States. If the joint venture is required to bargain with the UAW, GM-Toyota management will likely establish a firm bargaining position requiring that workers accept lower wages and benefits than those currently paid by the "Big Three" American auto makers. Arguably, these concessions will be necessary for GM-Toyota to remain competitive with nonunion Japanese auto manufacturers operating in the United States and in order to protect GM-Toyota's legitimate interest in operating a profitable enterprise. A refusal by the UAW to make such concessions may discourage formation of other auto manufacturing coalitions in the United States at a time when jobs in the auto industry are greatly needed.

The potential impact of auto manufacturing coalitions on the auto industry and on the American economy, and the effect that Japanese influences on plant management and labor relations have on union "nonmembership" is beyond the scope of this article. This article's focus is on the rights and duties of the GM-Toyota joint venture under the NLRA. Specifically, this article reviews GM-Toyota's duty, pursuant to the NLRA section 8(a)(3), to avoid discriminatory hiring of applicants solely because of their union membership, and the consequences for failure to abide by that duty. Additionally, the article reviews the successorship, joint employer, and alter ego doctrines, and addresses the issue of which of these theories, if any, is applicable to the GM-Toyota joint venture.

**REFUSAL TO HIRE UNION MEMBERS**

*Discrimination against union labor in the hiring of employees is a dam to self-organization at the source of supply.*

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21. See Koten, *U.S. Auto Makers Face Severe Challenge of Holding Down Costs as Profits Grow*, Wall St. J., Aug. 5, 1983, at 34, col. 1. "The Americans, despite their renewed vigor, are still far from competitive; the Japanese remain years ahead in their ability to produce better cars at lower cost. And there is mounting concern that unless U.S. producers can accelerate their drive to slash expenses and improve quality, they may fall even further behind." *Id.*

22. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 185 (1941) (Mr. Justice Frankfurter speaking for the majority of the Court).
Employees of an employer subject to the NLRA are guaranteed the right to unionize.\textsuperscript{23} It is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of this right.\textsuperscript{24} The NLRA section 8(a)(3) provides that it shall also be an unfair labor practice “for an employer . . . by 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.”\textsuperscript{25}

By virtue of section 8(a)(3), GM-Toyota is prohibited from refusing to hire qualified applicants for employment solely because of their UAW membership or labor activities.\textsuperscript{26} This mandate, however, does not impose any affirmative obligation on GM-Toyota to favor UAW members in its hiring practices.\textsuperscript{27} Congress intended section 8(a)(3) to insulate employees’ job security from their organizational rights so as to allow employees to freely join unions—or abstain from joining any union—without jeopardizing their livelihood.\textsuperscript{28} However, section 8(a)(3) was not designed to negate “the normal exercise of the right of the employer to select its employ-

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\item \textsuperscript{23} 29 U.S.C. § 157 (1976). The National Labor Relations Act, § 7 provides: 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
\item \textsuperscript{24} 29 U.S.C. § 158(a) (3) (1976) permits an employer and the employee’s certified majority bargaining representative to enter into an “agency shop” agreement, requiring all employees in a collective bargaining unit to join the union within thirty days of being employed. An agency shop clause does not require an employee to become a formal member of the union, to be a member before being hired, or to abide by internal union rules or regulations except with regard to payment of periodic dues and initiation fees to the union. See NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). The National Labor Relations Act permits states which have passed “right to work” legislation to prohibit even collection of initiation fees and periodic dues obligations of the agency shop. Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.
\item \textsuperscript{25} 29 U.S.C. § 158(a)(1) (1976).
\item \textsuperscript{26} See Phelps Dodge, 313 U.S. at 187. See, e.g., Alexander Dawson, Inc. v. NLRB, 586 F. 2d 1300, 1303 (9th Cir. 1978) (per curiam) (application for employment illegally rejected because of applicant’s prounion sentiment).
\item \textsuperscript{27} See Phelps Dodge, 313 U.S. at 186.
\item \textsuperscript{28} Radio Officers’ U. of the Com. Tel. U. v. NLRB, 347 U.S. 17, 40 (1954).
\end{itemize}
ees or discharge them."

GM-Toyota retains its managerial freedom to hire—or refuse to hire—applicants for any reason provided that the decision is not motivated by disdain for the UAW, and so long as encouragement or discouragement of free unionization will not be a "direct or foreseeable consequence" of its hiring practices.

In the years following the enactment of the NLRA, the Supreme Court of the United States had numerous occasions to consider the application of section 8(a)(3) to actions by employers aimed at discouraging union membership, primarily in cases involving the discharge of union members. However, it was not until its decision in *Phelps Dodge Corp. v. NLRB* that the Court addressed the issue of whether an employer subject to the NLRA may refuse to hire applicants solely because of union membership and activity. Prior to *Phelps Dodge*, at least one United States Court of Appeals had held that the discrimination in hiring union members did not violate section 8(a)(3). The Second Circuit had held that since the NLRA confers rights upon employees, not applicants for employment, it did not compel an employer to hire anyone. *Phelps Dodge*, however, dispelled any initial skepticism that section 8(a)(3) prohibits not only discriminatory discharge of

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30. See Omni Int'l Hotels, Inc. v. NLRB, 606 F.2d 570, 574 (5th Cir. 1979), enforcement denied, (absent antiunion motive, employer's right to make initial hiring decisions regarding applicant is at least as plenary as its right to discharge an employee).

31. See Republic Steel Corp. v. NLRB, 311 U.S. 7, 10-11 (1940) (employees protected against discriminatory discharge); NLRB v. Sands Mfg. Co., 306 U.S. 332, 345-46 (1939) (employer's offer of reemployment to laid-off workers held illegal if conditional on joining new union); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 346 (1938) (failure to reinstate solely because of employees' participation in a lawful strike is prohibited by the National Labor Relations Act, § 8(a)(3)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (Congress' power to deny employer freedom to discriminate in discharge of employees because of antiunion animus held constitutional).

32. 313 U.S. 177 (1941).

33. Id. at 181.

34. NLRB v. National Casket Co., 107 F.2d 992, 997 (2d Cir. 1939) (quoting Mr. Justice Roberts' remarks in Associated Press v. NLRB, 301 U.S. 103, 132 (1937)).
union members, but discrimination in the hiring of union members as well. The Supreme Court's enforcement of the NLRB's order requiring the Phelps Dodge Corporation to hire two applicants who were refused employment because of their union membership firmly established that "there is 'no greater limitation in denying [the employer] the power to discriminate in hiring than in discharging . . . [union members]."  

ANTIUNION MOTIVE

The relevance of an employer's antiunion motive in a section 8(a)(3) discrimination charge case has been consistently recognized by the NLRB and the courts. In Radio Officers' Union of the Commercial Telegraphers Union v. NLRB, the Supreme Court held, pursuant to the Phelps Dodge rule, that the test of whether an employer discriminatorily refuses to hire union applicants is whether the employer's true purpose for that refusal is the result of antiunion animus.

If GM-Toyota discriminates against UAW members in its hiring practices, its purpose for that discrimination will be controlling. Without a finding of an antiunion motive, there can

35. See Phelps Dodge, 313 U.S. at 187.
36. Id. (quoting from Judge Learned Hand's concurring opinion in Phelps Dodge in the court below, 113 F.2d 202, 207 (2d Cir. 1940)).
37. See Jones & Laughlin Steel, 301 U.S. at 46 (Where, in the first case to come before the NLRB under the newly enacted National Labor Relations Act, the Court stated with respect to limitations placed upon an employer's right to discharge employees under § 8(a)(3): "The [employer's] true purpose is the subject of investigation with full opportunity to show the facts."). See also Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (The employer's "real motive" is decisive; the National Labor Relations Act permits a discharge "for any reason other than union activity or agitation for collective bargaining with employees.") Id. (emphasis added).
38. 347 U.S. 17 (1954) (Black, J., dissenting). Radio Officers' was consolidated on review with two other cases: NLRB v. International Bhd. of Teamsters, 94 N.L.R.B. 1494 (1951), enforcement denied, 196 F.2d 1, 4 (8th Cir.), cert. granted, 344 U.S. 853 (1953), and Gaynor News Co., Inc. v. NLRB, 93 N.L.R.B. 299 (1951), enforced as modified, 197 F.2d 719 (2d Cir.), cert. granted, 345 U.S. 902 (1952), aff'd, 347 U.S. at 55 (1953). In each instance, the Supreme Court found that the employer violated section 8(a)(3) by encouraging union membership. 347 U.S. at 55. Although Radio Officers' involved application of section 8(a)(3) to employer's attempts to encourage union membership, "the principles construed [by the Court] are equally applicable where the employer's actions are aimed at discouraging union membership." 347 U.S. at 39.
40. See Radio Officers', 347 U.S. at 44. See also NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437 (6th Cir. 1981) (proper test to determine whether failure to hire an employee is an unfair labor practice is whether antiunion animus is a dominant motive).
generally be no unfair labor practice.  

When an employer is charged with an unlawful refusal to hire an applicant because of union membership or union activism, the employer may rebut that charge by demonstrating legitimate business motives for the decision. Unavailability of a job, poor work performance and lack of necessary qualifications, for example, have been recognized as legitimate business justifications for refusal to hire. Articulated reasons for refusal to hire a union applicant which are unconvincing or invalid will not rebut a discriminatory hiring charge.

