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A NEW LOOK AT NLRB POLICY ON MULTIEMPLOYER BARGAINING

STEVEN L. WILLBORN†

Multiemployer bargaining, which occurs when two or more employers in combination bargain with a single union representing employees of all the employers, is an accepted practice in collective bargaining under the National Labor Relations Act. That Act does not address the propriety or appropriate dimensions of a multiemployer bargaining unit, but the National Labor Relations Board has endorsed this practice and has taken affirmative steps to protect it. The criteria that the Board uses in determining whether this type of unit is appropriate in given situations are varied and often hard to identify. In this Article, Professor Willborn reviews the precepts followed by the Board in making these decisions and the underlying policy considerations that are the basis of current Board doctrine. He then discusses the problems in multiemployer bargaining caused by current Board practices. Professor Willborn concludes by noting the insufficiency of the Board's present doctrine and suggesting that the Board review and revise its own practices in an effort to remedy these problems.

Multiemployer bargaining is a common phenomenon in the United States.¹ Prototypically, in this type of bargaining structure two or more employers combine to bargain as a group with a single union that represents employees at both or all of the companies.²

The National Labor Relations Act,³ however, says very little about the multiemployer unit.⁴ Indeed, even though multiemployer bargaining existed

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1. In a study of collective bargaining agreements covering 1000 or more workers, the Bureau of Labor Statistics determined that approximately 42% of the agreements covering approximately 46% of the workers were multiemployer agreements. Bureau of Labor Statistics, Characteristics of Major Collective Bargaining Agreements, January 1, 1978, at 1, 12 (1980).

2. See Rains, Legal Aspects and Problems of Multiemployer Bargaining, 34 B.U.L. Rev. 159, 160 (1954).

3. 29 U.S.C. §§ 151-168 (1976) [hereinafter referred to as "the Act" or "the NLRA"].

4. The Act contains only one allusion to multiemployer bargaining. Under section 8(b)(4)(A) of the Act, 29 U.S.C. § 158(b)(4)(A) (1976), it is an unfair labor practice for a union to "forc[e] or requir[e] any employer or selfemployed person to join any . . . employer organization. . . ." Section 8(b)(4)(A) thus proscribes union attempts to force employers to engage in multiemployer bargaining. *Frito-Lay, Inc. v. International Bhd. of Teamsters*, 401 F. Supp. 370, 372-76 (N.D. Cal. 1975), aff'd in relevant part, 623 F.2d 1354, 1357-59 (9th Cir. 1980), cert. denied, 101 S. Ct. 922 (1981); *UMW Local 1854 (Amax Coal Co.)*, 238 N.L.R.B. 1583, 1587-88 (1978); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 N.L.R.B. 106, 116-17 (1963); *International Longshoremen's Local 8 (General Ore, Inc.)*, 126 N.L.R.B. 172, 173 (1960); *United Construction Workers (Kanawha Coal Operators' Ass'n)*, 94 N.L.R.B. 1731, 1732-33 (1951).

Section 8(b)(4)(A) was added to the National Labor Relations Act by the Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136, 141 (1947). The present language of section 8(b)(4)(A) was inserted into the Labor Management Relations Act of 1947 by the House-Senate conference committee. See H.R. Rep. No. 510, 80th Cong., 1st Sess. 44-45 (1947) (House confer-

prior to the Act's enactment,⁵ the Act explicitly recognizes only "the employer unit, craft unit, plant unit, or subdivision thereof."⁶ Despite this, multiemployer bargaining structures have been approved⁷ and even protected⁸ by the National Labor Relations Board and the courts.

The status accorded to multiemployer bargaining has not been without problems. After outlining the complex and varied determinants of bargaining structure, this Article describes the Board's current doctrine on multiemployer bargaining; that is, it reviews the legal principles governing the formation and

ence report), reprinted in 1947 U.S. Code Cong. Serv. 1135, 1150. The original House bill would have prohibited almost all, even entirely voluntary, multiemployer bargaining. H.R. 3020, 80th Cong., 1st Sess. §§ 2(16), 9(f)(1), 12(a)(3)(A) (1947). See H.R. Rep. No. 245, 80th Cong., 1st Sess. 5-6, 24, 35-36, 86 (1947). The original Senate bill prohibited only involuntary multiemployer bargaining. S. 1146, 80th Cong., 1st Sess. §§ 2(2), 9(b) (1947). The final bill adopted the Senate approach but achieved that result with statutory language that differed from the original Senate bill. Compare Labor Management Relations Act of 1947, Pub. L. No. 101, § 101, 61 Stat. 136, 141 (1947), with S. 1126, 80th Cong., 1st Sess. §§ 2(2), 9(b) (1947). See generally *Frito-Lay, Inc. v. Int'l Bhd. of Teamsters*, 401 F. Supp. 370, 372-76 (N.D. Cal. 1975), aff'd in part, 623 F.2d 1354 (9th Cir. 1980), cert. denied, 101 S. Ct. 922 (1981) (general review of the legislative history of section 8(b)(4)(A) of the National Labor Relations Act).

5. In the flint glass industry, for example, a pattern of comprehensive multiemployer bargaining was established by 1888. Somers, *Pressures on an Employers' Association in Collective Bargaining*, 6 *Indus. & Lab. Rel. Rev.* 557, 559 (1953). See also F. Pierson, *Multi-Employer Bargaining: Nature and Scope* 8 (1948); Willoughby, *Employers Associations for Dealing with Labor in the United States*, 20 *Q.J. Econ.* 110, 113 (1905); Note, *Multiemployer Bargaining and the National Labor Relations Board*, 66 *Harv. L. Rev.* 886, 886-87 (1953).

6. NLRA § 9(b), 29 U.S.C. § 159(b) (1976).

7. Early in the history of the NLRA, the National Labor Relations Board certified a multiemployer bargaining unit as appropriate. *Shipowners' Ass'n*, 7 N.L.R.B. 1002 (1938), appeal dismissed sub nom. *AFL v. NLRB*, 103 F.2d 933 (D.C. Cir. 1939), aff'd, 308 U.S. 401 (1940). In *Shipowners' Association* the Board determined that multiemployer units were encompassed within the term "employer unit" in section 9(b) of the Act because section 2(2) of the Act as then written, NLRA, ch. 372, § 2(2), 49 Stat. 449 (1935), defined employer as "any person acting in the interest of the employer," and section 2(1) of the Act, id. § 2(1), included "associations" within the definition of person. 7 N.L.R.B. at 1024-25. After the definition of employer in section 2(2) of the Act was amended to "any person acting as an agent of an employer," *Labor Management Relations Act*, ch. 120, § 2(2), 61 Stat. 136 (1947), the Board reaffirmed its determination that multiemployer units were appropriate. See *Furniture Firms*, 81 N.L.R.B. 1318, 1320 (1949) ("exhaustive search and study of the legislative history of the Act, as amended, fails to reveal an intent by Congress to limit the appropriate unit . . . to a single employer unit"); *Associated Shoe Indus.*, 81 N.L.R.B. 224 (1949).

The courts have supported the Board's interpretation. The United States Supreme Court has said that "the Board should continue its administrative practice of certifying multi-employer units." *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957). The Court supported its position by pointing to Congress' failure to enact proposals that would have limited or outlawed multiemployer bargaining. *Id.* at 95-96. The courts of appeals have also supported the Board's interpretation. See *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192 (5th Cir. 1977); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967); *NLRB v. Lund*, 103 F.2d 815, 819 (8th Cir. 1939). See also *NLRB v. New York Typographical Union No. 6*, 632 F.2d 171 (2d Cir. 1980); *McAx Sign Co. v. NLRB*, 576 F.2d 62, 66 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *NLRB v. Dover Tavern Owners' Ass'n*, 412 F.2d 725, 727 (3d Cir. 1969).

8. The primary way in which the Board and the courts affirmatively protect multiemployer bargaining structures is by limiting withdrawal rights. To protect the "stability" of multiemployer bargaining, see *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 393 (1958); *Engineering Metal Prods. Corp.*, 92 N.L.R.B. 823, 824 (1950), the Board and the courts have limited withdrawal after the commencement of negotiations to situations in which both the union and the company consent to the withdrawal or in which there are unusual circumstances. See, e.g., *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967); *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 395 (1958). See also notes 101-36 and accompanying text *infra*.

dissolution of multiemployer bargaining units. The Article then identifies and discusses the public policy underpinnings of the Board's current doctrine; problems created by that doctrine are also discussed. The Article concludes by suggesting that the Board take a new, more sophisticated look at the area.

I. DETERMINANTS OF BARGAINING STRUCTURE

The term "appropriate bargaining unit" in labor parlance is a misnomer. Under the National Labor Relations Act, the appropriate bargaining unit is really an election constituency.⁹ Before a representation election, the Board determines what jobs constitute an appropriate bargaining unit and then employees occupying those jobs vote on whether they want union representation.¹⁰ If the union is selected as the bargaining representative, the company and the union *may* conduct negotiations limited to the terms and conditions of employment of those employees in the appropriate bargaining unit.¹¹ For the purposes of negotiation, however, the company and the union may agree to expand the Board-delineated appropriate bargaining unit (really an election unit) to include other employees represented by the union.¹² If the negotiation unit is expanded to include other employees¹³ represented by the union and those employees are not employed by the same company, a multiemployer bargaining structure is established. To avoid confusion, this Article will use the term "election unit" to signify an appropriate bargaining unit defined by the Board for the purpose of conducting a representation election and the term "negotiation unit" to signify the bargaining unit formed for the purpose of conducting negotiations.

Multiemployer election and negotiation units are essentially consensual in nature.¹⁴ That is, such units are generally formed only with the mutual consent, actual or implied, of both the union and the companies. Consequently, the reasons unions and companies decide to engage in multiemployer bargaining are of great import because to a large extent those reasons determine the scope and frequency of multiemployer bargaining. Identification and description of the major determinants of multiemployer negotiation units are necessary to an understanding of Board policy.

A variety of interrelated factors is relevant to unions and companies in deciding whether to utilize a multiemployer negotiation unit. Professor Weber, in an insightful article, has organized these factors into five categories:

9. See NLRA § 9, 29 U.S.C. § 159 (1976).

10. See generally R. Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* 66 (1976).

11. Both the company, NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), and the union, NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3), are under an obligation to bargain in good faith about the terms and conditions of employment of those employees in an appropriate bargaining unit.

12. See R. Gorman, *supra* note 10, at 66.

13. "Other employees" refers to employees other than those occupying jobs in the Board-delineated appropriate bargaining unit.

14. The legal doctrines governing the formation and dissolution of multiemployer election and negotiation units will be discussed in detail in a later section of this Article. See notes 84-99 and accompanying text *infra*. See generally C. Morris, *The Developing Labor Law* 238-39 (1971).

market factors; the nature of bargaining issues; representational factors; government policies; and power tactics in the bargaining process.¹⁵ Another category, bargaining efficiency, also affects the incidence of multiemployer bargaining. Finally, public interests influence the bargaining unit decision. These public interests probably have little impact on the unions and companies making negotiation unit decisions. Nevertheless, they should guide the government in determining its role in influencing such decisions.

