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Recent Decisions

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Labor Law —WITHDRAWAL FROM MULTIEMPLOYER BARGAINING UNITS

To contend with the growth and power of industrial unions, many small and medium-sized employers form multiemployer bargaining units. A multiemployer bargaining unit (association) is an employer association, usually selling in the same market, which negotiates collectively with a union to form a master agreement that binds all the parties.[1]

An employer often may find it necessary or advantageous to withdraw unilaterally from the association. Withdrawal allows the employer to negotiate individually with a union, or take other actions to remain economically solvent. Once an association is formed, the National Labor Relations Board (Board) must use its specialized judgment to balance the parties' conflicting interests and maintain the multiemployer unit's stability. The Board also must determine when an employer may withdraw from a multiemployer bargaining unit.[2]

The withdrawal issue is critical to labor and management since the multiemployer bargaining method offers several advantages to each.[3] Multiemployer bargaining units allow smaller employers to bargain with a union without fear that the union will strike against a single employer while continuing to work for its competitors.[4] Competing employers may wish to negotiate on a multiemployer basis to ensure that rivals do not extract more favorable terms from the union.[5] Furthermore, multiemployer bargaining promotes establishment of industry-wide worker benefit programs which individual employers otherwise might be unable to provide.[6] Also,

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1 A. COX, D.C. BOK & R. GORMAN, LABOR LAW 299 (9th ed. 1981) [hereinafter cited as COX].

2 NLRB v. Charles D. Bonanno Linen Serv., 50 U.S.L.W. 4087, 4089-90 (Jan. 12, 1982).

3 NLRB v. Charles D. Bonanno Linen Serv., 630 F.2d 25, 28 (1st Cir. 1980), *aff'd*, 50 U.S.L.W. 4087 (Jan. 12, 1982).

4 In a multiemployer bargaining association, the members usually agree that if the union strikes against one member, the other members will lockout their employees in an effort to combat the strike. NLRB v. Brown, 380 U.S. 278, 281 (1965). Lockout is an employer ceasing to furnish work to employees in an effort to get more favorable terms for the employer. BLACK'S LAW DICTIONARY 848 (5th ed. 1979).

5 COX, *supra* note 1, at 299.

6 *Charles D. Bonanno Linen Serv.*, 630 F.2d at 28.

> multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; . . . employers can make concessions "without fear that other employers will refuse to make similar concessions to achieve a competitive advantage," and a union can act similarly "without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers."[7]

Multiemployer bargaining units combine the employers' collective negotiation experience and knowledge, producing a more efficient negotiation process.[8] "Congress has recognized multiemployer bargaining as a 'vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining'."[9]

However, it is crucial that the association remain intact if the advantages of multiemployer bargaining are to be realized.[10] If an employer could obtain more favorable terms through separate negotiations with a union, it would have an incentive to withdraw from the association. Its defection would compromise the association's effectiveness.[11] Furthermore, the lone defector's competitive advantage would encourage other employers to withdraw from the association.[12]

Although an employer's right to withdraw freely might adversely affect the association, an absolute prohibition against employer withdrawal would prove equally troublesome. Such a prohibition "would subvert each employer's interests in controlling its own labor relations, would cause injustice whenever an employer developed a unique situation requiring individualized treatment, and would undermine the multiemployer bargaining process itself by discouraging involvement therein."[13]

The Board has never held that a union or an employer can with-

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7 *Id.*

8 Cox, *supra* note 1, at 300.

9 630 F.2d at 28.

10 Murphy, *Impasse and the Duty To Bargain In Good Faith*, 39 U. PITT. L. REV. 1, 50 (1977) [hereinafter cited as Murphy].

11 A union may encourage an employer's withdrawal to weaken the association's negotiation position. Withdrawal of the association's largest employer or the employer controlling the key negotiators would seriously weaken the association with minimal effort. By negotiating attractive contractual terms with one or more employers, while continuing to strike against the others, the union can coerce other employers to accept the union's terms. This is known as the "whipsaw effect." NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 90 n.7 (1957).

12 630 F.2d at 28.

13 *Id.*

draw from an association at will. In *Retail Associates, Inc.*, the Board established ground rules for withdrawal.[14] It held that a party's intention to withdraw must be unequivocal and excercised at an appropriate time.[15] Prior to negotiation of a new contract, an employer can withdraw from an association merely by providing adequate written notice. However, once the association begins negotiation, only mutual consent or unusual circumstances justify withdrawal.[16]

Unfortunately, the Board in *Retail Associates* did not clearly define "mutual consent."[17] In *Olympia Automobile Dealers Association*, the Board clarified this ambiguity, holding that the association's permission is necessary before an employer may withdraw from the association to execute a separate agreement.[18] Absent unusual circumstances, both the union and the association must consent to any employer withdrawal.[19]

The Board also endorses unilateral withdrawal from an association when "unusual circumstances" exist. Since *Retail Associates*, the Board, with judicial approval, has consistently found unusual circumstances in two situations:[20] First, when an employer is faced with *dire* economic circumstances,[21] and second, when the association has

14 Retail Associates, Inc., 120 N.L.R.B. 388, 393 (1958).

15 *Id.*

16 *Id.* at 395.