One exception to this general rule exists where an employer's conduct is "so inherently destructive" of employees' protected right to unionize that the unavoidable and unforeseeable consequences of the employer's action bear their own indicia of antiunion animus. If the conduct can be properly characterized as inherently destructive, no proof of antiunion motivation is required; the NLRB can find an unfair labor practice despite the employer's proof of legitimate business justifications. An example of this inherently destructive employer conduct was present in NLRB v. Erie Resistor Corp., where an employer awarded an additional credit of twenty years seniority to workers who replaced

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41. 347 U.S. at 43-44. See, e.g., NLRB v. Southern Plasma Corp., 626 F.2d 1287, 1294 (5th Cir. 1980) (employer's action must have discriminatory motive).  
44. Paramount Metal & Finishing Co., 225 N.L.R.B. 464, 464-65 (1976) (nature of employer's asserted reasons for lay-off were unconvincing when weighed against "value" of employee to employer and thus did not support unlawful discrimination charge); cf. McCain Foods, Inc., 236 N.L.R.B. 447, 453-54 (1978) (refusal to hire for full-time position was valid because employer was led to believe that union applicant was only seeking part-time employment), enforced sub nom., NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 669, n.1 (1st Cir. 1979).  
45. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228, 231 (1963); see NLRB v. Sure-Tan, Inc., 672 F.2d 592, 601, n.15 (7th Cir. 1982).  
46. See Erie Resistor, 373 U.S. at 231-32.  
47. 373 U.S. 221 (1963).
striking employees, and also to strikers who returned to work immediately. The Court held that this "super-seniority" had the natural tendency to discourage union membership. Thus, the employer in Erie Resistor was held to have violated section 8(a)(3) even though no specific proof of antiunion motive was established, and even though the employer claimed that his action was necessary to continue business operations during the strike.

In the 1983 case of Metropolitan Edison v. NLRB, the Supreme Court upheld an NLRB ruling that it is "inherently destructive" of protected employees' rights for an employer to discipline union officials more severely than other employees who participated in an unlawful work stoppage. The Court reasoned that this disparate discipline discriminates solely on the basis of union status and, although it may have only an indirect effect on the rank and file's decision to strike, it is likely to deter qualified employees from seeking union office. In the absence of inherently destructive conduct, however, if the adverse affect on employees' rights to unionize is "comparatively slight" and the employer comes forward with evidence of legitimate and substantial business justification for his allegedly discriminatory action, specific proof of antiunion motive is required.

Much discrepancy has recently existed among the courts of appeals as to the degree of antiunion motive required to sustain a section 8(a)(3) discriminatory refusal to hire charge. This discrepancy arose primarily in dual motive cases, that is, where two or more reasons for discharge or refusal to hire were present, one legitimate and the other prohibited. To settle this confusion, the

48. Id. at 222-23.
49. See id. at 230-32 for the Court's analysis in reaching this conclusion.
50. 373 U.S. at 236-37.
51. 103 S. Ct. 1467 (1983).
52. Id. at 1474.
53. Id. citing Szewezuga v. NLRB, 686 F.2d 962, 973 (D.C. Cir. 1982).
54. Great Dane, 388 U.S. at 34; NLRB v. Borden, Inc., 600 F.2d 313, 321 (1st Cir. 1979), appeal after remand, 445 F.2d 87 (1st Cir. 1971), enforced; see NLRB v. Moore Business Forms, Inc., 574 F.2d 835, 841 (5th Cir. 1978).
55. Compare NLRB v. Consolidated Freightways, 651 F.2d at 437 (the test for failure to hire is whether the antiunion animus is a "dominant" motive) with NLRB v. Pfizer, Inc., 629 F.2d 1272, 1275 (7th Cir. 1980) (the test is whether antiunion animus accounted for "any significant part of the employer's motivation") and Chromalloy Mining & Minerals v. NLRB, 620 F.2d 1120, 1127 (5th Cir. 1980) (A refusal to recall discharged employees is unlawful if it is "partially motivated" by antiunion animus.) (quoting NLRB v. Big Three Indus., 497 F.2d 43, 49 (5th Cir. 1974)).
56. E.g., Boeing Airplane Co. v. NLRB, 217 F.2d 369, 373-74 (9th Cir. 1954) (evidence supported a finding that employee who resigned her position was refused reemployment because of erratic attendance records and unexplained tardiness, and not because of her previous union activity).
NLRB in the 1980 case of *Wright Line, A Division of Wright Line, Inc.*, set forth a "test of causation" for cases alleging violation of section 8(a)(3).

The *Wright Line* test, if applied to the GM-Toyota venture, would require the General Counsel of the NLRB to make a prima facie showing sufficient to support an inference that any refusal to hire UAW members was a "motivating factor" in GM-Toyota's hiring decision. Once this was established, the burden would shift to GM-Toyota to demonstrate that the same action would have been taken in the absence of antiunion motive.

If the first bow of the *Wright Line* test could not be met, there would be no unlawful refusal to hire. It would not be necessary, however, for the General Counsel to prove that antiunion animus was the *sole* motive for a refusal to hire. It would only be necessary to show, by a preponderance of the evidence, that a refusal to hire was in some way motivated by antiunion animus. GM-Toyota would then be permitted to demonstrate, by a preponderance of the evidence, that even absent the improper motivation, it would have acted in the same manner for wholly legitimate reasons. Recently, in *NLRB v. Transportation Management Corp.*, the Supreme Court held that the burden of persuasion placed upon the employer in *Wright Line* is consistent with the NLRA sections 8(a)(3) and 10(c).

Perhaps the most direct evidence of GM-Toyota's antiunion animus is the forthright statement by Eiji Toyoda that he does not want a unionized shop at Fremont. Where there is direct evidence of an employer's antiunion motive for a refusal to hire union applicants, otherwise legitimate business justifications may be held to be a pretext for that refusal to hire. Toyoda's statement might cause unemployed UAW applicants to renounce their union membership in hopes of better chances of being hired by GM-Toyota. Even if renunciation of UAW membership does not result, some courts might hold that the statement interferes unlawfully

58. 662 F.2d at 903.
59. See id. at 905.
60. See id.
62. Id. at 2472, citing *Consumers' Research, Inc.*, 2 N.L.R.B. 57, 73 (1936).
63. *Transportation Mgmt.*, 103 S. Ct. at 2474.
64. Id.
66. Id. at 2474-75.
67. See note 5 and accompanying text *supra*.
with employees' exercise of their protected organizational rights. Courts have held that it is the coercive tendency of an employer's statements, not their actual effect, that constitutes a violation of section 8(a)(3) and interferes with the right to unionize guaranteed under section 8(a)(1).

Most courts, however, would probably not consider Toyoda's single remark, without more, as amounting to an unfair labor practice under the circumstances. Employers are entitled to oppose unionization. Employers have a free speech right to communicate their views on unionization to employees and that right cannot be infringed by a union or the NLRB. At the time Toyoda's statement was made, the joint venture was still in the primal stage. Furthermore, the statement was not made to GM-Toyota hirees. The employer's right of free speech to express opposition to unionization can be circumscribed only when he addresses his employees, and then only if he goes further than expressing a view and proposes the adverse effects that unionization may have on his business, his employees and their incomes or work opportunities.

Evidence of Unlawful Refusal to Hire

Obviously, one indispensable element of proof for an unlawful refusal to hire because of union membership would be that GM-Toyota had knowledge of an applicant's UAW affiliation. Absent this knowledge, no section 8(a)(3) charge could be fairly sus-

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69. Cf. Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 146 (1st Cir. 1981) ("[E]ven a single oblique remark can be considered unduly coercive in appropriate circumstances.").

70. NLRB v. Marine Optical, Inc., 671 F.2d 11, 18 (1st Cir. 1982); NLRB v. P.B. and S. Chemical Co., 567 F.2d 1263, 1267 (4th Cir. 1977).

71. See Charge Card Ass'n v. NLRB, 653 F.2d 272, 272-74 (6th Cir. 1981); General Motors Corp. v. NLRB, 596 F.2d 1295, 1310 (5th Cir. 1979) ("opposition [to unionization], without more, does not amount to antiuion animus").

72. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969); NLRB v. Intertherm, Inc., 596 F.2d 267, 277 (8th Cir. 1979). This free speech right is guaranteed by the National Labor Relations Act, § 8(c), 29 U.S.C. § 158(c) (1976) which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

73. At the time the statement was made to the press, approval by the FTC remained a potential obstacle to the joint venture. See National L. J., Mar. 14, 1983 at 3, col. 2.

74. Patsy Bee, Inc. v. NLRB, 654 F.2d 515, 516-17 (8th Cir. 1981).

75. See NLRB v. Holcombe, 325 F.2d 508, 511 (5th Cir. 1963) (insufficient evidence that company actually knew that an employee discharged for failing to report for work failed to report because he wished to walk in union picket line).
Where direct proof of knowledge is unavailable, the NLRB is free to infer knowledge from the surrounding circumstances. For example, if the personnel manager for GM-Toyota who conducts interviews with applicants is the same individual who was in charge of hiring for GM at Fremont before that plant shut down, GM-Toyota may be held to have constructive knowledge of the applicant's union membership or activism. The personnel officer's potential prior knowledge of a former employee's union affiliation in this circumstance would be too substantial for GM-Toyota to credibly be heard to deny knowledge of the alleged discriminatee's union membership or activity.