Market factors strongly influence the negotiation unit decisions of both unions and companies. Unions have generally provided the impetus for market-wide negotiation units:

Unions generally have sought to devise bargaining structures that are coextensive with the specific market(s) encompassed by their jurisdictions. In building such structures unions may hope to attain their traditional goal of "taking wages out of competition" by insuring the uniformity of wage rates among producers who operate in the same market.¹⁶

Thus, market-wide negotiation units further the traditional union goal of standardized wages and working conditions¹⁷ and may weaken employer resistance to union demands since the increased costs of such demands will be borne by all employers operating in the market.¹⁸

The negotiation unit decisions of employers may also be influenced by market factors. When there is severe competition between many firms in a product market, management may favor a multiemployer bargaining unit because that unit may impose some measure of regulation on market behavior.¹⁹ A multiemployer bargaining unit may reduce or eliminate labor costs as a competitive factor and shift the competition to other factors like quality, efficiency and technological improvement.²⁰ Other market factors may influence the negotiation unit decisions of employers. In the construction industry, for

15. Weber, *Stability and Change in the Structure of Collective Bargaining*, in *Challenges to Collective Bargaining* 13, 15 (1967).

16. Weber, *supra* note 15, at 15. See also N. Feinsinger, *Collective Bargaining in the Trucking Industry* 38 (1949); O. Pollak, *Social Implications of Industry-Wide Bargaining* 6-7 (1948); Chamberlain, *Determinants of Collective Bargaining Structures*, in *The Structure of Collective Bargaining* 3, 11 (A. Weber ed. 1961).

17. See Comment, *The Status of Multiemployer Bargaining Under the National Labor Relations Act*, 1967 Duke L.J. 558, 560; Note, *Labor Law—Third Circuit Holds Impasse in Bargaining Excuses Employer's Unilateral Withdrawal from Multiemployer Negotiations*, 44 *Fordham L. Rev.* 1256, 1257; Note, *supra* note 5, at 887.

18. See W. Fisher, *Collective Bargaining in the Bituminous Coal Industry: An Appraisal* 42 (1948); Leslie, *Principles of Labor Antitrust*, 66 *Va. L. Rev.* 1183, 1208 (1980); Comment, *supra* note 17, at 560-61 n.8.

19. C. Kerr & R. Randall, *Collective Bargaining in the Pacific Coast Pulp and Paper Industry* 8-9 (1948); Weber, *supra* note 15, at 16. The likelihood of management acceptance of a multiemployer negotiation unit will be lessened if union representation does not substantially cover the product market or if the nature of the product market, because of a significant cross-elasticity of demand, makes it impossible or unlikely that the major companies in the product market can be included in the multiemployer negotiation unit. See Weber, *supra* note 15, at 16-17. Because of these factors, the existence of substantial competition from foreign companies may reduce the willingness of domestic companies to enter into multiemployer negotiation units confined to domestic companies.

20. Rains, *supra* note 2, at 162.

example, the market provides only intermittent business for construction companies. Consequently, a multiemployer negotiation unit is often utilized because it permits a mechanism whereby employer members of the multiemployer negotiation unit can, in effect, share employees:

We [construction contractors] have flexibility unknown anywhere else in the Western world. When we need another 10, 20, or 100 pipefitters, we call the union hall, and within a reasonably short period we have these men working. Conversely, when our volume drops, these men are sent back to their labor depository to be called to work by some other contractor.

...

So a union contractor has this ready pool of trained men and this readily available degree of flexibility. A union employing contractor's only limitation on his volume of work is his ambition, financial capability and executive talent. A non-union contractor has these limitations plus the number of skilled men he has available, and this governs the volume of work he can perform.²¹

The nature of bargaining issues may also influence negotiation unit decisions. To the extent the major issues are market-wide, a multiemployer negotiation unit may be an efficient and desirable structure for their resolution.²² Indeed, issues that transcend the capabilities of individual employers, such as pension benefits or industry-wide training programs, may be subject to resolution only through a multiemployer negotiation unit.²³ On the other hand, to the extent the salient bargaining issues are local in nature, a multiemployer negotiation unit may be cumbersome and inefficient. For example, if "work rules, safety, wash-up time and other minutiae of industrial relations"²⁴ are the salient issues, a localized negotiation unit would be preferable. Many, if not most, negotiations cover both market-wide and local issues. Consequently, the bargaining structure may attempt to allocate the issues to separate, but overlapping, negotiation units.²⁵ In the trucking industry local issues are decided by smaller, more localized negotiation units. Those units are then combined into a larger, multiemployer negotiation unit for decisions on the broader, market-wide issues.²⁶

Representational factors also influence negotiation unit decisions. For

21. Industrial Relations Research Ass'n, *Collective Bargaining: Contemporary American Experience* 63 (G. Somers ed. 1980) [hereinafter cited as *Contemporary American*].

22. Weber, *supra* note 15, at 17.

23. See Comment, *supra* note 17, at 561; Note, *Labor Law*, *supra* note 17, at 1257.

24. Weber, *supra* note 15, at 17.

25. The National Labor Relations Board has approved bargaining structures that assign certain issues to a multiemployer negotiation unit and other issues to a more localized negotiation unit. *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964); *Radio Corp. of Am.*, 135 N.L.R.B. 980, 982 (1962). Cf. *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969) (local bargaining on uniquely local issues may be required of an employer member of a multiemployer negotiation unit).

26. *Contemporary American*, *supra* note 21, at 141. A similar allocation of issues between overlapping local and market-wide negotiation units takes place in the steel industry. See *id.* at 164-67.

unions, broad multiemployer negotiation units may result in dissatisfaction at the local level. While smaller, more localized negotiation units may be willing to combine into a multiemployer negotiation unit to augment their bargaining power, acceptance of the larger unit inevitably results in the relinquishment of certain individualized local goals. The local negotiation units should continue to accept a multiemployer unit, however, as long as "the gains derived from the increment to bargaining power are greater than the perceived losses associated with the denial of autonomy in decision-making."²⁷ At some point, though, the perceived losses will outweigh the gains and political pressure inside the union will build for smaller negotiation units.²⁸ In the coal industry, for example, dissatisfaction at the local level with the results of multiemployer bargaining has strained the existing multiemployer bargaining structure.²⁹ Thus, problems in adequately representing localized negotiation units may undermine union efforts to establish a multiemployer negotiation unit.

Unions may favor multiemployer negotiation units for another reason related to representation. After a period of bargaining in a multiemployer negotiation unit, the National Labor Relations Board may find that a multiemployer election unit is appropriate.³⁰ In most cases, a multiemployer election unit will enhance union security; a rival union must gain the allegiance of a much larger number of workers before it can replace the incumbent union.³¹

The negotiation unit decisions of employers are also affected by representational considerations. As with unions, a calculus of anticipated gains and losses underlies the decision to join in an employer alliance.³² In the trucking³³ and construction³⁴ industries, internal divisions *between employers* have weakened multiemployer negotiations and, indeed, may lead to more decentralized negotiation units.³⁵

Government policies are also relevant to unions and companies making a bargaining structure decision. National Labor Relations Board recognition of

27. Weber, *supra* note 15, at 18.

28. *Id.*

29. See Contemporary American, *supra* note 21, at 46-47, 581. See also Wall St. J., Jan. 22, 1981, at 23, col. 4.

30. See, e.g., I. Miller & Bro., Inc., 135 N.L.R.B. 924 (1962); Motor Cargo, Inc., 108 N.L.R.B. 716 (1954); Grand Rapids Fuel Co., 107 N.L.R.B. 1402 (1954). See also notes 90-98 and accompanying text *infra*.

31. See, e.g., Alston Coal Co., 13 N.L.R.B. 683 (1939). See also C. Kerr & R. Randall, *supra* note 19, at 28; Note, *supra* note 5, at 887. Union security may also be enhanced because organized employer-members of a multiemployer group have an interest in seeing that the plants of their competitors either become or remain unionized. See O. Pollak, *supra* note 16, at 7-8; R. Tilove, *Collective Bargaining in the Steel Industry* 40 (1948) (multiemployer bargaining makes it "more difficult for fragments of the industry . . . to shake off the union"); Kassalow, *How Some European Nations Avoided U.S. Levels of Industrial Conflict*, 101 Monthly Lab. Rev. 4, 37 (1978) (employer associations encouraged comparable companies to recognize unions so that the associations could ensure that competitors would not obtain more desirable labor contracts).

32. G. Bahrs, *The San Francisco Employers' Council* 24-25, 38 (1948); C. Kerr & R. Randall, *supra* note 19, at 24-25; Weber, *supra* note 15, at 19.

33. Contemporary American, *supra* note 21, at 71-72.

34. *Id.* at 139-41.

35. *Id.* at 583.

multiemployer election units³⁶ may encourage some unions to enter into multiemployer negotiation units because of the potential beneficial effect on union security.³⁷ Conversely, if a company perceives the union as having the support of only a narrow majority of its workers, that company may be dissuaded from entering into a multiemployer negotiation unit for fear of increasing the security of the "shaky" union. Similarly, the National Labor Relations Board has imposed restrictions on the ability of unions and employers to withdraw from multiemployer negotiation units.³⁸ This policy may inhibit the formation of multiemployer negotiation units since unions and companies may be unwilling to bind themselves to a bargaining structure that may prove unworkable or disadvantageous.

Government policies may also have a less direct, but nevertheless real, impact on bargaining structure decisions. In *NLRB v. Local 449, International Brotherhood of Teamsters*,³⁹ the Supreme Court held that if one member of a multiemployer negotiation unit is struck, the other employer members of the unit could lawfully lockout their employees.⁴⁰ This governmental policy provided employers in multiemployer negotiation units with a tool to combat whipsawing⁴¹ and, hence, may have influenced the bargaining structure decisions of both employers and unions.⁴² The steel industry provides another example of the indirect influence of government policies. In the steel industry the movement towards market-wide bargaining was hastened by the ever-present threat of government intervention in the event of a disruptive bargaining impasse.⁴³

Power tactics are, of course, a major consideration in the formation of

36. See, e.g., *Taylor Motors, Inc.*, 241 N.L.R.B. 711 (1979). See also notes 84-98 and accompanying text *infra*.

37. See notes 30-31 and accompanying text *supra*.

38. "Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 395 (1958). See also notes 101-36 and accompanying text *infra*.

39. 353 U.S. 87 (1957).

40. *Id.* at 97. See also *NLRB v. Brown*, 380 U.S. 278 (1965).

41. In a whipsaw strike, a union strikes one or more, but not all members of a multiemployer unit or uses a similar tactic with a group of employers with whom it bargains individually over the same terms at the same time. Because the employers are usually in competition with each other the struck employer will lose business to the others if they continue to operate. The union is thus able to bring enormous pressure upon the struck employer to settle.

Bernhardt, *Lockouts: An Analysis of Board and Court Decisions Since Brown and American Ship*, 57 Cornell L. Rev. 211, 212 n.6 (1972). See also *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 90 n.7 (1957); *Frito-Lay, Inc. v. Local 137, Int'l Bhd. of Teamsters*, 623 F.2d 1354, 1359 n.6 (9th Cir. 1980), cert. denied, 101 S. Ct. 922 (1981).

42. See C. Kerr & R. Randall, *supra* note 19, at 9. The impact of this governmental policy on the bargaining structure decisions of unions and companies has been minimized by subsequent court and Board decisions. Later decisions have recognized the lockout rights of employers who are not members of multiemployer negotiation units. See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965); *Weyerhaeuser Co.*, 166 N.L.R.B. 299 (1967); *Evening News Ass'n*, 166 N.L.R.B. 219 (1967), enforced, 404 F.2d 1159 (6th Cir. 1968). See also *Darling & Co.*, 171 N.L.R.B. 801 (1968), *aff'd sub nom. Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969).