17 In *Retail Associates*, the Board said "mutual consent" is necessary for withdrawal. *Id.* In a later case, Teamsters Local 717 (Ice Cream Council), 145 N.L.R.B. 865, 870 (1964), the Board stated that "in a situation . . . where there has been a breakdown in negotiations . . . an employer, if he so chooses and the union agrees, is not precluded from voluntarily withdrawing from the multiemployer unit." Although not citing, but apparently applying the *Retail Associates* criteria, the Board implied that the consent of the withdrawing employer and the union would allow either to withdraw. In Hi-Way Billboards, Inc., 206 N.L.R.B. 22 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974), the Board said "an employer's withdrawal after bargaining has commenced is effective only if acquiesced in by the union or if justified by 'unusual circumstances.' " *Id.* at 22. This indicates that in *Retail Associates* the Board contemplated only the consent of the withdrawing employer and the union.

18 Teamsters Union Local No. 378 (Olympia Automobile Dealers Ass'n), 243 N.L.R.B. 1089, *enforcement pending*, No. 79-7683 (9th Cir., argued Nov. 5, 1980).

19 Consent may not be a sufficient mechanism for release from the multiemployer agreement, which is a contractual agreement between the parties. Generally, consideration is necessary to effect a valid release from a contractual obligation. See J. CALAMARI & J. PERILLO, CONTRACTS 771 (2d ed. 1977).

20 *Charles D. Bonanno Linen Serv.*, 630 F.2d at 29.

21 Hi-Way Billboards, Inc., 206 N.L.R.B. 22, 23 (1973). For cases allowing such a withdrawal, see Atlas Electrical Serv. Co., 176 N.L.R.B. 827 (1969) (employer being forced out of business for lack of qualified employees; union refused to provide replacement employees); United States Lingerie Corp., 170 N.L.R.B. 750 (1968) (employer subject to extreme economic difficulties resulting in arrangement under the bankruptcy laws); Spun-Jee Corp., 171 N.L.R.B. 557 (1968) (employer faced with the imminent prospect of closing his plant due to adverse economic conditions).

been substantially fragmented, as through consensual withdrawals.[22] Courts have had to determine recently whether the "unusual circumstances" exception should be expanded to justify unilateral employer withdrawal from the association when: (1) numerous interim agreements threaten fragmentation of the bargaining unit, or (2) a bargaining impasse occurs. In *Charles D. Bonanno Linen Service, Inc. v. NLRB*,[23] the Supreme Court of the United States addressed both issues. It definitively decided the latter, holding that an impasse in negotiations is not an "unusual circumstance" justifying a unilateral withdrawal.[24]

The petitioner in *Bonanno*, an industrial linen service, was one of a ten-member multiemployer bargaining unit that negotiated collectively with the union. After numerous bargaining sessions, the parties reached an impasse over the linen truck drivers' method of compensation; the union demanded commissions and the association insisted on an hourly rate. When the impasse could not be broken, the union selectively struck against the petitioner; several association members countered by locking out their drivers. The strike had continued for six months when the petitioner notified the union and the association that it was withdrawing from the association because of the impasse. Soon after the petitioner's withdrawal, the association ended the lockout and resumed negotiations with the union. Ultimately, the union abandoned its demand for commissions, and the parties reached an agreement nearly a year after the original impasse.[25]

The union sued the petitioner shortly before agreeing on the final contract. It alleged that absent union consent to the withdrawal, the petitioner's actions constituted an unfair labor practice.

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22 *See, e.g.*, NLRB v. Southwestern Colo. Contractors Ass'n, 447 F.2d 968 (10th Cir. 1971) (association reduced from fifteen to five members); Connell Typesetting Co., 212 N.L.R.B. 918 (1974) (union agreed to bargain separately with twenty-eight of thirty-six employers).

The question arises, however, whether fragmentation due to consensual withdrawals is a viable reason for other employers to withdraw given the need for consent by all association members. An employer could consent to other employers' withdrawals, then seek to withdraw because of the fragmentation caused by the consensual withdrawals.

Although the Board apparently has never so held, several courts have found "unusual circumstances" in instances where the negotiating committee does not fairly represent the interests of an employer. *See* NLRB v. Siebler Heating & Air Conditioning, Inc., 563 F.2d 366 (8th Cir. 1977) *cert. denied*, 437 U.S. 911 (1978); NLRB v. Unelko Corp., 71 Lab. Cas. ¶ 13,764 (7th Cir. 1973) (dictum).