Often, union affiliation will be evident from the face of an employment application in the form of a direct inquiry about the applicant's union membership, or where the applicant simply announces his union membership. Inquiries by the job interviewer, whether direct or subtle in nature, into an applicant's union affiliation or preference to operate without a union, also bear an indicia of discrimination in hiring. Even if an applicant questioned on union activity were to be subsequently hired by GM-Toyota, the NLRB may find an unlawful interference with the applicant's right to unionize.

Likewise, if GM-Toyota ignores appli-

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76. NLRB v. Melrose Processing Co., 351 F.2d 693, 697 (8th Cir. 1965) ("The essential ingredients ... are a knowledge on the part of the employer that the employee is engaged in union activity and a failure to rehire the employee because of this activity.").

77. Local 357, Int'l Bhd. Teamsters v. NLRB, 365 U.S. 667, 675 (1961) ("The existence of discrimination may ... be inferred by the [NLRB] for 'it is permissible to draw on experience in factual inquiries.").

78. See McCain Foods, 236 N.L.R.B. at 448, 453.

79. Id. at 453.

80. Young Hinkle Corp., 244 N.L.R.B. 264, 266 (1979). When facing a situation involving potential discrimination for union activity, an applicant may voluntarily declare his or her union membership and thereby effectively deprive the employer of a defense of lack of knowledge of union activity. Id. at 266, citing Ohio Valley Graphic Arts, Inc., 234 N.L.R.B. 493 n.4 (1978).

81. See Eastern Maine Med. Center v. NLRB, 658 F.2d 1, 7 (1st Cir. 1981) (questioning of job applicant by head of nursing department about job applicant's union sentiments violated the National Labor Relations Act, §§ 8(a)(1) and (3)); NLRB v. Pineville Stud Co., 578 F.2d 1292, 1294 (9th Cir. 1978) (interrogation of employees about union activity held to be an unfair labor practice). Compare Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 725 (9th Cir.) (interrogation of employees concerning union activities is not a per se violation of the National Labor Relations Act), cert. denied, 451 U.S. 984 (1980) and NLRB v. Bighorn Beverage, 614 F.2d 1238, 1241 (9th Cir. 1980) (test of unfair labor practice is whether, under all circumstances, interrogation of employees by employer reasonably tended to restrain or interfere with employees in the exercise of their protected rights).

82. See McCain Foods, 236 N.L.R.B. at 453.
cations of highly-skilled and experienced applicants with substantial employment history at GM's former Fremont operation, and it turns out that the applicants had been extremely active in union endeavors, or had been involved in a single significant union event such as a work stoppage, and GM-Toyota hires a non-union applicant instead, this conduct may in itself be sufficient to sustain a section 8(a)(3) violation.\footnote{NLRB v. Gogin, 575 F.2d 596, 602-03 (7th Cir. 1978) (employer's disregard of seniority criteria in recalling laid-off employees held to be strongly indicative of discriminatory motive). \textit{Cf.} NLRB v. Fire Alert Co., 566 F.2d 696, 697 (10th Cir. 1977) (hiring of "outsiders" before recalling strikers who had made an unconditional offer to return to work "clearly established" an unfair labor practice).}

Obviously, an employer is not required to refuse to hire all union activists before being found in violation of section 8(a)(3).\footnote{Broyhill Co., 210 N.L.R.B. 288, 296 (1974). \textit{See} American Greetings Corp., 233 N.L.R.B. 1279, 1280-81 (1977).} Thus, even if GM-Toyota hires a union member equally qualified but less active in the union, there is a possibility that a section 8(a)(3) violation can be made out. Simply because some union members are hired does not preclude a section 8(a)(3) violation accruing to those who are not.\footnote{See McCain Foods, 236 N.L.R.B. at 453.}

\section*{Consequences of a Section 8(a)(3) Violation}

If GM-Toyota discriminates against hiring UAW members in violation of section 8(a)(3), the NLRB's remedial powers under the NLRA section 10(c) will become operative.\footnote{See Phelps Dodge, 313 U.S. at 187. The National Labor Relations Act, § 10(c), 29 U.S.C. § 160(c) (1976) provides in relevant part: If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: \textit{Provided}, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . . \textit{Republic Steel}, 311 U.S. at 11, see NLRB v. Fort Vancouver Plywood Co., 604 F.2d 596, 601-02 (9th Cir. 1979) \textit{cert. denied}, 445 U.S. 915 (1980).} Section 10(c) grants the NLRB broad—although not unlimited—power to fashion a remedy for an unfair labor practice,\footnote{Republic Steel, 311 U.S. at 11; see NLRB v. Fort Vancouver Plywood Co., 604 F.2d 596, 601-02 (9th Cir. 1979) \textit{cert. denied}, 445 U.S. 915 (1980).} as well as the discretion to
grant no remedy at all. The purpose of section 10(c) is to provide a "make-whole" remedy for victims of unfair labor practices, whether the guilty party be the employer or the union. Since the remedy is to "make-whole," the NLRB order must be limited to remedial measures; the order may not be punitive.

Section 10(c) directs the NLRB to neutralize the effect of illegal discrimination against hiring union members by ordering the guilty party to "take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of [the NLRA]." On its face, section 10(c) appears to provide a remedy only for those employees discriminatorily discharged in violation of section 8(a)(3). That is not the case. Section 10(c) does not differentiate between discrimination in refusing employment and in terminating it. The NLRB's power to order an employer to hire "does not derive from the phrase 'including reinstatement of employee's . . .' and is not limited by it." Discriminatory refusal to hire union members is equivalent to discriminatory firing. As noted by the Supreme Court in the Phelps Dodge case, "it would indeed be surprising if Congress gave a remedy for the one which it denied for the other."

If GM-Toyota violates section 8(a)(3) by refusing to hire UAW members solely because of their union affiliation or activity, the NLRB has the authority to require GM-Toyota to offer immediate employment, in the positions applied for, to UAW member applicants. If such positions are not available, the UAW members are entitled to substantially equivalent positions, without prejudice to their seniority rights and other rights and privileges of employment. Additionally, the fact that UAW members discriminated against may have obtained substantially equivalent work else-

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88. E.g., In re Thompson Cabinet Co., 11 N.L.R.B. 1106, 1116-17 (1939) (worker illegally discharged for union activity denied remedy after he offered his services as a labor spy).
89. Phelps Dodge, 313 U.S. at 197.
90. Republic Steel, 311 U.S. at 12.
92. Phelps Dodge, 313 U.S. at 188.
93. Id. at 191.
94. Id. at 187.
95. Cf. Great Dane, 388 U.S. at 34 (employer required to reinstate striking employees to substantially equivalent positions of employment after the strike had ended unless employer could show that his refusal was due to legitimate business justifications). The hiring of permanent replacements for economic strikers, however, is not an unfair labor practice. Mackay Radio, 304 U.S. at 345. And an employer "is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create [a position] for them." Id. at 345-46.
96. See Big Bear Supermarkets #3, 239 N.L.R.B. 179, 185 (1978).
where does not, in itself, preclude the NLRB from requiring GM-Toyota to hire them.97

Section 10(c) expressly authorizes the NLRB to award back-pay for a section 8(a)(3) violation.98 If GM-Toyota refuses to hire any applicants which it has illegally discriminated against, those applicants are eligible for back-pay accruing with interest, if so ordered by the NLRB, until such time as GM-Toyota complies with an order to hire them.99 Specifically, this means that workers illegally denied employment may be awarded a sum equal to wages they would have earned from the date of discrimination to the time of employment, less net earnings from other employment during this back-pay period.100 Sums which workers neglected to earn, which they may have been capable of earning, may also be deducted from their back-pay awards.101

GM-TOYOTA'S DUTY TO BARGAIN

Section 8(a)(5) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees. . . ."102 Collective bargaining is defined by the NLRA as "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. . . ."103 This statutory duty to bargain only requires an employer and union "to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agree-

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97. See Phelps Dodge, 313 U.S. at 193.
101. Phelps Dodge, 313 U.S. at 197-98. ("Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.") In reality, where a substantial number of workers are involved, application of this doctrine of mitigation is "too burdensome for effective administration." Id. at 198. Thus, it is likely that "neglected" wage earnings would not be a factor in the formula to determine back-pay awards if a substantial number of laid-off Fremont UAW workers are illegally discriminated against in hiring. See id.
103. 29 U.S.C. § 158(d) (1976). Whether the parties have the requisite good faith is a factual matter initially for the NLRB to decide. NLRB v. Insurance Agents' Int'l U., 361 U.S. 477, 498 (1960). The NLRB has been afforded flexibility to determine whether the "conduct at the bargaining table evidences a real desire to come into agreement." Id. The NLRB may make this determination by "drawing inferences from the conduct of the parties as a whole." Id. See generally Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1418 (1958).
ment. . . .”{104} It does not require either party to make any concessions or yield to the demands of the other on a position fairly maintained.{105}

At least three labor law theories, the successorship, the joint employer and the alter ego doctrines, might be invoked in attempts to extract a duty from GM-Toyota to recognize and bargain with the UAW. The following sections review each theory and discuss the possible relevance and ramifications of each theory as applied to the GM-Toyota joint venture.