43. *Contemporary American*, *supra* note 20, at 166-67. See also F. Pierson, *supra* note 5, at 46; O. Pollak, *supra* note 16, at 25-36.

multiemployer bargaining units. Simply stated, employers negotiating as a group may be in a better position to match the strength of organized labor⁴⁴ and unions may be willing to accept the increase in employer economic power in the belief that wages can be both standardized and taken out of competition.⁴⁵

Finally, notions of bargaining efficiency may affect the bargaining structure decision. "By negotiating a single contract rather than many, employers may pool their resources and consequently are often able to afford the services of a highly skilled, professional negotiator, while unions are able to save the expense and time involved to negotiate separate contracts with each employer."⁴⁶

There are, then, many and complex factors influencing the negotiation unit decisions of management and labor. In addition to these factors, there are broader public policy considerations that should affect the government's policies on multiemployer bargaining. One consideration is the effect of multiemployer bargaining on the economy and, specifically, on the inflation rate. Some commentators argue that if wages are removed from competition by multiemployer bargaining, consumers might be unduly burdened by wage increases that are not tempered by competition.⁴⁷ Moreover, the cooperation between employers fostered by multiemployer bargaining may result in increases in other anticompetitive practices that would also raise the inflation rate and be harmful to consumers.⁴⁸ On the other hand, multiemployer bargaining may enable employers to avoid "leap-frogging" and its inevitable inflationary bias.⁴⁹ The extent and severity of multiemployer work stoppages is another relevant public policy consideration. While multiemployer work stoppages would probably be more massive and have a greater impact on the economy,⁵⁰ there may be fewer work stoppages under a multiemployer bargaining structure than under a single employer structure.⁵¹

44. See G. Bahrs, *supra* note 32, at 18-19; J. Freidin, *The Taft-Hartley Act and Multi-Employer Bargaining* 4-5 (1948); C. Kerr & R. Randall, *supra* note 19, at 3-4; O. Pollak, *supra* note 16, at 2, 66; Comment, *supra* note 17, at 559; Note, *Labor Law*, *supra* note 17, at 1257. See also *Contemporary American*, *supra* note 21, at 71.

45. See notes 17-18 and accompanying text *supra*.

46. Comment, *supra* note 17, at 561 (footnotes omitted). See also R. Gorman, *supra* note 10, at 86-87; C. Kerr & R. Randall, *supra* note 19, at 9-10; Note, *Labor Law*, *supra* note 17, at 1257.

47. See W. Fisher, *supra* note 18, at 42-43; Rains, *supra* note 2, at 162; Note, *supra* note 5, at 888.

48. See R. Gorman, *supra* note 10, at 87.

49. "Leap-frogging" is the result of competition between various negotiation units. The employees in one negotiation unit obtain a settlement, the employees in the next negotiation unit obtain a slightly higher settlement, and so on. Leap-frogging has been a recurrent phenomenon in the construction industry. See *Contemporary American*, *supra* note 21, at 74.

50. See R. Gorman, *supra* note 10, at 87; O. Pollak, *supra* note 16, at 2; Rains, *supra* note 2, at 162; Note, *supra* note 5, at 888.

51. There are several factors supporting this conclusion: (1) more experienced negotiators may be involved; (2) employees in a particular negotiation unit need not strike in the fear that employees in other negotiation units will obtain a more advantageous settlement; and (3) the external effect of the strike and potential adverse public reaction may facilitate agreements short of economic action. See Rains, *supra* note 2, at 162. See generally C. Kerr & R. Randall, *supra* note 19, at 28-29; F. Pierson, *supra* note 5, at 43-44.

The guidance provided by these abstract public policy considerations is minimal. In the absence of empirical evidence on the inflationary impact of multiemployer bargaining and on the extent and severity of multiemployer work stoppages,⁵² these considerations are little more than conjecture. Nevertheless, there is an established public policy on multiemployer bargaining, a public policy that is expressed through Board and court decisions.

II. CURRENT BOARD DOCTRINE ON MULTIEMPLOYER BARGAINING STRUCTURES

Multiemployer bargaining structures are essentially consensual in nature.⁵³ Such structures can be formed initially only with the consent of the participating employers⁵⁴ and union.⁵⁵ Board doctrine on multiemployer bargaining structures, however, is not limited to noninterference with voluntary multiemployer bargaining structures. Rather, current Board policy affirmatively supports and protects such structures.⁵⁶ This support and protection is most apparent in two areas: (1) Board recognition of multiemployer election and negotiation units and (2) Board limitations on employer and union withdrawal from multiemployer negotiation units. The Board doctrine in these two areas and the public policy underpinnings of this doctrine merit further discussion.

A. Board Recognition of Multiemployer Election and Negotiation Units

Current Board policy supports and protects multiemployer bargaining

52. The author knows of no such empirical evidence.

53. The test [for determining whether a multiemployer bargaining structure has been established] is whether the employer members of the group have indicated from the outset an unequivocal intention to be bound by group action in collective bargaining, and whether the union, being informed of the delegation of bargaining authority to the group, has assented and entered into negotiations with the group representative.

NLRB v. Beckham, Inc., 564 F.2d 190, 192 (5th Cir. 1977). See also Steamship Trade Ass'n, 155 N.L.R.B. 232 (1965). See generally note 4 *supra*.

54. See, e.g., *McAx Sign Co. v. NLRB*, 576 F.2d 62, 66 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *NLRB v. Hart*, 453 F.2d 215, 217-18 (9th Cir. 1971); *NLRB v. Bagel Bakers Council*, 434 F.2d 884, 886-87 (2d Cir. 1970), cert. denied, 402 U.S. 908 (1971); *NLRB v. Dover Tavern Owners' Ass'n*, 412 F.2d 725, 727 (3d Cir. 1969); *Ruan Transport Corp.*, 234 N.L.R.B. 241, 242 (1978); *Van Eerden Co.*, 154 N.L.R.B. 496, 499 (1965); *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964).

55. See, e.g., *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 905 (8th Cir. 1979); *Tahoe Nugget, Inc.*, 227 N.L.R.B. 357, 357 (1976), enforced, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Dancker & Sellow, Inc.*, 140 N.L.R.B. 824, 825-26 (1963), enforced sub nom. *NLRB v. Local 210, Int'l Bhd. of Teamsters*, 330 F.2d 46 (2d Cir. 1964); *Mohawk Business Mach. Corp.*, 116 N.L.R.B. 248, 249 (1956).

56. It should be noted at the outset that the Board has not wholeheartedly supported multiemployer bargaining structures. The Board does not require the establishment of multiemployer units; single employer units are still presumptively appropriate. See, e.g., *Cab Operating Corp.*, 153 N.L.R.B. 878, 879-80 (1965). Nevertheless, Board doctrine in the area does tacitly support and protect multiemployer bargaining structures. This section of the article will discuss that tacit support and protection.

It should also be noted that no claim is made that the Board intends actively to support multiemployer bargaining. Rather, in light of the Board's woefully inadequate analysis of public policy in the area, see notes 147-63 and accompanying text *infra*, it is likely that the Board has "generally . . . acted inadvertently rather than by conscious design." *The Structure of Collective Bargaining* at xxix (A. Weber ed. 1961).

structures by recognizing multiemployer election and negotiation units in situations that explicitly or tacitly encourage multiemployer bargaining or, at the least, bolster the status of multiemployer bargaining as a bargaining structure option. These situations, and the factors the Board relies on in recognizing multiemployer election and negotiation units, can be identified through a review of Board decisions in this area.

There are several situations in which Board recognition of multiemployer election and negotiation units encourages or bolsters multiemployer bargaining. One situation is Board recognition of multiemployer election units where an election petition has been filed with respect to a single employer-member of a multiemployer negotiation unit.⁵⁷ This situation usually arises when a rival union petitions for a representation election with respect to a single employer who is a member of a multiemployer negotiation unit.⁵⁸ A Board policy that single employer, or small, election units are conclusively presumed to be appropriate⁵⁹ would risk fragmentation of the existing multiemployer negotiation unit.⁶⁰ Rather than risk such fragmentation, the Board has protected multiemployer bargaining structures in these situations by dismissing petitions for elections in single employer units and permitting elections only in multiemployer election units.⁶¹ The Board policy of recognizing multiemployer election units should encourage incumbent unions to engage in multiemployer bargaining because this bargaining would support Board recognition of a multiemployer election unit⁶² and this election unit would enhance the security of the incumbent union.⁶³

Board policy also encourages or bolsters multiemployer bargaining in situations where an employer-member of a multiemployer bargaining group re-

57. The issue whether to recognize a single employer or a multiemployer election unit can arise regardless of the identity of the petitioner. The petitioner can be (1) a rival union, see, e.g., *I. Miller & Bro., Inc.*, 135 N.L.R.B. 924 (1962); *Carbondale Retail Druggists' Ass'n*, 131 N.L.R.B. 1021 (1961), (2) a disgruntled employee seeking decertification, see, e.g., *Schaetzel Trucking, Inc.*, 250 N.L.R.B. 321 (1980); *Grand Rapids Fuel Co.*, 107 N.L.R.B. 1402 (1954); *American Bakeries Co. (Merita Bakery)*, 103 N.L.R.B. 434 (1953), or (3) an employer, see, e.g., *Ainsworth Sentry*, 242 N.L.R.B. 1221 (1979).

58. See, e.g., *I. Miller & Bro. Inc.*, 135 N.L.R.B. 924 (1962); *Carbondale Retail Druggists' Ass'n*, 131 N.L.R.B. 1021 (1961).

59. A plain reading of section 9(b) of the Act—"[the election unit] shall be the employer unit, craft unit, plant unit, or subdivision thereof"—would support such a conclusive presumption. NLRA § 9(b), 29 U.S.C. § 159(b) (1976). The Board, however, has been unwilling to accept such a plain reading of the statute. See notes 6-7 and accompanying text *supra*, and notes 57-99 and accompanying text *infra*.

60. If a single employer election unit is approved by the Board and the rival union wins the election, the multiemployer negotiation unit will not be able to continue unless the rival union and the ousted union agree to cooperate. Such cooperation is unlikely immediately after an election campaign.

61. See, e.g., *Motor Cargo, Inc.*, 108 N.L.R.B. 716 (1954) (single employer election unit sought by a rival union was found to be inappropriate because there was a substantial history of multiemployer bargaining). Accord, *I. Miller & Bro. Inc.*, 135 N.L.R.B. 924 (1962); *Taylor and Boggis Foundry Div.*, 98 N.L.R.B. 481 (1952).

62. For the factors the Board relies on in determining the appropriateness of multiemployer election units, see notes 84-98 and accompanying text *infra*.

63. See notes 30-31 and accompanying text *supra*. But see *Taylor Motors, Inc.*, 241 N.L.R.B. 711 (1979).

fuses to sign a collective bargaining contract negotiated and agreed upon by the group. In the absence of Board recognition of multiemployer negotiation units, the union response in such a situation would be limited to economic action.⁶⁴ The Board, however, recognizes multiemployer negotiation units and requires employer-members of multiemployer negotiation units to sign contracts negotiated on their behalf by the negotiators for the unit.⁶⁵ Consequently, because of the Board's recognition of multiemployer negotiation units,⁶⁶ unions have a response in addition to economic action: the filing of an unfair labor practice charge.⁶⁷

This Board policy may encourage multiemployer bargaining. If unions can reach agreement with the multiemployer group, they are assured of standardized wages and terms and conditions of employment⁶⁸ without resorting to economic action against individual employers.⁶⁹ In addition, many employers may favor the policy. If an agreement is reached between a union and a multiemployer negotiation unit, employers can rest assured that their competitors and fellow employer-members will be burdened with the same labor contract and will not be able to renegotiate a separate and more advantageous deal.⁷⁰

64. The union could utilize its economic weapons in an attempt to coerce the recalcitrant employer-members to sign the collective bargaining contract. Typically, the union's economic weapons take the form of the strike, the picket line and the boycott. See R. Smith, L. Merrifield & T. St. Antoine, *Labor Relations Law* 261 (1979).