23 50 U.S.L.W. 4087 (Jan. 12, 1982).

24 *Id.* at 4090.

25 *Id.* at 4088.

The union considered the petitioner bound by the final agreement.[26]

The Board considered the petitioner's attempt to withdraw untimely and ineffective, and ordered it to sign and implement the contract retroactively.[27] The First Circuit enforced the Board's finding that no "unusual circumstances" existed, and the Supreme Court, in a 5-4 decision, affirmed the First Circuit.

Although the parties in *Bonanno* executed no interim agreements, and the focus of the Supreme Court's decision was whether an impasse justifies unilateral withdrawal, the majority opinion as well as the dissenting opinions each contained a brief discussion on the impact of interim agreements on the bargaining process.

Interim agreements between an employer and the union "are temporary contracts which govern the employee-employer relationship between the time a previous contract expires and a new contract is negotiated by the union and association."[28] By its terms, an interim agreement is superseded by a final contract between the union and the association.[29] The employer who signs an interim agreement continues to be represented by the association in the ongoing negotiation of a permanent contract with the union.[30] The interim agreement merely allows an employer to continue business operations until the association concludes a final employment contract. The interim agreement alleviates the economic pressure created by work stoppage, and provides a "safety valve" to employers particularly vulnerable to strikes.[31]

Although the interim agreement aids the contracting employer, it undermines the association's unity and diminishes its strength at the bargaining table. The Board has recognized that "a party to such an agreement, having alleviated its immediate concerns and quite possibly enjoying a competitive surge relative to its struck counterparts, is less likely to push for a prompt settlement or otherwise

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26 *Id.*

27 *Id.*

28 Tobey Fine Papers v. NLRB, [Current Binder] 4 LAB. L. REP. (CCH) (91 Lab. Cas.) ¶ 12,701, at 17,195 n.2 (8th Cir. Apr. 20, 1981).

29 *Id.*

30 The Board has held that interim agreements "do not represent withdrawals . . . since the signatories retain a vested interest in the outcome of the group negotiations." *Bonanno*, 630 F.2d at 33, n.17.

31 *Id.* The "safety valve" function is illustrated by Plumbers & Steamfitters Union No. 323 (PHC Mechanical Contractor), 191 N.L.R.B. 592 (1971), where an interim agreement with the union allowed an employer to complete a contract containing a penalty clause for nonperformance. The agreement enabled the employer to avoid the contract penalty, while retaining the advantages of association membership.

share the group's bargaining strategies."[32] Because an interim agreement affords the contracting employer economic advantages over association members still awaiting an employment contract, the union may exert pressure on employers similarly desiring to resume competitive business operation to agree to like terms.[33]

In *Bonanno*, the Court recognized the important distinction between temporary, interim agreements and final, separate agreements. The Court distinguished "between interim agreements which contemplate adherence to a final unitwide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of, group bargaining."[34] Interim agreement signers maintain a vested interest in the outcome of final negotiations. Because interim agreements neither fragment nor significantly weaken the association, unilateral withdrawal is not justified.[35]

Separate agreements that do survive unit negotiations effectively "fragmen[t] and destro[y] the integrity of the bargaining unity . . . to create an 'unusual circumstance' under *Retail Associates* rules."[36] The Court approved the Board's reasoning that a separate agreement permitting "either the union or the employer to escape the binding effect of an agreement resulting from group bargaining is a refusal to bargain and an unfair labor practice."[37] It said that the "remaining members of the unit thus can insist that parties remain subject to unit negotiations in accordance with their original understanding."[38]

Although an interim agreement can temporarily dictate its own terms, "all employers [in the unit], including those executing interim

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32 *Id.*

33 *Charles D. Bonanno Linen Serv.*, 630 F.2d at 32-33. The lower court in *Bonanno* said the union may use the interim agreement as a legitimate economic weapon to exert pressure on association members. Though interim agreements may create uneven economic pressure on certain employers, "the uneven application of economic pressure per se is not inconsistent with multiemployer bargaining." *Id.* at 33.

34 50 U.S.L.W. 4087, 4090 (U.S. Jan. 12, 1982), *quoting* Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1096 (1979).

35 *Id.*

36 *Id.* In *Retail Associates, Inc.*, 120 N.L.R.B. 388 (1959), the Board established ground rules for permitting withdrawal from the multiemployer bargaining unit. Although impasse alone has never been accepted as a justification for withdrawal, the Board has recognized that a fragmented bargaining unit would be an unusual circumstance. *See* text accompanying notes 20-22.

37 50 U.S.L.W. at 4090.