**THE SUCCESSORSHIP DOCTRINE**

The successorship doctrine requires a company to bargain with the union of its “predecessor’s” employees when it acquires ownership of another company that is a party to an unexpired labor contract.{106} Unless the new employer evidences a “good faith doubt” as to its new employee’s majority support for their union, a “true” successor’s refusal to bargain with that union is a per se violation of the NLRA section 8(a)(5).{107}

*Determination of a True Successor*

The NLRB and the courts evaluate three criteria to determine whether a new employer is a true successor and thus has a duty to bargain with a preexisting bargaining group:

1. the identity of the employing industry;
2. the workforce majority; and
3. appropriateness of the bargaining unit.{108}

When successorship issues arise, the NLRB typically applies the identity of the employing industry test.{109} Basically, under this concept, if there is a substantial continuity between the old and new company, the new employer will be a successor.{110} The focus

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104. See Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717, 719 (9th Cir. 1972) (quoting NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960)).
105. See Holmes Tuttle, 465 F.2d at 719.
107. See 4 T. KHEE, LABOR LAW § 17.01[1] (3d ed. 1982). International U. of Elec., Radio & Mach. Wkrs. v. NLRB, 604 F.2d 889, 693 (D.C. Cir. 1979); NLRB v. Middleboro Fire Apparatus, Inc., 590 F.2d 4, 6 (1st Cir. 1978) (successor employer not required to bargain with predecessor's employees' union where employer could "reasonably have entertained a good faith doubt" about union's continued majority status); NLRB v. SAC Constr. Co., 603 F.2d 1155, 1156 (5th Cir. 1979) ("employer's duty to bargain with a union . . . ceases when employer can demonstrate a good faith belief that union lacks majority status").
108. 4 T. KHEE, supra note 107 at §§ 17.03[1][a]-[c].
109. Id. at § 17.03[1][a].
110. Id.
is upon the variance in the job situation as a result in the shift of ownership; the less variance the more likely the new employer will be deemed a successor for bargaining purposes.\textsuperscript{111} In making its determination, the NLRB will look to such factors as the continuity in operations, workforce, location, working conditions, supervision and methods of production.\textsuperscript{112}

The NLRB decisions do not afford the second criterion, the workforce majority, the same preeminence as the Supreme Court does.\textsuperscript{113} Although the continuity of the workforce is one factor considered by the NLRB under the identity of the employing industry test, the Supreme Court apparently regards the workforce majority as the single most important factor to determine a successor employer's bargaining duties.\textsuperscript{114} The focus under the workforce majority test is upon the numerical composition of the new employer's workforce.\textsuperscript{115} If the newly hired workforce is comprised of more than one-half of the predecessor employee's bargaining unit, the employer will be deemed a successor and be bound to bargain with a preexisting union.\textsuperscript{116}

The third criterion considered by the NLRB and the courts when successorship issues arise, the "continued appropriateness of the collective bargaining unit," should perhaps be the first criterion inquired into. This is so because, even where a new employer is determined to be a successor, unless the bargaining unit continues to be appropriate—or the new employer agrees that the unit is appropriate—the successor employer has no duty to bargain with the preexisting union.\textsuperscript{117}

Even if all of the predecessor's employees are hired, if the successor employer's operational structure differs from the predecessor's, the former bargaining unit may no longer be appropriate and the duty to bargain may not carry over to the successor.\textsuperscript{118} However, a change in the size of the unit will not necessarily render the
unit inappropriate. Thus, merely because the new employer's workforce may be substantially less in number, the bargaining unit will not necessarily be inappropriate; so long as the union maintains majority status and the unit which actually is acquired remains appropriate, the duty to bargain will carry over.

The NLRA does not define what an “appropriate” bargaining unit is. Rather, section 9(b) of the NLRA provides that unless an employer agrees to the appropriateness of a unit, it shall be for the NLRB to make this determination. The NLRA does not require that the unit chosen be the most appropriate; it only requires that the unit be an appropriate one. Often, a successor employer will challenge the appropriateness of the preexisting bargaining unit to justify a refusal to bargain with its predecessor's employees' union. Whether the employer prevails on this "defense" depends ultimately on the "unit appropriateness" determination made by the NLRB.

119. NLRB v. Fabsteel Co., 587 F.2d 689, 695 (5th Cir.), cert. denied, 442 U.S. 943 (1979) (obligation of a successor employer to bargain with union may be found even though workforce is substantially diminished by the transfer of ownership).
120. International U. of Elec., Radio & Mach. Wkrs., 604 F.2d at 695. See, e.g., NLRB v. Band-Age, Inc., 534 F.2d 1, 2-3, 6 (1st Cir. 1976) (Campbell, J., dissenting) (employer's argument that it ought not to be held a successor because its predecessor's workforce of 250-300 employees diminished to 25 at time of take-over was rejected by the court), cert. denied, 429 U.S. 921 (1976).
122. The National Labor Relations Act, § 9(b), 29 U.S.C. § 159(b) (1976) provides in part:
   The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .
To determine bargaining unit appropriateness, the NLRB applies what it refers to as the "community of interest test." Under this test, the NLRB looks to such factors as: (1) similarity in wages; (2) similarity in benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization. R. Gorman, supra note 43 at 68-69.
123. MPC Restaurant Corp. v. NLRB, 481 F.2d 75, 78 (2d Cir. 1973).
124. See, e.g., NLRB v. Midvalley Steel Fabricators, Inc., 621 F.2d 49, 53 (2d Cir. 1980) (employer's refusal to bargain with union was not justified by employer's contention that union represented inappropriate bargaining unit).
The "defense" of bargaining unit inappropriateness was "created" in Burns where, in dicta the Court stated: "It would be a wholly different case if the Board had determined that because Burns' operational structure and practices differed from those of [its predecessor's], the . . . bargaining unit was no longer an appropriate one." 406 U.S. at 280.
Rights And Duties Of A Successor Employer

A successor employer is not obligated to hire its predecessor's employees.\footnote{Burns, 406 U.S. at 280-81 n.5; NLRB v. Houston Dist. Servs., Inc., 573 F.2d 260, 264 (5th Cir.), cert. denied, 439 U.S. 1047 (1978).} The new employer is free to recruit and hire whomever it wishes \textit{provided} it does not discriminate against union employees solely because of their union membership or activism.\footnote{Howard Johnson Co., 417 U.S. at 262, Local Lodge No. 1266, Int'l Ass'n of Mach. & Aerospace Wkrs. v. Panoramic Corp., 668 F.2d 276, 287 (7th Cir. 1981). See notes 23-39 and accompanying text \textit{supra}.}

The most significant Supreme Court decision to address a successor employer's duty to bargain with a preexisting union is \textit{NLRB v. Burns International Security Services, Inc.}\footnote{406 U.S. 272 (1972). Stated simply, the facts in \textit{Burns} are as follows: Burns replaced another employer, Wackenhut, as the plant security service for Lockheed Aircraft Service Company at California's Ontario International Airport. 406 U.S. at 274. When Burns began providing this new service, it employed 42 guards; 27 of whom had been hired from Wackenhut's workforce. \textit{Id.} Burns provided the former Wackenhut guards with membership cards of the American Federation Guards Union (AFG)—a union which Burns had labor contracts with at other locations—and informed the guards that they had to become AFG members to work for Burns. \textit{Id.} at 274-75. Shortly thereafter, the United Plant Guard Workers of America Union (UPG)—which only four months earlier had been elected as the bargaining representative of the 27 guards hired from Wackenhut—demanded that Burns recognize it as the guard's union and adhere to the labor contract between the UPG and Wackenhut. \textit{Id.} at 274-76. Burns refused and the UPG filed unfair labor practice charges with the NLRB. \textit{Id.} at 276.}

Although the Court in \textit{Burns} avoided using the term "successorship" in finding a statutory duty to bargain with the union, it affirmed the conclusions of the NLRB and the Second Circuit to that effect based entirely on the successorship doctrine. \textit{Id.} at 296 (Rehnquist, J., dissenting).

The Supreme Court has addressed the successorship issue in three other major cases. In \textit{John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964)}, the Court held a successor employer was compelled to arbitrate disputes arising under a preexisting private labor contract. \textit{Id.} at 548. The union in \textit{Wiley}, however, was not permitted to use arbitration to acquire new rights against the successor. \textit{Id.} at 555.

In \textit{Howard Johnson Company v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees & Bartenders Int'l U., 417 U.S. 249 (1974)}, the Supreme Court modified the holding in \textit{Wiley} to the extent that where a new employer purchases all the assets of its predecessor (rather than as in \textit{Wiley} simply merges with a predecessor) no duty to arbitrate can be imposed upon the successor unless there is a substantial continuity in the identity of the workforce "across the change in ownership." \textit{Id.} at 253. In \textit{Wiley}, the successor company had retained all of its predecessor's employees; in \textit{Howard Johnson}, only a small fraction of the predecessor's employees were hired. \textit{Id.} at 250.