65. See, e.g., *Smith's Management Corp.*, 197 N.L.R.B. 1156, 1157 (1972); *Homer Gale*, 176 N.L.R.B. 1049, 1051-52 (1969). See also *McAx Sign Co. v. NLRB*, 576 F.2d 62, 66-68 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *NLRB v. Beckham, Inc.*, 564 F.2d 190, 192-95 (5th Cir. 1977).

66. It could be argued that this Board doctrine is nothing more than an application of the Board policy that an employer may be bound by the actions of its agents. Thus, if an employer gives an agent the authority to negotiate and enter into a contract and the agent does so, the employer will be bound by that contract. *NLRB v. Coletti Color Prints, Inc.*, 387 F.2d 298, 302-04 (2d Cir. 1967), enforcing 159 N.L.R.B. 1593, 1593-94 (1966); *J.E. Cote*, 101 N.L.R.B. 1486, 1507, 1513 (1952).

The Board's multiemployer doctrine, however, expands the policy noted above. First, the Board has found multiemployer negotiation units to exist in situations where it may have been reluctant to find an agency relationship. See, e.g., *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964) (multiemployer negotiation unit may be recognized "even though the employer may not have specifically delegated to an employer group the authority to represent it in collective bargaining or given the employer group the power to execute final and binding agreements on its behalf"). See generally notes 84-99 and accompanying text *infra*. Second, the Board's multiemployer negotiation unit rule has a greater impact than the agency rule because the Board does not impose rigid limits on withdrawal from ordinary agency relationships, but it does on withdrawal from multiemployer negotiation units. See notes 102-19 and accompanying text *infra*. Third, the obligation to bargain on a multiemployer basis survives *even if* the bargaining agent ceases to exist. *Lehigh Lumber Co.*, 238 N.L.R.B. 675, 676 n.4 (1978), enforced, 89 Lab. Cas. ¶ 12,157 (3d Cir. 1979).

67. Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5) (1976) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively" with a union that represents that employer's employees. Section 8(d) of the Act, *id.* § 158(d), defines "bargain collectively" to include "the execution of a written contract incorporating any agreement reached." Consequently, the refusal of an employer-member of a multiemployer negotiation unit to sign a collective bargaining contract negotiated and agreed upon by the group is a violation of section 8(a)(5) of the Act.

68. Standardized wages and terms and conditions of employment are a traditional union goal. See notes 16-17 and accompanying text *supra*.

69. See notes 65-67 and accompanying text *supra*.

70. See notes 19-20 and accompanying text *supra*.

Multiemployer bargaining structures are also encouraged by Board policy on secondary boycotts. Board recognition of a multiemployer negotiation unit, under current Board policy, will allow unions to engage in conduct that, but for the multiemployer negotiation unit, would be an impermissible secondary boycott.⁷¹ Assume, for example, that Union represents the employees of three separate companies engaged in the manufacture of bicycles: Company A assembles bicycles; Company B manufactures bicycle frames and sells them to Company A and other companies; and Company C manufactures bicycle components other than frames and sells them to Company A and other companies. The Union and Companies A, B, and C engage in multiemployer bargaining⁷² and enter into a collective bargaining contract that includes a "frame" clause intended to preserve the work of welding frames for the employees of the multiemployer negotiation unit.

71. The term "secondary boycott" has been concisely defined by Judge Learned Hand:

The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands.

International Bhd. of Electrical Workers, Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950).

Despite the historic use of secondary boycotts as a union tactical weapon, the National Labor Relations Act has restricted their use. Professor Leslie has capsulized the public policy arguments for and against this restriction:

[Secondary boycotts have been restricted for several reasons.] First, it is unfair to the primary employer (the one with whom the union has its dispute, either organizational or economic) to permit the union to enlist the aid of a secondary employer in what should be an intrafamily struggle; the enlistment of the secondary distorts the economics of the marketplace. . . . Second, it is unfair to the secondary employer to subject it to union economic coercion merely because the secondary does business with an offending employer over which it has no control. Third, the proliferation of labor disputes injures the public and should thus be minimized; since the secondary boycott makes two (or more) disputes out of one, it should be prohibited.

Counter-arguments come less easily to mind, but consider a few of the possible responses. First, fairness is, after all, in the eye (or the pocket) of the beholder. . . . Where the employers are interdependent, there is no reason to arbitrarily limit the focus of union pressure to a "primary" employer. . . . Nor are secondary boycotts necessarily more harmful to secondary employers than the effects of primary strikes, a distributor may be devastated by a primary strike which closes down a major manufacturer. There is no reason to single out secondary boycotts for special treatment. As to the third argument, the public impact of a strike depends on the nature of the employer and the duration of the strike, not on whether it is primary or secondary.

D. Leslie, *Cases and Materials on Labor Law: Process and Policy* 285-86 (1979).

Sections 8(b)(4)(A) and (B) and 8(e) are the provisions of the Act that restrict the use of secondary boycotts. Section 8(b)(4)(B) prohibits unions from engaging in or persuading or coercing others to engage in secondary boycotts. 29 U.S.C. § 158(b)(4)(B) (1976). Section 8(e) prohibits unions and employers from entering into agreements whereby the employer agrees to engage in a secondary boycott of another employer. *Id.* § 158(e). Section 8(b)(4)(A) prohibits union economic action to acquire an agreement prohibited by section 8(e). *Id.* § 158(b)(4)(A). See D. Leslie, *supra*, at 286. See generally Farmer, *Secondary Boycotts—Loopholes Closed or Reopened?*, 52 *Geo. L.J.* 392 (1964); Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 *Kan. L. Rev.* 651 (1971); Lesnick, *The Gravamen of the Secondary Boycott*, 62 *Colum. L. Rev.* 1363 (1962).

72. The formation of a multiemployer negotiation unit and subsequent Board recognition thereof is not precluded because the employers are engaged in different lines of business or because the employees in the putative unit have diverse job responsibilities. See, e.g., *Safeway Stores, Inc.*, 98 N.L.R.B. 528, 529-30 (1952); *Cloth Laying Appliances Corp.*, 78 N.L.R.B. 785, 786 (1948).

Under current Board policy, if Companies A, B and C engaged in single employer bargaining, the Union and Companies A and C would violate section 8(e)⁷³ of the National Labor Relations Act if they agreed to the frame clause.⁷⁴ The clause would be secondary and, hence, impermissible.⁷⁵ Its objective would not be to satisfy Union objectives with respect to Companies A and C and their employees, but rather to satisfy Union objectives elsewhere; specifically, the Union objective would be to preserve work for employees of Company B. Similarly, if Company A bought frames welded by a company other than Company B and Company A's employees refused to handle the frames, the Union would violate section 8(b)(4)(B)⁷⁶ of the Act.⁷⁷ Once again, the Union's objectives would be secondary because they are directed to the labor relations of Company B.⁷⁸ The Union and Company B, on the other hand, could agree to the frame clause without violating section 8(e) because the objective of the clause would be to preserve work traditionally done by Company B's employees and, hence, the clause would be primary.⁷⁹

The multiemployer bargaining structure, however, permits Companies A and C to agree to the clause without violating the Act.⁸⁰ Once a multiem-

73. 29 U.S.C. § 158(e) (1976).

74. As noted in note 71 supra, it is an unfair labor practice under Section 8(e) for "any labor organization and any employer to enter into any contract . . . whereby such employer . . . agrees to . . . refrain from . . . dealing in any of the products of any other employer . . ." 29 U.S.C. § 158(e) (1976). Through the frame clause, Companies A and C agree to refrain from buying frames welded by any company other than Company B. That restriction on their liberty to deal with other employers violates section 8(e). See, e.g., *Brown v. Local No. 17, Amalgamated Lithographers*, 180 F. Supp. 294, 303 (N.D. Cal. 1960) (a clause that "limit[s] and possibly determine[s] an employer's] freedom to change his mind" about with whom he deals violates section 8(e)); *Milk Drivers and Dairy Employees, Local Union No. 537*, 147 N.L.R.B. 230, 235 (1964) (section 8(e) is violated where "the employer is restricted in his liberty to deal with others").

75. Even if a clause has the effect of limiting an employer's dealings with other employers, see note 74 supra, it does not violate section 8(e) if the Union's objective was primary, that is, if it is addressed to the labor relations of the contracting employer vis-à-vis his own employees. *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967). For example, if the clause is designed to preserve work traditionally done by the contracting employer's employees, the clause does not violate the Act even though it may also have the effect of interfering with the employer's freedom to deal with other employers. *Id.* at 635. See also *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 504-05 (1980); *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. 507, 517 (1977). On the other hand, if a clause is "tactically calculated to satisfy union objectives elsewhere," *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. at 644-45, it is secondary and, hence, impermissible. See also *NLRB v. International Longshoremen's Ass'n*, 447 U.S. at 504, *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. at 519-20.

76. 29 U.S.C. § 158(b)(4)(B) (1976).

77. As noted in note 71 supra, it is an unfair labor practice under section 8(b)(4)(B) for a union to "forc[e] . . . any person to cease . . . dealing in the products of any other producer." Through their refusal to handle the frames, Company A's employees are attempting to force Company A to cease dealing in the products of the other company.

78. As with section 8(e), see note 75 supra, section 8(b)(4)(B) is directed only against secondary activities. See *NLRB v. International Longshoremen's Ass'n*, 447 U.S. at 504-05; *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. at 510-11; *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. at 633-35. In the instant case, however, the Union's objectives are secondary; Company A's employees are not attempting to preserve work they traditionally perform, but rather to preserve work traditionally performed by employees of Company B.

79. See *NLRB v. International Longshoremen's Ass'n*, 447 U.S. at 504-05; *NLRB v. Enterprise Ass'n of Pipefitters*, 429 U.S. at 517-20; *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. at 644.

80. The clause may still be subject to attack under the antitrust laws. Inasmuch as Company

ployer negotiation unit is formed, the unit itself is considered the "employer" for bargaining purposes.⁸¹ Consequently, since the frame clause preserves work traditionally done by employees of the "employer," the clause is primary.⁸² Similarly, if Company A purchases frames welded by a company other than Company B, Company A's employees would not violate section 8(b)(4)(B) by refusing to handle the frames; the employees' activity would be primary because the objective would be to affect the labor policies of the "employer"—the multiemployer negotiation unit.⁸³

In summary, Board recognition of multiemployer negotiation units in secondary boycott situations encourages unions to engage in multiemployer bargaining because it increases the breadth of permissible work preservation agreements and of economic action to enforce such agreements.

Board recognition of multiemployer election and negotiation units, then, may affect the outcome of disputes in several situations. Nevertheless, despite the significance of such recognition, the Board has been unable definitively to delineate the factors it relies on in making a multiemployer election or negotiation unit determination. Rather, identifying the precise factors the Board relies on in making these unit determinations is like trying to determine why the University of North Carolina basketball team has won so consistently. Defense, teamwork and individual talent are all clearly relevant factors, but no one is determinative and, indeed, the mix seems to vary from year to year.