38 *Id.*

agreements, have an 'equivalent stake' in the final outcome."[39] In reaching this position, the Court did not address the period *before* negotiations reach a final contract. Though the parties have an equal stake in the final contract, employers who sign interim agreements have little interest in a prompt settlement. In his dissent, Chief Justice Burger noted:

> [c]ontrary to the Board's conclusory statements, accepted by the Court, employers who execute interim agreements do not have an equivalent stake in promptly securing a reasonable final agreement. Such employers are able to operate fully while their competitors are hampered by a strike or defensive lockout; employers covered by interim agreements have a natural economic interest in prolonging the deadlock, thereby increasing their competitive advantage over the employers who remain in the multiemployer group.[40]

The Court's deference to the Board's specialized judgment was particularly pronounced in its holding that a negotiations impasse does not constitute an unusual circumstance justifying unilateral withdrawal. The majority opinion clearly stated its conception of the judiciary's proper role. The Court stated that:

> [t]he Board might have struck a different balance from the one it has, and it might be that some or all of us would prefer that it had done so. But assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that . . . should be left to the Board.[41]

Chief Justice Burger characterized the Court's holding as "just the kind of uncritical judicial rubber-stamping we have often condemned."[42]

Although noting that several circuit courts disagreed with the Board and allowed employers to withdraw from the unit upon impasse,[43] the Court held that impasse is not a sufficiently unusual circumstance to justify withdrawal. In answering the Chief Justice's argument that allowing withdrawal would be more consistent with the goal of industrial peace,[44] the Court acknowledged that the issue

39 *Id.*

40 *Id.* at 4093 (Burger, C.J., dissenting).

41 *Id.* at 4090.

42 *Id.* at 4093 (Burger, C.J., dissenting).

43 *Id.* at 4089. *See* NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181 (5th Cir. 1974); NLRB v. Beck Engraving Co., 522 F.2d 475 (3d Cir. 1975); NLRB v. Independent Ass'n of Steel Fabricators, 582 F.2d 135 (2d Cir. 1978); H & D, Inc. v. NLRB, 105 L.R.R.M. 3070 (9th Cir. 1980), *petition for cert. pending*, no. 80-1498.

44 50 U.S.L.W. at 4093 (Burger, C.J., dissenting).

lent itself to differing judgments.[45] However, the majority refused to substitute its judgment for the Board's "with respect to the issues that Congress intended the Board should resolve."[46] The Court noted:

> [i]f the courts are to monitor so closely the agency's assessment of the kind of factors involved in this case, the role of the judiciary in administering regulatory statutes will be enormously expanded and its work will become more complex and time-consuming. We doubt that this is what Congress intended in subjecting the Board to judicial review.[47]

One of the Board's rationales for disallowing withdrawal upon impasse was that "impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken either through a change of mind or the application of economic force'."[48] The Chief Justice retorted that, in this case, the deadlock was neither temporary nor broken by economic force.[49] The Board also argued that an "impasse may be 'brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process'."[50] It added that an impasse is neither sufficiently unusual nor adequately identifiable to support withdrawal.[51]

The Chief Justice noted that the Court did not acknowledge the good-faith bargaining that must necessarily precede an impasse, and that "[t]he Board has ample means to deal with feigned bargaining."[52] In advancing his view that the possibility of intentionally created impasse should not block a withdrawal, Chief Justice Burger said "it is high time that the Board exercise its presumed expertise and establish more definite guidelines to identify impasse. Unions and employers are entitled to that guidance."[53]

The major flaw in the Court's decision may be, as Justice O'Connor stated in her dissent, that it "sweeps too broadly" and "provides an excellent example of the result which obtains when the

45 *Id.* at 4091.

46 *Id.*

47 *Id.*

48 *Id.* at 4090, *quoting* Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1093-94 (1979).

49 *Id.* at 4092 (Burger, C.J., dissenting). The Chief Justice pointed out that at the time of Bonanno's withdrawal, "[t]he negotiations had been stalemated for more than six months, a selective strike and unit-wide lockout had kept employees away from their jobs for five months, and there were no signs that the parties would return to the bargaining table." *Id.*

50 *Id.* at 4090, *quoting* 243 N.L.R.B. at 1094.

51 *Id.*

52 *Id.* at 4093 (Burger, C.J., dissenting).

53 *Id.*

Board applies a general rule without analysis of the particular fact situation."[54] Specifically, Justice O'Connor pointed to the Board's failure to consider how long the impasse lasted and whether the parties seemed likely to break the impasse at the time Bonanno withdrew.[55]

Deferring to the Board, the Court refused to permit unilateral withdrawal from the association at impasse. But the Court failed to recognize that some impasses, especially the ongoing kind involved in *Bonanno*, may justify withdrawal. Truly temporary bargaining hiatuses may not. The "absolutist"[56] position adopted by the Board and approved by the Court in *Bonanno* may need to be narrowed in future situations where the withdrawal prohibition at impasse seems particularly inequitable.

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54 *Id.* at 4094 (O'Connor, J., dissenting).
55 *Id.*
56 *Id.*