In \textit{Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973)}, the Supreme Court established the principle that a successor employer who purchases a business with notice of an outstanding unfair labor practice has a duty under the National Labor Relations Act §§ 8(a)(1) and 8(a)(3) to remedy its predecessor's unfair labor practices. \textit{Id.} at 172-76. The Court justified imposition of this liability on the ground that victims of unfair labor practices are without a "meaningful remedy when title to the employing business operation changes hands." \textit{Id.} at 181, \textit{citing Perma Vinyl Corp., 164 N.L.R.B. 968 (1967), enforced sub nom., United States Pipe & Foundry Co. v.\footnote{Howard Johnson Co., 417 U.S. at 250.}}}
Burns, an employer who hires a majority of its new workforce from its predecessor’s workforce, to perform the same task at the same location, has a statutory obligation to bargain with the union of the predecessor’s employees for the same period of time as the predecessor employer would have been obligated to bargain. Additionally, the Court in Burns held that an employer’s duty to bargain with a preexisting union does not arise until the employer has hired a full complement of employees, and then only if that complement constitutes a majority of its predecessor’s employees covered by that preexisting bargaining contract. Although a successor employer may be bound to recognize and bargain with a preexisting union, Burns established that the employer is not bound to the substantive provisions of a labor contract unless it assumes that obligation by expressly agreeing to be bound.

NLRB, 398 F.2d 544, 548 (5th Cir. 1968). Furthermore, the Court noted that a successor with notice of an outstanding unfair labor practice can reflect the matter in the purchase price of his predecessor’s business. 414 U.S. at 185. Compare Kallmann v. NLRB, 640 F.2d 1094, 1100 (9th Cir. 1981) (successor employer which conducted essentially the same business as its predecessor was required to bargain with union where a majority of its new workforce was former employees of its predecessor) and Saks & Co. v. NLRB, 634 F.2d 681, 686 (2d Cir. 1980) (employer succeeded to obligation of predecessor employer to bargain with incumbent union where there was a substantial continuity in identity of workforce in that 16 employees hired by employer constituted a majority of 20 employees in bargaining unit and there was no reason to think that those 16 employees did not represent the same measure of union support as did the predecessor’s bargaining unit). But see Burns, 406 U.S. at 297, where Mr. Justice Rehnquist in his dissent cogently argued:

The Court concludes that because the trial examiner and the Board found the Lockheed facility to be an appropriate bargaining unit for Burns’ employees, and because Burns hired a majority of Wackenhut’s previous employees who had worked at that facility, Burns should have bargained with the union, even though the union never made any showing to Burns of majority representation. There is more than one difficulty with this analysis. First, it is by no means mathematically demonstrable that the union was the choice of a majority of the 42 employees with which Burns began the performance of its contract with Lockheed. True, 27 of the 42 had been represented by the union when they were employees of Wackenhut, but there is nothing in the record before us to indicate that all 27 of these employees chose the union as their bargaining agent even at the time of negotiations with Wackenhut. There is obviously no evidence whatever that the remaining 15 employees of Burns, who had never been employed by Wackenhut, had ever expressed their views one way or the other about the union as a bargaining representative. It may be that, if asked, all would have designated the union. But they were never asked.

The National Labor Relations Act, § 8(d), 29 U.S.C. § 158(d) (1976) made this policy an express statutory mandate. The statute provides in pertinent part:

For the purposes of this section, to 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, or the negot-
In light of the holding in Burns, the disappearance of an employer as the sole employer which has entered into a labor contract does not automatically terminate all rights of the employees covered by that agreement. Thus, a true successor will have a duty to bargain with a preexisting union despite the change in ownership.

A successor employer's duty to bargain with the union does not arise, under the holding in Burns, until it has hired its predecessor's employees as a majority of its own workforce, and then only upon a bargaining demand made by the union. Consequently, a successor employer is permitted to freely establish the initial wages and working conditions for its new employees without first having to bargain over those terms with the union until it hires a full workforce. The Burns decision, however, qualified a successor employer's right to unilaterally establish the initial terms of employment: It is free to do so unless "it is perfectly clear that the new employer plans to retain all of the employees in the [bargaining] unit." Although the Court in Burns noted that "there will be instances in which it will be perfectly clear" that the successor will retain the full complement of its predecessor's workforce, the Court did not clearly define such an instance. One circuit court of appeals, however, has addressed this issue, holding that such an instance is "perfectly clear" only

The history regarding § 8(d) was reviewed in detail and given controlling effect in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). In Porter, the Supreme Court, while agreeing that the employer violated § 8(a)(5) by adamantly refusing to agree to a union dues checkoff to frustrate the consummation of any bargaining agreement, held that the NLRB had erred in ordering the employer to agree to such a provision. 397 U.S. at 102, 108.

See Golden State Bottling, 414 U.S. at 182.

See Burns, 406 U.S. at 277-81.

See Burns, 406 U.S. at 295 (quoting Mr. Justice Learned Hand's opinion in the court below: "The successor has always been held merely to have the duty of bargaining with his predecessor's union." 441 F.2d 911, 915 (2d Cir. 1971)). See also Bellingham Frozen Foods, 626 F.2d at 678.

See, e.g., NLRB v. Wayne Convalescent Center, Inc., 465 F.2d 1039, 1042 (6th Cir. 1972) (successor employer was unilaterally entitled to establish the initial terms of employment even though the union had a contract ready for signing when the change in ownership took place). See also R. GORMAN, supra note 43 at 122-23.


See Burns, 406 U.S. at 295.
when an employer, prior to a takeover, informs a predecessor's employees that it will employ all workers who wish to be employed.\textsuperscript{138}

If a union initially obtains a workforce majority, a successor employer is obligated to bargain to impasse before unilaterally changing the wages or terms under a labor contract covering its predecessor's employees.\textsuperscript{139} A successor employer's failure to bargain to impasse where a union workforce majority exists will require it to make employees "whole" for any losses they suffer as a result of a unilateral change in wages or working conditions.\textsuperscript{140}

\textit{Good Faith Doubt of Union Majority Status}

Even if an employer is found to be a true successor and initially hires a full complement of workers so as to create a duty to bargain, the successor employer may avoid that duty if it can demonstrate an objective good faith doubt as to the employees' continued majority support for the union.\textsuperscript{141} Where a successor acquires ownership of a company within a year of union certification there is "almost a conclusive presumption" that majority support for the union continues.\textsuperscript{142} Thus, a successor which has hired, as a majority of its workforce, members of a preexisting bargaining group within one year of union certification will be precluded from

\begin{itemize}
\item \textsuperscript{138} NLRB v. Bachrodt Chevrolet Co., 468 F.2d 963, 969-70 (7th Cir. 1972) (Stevens, J., dissenting in part), vacated on other grounds, 411 U.S. 912 (1973); see NLRB v. World Evangelism, Inc., 656 F.2d at 1355; NLRB v. Edjo, Inc., 631 F.2d 604, 607-09 (9th Cir. 1980).
\item \textsuperscript{139} See \textit{Burns}, 406 U.S. at 295. It is a fundamental tenet of labor law that an employer cannot make a unilateral change in wages, hours, terms or conditions of employment during the course of collective bargaining. First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674-75 (1981) (Brennan, J., dissenting; Marshall, J., joining in dissent). A unilateral change in mandatory subjects of bargaining cannot be made even in good faith with no intent to frustrate collective bargaining or to undermine the union. See \textit{Alfred M. Lewis, Inc.} v. NLRB, 587 F.2d 403, 408 (9th Cir. 1978). However, once the employer and union have bargained in good faith to a genuine impasse, the employer is free to institute its final offer made to the union. NLRB v. Katz, 369 U.S. 736, 745 (1962). A genuine impasse only suspends the obligation to bargain; it does not extinguish it. See NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 401-09 (1952).
\item \textsuperscript{141} See, e.g., Howard Johnson Co., 198 N.L.R.B. 763, 763-64 (1972) (successor employer required to reimburse wages, with six percent interest, for employee losses as a result of employer's unilateral changes in working conditions).
\item \textsuperscript{142} See \textit{World Evangelism, Inc.}, 656 F.2d at 1355; NLRB v. Edjo, Inc., 631 F.2d at 607; NLRB v. Maywood Plant of Grede Plastics, 629 F.2d 1, 4 (D.C. Cir. 1980) (per curiam).
\item \textsuperscript{140} \textit{Brooks v. NLRB}, 348 U.S. 96, 103 (1954); Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d at 633, 638 (10th Cir. 1980) (incumbent union enjoys a virtually irrebuttable presumption of majority status for the period of one year following union certification); NLRB v. Lee Office Equip., 572 F.2d 704, 706 (9th Cir. 1978) (employer not permitted to refuse to bargain during year following certification even though employer was confident that union had lost majority support).
\end{itemize}
raising a good faith doubt as to majority support for the union.\textsuperscript{143} Where union certification is more than one year old, the presumption of majority status is rebuttable and may be overcome by objective evidence that the union no longer enjoys support by the majority of employees.\textsuperscript{144}

The presumption of majority status can be rebutted only with a clear and convincing showing of "either an actual loss of majority status or objective factors sufficient to support a reasonable good faith doubt of the [u]nion's majority."\textsuperscript{145} To establish a good faith doubt based on objective considerations, employers have sometimes relied upon decline in the number of workers paying union dues, sudden changes in union bargaining posture, failure of the union to communicate with the employer over an extended period of time, and rumors of employee dissatisfaction.\textsuperscript{146} These approaches have not always been successful.\textsuperscript{147}

\textit{GM-Toyota As a True Successor?}

Under the NLRB's "identity of employing industry" test, the GM-Toyota joint venture will exhibit a certain degree of business continuity with the former, exclusively GM, enterprise at the Fremont, California facility. The joint venture will manufacture the same generic product, at the same plant, with substantially equivalent methods of production. On the other hand, there is also business variance. GM-Toyota will be headed by a Toyota executive and at lower levels of management Toyota, as well as GM, managers and supervisors will oversee the "new" plant's operations.\textsuperscript{148}

At this point in time, whether a "workforce majority" will be present is questionable. GM-Toyota has not, as of yet, informed the UAW that it plans to hire exclusively from the ranks of laid-off

\textsuperscript{143} NLRB v. Key Motors Corp., 579 F.2d 1388, 1390 (7th Cir. 1978); Pioneer Inn Assoc. v. NLRB, 578 F.2d 835, 838 (9th Cir. 1978) (employers not entitled to challenge union majority status within one year after union certification).