A is in effect agreeing to buy frames only from Company B, the clause is a type of exclusive dealing contract and may violate the antitrust laws. This would depend on a number of factors, including the duration of the contract and the share of the market controlled by Company A. See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). See generally L. Sullivan, *Handbook of the Law of Antitrust* §§ 163-71 (1977).

81. See, e.g., *Sheridan Creations, Inc.*, 148 N.L.R.B. 1503, 1506 (1964), enforced, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967); *Grand Rapids Fuel Co.*, 107 N.L.R.B. 1402, 1404 (1954).

82. The "bargaining unit" for which a union may lawfully seek to preserve work for its members has been defined as the same unit for which separate collective bargaining occurs, whether it consists of the employees of a single employer, or a multiemployer association.

Local Union No. 282, Int'l Bhd. of Teamsters, 197 N.L.R.B. 673, 675 n.10 (1972). Accord, *United Mine Workers (Dixie Mining Co.)*, 165 N.L.R.B. 467, 468 (1967). See also *Local 98, Sheet Metal Workers' Int'l Ass'n v. NLRB*, 433 F.2d 1189, 1199-1201 (D.C. Cir. 1970) (Wright, J., dissenting), quoted with approval in *Plumbers and Steam Fitters Local 342 v. NLRB*, 598 F.2d 216, 222 n.17 (D.C. Cir. 1979) and *Sheet Metal Workers' Int'l Ass'n Local 223 v. NLRB*, 498 F.2d 687, 693-94 n.28 (D.C. Cir. 1974); *Lewis v. NLRB*, 350 F.2d 801, 802-03 (D.C. Cir. 1965). See generally Comment, *Secondary Boycotts and Work Preservation*, 77 *Yale L.J.* 1401, 1414-15 (1968). Cf. *Joint Council of Teamsters No. 42*, 212 N.L.R.B. 320, 320 (1974); id. at 321 (Jenkins, M., concurring), id. at 324-25 (Miller, C., and Kennedy, M., dissenting); id. at 330-31 (Penfield, A.L.J.); *International Union of Operating Eng'rs, Local Union No. 12*, 212 N.L.R.B. 343, 353-56 (1974) (Miller, A.L.J.), rev'd, 545 F.2d 1194 (9th Cir. 1976); *Raymond O. Lewis*, 148 N.L.R.B. 249, 253-55 (1964); id. at 257-60 (Jenkins, M., dissenting). But see *International Longshoremen's Union*, 208 N.L.R.B. 994, 996, 1007 (1974), enforced sub nom. *Pacific Maritime Ass'n v. NLRB*, 77 *Lab. Cas.* ¶ 10,949 (D.C. Cir. 1975), where the Board did not pass upon or adopt dicta in the Administrative Law Judge's decision that primary and secondary employers may coexist in the same multiemployer unit.

83. See cases cited in note 82 supra. Cf. *Houston Insulation Contractors Ass'n v. NLRB*, 386 U.S. 664 (1967) (a refusal to handle by one local in order to protect the work customarily done by members of a sister local for the same employer does not constitute an illegal secondary boycott).

Similarly, certain factors are clearly relevant to a multiemployer election or negotiation unit determination, but no single factor is determinative.

As noted above⁸⁴ multiemployer bargaining is "rooted in consent."⁸⁵ Consequently, the touchstone for a multiemployer unit determination is whether the parties to the putative unit have evidenced an unequivocal intention to be included in a multiemployer unit.⁸⁶ Intention, though, has often proved to be an elusive concept.⁸⁷

When there is no objection to the formation of a multiemployer unit, the subjective intent of the parties is sufficient to meet the unequivocal intention standard.⁸⁸ When there is an objection, however, the elusive nature of unequivocal intention becomes apparent. If an employer objects to a proposed multiemployer unit,⁸⁹ the Board may still find that the employer has expressed

84. See notes 53-55 and accompanying text *supra*.

85. Evening News Ass'n, 154 N.L.R.B. 1494, 1496 (1965), enforced sub nom. Detroit Newspapers Publishers Ass'n v. NLRB, 372 F.2d 569 (6th Cir. 1967).

86. See, e.g., Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899, 904 (9th Cir. 1979); McAx Sign Co. v. NLRB, 576 F.2d 62, 66 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); NLRB v. Beckham, Inc., 564 F.2d 190, 192 (5th Cir. 1977); NLRB v. Bagel Bakers Council, 434 F.2d 884, 886-87 (2d Cir. 1970), cert. denied, 402 U.S. 908 (1971); Ruan Transport Corp., 234 N.L.R.B. 241, 242 (1978); Van Eerden Co., 154 N.L.R.B. 496, 499 (1965); Kroger Co., 148 N.L.R.B. 569, 573 (1964).

87. The elusiveness of the concept is not, of course, confined to multiemployer unit determinations. See, e.g., Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam) ("[I]ntent, motive and purpose are elusive subjective concepts"). See also Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977). See generally Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

88. Professor Morris' statement that "subjective intent alone is not sufficient" to constitute unequivocal intention, C. Morris, *supra* note 14, at 239, is overbroad; subjective intent alone is sufficient where there is no objection to formation of the multiemployer unit. See, e.g., Broward County Launderers & Cleaners Ass'n, Inc., 125 N.L.R.B. 256, 257 (1959); Calumet Contractors Ass'n, 121 N.L.R.B. 80, 81 (1958).

89. Although the text discusses unequivocal intention with respect to employers, employees must also acquiesce in the formation of the multiemployer unit. See note 55 and accompanying text *supra*. See also James E. Olson (Advice Memorandum), 1976-77 NLRB Dec. ¶ 20,062 at 32,101 (1976). When the unit is initially formed, a majority of the employees of each individual participating employer must consent, expressly or impliedly, to establishment of the unit; a union and an employer cannot include employees in a multiemployer unit without this consent. See, e.g., Dancker & Sellow, Inc., 140 N.L.R.B. 824, 825-26 (1963), enforced sub nom. NLRB v. Local 210, Int'l Bhd. of Teamsters, 330 F.2d 46 (2d Cir. 1964); Morgan Transfer & Storage Co., Inc., 131 N.L.R.B. 1434, 1435 (1961); Mohawk Business Machs. Corp., 116 N.L.R.B. 248, 249 (1956); Pepsi-Cola Bottling Co., 55 N.L.R.B. 1183, 1186-87 (1944). Once a multiemployer unit is formed, though, a majority of the employees of all the employers participating in the unit must acquiesce either expressly or impliedly. Consequently, if a majority of the employees of one employer no longer want to be included in an existing multiemployer unit, but the union wishes to continue bargaining with the unit, the lack of employee consent "would not relieve the . . . [employer] of its obligation to bargain with the union as to the appropriate multi-employer unit, nor justify an untimely withdrawal from such unit." Sheridan Creations, Inc., 148 N.L.R.B. 1503, 1506 (1964), enforced, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967). See also Bel-Window, 240 N.L.R.B. 1315, 1315 (1979). See generally C. Morris, *supra* note 14, at 240; Collins & Freeman, *Multi-employer Bargaining Units, in Appropriate Units for Collective Bargaining* 39, 54-56 (P. Nash & G. Blake eds. 1979).

As with employers, see note 89 and accompanying text *infra*, the Board may find the required unequivocal intention even in the face of a union objection to a multiemployer unit; the Board may infer unequivocal intention from the existence of a substantial multiemployer bargaining history. Stouffer Corp., 101 N.L.R.B. 1331, 1332 (1952). See Foley Constr. Co., 134 N.L.R.B.

an unequivocal intention to be included in the unit if there is a substantial history of multiemployer bargaining with the employer.⁹⁰ A substantial history of multiemployer bargaining, though, does not always result in a finding of unequivocal intention; the Board on occasion has found the required intention lacking even in the face of a multiemployer bargaining history.⁹¹ Moreover, a finding of unequivocal intention is not precluded even if there is an objection *and* no history of multiemployer bargaining where such bargaining is typical in the industry.⁹²

Despite this wavering, the use of a substantial multiemployer bargaining history as evidence of unequivocal intention⁹³ would be useful if this bargaining history could be confidently identified. This, however, is not possible under current Board doctrine. Although several factors may point to the lack

1385, 1397-99 (1961) (Trial Examiner's decision). Thus, the intention element is as elusive with respect to employees as it is with respect to employers.

90. See, e.g., Kroger Co., 148 N.L.R.B. 569, 573-74 (1964); Quality Limestone Prods., Inc., 143 N.L.R.B. 589, 589-92 (1963); Capital District Beer Distribs. Ass'n, 109 N.L.R.B. 176, 178-79 (1954); Waterfront Employers Ass'n, 71 N.L.R.B. 80, 111 (1946). See generally C. Morris, *supra* note 14, at 239; Comment, *supra* note 17, at 564, 570.

91. The Board has found the required intention to be lacking even in the face of a history of multiemployer bargaining history in several circumstances. The most obvious circumstance is one in which the employer or union effects a timely withdrawal from the multiemployer negotiation unit. See notes 104-09 and accompanying text *infra*. The Board has also refused to recognize a multiemployer election unit in the face of a multiemployer bargaining history where the merger of two unions resulted in the dissolution of the union that had bargained with the multiemployer group and the successor union, although it maintained a substantial identity with the dissolved union, disclaimed any interest in representing a multiemployer unit. McKesson Wine & Spirits Co., 232 N.L.R.B. 208, 209 (1977). Finally, a multiemployer bargaining history has not been controlling when the multiemployer bargaining involved one set of employees of the multiemployer group and the requested Board recognition involved a different set of employees of the group. See, e.g., NLRB v. E-Z Davies Chevrolet, 395 F.2d 191, 192-93 (9th Cir. 1968) (history of multiemployer bargaining with respect to mechanic and repairmen employees of multiemployer group did not justify a multiemployer election unit with respect to the salesmen employees of the group). See generally C. Morris, *supra* note 14, at 244-45.

92. See Calumet Contractors Ass'n, 121 N.L.R.B. 80, 81 (1958); Western Ass'n of Eng'rs, 101 N.L.R.B. 64, 64-65 (1952). See generally Collins & Freeman, *supra* note 89, at 53. But see Chicago Metropolitan Home Builders Ass'n, 119 N.L.R.B. 1184, 1185 (1957).

93. One court has articulated the following test:

[T]he relevant test [is] in the disjunctive: a multi-employer bargaining unit may be established *either* by "a controlling history of collective bargaining on such basis, *or* an unequivocal agreement of the parties to bind themselves to a course of group bargaining in the future."

McAx Sign Co. v. NLRB, 576 F.2d 62, 66 n.3 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) (emphasis in original). Although language supportive of such a disjunctive test has found its way into Board decisions, see Electric Theatre, 156 N.L.R.B. 1351, 1352 (1966), the test is imprecise and may be misleading. An insensitive application of the disjunctive test would reverse the results in the cases cited in note 91 *supra*, because in those cases the Board refused to recognize multiemployer units despite the existence of multiemployer bargaining histories. A substantial multiemployer bargaining history should be considered as an objective indication of unequivocal intention, not as an alternative to a finding of unequivocal intention. See Van Eerden Co., 154 N.L.R.B. 496, 499 (1965) ("[W]e have often inferred the presence of [unequivocal] intention from the facts that the employers have participated . . . in joint bargaining negotiations and have adopted . . . uniform contracts . . ."); Quality Limestone Prods., Inc., 143 N.L.R.B. 589, 591 (1963) ("Their conduct [in bargaining on a multiemployer basis] throughout indicates that they evinced an unequivocal intent to be bound by group action . . ."); Bennett Stone Co., 139 N.L.R.B. 1422, 1424 (1962) ("[A multiemployer unit may be held to exist when] the employers have by an established course of conduct unequivocally manifested a desire to be bound . . . by group rather than individual action.").

of a substantial⁹⁴ multiemployer bargaining history—the execution of individual contracts rather than a group contract,⁹⁵ the absence of a formal organization,⁹⁶ and the failure to empower a bargaining agent with binding authority⁹⁷—none is determinative.⁹⁸ Instead, one is once again left wondering why the Tar Heels have won so many games.