\textsuperscript{144} See NLRB v. Tahoe Nugget Inc., 584 F.2d 293, 297-98 (9th Cir.), cert. denied, 442 U.S. 921 (1978).

\textsuperscript{145} NLRB v. Carilli, 648 F.2d 1206, 1214 (9th Cir. 1981); NLRB v. Vegas Vic, Inc., 546 F.2d 828, 829 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977). Cf. Western Dist. Co. v. NLRB, 608 F.2d 397, 399 (10th Cir. 1979) (subjective good faith doubts about a union's majority status are insufficient to justify refusal to bargain).

\textsuperscript{146} See NLRB v. A.W. Thompson, Inc., 651 F.2d 1141, 1143 (5th Cir. 1981).

\textsuperscript{147} E.g., Fotomat Corp. v. NLRB, 634 F.2d 320, 327 (6th Cir. 1980) (Merritt, J., dissenting) (high employee turnover unaccompanied by objective evidence that new employees did not support the union was not evidence of loss of majority status by that union).

Fremont auto workers. The tenor of present labor negotiations indicates that such a guarantee will not be made. In any event, GM-Toyota is not required to make a guarantee; a successor is not required to hire its predecessor's employees. In a recent decision, the NLRB has held that it was not unlawful for a successor employer to refuse to hire any experienced production employees of the predecessor employer. The NLRB reasoned that, although this refusal foreclosed the possibility that union members would be hired, since the employer had recently experienced success in other plants with training inexperienced workers in its methods of production, the employer's decision was not based on a discriminatory motive.

The chance, while perhaps not overwhelming, is at least likely that the majority of the GM-Toyota workforce will eventually constitute former Fremont UAW members. Two reasons buttress this assumption. First, good business judgment dictates that GM-Toyota hire conveniently available and experienced auto workers. Second, section 8(a)(3) mandates that an employer not engage in any antiunion bias. These factors might inevitably force GM-Toyota to hire a sizeable number of laid-off UAW members to staff its Fremont operations.

If, however, nonunion employees are available and adequately skilled, or at least subject to being trained, GM-Toyota might avoid any successorship duty to bargain with the UAW by selecting a new workforce not comprising, as a majority, former Fremont UAW members. The selection, however, must not be predicated on a motive designed to discriminate against the union. It is unlawful for a company to hire no more than half of its predecessor's unit employees in order to avoid becoming obligated to recognize and bargain with a union. In addition, an employer's benign reasons for not hiring the predecessor's experienced employees are susceptible of being characterized, in the words of the NLRB, as "mere pretexts to cloak its illegal scheme."

While theoretically a totally nonunion workforce can be hired in the absence of an antiunion motive, that situation seems unreal-
istic. GM-Toyota cannot legally prevent all UAW members from tendering applications, and a flat refusal to hire any UAW members would be a violation of section 8(a)(3). Thus, it would appear that most of the qualified labor pool will be former Fremont UAW workers.

If the NLRB determines that any former Fremont UAW members rehired constitute an appropriate bargaining unit, the third successorship criterion will have been met, and a duty to bargain with the UAW could arguably be imposed. If, however, the NLRB finds that the operational structure of the GM-Toyota venture differs from the old, exclusively GM operation, the former bargaining unit can be held to no longer be "appropriate," and the duty to bargain would not carry over. Merely because the anticipated GM-Toyota workforce will be substantially fewer in number—6,000 laid-off, as opposed to 3,000 "new" hirees—will not alone cause the bargaining unit to be inappropriate.

If the NLRB and the courts find that all three criteria for successorship have been met, GM-Toyota would still be able to avoid any successorship duty to bargain if it can demonstrate a good faith doubt of the UAW's majority status. The hiatus in plant operations between the exclusively GM controlled operations and the new operations of the GM-Toyota joint venture is one factor which may evidence an objective good faith doubt as to the employees' majority support of the UAW. But this factor alone will probably not be sufficient to relieve GM-Toyota of its duty to bargain if the joint venture does in fact hire as a majority of its workforce former Fremont UAW members. Furthermore, it is arguable that at least one circuit court of appeals would hold that the long standing GM-UAW contracts had raised a presumption of continued majority support for the union even stronger.

At first blush, GM-Toyota appears to fit neatly into the successorship paradigm. An analysis of the NLRB's and Supreme Court's treatment of the successorship doctrine, however, reveals

160. See notes 117-25 and accompanying text supra.
161. See note 118 and accompanying text supra.
162. See note 120 and accompanying text supra.
163. See notes 141-47 and accompanying text supra.
165. Cf. Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1110 (1st Cir. 1981) ("Generally, several indicia of loss of majority support are required, and no one factor . . . is determinative.").
166. Valamac Indus., 599 F.2d at 248.
that there is no definitive pattern as to when a successorship is present. Only fact-specific tests and criteria exist.

As Professor Kheel points out, the Supreme Court has stated that "[t]here is, and can be, no single definition of 'successor' applicable in every legal context." He prefers the term "successor" to refer to a "mere conveyee," with the characterization of successorship depending on the circumstances of the conveyance. GM-Toyota is not a mere conveyee. Also, other circumstances surrounding the GM-Toyota joint venture do not sufficiently parallel a "typical" successorship situation.

In the first instance, GM is both the predecessor corporation and the "new" employer. GM has not acquired ownership of another company; it has initiated a new company's formation. Likewise, there has been no transfer of GM's Fremont operations to a new employer; the operations had legitimately ceased and will begin anew.

Focusing on GM's former Fremont employees, there is no transfer of employees across a change in ownership as is almost always the case where a successorship has been held to exist. The GM employees had been "laid-off", but in reality there was little or no likelihood that they would be recalled to staff the Fremont plant. Prior to the joint venture, there was no reasonable expectation that GM would revive its Fremont operations. For all practical purposes then, Fremont UAW workers had been terminated for economic reasons. Thus, it appears that any relationship between GM and Fremont UAW members will be held to have legitimately ceased along with the plant operations.

THE JOINT EMPLOYER DOCTRINE

Some legal observers regard the "joint employer doctrine," rather than the successorship doctrine, as being more relevant to determine GM-Toyota's labor obligations to the UAW. The joint employer doctrine—sometimes referred to as the "single integrated enterprise theory"—reflects a determination that two or more separate business entities are sufficiently integrated to treat them as a single employer for various statutory purposes under the NLRA. Once joint employer status is determined to exist,

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167. 4 T. Kheel, supra note 107 at § 17.03 citing Howard Johnson, 417 U.S. at 262-63, n.9.
168. 4 T. Kheel, supra note 107 at § 17.03.
169. See, e.g., Burns, 406 U.S. at 274.
171. Pulitzer Pub. Co. v. NLRB, 618 F.2d 1275, 1278 (8th Cir. 1980); Parklane Ho-
the bargaining obligations of the first employer under an existing labor contract also become the obligations of the other joint employer or employers.\textsuperscript{172}

\textbf{Determination of Joint Employer Status}

The NLRB has devised a four-point test to determine whether a joint employer exists.\textsuperscript{173} Under this test, the NLRB focuses upon the following factors to determine if two or more business enterprises are sufficiently integrated to find joint employer status:

1. interrelation of business operations;
2. common management;
3. centralized control of labor relations; and
4. common ownership.\textsuperscript{174}

No one factor is determinative as to whether sufficient integration exists, and all four factors need not be present in a single case.\textsuperscript{175} However, the first three factors, because they evidence functional integration, are more crucial to a joint employer determination than the fourth, common ownership.\textsuperscript{176} Particular stress is often...
placed upon the centralized control of labor relations, though this factor is not critical "in the sense of being the sine qua non of 'single employer' status."

Court Treatment of Joint Employers

The circuit courts of appeals have addressed the application of the NLRB's four-point test in a number of recent cases, some of which will probably be relied upon by UAW attorneys in an attempt to force GM-Toyota to recognize and bargain with the UAW. Two such cases are NLRB v. Triumph Curing Center and NLRB v. Cofer.