Board policy on the recognition of multiemployer election and negotiation units thus may have significant consequences, consequences that may encourage multiemployer bargaining structures. Nevertheless, the criteria relied on by the Board in making these unit determinations are uncertain at best.⁹⁹ The Board protects multiemployer bargaining in a more direct manner, how-

94. The "substantial" requirement has been relatively well-delineated. Although not uniformly applied, see, e.g., *Acryvin Corp. of Am.*, 107 N.L.R.B. 917, 918 (1954) (ten month multiemployer bargaining history held sufficient), the Board has tended to follow a one year benchmark in determining substantiality. See, e.g., *Miron Bldg. Prods. Co.*, 116 N.L.R.B. 1406, 1407-08 (1956) (less than one year is insubstantial); *Taylor and Boggis Foundry Div.*, 98 N.L.R.B. 481, 482 (1952) (nineteen months is substantial); *Manufacturers' Protective & Dev. Ass'n*, 95 N.L.R.B. 1059, 1061 (1951) (less than one year is insubstantial); *Van Iderstine Co.*, 95 N.L.R.B. 966, 968 (1951) (less than one year is insubstantial). See generally *Collins & Freeman*, supra note 89, at 50.

95. Compare cases finding a multiemployer unit to be appropriate despite the execution of individual contracts, e.g., *Bel-Window*, 240 N.L.R.B. 1315, 1315 (1979); *Quality Limestone Prods., Inc.*, 143 N.L.R.B. 589, 590-91 (1963); *Samuel Bernstein & Co.*, 98 N.L.R.B. 1144, 1145 (1952), with cases finding a multiemployer unit to be inappropriate based in part on the execution of individual contracts, e.g., *Electric Theatre*, 156 N.L.R.B. 1351, 1352-53 (1966); *Bennett Stone Co.*, 139 N.L.R.B. 1422, 1424-25 (1962); *Chicago Metropolitan Home Builders Ass'n*, 119 N.L.R.B. 1184, 1186 (1957).

96. Compare cases finding a multiemployer unit to be appropriate despite the absence of a formal employer organization, e.g., *Fish Indus. Comm.*, 98 N.L.R.B. 696, 698 (1952); *Metz Brewing Co.*, 98 N.L.R.B. 409, 410 (1952); *Abbotts Dairies, Inc.*, 97 N.L.R.B. 1064, 1067 (1952), with cases finding a multiemployer unit to be inappropriate based in part on the absence of such an organization, e.g., *Electric Theatre*, 156 N.L.R.B. 1351, 1352 (1966).

97. Compare cases finding a multiemployer unit to be appropriate despite the failure to empower a bargaining agent with binding authority, e.g., *Fish Indus. Comm.*, 98 N.L.R.B. 696, 698 (1952), with cases finding a multiemployer unit to be inappropriate based in part on the failure to empower a bargaining agent with binding authority, e.g., *Bennett Stone Co.*, 139 N.L.R.B. 1422, 1424 (1962).

98. Other factors are equally nondeterminative. Fluctuating membership in the multiemployer group, for example, is nondeterminative. Compare *Bennett Stone Co.*, 139 N.L.R.B. 1422, 1424-25 (1962) (no multiemployer unit) with *Quality Limestone Prods., Inc.*, 143 N.L.R.B. 589, 591 (1963) (multiemployer unit) and *Samuel Bernstein & Co.*, 98 N.L.R.B. 1144, 1145-46 (1952) (multiemployer unit).

Perhaps the most egregious recent multiemployer unit determination was enforced in *McAx Sign Co. v. NLRB*, 576 F.2d 62 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). In *McAx* a multiemployer negotiation unit was recognized because of a multiemployer bargaining history even though contracts were signed by individual companies; there was no formal employers' association; there was no prebargaining agreement among employers that they were negotiating as a group; and there was no announcement during negotiations that the employers were acting as a group. *Id.* at 64; *id.* at 69 (Godbold, J., dissenting). See generally *Collins & Freeman*, supra note 89, at 52-53.

99. It should be noted that multiemployer unit determinations are not uncertain at the outer ends of the multiemployer-single employer continuum. If a union and certain employers want to take advantage of Board policy on multiemployer bargaining, it should be relatively easy for them to establish a clear multiemployer bargaining situation. Similarly, if the parties desire to avoid multiemployer bargaining, that should be easy to do. If, however, the parties want to retain flexibility or obtain some but not all of the benefits of multiemployer bargaining, the situation becomes hazy. The gray area in the center of the continuum is large in proportion to the clear areas on either end of the spectrum.

ever, by limiting the ability of unions and employers to withdraw from multiemployer bargaining structures.

B. Board Policy on Withdrawal from Multiemployer Negotiation Units

Current Board policy protects established multiemployer bargaining structures by limiting the ability of unions and employers to withdraw from these structures. Assume, for example, that Union and Companies A, B and C have begun bargaining on a multiemployer basis. Company A then decides that it would prefer to negotiate on an individual employer basis. Current Board policy prohibits Company A from withdrawing from the multiemployer group absent either "mutual consent" or "unusual circumstances."¹⁰⁰ This Board policy directly protects established multiemployer bargaining structures because these structures cannot be broken up by the unilateral actions of a participant.

The Board has not always maintained this restrictive withdrawal policy; early Board cases permitted virtually unrestricted withdrawal.¹⁰¹ In the early 1950s, the Board began to impose restrictions on withdrawal rights.¹⁰² In a 1958 decision, *Retail Associates, Inc.*,¹⁰³ the Board established specific withdrawal guidelines that have guided the Board and the courts¹⁰⁴ ever since:

We would . . . refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.¹⁰⁵

The *Retail Associates* guidelines set forth different standards for withdrawal before negotiations begin than for withdrawal after the commencement of negotiations. Before negotiations begin,¹⁰⁶ unions¹⁰⁷ and employers may

100. *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 395 (1958).

101. E.g., *Economy Shade Co.*, 91 N.L.R.B. 1552, 1553 n.4 (1950); *Pacific Metals Co.*, 91 N.L.R.B. 696, 699-700 (1950); *Bercut-Richards Packing Co.*, 68 N.L.R.B. 605, 606-07 (1946). See generally *Collins & Freeman*, supra note 89, at 64; *Meltzer*, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. Chi. L. Rev. 70, 91-94 (1956); *Comment*, supra note 17, at 571.

102. See *Washington Hardware Co.*, 95 N.L.R.B. 1001, 1003 (1951); *Milk & Ice Cream Dealers*, 94 N.L.R.B. 23, 25 (1951); *Engineering Metal Prods. Co.*, 92 N.L.R.B. 823, 824 (1950). See generally *Collins & Freeman*, supra note 89, at 64 n.91; *Comment*, supra note 17, at 572.

103. 120 N.L.R.B. 388 (1958).

104. The *Retail Associates* guidelines have been accepted by the courts. See, e.g., *NLRB v. Brotherhood of Teamsters Local No. 70*, 470 F.2d 509, 509-10 (9th Cir. 1972), cert. denied, 414 U.S. 821 (1973); *NLRB v. Dover Tavern Owners Ass'n*, 412 F.2d 725, 728 (3d Cir. 1969); *NLRB v. Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 57 (10th Cir. 1966); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967).

105. *Retail Assocs., Inc.*, 120 N.L.R.B. at 395.

106. Although *Retail Associates* indicates that the prenegotiation withdrawal rules apply "prior to the date set by the contract for modification, or to the agreed-upon date to begin the

withdraw from established multiemployer negotiation units by providing written notice¹⁰⁸ of an unequivocal intent¹⁰⁹ to withdraw.¹¹⁰ After the commence-

multi-employer negotiations," id. at 395, the Board has applied the rules prior to the date negotiations actually begin. See, e.g., *South Tex. Chapter, Associated Gen. Contractors*, 238 N.L.R.B. 156, 156 n.3 (1978); *Local 260 of the Wood, Wire and Metal Lathers Int'l Union*, 228 N.L.R.B. 1347, 1351-52 (1977); *Carvel Co.*, 226 N.L.R.B. 111, 112 (1976), enforced, 560 F.2d 1030 (1st Cir. 1977), cert. denied, 434 U.S. 1065 (1978); *Brotherhood of Teamsters Local No. 70*, 195 N.L.R.B. 454, 459-60 (1972). The issue of when negotiations actually begin, however, is not always easy to determine. See, e.g., *Carvel Co.*, 226 N.L.R.B. 111 (1976) (negotiations begun by a phone call and exchange of letters). Consequently, parties desiring to limit withdrawal rights may attempt to commence negotiations before the formal commencement of negotiations. Inequities may result. See, e.g., *Carvel Co.*, id. (company could not withdraw after negotiations commenced by a phone call and exchange of letters even though letters were not submitted to the formal negotiations committee and even though the company was unaware of the phone call and letters). See generally *Collins & Freeman*, supra note 89, at 67-69. In addition, as with any per se rule, withdrawal rights may depend on artificial factors that have virtually no relation to the policy underpinnings of the rule. See, e.g., *South Tex. Chapter, Associated Gen. Contractors*, 238 N.L.R.B. 156, 156 n.3 (1978) (withdrawal rights dependent on whether first bargaining session began with union giving its proposals to bargaining agent for employers or with bargaining agent giving union list of withdrawing employers).

107. Even though *Retail Associates* clearly stated that its withdrawal rules applied to both unions and employers, the notion lingered that the withdrawal rights of unions may be more restricted than those of employers. See Comment, supra note 17, at 575-77. In 1965, however, the Board explicitly held that "the existing rules governing employer withdrawal from multiemployer units should be applied on an equal basis to union withdrawal from such units." *Evening News Ass'n*, 154 N.L.R.B. 1494, 1501 (1965), enforced sub nom. *Detroit Newspapers Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1976). See also *Publishers' Ass'n v. NLRB*, 364 F.2d 293 (2d Cir.), cert. denied, 385 U.S. 971 (1966).

108. Although *Retail Associates* clearly requires a written notice, 120 N.L.R.B. at 395, it does not indicate to whom the notice must be given. But see *Collins & Freeman*, supra note 89, at 70-71 (suggesting that Interstate Constr. Co., 229 N.L.R.B. 271 (1977), may indicate an easing of the written notice requirement). While it is clear that notice must be given to the union, see, e.g., *Goodsell & Vocke, Inc.*, 223 N.L.R.B. 60, 66 (1976), enforced, 559 F.2d 1141 (9th Cir. 1977); *Korner Kafe, Inc.*, 156 N.L.R.B. 1157, 1163-64 (1966), dicta in some cases indicate that notice also must be given to the association. See *NLRB v. Central Plumbing Co.*, 492 F.2d 1252, 1255 (6th Cir. 1974); *Audit Serv., Inc. v. Brasel & Sims Constr. Co.*, 176 Mont. 1, 7-8, 575 P.2d 908, 910-11 (1978). Presumably, the rationale is that it is as important for the association to know who it is bargaining for as it is for the union to know who it is bargaining with. In this connection, at least one court has stated in dicta that association-imposed restrictions on an employer's right to withdraw are unenforceable. *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 588 (2d Cir. 1961). See generally Note, *From Chains of Iron to Ropes of Sand: Employer Withdrawal From Multiemployer Bargaining After Steel Fabricators*, 45 Brooklyn L. Rev. 1283, 1298 n.71 (1979). See also note 114 and accompanying text infra.

109. *Retail Associates* defined unequivocal intent to mean that the decision "must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis." 120 N.L.R.B. at 394. The withdrawal, then, must not be conditional, *Universal Insulation Corp.*, 149 N.L.R.B. 1397 (1964), enforced, 361 F.2d 406 (6th Cir. 1966) (no withdrawal where employer said he would remain in association unless association negotiated a contract with a wage increase), or constructive, see, e.g., *NLRB v. Paskesz*, 405 F.2d 1201 (2d Cir. 1969) (no withdrawal when association suspended employer from association after deliberate nonpayment of dues); *Kasco Trucking Corp.*, 133 N.L.R.B. 627 (1961) (no withdrawal merely because employer ceased to pay association dues). Rather, the employer must act in good faith, *Walker Elec. Co.*, 142 N.L.R.B. 1214, 1221 (1963) (no withdrawal where there is "secrecy and want of good faith"); *Town & Country Dairy*, 136 N.L.R.B. 517, 523 (1962) (no withdrawal where it "was more a tactical bargaining maneuver than a bona fide attempt to withdraw from multiemployer bargaining"); *Retail Assocs., Inc.*, 120 N.L.R.B. at 394 (withdrawal may not be used "as a measure of momentary expedience, or strategy"), and must abandon group bargaining, *Anderson Lithograph Co.*, 124 N.L.R.B. 920 (1959), enforced sub nom. *NLRB v. Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960) (no withdrawal where employer continued to participate in group negotiations after withdrawal).

110. Even this relatively liberal withdrawal rule is restricted by the Board's one year certification rule. If the Board has certified the multiemployer unit, the Board will not permit withdrawal

ment of negotiations, unions and employers may withdraw only with mutual consent or under unusual circumstances.¹¹¹ By mutual consent¹¹² the Board initially meant the consent of the individual employer and union involved¹¹³ but has recently required the consent of the association as well.¹¹⁴ With one exception, the delineation of unusual circumstances permitting withdrawal has been noncontroversial. Dire economic hardship,¹¹⁵ dissolution or fragmentation of the multiemployer group,¹¹⁶ and substantial conflicts of interest within the multiemployer group¹¹⁷ have all been recognized as unusual circumstances justifying withdrawal. The Board has refused to recognize a bargain-

for a reasonable period of time, usually one year. *Southwestern Colo. Contractors Ass'n*, 153 N.L.R.B. 1141, 1142-43 (1965).

111. *Retail Assocs., Inc.*, 120 N.L.R.B. at 395.

112. Consent can be either express or implied. Implied consent, however, will not be based on a mere failure to protest withdrawal, *Fairmont Foods Co., v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972); *NLRB v. John J. Corbett Press, Inc.*, 401 F.2d 673, 675 (2d Cir. 1968), but must be based instead on conduct "clearly antithetical" to a claim that consent has not been given. *I.C. Refrigeration Serv., Inc.*, 200 N.L.R.B. 687, 689 (1972). See generally *Collins & Freeman*, supra note 89, at 71-74; Note, supra note 108, at 1298-99 n.73.

113. In *Retail Associates* the Board expressed concern only with employers and unions. 120 N.L.R.B. at 393 ("the right of withdrawal by either a union or employer") (emphasis added); id. at 395 ("[W]e would . . . refuse to permit the withdrawal of an employer or a union . . . except on mutual consent . . .") (emphasis added). Until recently, the cases that subsequently applied the *Retail Associates* guidelines had with near unanimity focused on union consent to an employer withdrawal. See, e.g., cases cited in note 112 supra. In addition, the commentators have discussed only union consent when considering the issue. See, e.g., *Collins & Freeman*, supra note 89, at 71-74 ("[T]he *Retail Associates* rules contemplates employer withdrawal . . . only in the event of consent by the union . . .") (emphasis added); Note, supra note 108, at 1298-99 n.73 ("Consent may be implied from a union's course of conduct . . .") (emphasis added); Comment, supra note 17, at 575 ("Under the union consent exception, compliance with the withdrawal rules is unnecessary where the union . . . recognizes [a] withdrawal.") (emphasis added).

114. *Teamsters Union Local No. 378 (Capital Chevrolet Co.)*, 243 N.L.R.B. 1086 (1979). See also *Joseph J. Callier*, 243 N.L.R.B. 1114, 1117 n.8 (1979), enforced, 630 F.2d 595 (8th Cir. 1980). But cf. *Tobey Fine Papers*, 245 N.L.R.B. 1393, 1395 & n.10 (1979) (individual employer need not obtain association's consent to withdraw, but association can successfully object to an attempted withdrawal by filing a refusal-to-bargain charge), enforced, 91 Lab. Cas. ¶ 12,701 (8th Cir. 1981). The primary policies cited by the Board in support of its restrictive withdrawal rules support this recent requirement. "[F]ostering and maintaining stability in bargaining relationships" is the primary policy cited in *Retail Associates* in support of restrictive withdrawal rules. 120 N.L.R.B. at 393, 395. If stability would be enhanced by allowing withdrawals by individual employers only if the union consents, stability would be enhanced a fortiori if such withdrawals were allowed only if both the union and the employer association consent.

115. See *North Am. Refractories Co.*, 238 N.L.R.B. 480, 481-83 (1978); *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968); *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 751 (1968). But see *Tulsa Sheet Metal Works, Inc. v. NLRB*, 367 F.2d 55, 58 (10th Cir. 1966); *Co-Ed Garment Co.*, 231 N.L.R.B. 848, 848, 854 (1977).

116. See *NLRB v. Southwestern Colo. Contractors' Ass'n*, 447 F.2d 968, 969-70 (10th Cir. 1971); *Typographic Serv. Co.*, 238 N.L.R.B. 1565, 1566 (1978); *Connell Typesetting Co.*, 212 N.L.R.B. 918, 921 (1974).

117. See *NLRB v. Siebler Heating & Air Conditioning, Inc.*, 563 F.2d 366, 371 (8th Cir. 1977), cert. denied, 437 U.S. 911 (1978); *NLRB v. Unelko Corp.*, 71 Lab. Cas. ¶ 13,764 at 27,344 (7th Cir. 1973). The decision of the United States Court of Appeals for the Eighth Circuit in *Siebler* reversed the Board's decision. See *Siebler Heating & Air Conditioning, Inc.*, 219 N.L.R.B. 1124 (1975). The Board, however, merely affirmed the finding of an administrative law judge that no severe conflict of interest existed. Id. at 1124, 1131. Thus, the Board was not required to determine whether a substantial conflict of interest would constitute an unusual circumstance justifying withdrawal. On the other hand, the Board has not yet acquiesced in the conflict of interest rulings of the Seventh and Eighth Circuit Courts of Appeal. Consequently, it is possible that the Board and the courts of appeals may disagree on whether a substantial conflict of interest is an unusual circumstance. That potential disagreement, however, has clearly not risen to the level of the disa-

ing impasse as an unusual circumstance,¹¹⁸ although most courts of appeals that have considered the issue have disagreed.¹¹⁹

Permitting withdrawal after a bargaining impasse, as many courts of appeals have done, severely undermines the Board policy of protecting established multiemployer negotiation units.¹²⁰ Despite protestations to the contrary by a court of appeals,¹²¹ a bargaining impasse is an event that can be manipulated by the parties.¹²² Consequently, a party that wishes to withdraw and has control over the bargaining process can precipitate a bargaining impasse and avoid the Board's restrictive withdrawal policies.

greement over whether a bargaining impasse is an unusual circumstance. See notes 118-19 and accompanying text *infra*.

It should be noted that, in light of the Board's generally restrictive withdrawal policies, the Board may resist recognizing conflicts of interest as unusual circumstances that justify withdrawal. Such a recognition could greatly increase the ability of employers to withdraw. The potential variety of conflicts is infinite and the existence of some conflict between association members is inevitable. Indeed, virtually any time an individual employer seeks to withdraw, a conflict arises since it is in the interest of the association to bolster its bargaining power with a unified front. See Collins & Freeman, *supra* note 89, at 80. See also notes 44-45 and accompanying text *supra*.

118. Despite disagreement by several courts of appeals, see note 119 *infra*, the Board has continued to refuse to recognize a bargaining impasse as an unusual circumstance justifying withdrawal. See, e.g., Seattle Auto Glass, 246 N.L.R.B. 94, 96 (1979); Golden Bear Motors, Inc., 245 N.L.R.B. 300, 300 n.2 (1979); Western Pac. Roofing Corp., 244 N.L.R.B. 501, 501 n.1 (1979); Marine Mach. Works, Inc., 243 N.L.R.B. 1098, 1099 (1979), enforced, 635 F.2d 522 (5th Cir. 1981); Florida Fire Sprinklers, Inc., 237 N.L.R.B. 1034, 1035 (1978); Charles D. Bonanno Linen Serv., Inc., 229 N.L.R.B. 629, 630-31 (1977), enforced, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981); Bill Cook Buick, Inc., 224 N.L.R.B. 1094, 1096 (1976).

119. H & D, Inc. v. NLRB, 633 F.2d 139, 142 (9th Cir. 1980); Authorized Air Conditioning Co. v. NLRB, 606 F.2d 899, 907 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980); NLRB v. Acme Wire Works, Inc., 582 F.2d 153, 156-57 (2d Cir. 1978); NLRB v. Independent Ass'n of Steel Fabricators, Inc., 582 F.2d 135, 146 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979); NLRB v. Beck Engraving Co., 522 F.2d 475, 483 (3d Cir. 1975); NLRB v. Associated Shower Door Co., 512 F.2d 230, 232 (9th Cir.), cert. denied, 423 U.S. 893 (1975); Fairmont Foods Co. v. NLRB, 471 F.2d 1170, 1172-73 (8th Cir. 1972). But see NLRB v. Marine Mach. Works, Inc., 635 F.2d 522 (5th Cir. 1981) (reversing NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 183-84 (5th Cir. 1974)); NLRB v. Charles D. Bonanno Linen Serv., Inc., 630 F.2d 25, 28-35 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981).

120. Although this section discusses current Board policy on multiemployer bargaining, it should be noted that undermining Board protection of multiemployer negotiation units may not be undesirable. See notes 171-77, 188-89 and accompanying text *infra*.

121. See NLRB v. Beck Engraving Co., 522 F.2d 475, 483 (3d Cir. 1975).

122. Simply stated, an impasse is "a state of facts in which the parties, despite the best of faith, are simply deadlocked." NLRB v. Tex-Tan, Inc., 318 F.2d 472, 482 (5th Cir. 1963). See also American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622, 628 (D.C. Cir. 1968) (An impasse occurs when "there [is] no realistic possibility that continuation of discussion at that time [will be] fruitful."). Although the Board has identified several factors that are relevant to an impasse determination, see Taft Broadcasting Co., 163 N.L.R.B. 475, 478, enforced sub nom. American Fed'n of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968); see generally Comment, Impasse in Collective Bargaining, 44 Tex. L. Rev. 769 (1966), the determination remains at best a "matter of judgment," 163 N.L.R.B. at 478, or at worst a "visceral reaction of the trial examiner and the Board to the record," Stewart & Engeman, Impasse, Collective Bargaining and Action, 39 U. Cin. L. Rev. 233, 241 (1970).