In Triumph, the Ninth Circuit Court of Appeals enforced an NLRB order which required a garment industry pressing subcontractor and a sewing subcontractor to bargain as joint employers with the union of the pressing employees working at the sewing subcontractor's plant. The garment pressing subcontractor, Triumph, had voluntarily recognized the garment worker's union at its plant and was party to several labor contracts with the union over a period of years. When the union gave notice that it would not renew the existing contract, and when negotiations for a new contract proved futile, Triumph closed its operations. Shortly thereafter, the garment sewing subcontractor, Lee, opened a pressing operation at its plant and offered employment to all former Triumph employees, conditioned upon their resigning from the garment worker's union.

Consequently, for the first six months of Lee's new pressing operation, between sixty and one hundred percent of Lee's press-

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177. Pulitzer, 618 F.2d at 1279. See Cofer, 637 F.2d at 1313 ("It is hard to imagine any one factor more supportive of a single employer determination . . . than a contractual requirement that the corporate partner be consulted prior to any union dealings. . . ."); Transcontinental Theaters, 568 F.2d at 129.

178. Local No. 627, Int'l U. of Operating Engrs. v. NLRB, 518 F.2d 1040, 1046 (D.C. Cir. 1975). See Industrial Personnel, 657 F.2d at 229 ("[A]lthough the control of labor relations is one factor to be considered [in a joint employer determination], it is not controlling in and of itself."); see also Miscellaneous Drivers, 624 F.2d at 833.

179. See cases cited at note 172 supra.


181. 571 F.2d 462 (9th Cir. 1978).

182. 637 F.2d 1309 (9th Cir. 1981).

183. 571 F.2d at 465-66, 476.

184. Id. at 466.

185. Id.

186. Id. at 469-70.
ing employees formerly had worked for Triumph.\textsuperscript{187} Although Tri-
umph and Lee were separately owned business entities,\textsuperscript{188} Lee's new pressing operation was supervised by former Triumph super-
visors and utilized Triumph's old equipment.\textsuperscript{189} Furthermore, Tri-
umph's owner was found to have exercised substantial control
over Lee's plant.\textsuperscript{190}

Based on this evidence, the court held that Triumph had de-
viously shut down its plant and shifted its operation in order to
 evade its responsibility to bargain with the garment worker's union.\textsuperscript{191} The court concluded that this conduct, and the inte-
gation of the two enterprises, was sufficient under the NLRB's four-
point test to hold that Triumph had violated its duty to bargain
under the NLRA section 8(a)(5), and sufficient to require Lee and
Triumph to bargain as joint employers with the garment worker's union.\textsuperscript{192}

\textit{NLRB v. Cofer} involved application of the joint employer doc-
trine to a joint venture.\textsuperscript{193} In \textit{Cofer}, two employers each held a fifty
percent interest in a motel pursuant to a joint venture agree-
ment.\textsuperscript{194} In this case, the Ninth Circuit enforced an NLRB order
which required the joint operators of the motel to reinstate four
dismissed union employees, with back pay, and to bargain with the
employees' union.\textsuperscript{195} The joint venturers had contended that, be-
cause there was no specific finding that the NLRB's four-point test
had been met, the NLRB had abused its discretion in holding the
partners to be a single employer.\textsuperscript{196} In response to this contention,
the court stated that "[i]t is not clear, however, that the . . .
[NLRB] ever intended these factors to constitute a rule for part-
nership cases."\textsuperscript{197} The court stated that the NLRB "apparently did
not believe the rule applied and did not find it useful to refer to [it]
. . ."\textsuperscript{198} The Ninth Circuit concluded that even though the four-

\textsuperscript{187} Id. at 468. These employees initially worked on the same contracts for the
same customers at Triumph before it closed. \textit{Id.}

\textsuperscript{188} Id. The court found this distinction "blurred" by the fact that Triumph's
owner leased the premises where Lee's plant was located, paid the rent and was not
reimbursed by Lee. \textit{Id. at 467-68.}

\textsuperscript{189} Id.

\textsuperscript{190} Id. at 468.

\textsuperscript{191} Id. at 472. The court also found that Triumph had violated the National
Labor Relations Act, § 8(a)(1) by interfering with the employee's right to unionize
freely. \textit{Id. at 468-69.}

\textsuperscript{192} Id. at 468.

\textsuperscript{193} 637 F.2d at 1310-12.

\textsuperscript{194} Id. at 1310.

\textsuperscript{195} Id.

\textsuperscript{196} Id. at 1312.

\textsuperscript{197} Id.

\textsuperscript{198} Id.
point test had not been specifically applied, a sufficient integration of business operations existed to sustain the NLRB's determination that the joint venture constituted a single employer. 199

The joint employer doctrine was applied in Cofer—as the doctrine is frequently applied by the NLRB—primarily to meet the NLRB's self-imposed jurisdictional restraint. 200 Concerning this jurisdictional restraint, it should be noted that although the NLRB may have jurisdiction over an employer, under certain circumstances it may decline to exercise that jurisdiction at its discretion. 201 Pursuant to this grant of discretion, the NLRB has established certain jurisdictional "yardsticks" for particular industries which, if not met, may cause the NLRB to decline to assert its jurisdiction. 202 Generally, these jurisdictional requirements are cast as a predetermined annual gross income. 203 Where an employer's annual dollar volume of business does not meet this predetermined jurisdictional amount, the NLRB will, in its discretion, apply the joint employer doctrine to determine whether a sufficient degree of integration is present so as to treat separate employers as a single enterprise. 204 If the four-point test indicates sufficient integration, the NLRB can combine the employers' annual gross incomes to meet the requisite amount for that industry and thereby exercise its jurisdiction. 205 Such was the situation in Cofer. 206

It is apparent why a specific application of the NLRB's four-point test is not necessary in a joint venture arrangement: The typical joint venture squarely meets the test in almost every situation. That is, each joint venturer necessarily exercises a certain degree of control over the joint venture's operations and labor relations. 207 Furthermore, the standard joint venture agreement pro-

199. Id. at 1313.
200. Id. at 1312.
202. Cofer, 637 F.2d at 1312. See 1 LAB. L. REP. (CCH) ¶ 1610 (1979) for the current NLRB jurisdictional "yardsticks" for various industries.
203. See 637 F.2d at 1312.
204. See id.
205. Transcontinental Theaters, 568 F.2d at 126.
206. 637 F.2d at 1312. The NLRB has established $500,000 annual gross income as the jurisdictional requirement for the motel/hotel industry. Id. This amount would not have been met by the motel itself. Id. The joint venture, however, stipulated that the amount would be met if the local partner and the corporate partner were counted as a single employer. Id.
207. Cf. Industrial Personnel, 657 F.2d at 229 (joint employer's control of working conditions will inevitably involve control of labor relations).
vides for common management and financial control. Thus, joint venturers, by the very nature of their business arrangement, are joint employers and the NLRB’s test is not required to determine joint employer status.

**Application of the Joint Employer Doctrine to GM-Toyota**

The joint employer doctrine seems inapplicable to a joint venture business arrangement similar to that being contemplated by GM and Toyota. A joint venture of this type is posturally inappropriate to the context in which the joint employer doctrine is most often invoked. The doctrine is most often applied where two separate legal entities provide separate services or engage in separate phases of a business enterprise. The employers’ relationship to one another is generally determined solely under a business contract which is collateral to each employer’s primary business operations, usually a contract to provide a service. A joint venture, on the other hand, is a single business entity. The association of two or more companies in a joint venture creates a new legal entity. Each joint venturer contributes either capital, technology, expertise, or any combination of the three, toward the performance of a single task; in GM and Toyota’s arrangement, the manufacture of an automobile.

In other instances, such as Cofer, where the joint employer doctrine has been applied, the NLRB has done so only in order to meet its self-imposed jurisdictional requirement. In light of the holding in Cofer, that it is not clear that the NLRB ever intended its four-point test to constitute a rule for joint ventures, and because the NLRB only invoked the joint employer doctrine in that case to permit the exercise of its jurisdiction, the joint employer doctrine would seem inapplicable to GM-Toyota’s joint venture

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209. See Ace-Alkire, 431 F.2d at 281 (common carrier and lessor of trucks to carrier held to be joint employers). See also *Industrial Personnel*, 657 F.2d at 227 (joint employer doctrine applied to company which provided drivers to distribute other companies’ products); *Miscellaneous Drivers*, 624 F.2d at 832 (funeral home operator employed embalmers and other general employees but obtained funeral vehicle drivers from other mortuaries); *Triumph Curing*, 571 F.2d at 466 (garment industry pressing subcontractor and sewing subcontractor); *Transcontinental Theaters*, 568 F.2d at 125 (joint employer doctrine applied to determine relationship between corporate lessee of motion picture theater and partnership sublessee).

210. E.g., *Pulitzer*, 618 F.2d at 1279 (newspaper publisher and newspaper distributor’s relationship solely determined by a contract providing for delivery of publisher’s daily newspaper).


212. *Cofer*, 637 F.2d at 1312. See also *Sakrete*, 332 F.2d at 907.
where jurisdiction exists without having to combine the joint venturer's annual gross incomes.213

THE ALTER EGO DOCTRINE

An alter ego employer is, in reality, the same employer as its purported predecessor.214 The NLRB generally has found alter ego status where two nominally separate business entities have "substantially identical" management, business purpose, operation, equipment, customers, supervision and ownership.215 However, crucial to the determination of alter ego status is the fact that ownership and control of a business entity have not actually shifted to a new employer.216

The typical business reorganization involved in an alter ego situation is the transfer of assets "from a going concern to a corporate shell controlled by the same parties,"217 or where an employer simply ceases doing business as one company and forms another company with a different name.218 Consequently, one of the main characteristics of the alter ego employer is the fact that the new corporation has the identical stockholders and officers, and that there has been a transfer of assets without consideration to the new company.219

An alter ego employer must bargain with the employees of its predecessor corporation.220 After union activity begins, or where it


214. 4 T. KHEEL, supra note 107 at § 17.02[1].

215. Denzil S. Alkire, 259 N.L.R.B. 1323, 1324 (1982); Edward J. White, Inc., 237 N.L.R.B. 1020, 1025 (1978). Cf. Chippewa Motor Freight, Inc., 261 N.L.R.B. 455, 458 (1982) (Although two trucking companies were owned by the same family and had the same business purpose, one was not the alter ego of the other. The "lower-echelon management and supervision" of the two was "dramatically different" and there was no similarity in their methods of operation).

216. Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942). See Almamated Meat Cutters & Butchers Workmen, Local 576 v. NLRB, 663 F.2d 223, 226-27 (D.C. Cir. 1980) (no finding of alter ego status; while management remained essentially the same, there was a genuine change in ownership).

217. 4 T. KHEEL, supra note 107, at § 17.02[1].


220. See 4 T. KHEEL, supra note 107, at § 17.02[1].
already exists, the refusal to hire union employees followed by the creation of an alter ego employer "is tantamount to a finding of intentional employer evasion of the bargaining duty." Where there is "substantially undisputed evidence" that an alter ego employer exists, and that it was created for the purpose of eliminating the cost of dealing with the union, a section 8(a)(5) violation of the employer's duty to bargain is certain to be found.

Unlike the successor employer, the alter ego employer is subject to all the legal and contractual obligations of the predecessor company. Thus, the alter ego employer is required not only to bargain with a preexisting union, but also to honor the substantive provisions of a preexisting labor contract. Additionally, the alter ego employer is obligated to remedy its purported predecessor's unfair labor practices. Since the alter ego employer is bound by the obligations of a preexisting labor contract, the consequences of holding GM-Toyota to be an alter ego of the GM Corporation would not only be to require the joint venture to recognize and bargain with the UAW, but also to recall laid-off Fremont UAW members under the seniority provisions of the presently unexpired GM-UAW contract. Repudiation of the existing contract and refusal to pay union benefits would be an unlawful refusal to bargain with the UAW.

**GM-Toyota as an Alter Ego Employer**

GM-Toyota's status as an alter ego employer primarily depends on whether there was a bona fide discontinuance of GM's Fremont operation, and a true change of ownership. That GM's shut down of its Fremont auto assembly plant was for legitimate business reasons is perhaps best reflected in a recent news article:

Less than a year before shutting Fremont down, GM had invested $280 million in the plant, more than half the cost of building a totally new assembly plant. This investment

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221. See id. Cf. Shearer, 262 N.L.R.B. 622, 623 (1982) (second company held to be an alter ego where, after union activity began among the first company’s drivers, the drivers were discharged and the second company was immediately formed to operate the same kind of business).

222. J.M. Tanaka Constr., Inc. v. NLRB, 675 F.2d 1029, 1035 (9th Cir. 1982).

223. See note 133 and accompanying text supra.

224. 4 T. Kheel, supra note 107, at § 17.02[2].


227. See Big Bear Supermarkets #3, 239 N.L.R.B. at 185.

228. See Tanaka, 675 F.2d at 1033.

equipped Fremont for assembly of a new family of front-wheel-drive midsize cars. The introduction of these A-body cars proved to be a fizzle. Demand was so weak that GM shut down two of the five A-body plants, Fremont and Framingham in Massachusetts. The choice was no accident. Both ranked among the worst in GM from the standpoint of the corporation's measurement of quality, worker attendance and labor relations. Subsequently, when the A-body became a large and deserved hit, GM chose to reopen Framingham rather than Fremont.  

Whether there is a true change of ownership which would terminate the duties of a new employer, "or merely a disguised continuance of the old employer," is a question of fact properly for the NLRB in the first instance. Although the NLRB generally finds an alter ego employer where two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership, "each case must turn on its own facts." The facts present in the GM-Toyota joint venture do not, however, appear sufficient to establish alter ego status.

In reaching this conclusion, there is no disagreement regarding the substantially identical business purpose and operation of GM and GM-Toyota. However, the management, supervision and ownership of the joint venture will lack similar substantial identity. Under present plans, the joint venture will be headed by a Toyota executive. Being a new business entity, GM-Toyota's issuance of new stock will likely result in new stockholders. As stated earlier, both Toyota and GM officers and directors will oversee the company, and Toyota, as well as GM, managers and supervisors will operate at lower levels. There will not be a transfer of assets to a corporate shell for nominal or no consideration. As joint venturers, Toyota and GM will share in the profits and other benefits of ownership, as well as bear the same financial risks.

It is difficult, then, to justify a contention that the GM-Toyota joint venture is the alter ego of the GM Corporation. The factual situation present does not support a conclusion that the joint venture is an instrumentality through which GM is seeking to evade its responsibility to bargain with the UAW at Fremont. This is particularly true given the substantial capital expenditure by GM, its legitimate business reasons for shutting down its Fremont plant,

234. See id.
235. See note 230 and accompanying text supra.
and GM's continued industry-wide bargaining efforts with the UAW.

CONCLUSION

The GM-Toyota joint venture does not sufficiently parallel those situations where the successorship, joint employer or alter ego doctrines have been successfully invoked to require an employer to bargain with a preexisting union.

The successorship doctrine is applied where one company has acquired ownership of some other company which is a party to a preexisting labor contract. GM-Toyota is not a conveyee of the GM Corporation's Fremont operation, nor is the joint venture merely taking over that plant's former operation. GM-Toyota will operate as an entirely new and independent business enterprise. As a new company, with new ownership, GM-Toyota will have no preexisting obligation to bargain with the UAW as a successor employer, despite the composition of the newly hired workforce.

The joint employer doctrine is predominantly applied in a jurisdictional context when the NLRB finds it necessary to combine two nominally separate employer's annual gross incomes in order to meet a self-imposed jurisdictional requirement. This necessity is not present with the GM-Toyota joint venture. Furthermore, in view of the holding of the Ninth Circuit in *NLRB v. Cofer*, that the NLRB's four-point test was not intended to apply to a joint venture, and because the test is not helpful or needed to determine joint employer status where a joint venture is involved, it is questionable whether the doctrine should be considered at all in regard to the GM-Toyota venture.

Likewise, GM's bona fide discontinuance of its Fremont operation in 1981 refute a charge of alter ego status. In view of the surrounding factual and economic realities, it is simply untenable to conclude that the joint venture is a mere "paper" arrangement through which GM is seeking to evade its responsibility to bargain with the UAW at Fremont. In this absence of alter ego status, GM-Toyota is not required to rehire laid-off Fremont UAW workers under the seniority provisions of the unexpired GM-UAW contract.

Based on the foregoing conclusions, GM-Toyota is not saddled with a preexisting obligation to bargain with the UAW over a new labor contract. That obligation will not arise until those employees hired at Fremont demonstrate majority support for the UAW, or another union; until the employees' choice of a bargaining representative is certified by the NLRB after an employee election; and
finally, until the union elected makes a bargaining demand upon GM-Toyota.

Although freed from a preexisting bargaining obligation, GM-Toyota is not free to refuse to hire qualified applicants solely because of those applicants' union membership or activism. A refusal to hire for that reason is clearly an unfair labor practice which contravenes the mandate of the NLRA section 8(a)(3). A refusal to hire skilled and otherwise qualified UAW applicants with a history of union activity at Fremont will be strongly indicative of discriminatory motive, particularly in view of Eiji Toyoda’s forthright declaration that he does not want a unionized shop at Fremont. If a section 8(a)(3) violation is charged, and the NLRB’s General Counsel can establish a prima facie showing that a refusal to hire UAW members was predicated on an antiunion motive, then unless GM-Toyota can demonstrate that employment was refused for a reason wholly independent of antiunionism, the joint venture will be required to hire those applicants illegally discriminated against.

While no formal agreement has yet been reached, and many potential obstacles to the joint venture remain, a framework which accommodates the legitimate interests of Toyota, GM and the UAW will be advantageous to all concerned. Cooperation in resolving the labor issues involved are essential for the joint venture to become a reality; such cooperation should be encouraged by the NLRB and the courts to the extent permissible. For the UAW, a successful compromise will create new jobs and has the potential to boost union organizing efforts at other Japanese-owned auto assembly plants located in the United States. For the American auto makers, the GM-Toyota joint venture will encourage other auto manufacturing coalitions of this nature and will spark the American auto industry with renewed vigor and new found prosperity.

Richard F. Nelson—'84