Because of the hazy nature of impasse and because the Act "does not compel either party to agree to a proposal or require the making of a concession," 29 U.S.C. § 158(d) (1976), a party can create a bargaining impasse merely "by adhering to a position known to be unacceptable to the other side." NLRB v. Charles D. Bonanno Linen Serv., Inc., 630 F.2d 25, 34 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981), enforcing 243 N.L.R.B. 1093 (1979). See Note, Labor—Effect of Negotiating Impasse on Employer's Right to Withdraw From a Multi-Employer Bargaining Association—*NLRB v. Beck Engraving Co.*, 17 B.C. Indus. & Com. L. Rev. 525, 539 (1976); Note, *supra* note 102, at 1318.

The courts of appeals that have adopted an impasse withdrawal rule justify the rule as necessary to preserve the balance of economic power between unions and employers. Upon impasse, the argument goes, the union can engage in selective strikes while simultaneously entering into interim agreements¹²³ with individual employers. Unions can combine the strike with interim agreements to whipsaw¹²⁴ the members of a weakened multiemployer negotiation unit.¹²⁵ In contrast, the only economic response available to employers is a lockout, and even that weapon is weak where individual employers have entered into interim agreements.¹²⁶ Thus, the union has "two weapons for its economic arsenal . . . while the employers [have] only one."¹²⁷ In an attempt to rectify this imbalance, the courts of appeals have approved an impasse withdrawal rule that provides employers with an additional response.

It is ironic that the impasse withdrawal rule actually aids unions more

123. "Interim" agreements with individual employers must be contrasted with "final" agreements with individual employers. Interim agreements are applicable only until the multiemployer group reaches a final agreement with the union; an interim agreement is superceded when a multiemployer agreement is reached. A final agreement, on the other hand, would bind the employer and the union even after a multiemployer agreement is reached. See *NLRB v. Marine Mach. Works, Inc.*, 635 F.2d 522 (5th Cir. 1981); *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093 (1979), enforced, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981).

Under current Board policy, the employer association can prevent individual employer-members from entering into final agreements. See *Teamsters Union Local No. 378*, 243 N.L.R.B. 1086, 1089 n.14 (1979); *Joseph J. Callier*, 243 N.L.R.B. 1114, 1118 (1979), enforced, 630 F.2d 595 (8th Cir. 1980). In addition, if an employer-member does enter into a final agreement, the Board may permit the remaining employer-members to withdraw from the multiemployer negotiation unit because the agreement may have "effectively fragmented . . . and destroyed . . . the integrity of the bargaining unit," thus creating an "unusual circumstance." *Typographic Serv. Co.*, 238 N.L.R.B. 1565, 1566 (1978); *Connell Typesetting Co.*, 212 N.L.R.B. 918, 921 (1974). See note 114 and accompanying text supra. But see *Tobey Fine Papers*, 245 N.L.R.B. 1393, 1395 (1977) (employer-members are not automatically entitled to withdraw when a fellow employer-member enters into a separate final agreement; rather, withdrawal rights will depend on the effect that an individually negotiated final agreement has on viability of multiemployer bargaining).

In contrast, under current Board policy, interim agreements cannot be vetoed by the association and in most cases will not justify the withdrawal of nonsignatory employer-members of the multiemployer group. See, e.g., *Joseph J. Callier*, 243 N.L.R.B. 1114, 1118 (1979), enforced, 630 F.2d 595 (8th Cir. 1980); *PHC Mechanical Contractors*, 191 N.L.R.B. 592, 596 (1971); *Sangamo Constr. Co.*, 188 N.L.R.B. 159, 160 (1971). Since interim contracts may be one way of breaking an impasse and since employers who sign interim contracts remain committed to the multiemployer negotiations, the Board has refused to recognize such contracts as unusual circumstances justifying withdrawal. But see *Connell Typesetting Co.*, 212 N.L.R.B. 918, 921 (1974) (interim agreements may justify withdrawal if they are negotiated on such a scale that the multiemployer unit is fragmented); Note, *Labor Law*, supra note 17, at 1265.

The courts of appeals have generally held that the negotiation of individual agreements justifies unilateral withdrawal by other employer-members of the multiemployer negotiation unit, regardless of whether the agreements are interim or final. *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 582-84 (3d Cir. 1975).

124. See note 41 supra.

125. See *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 482-83 (3d Cir. 1975); *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir. 1975), cert. denied, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 183 (5th Cir. 1974) (overruled in *NLRB v. Marine Mach. Works, Inc.*, 635 F.2d 522, (5th Cir. 1981)).

126. *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 483 (3d Cir. 1975).

127. *Id.* The balancing of economic weapons in *Beck Engraving* has been criticized as incomplete. See *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25, 32 & n.15 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981); Note, supra note 122, at 537-38.

than it aids the employers for whose protection the rule was formulated. To illustrate, assume the existence of a typical multiemployer bargaining structure: Union negotiating with Companies A, B and C. Assume first that Union decides it would be to its advantage to free itself from the bonds of multiemployer bargaining. Since Union is in total control of the bargaining, Union can precipitate a bargaining impasse¹²⁸ and then unilaterally withdraw from the multiemployer negotiation unit. Union can then demand that Companies A, B and C each bargain with it on an individual basis.¹²⁹ In a worst case scenario for Union, Companies A, B and C may refuse to bargain on an individual basis with Union, arguing that an impasse did not exist at the time of Union's withdrawal¹³⁰ and, consequently, that Union remains under a duty to bargain on a multiemployer basis. If Companies A, B and C prevail on that argument, Union will be placed in the position it was in prior to its attempted withdrawal, that is, it will be required to bargain on a multiemployer basis until either an agreement or an impasse is reached.

Assume now that Company A decides it would be to its advantage to free itself from the multiemployer negotiation unit. If Companies B and C want to maintain the multiemployer unit, Company A may not control the bargaining and, hence, may not be able to precipitate a bargaining impasse. In the absence of an impasse, Company A will not be able to take advantage of the impasse withdrawal rule. Indeed, since a strike is not always evidence of an impasse,¹³¹ Company A could not take advantage of the rule even if it was struck, either by itself or along with Company B and/or Company C. The ability to negotiate an interim agreement with Union probably will not be satisfactory to Company A since the interim agreement would be superceded by the multiemployer agreement as soon as the latter became effective.¹³² Finally, if Companies B and C objected, Company A could not withdraw even if Union consented to the withdrawal.¹³³

Even if Company A *and* Company B wish to free themselves from the multiemployer bargaining structure, the impasse withdrawal rule does not place them in as advantageous a position as Union. Assuming that Companies A and B control the bargaining and act to precipitate an impasse, they may err in determining when the impasse came into existence.¹³⁴ If they do, a

128. See note 122 *supra*.

129. See *NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 150-51 (2d Cir. 1978); *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 485-86 (3d Cir. 1975). See generally Note, *supra* note 108, at 1308-14 & n.138.

130. See note 122 *supra*. Compare cases finding that an impasse did not exist, e.g., *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 899, 906-07 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *NLRB v. Acme Wire Works, Inc.*, 582 F.2d 153, 157-58 (2d Cir. 1978), with cases finding that an impasse did exist, e.g., *NLRB v. Independent Ass'n of Steel Fabricators*, 582 F.2d 135, 147-48 (2d Cir. 1978); *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 484-85 (3d Cir. 1975).

131. Rather than evidence of impasse, a strike may be a "mere bargaining strategem." *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1173 (8th Cir. 1972). Indeed, a strike may serve to break an impasse. *R. Gorman*, *supra* note 10, at 450; *Stewart & Engeman*, *supra* note 122, at 247.

132. See note 123 *supra*.

133. See note 114 and accompanying text *supra*.

134. See note 130 *supra*.

worst case scenario would bind Companies A and B to a contract Union negotiated with Company C, a contract that was negotiated without input from Companies A and B.

Thus, the impasse withdrawal rule operates in practice to aid unions more than employers. If the courts of appeals were serious about balancing economic weapons, they would have disallowed "interim," as well as "final,"¹³⁵ individual bargaining absent the consent of the union, the individual employer and the association. Then, in the crude calculus of the Third Circuit in *NLRB v. Beck Engraving Co.*,¹³⁶ unions would have one economic weapon (the strike, selective or otherwise), as would employers (the lockout).

In summary, the Board protects established multiemployer bargaining structures by restricting the withdrawal rights of unions and employers. The Board has maintained this policy of affirmative protection despite several circuit court opinions that, although misguided, have eased the withdrawal restrictions.

C. Public Policy and Current Board Doctrine on Multiemployer Bargaining

The Board has articulated a public policy basis for its support and protection of multiemployer bargaining.¹³⁷ As perceived by the Board, public policy requires stable multiemployer negotiation units. Board doctrine on multiemployer bargaining attempts to preserve that policy while accommodating the countervailing interest of employers in retaining control over their own labor relations.¹³⁸

The Board views multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining."¹³⁹ The Board sees multiemployer bargaining as important because it enables smaller employers to bargain with large unions on an equal basis; facilitates the development of industry-wide programs benefiting employees, such as pension funds; provides an efficient structure within which to carry out the bargaining process; and encourages unions and employers to forward reasonable proposals since concessions will be applied across

135. See note 123 supra.

136. 522 F.2d 475, 483 (1975). See note 127 and accompanying text supra.

137. The clearest and most concise statement of the public policy bases for the Board's multiemployer doctrine is contained in the Board's brief in *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981). This is an indication of the remarkable degree to which Board decisions in this area are devoid of public policy considerations. While several Board decisions allude to "stability in bargaining relationships" as a public policy basis for its multiemployer bargaining doctrine, see, e.g., *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 393 (1958), or other equally vague public policy bases, see, e.g., *Rayonier Inc.*, 52 N.L.R.B. 1269, 1274 (1943) (multiemployer bargaining lessens "industrial strife"), none have fully articulated the reasons for those conclusions or engaged in a more sophisticated analysis of public policy. See notes 147-63 and accompanying text infra. See also Comment, *Withdrawal from Multi-Employer Bargaining—Reconsidering Retail Associates*, 115 U. Pa. L. Rev. 464, 472-73 (1967).

138. See Brief for NLRB at 8-9, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980).

139. *Id.* at 9 (quoting *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957)).

the industry and, hence, will not result in competitive disadvantage.¹⁴⁰

Because of the desirability of multiemployer bargaining, the Board has attempted to bolster the stability of such bargaining relationships.¹⁴¹ The Board has done that primarily by restricting withdrawal rights, but also by recognizing multiemployer election units. In the absence of such steps, the Board believes that the stability of multiemployer bargaining would be undermined and the public benefits derived from multiemployer bargaining would be lost. For example, the Board argues, "if a party were free to withdraw whenever the tide of negotiations appeared to be running against its own perceived best interests, many multiemployer units would founder on the rocks of temporary disagreements and . . . the public would be denied the . . . benefits of multiemployer bargaining."¹⁴² In addition, the stability of multiemployer bargaining would be undermined because the employers' bargaining representative would have to take extreme bargaining positions to satisfy all group members and neither the companies nor the union could be assured that the agreement reached would be accepted by all the employers.¹⁴³

The Board thus views multiemployer bargaining as central to national labor policy. Consequently, it has formulated a multiemployer doctrine that supports and protects multiemployer bargaining. The following section critically examines this doctrine.

III. A NEW LOOK AT BOARD DOCTRINE ON MULTIEMPLOYER BARGAINING

Multiemployer bargaining predates the National Labor Relations Act.¹⁴⁴ Although public policy on multiemployer bargaining was debated vigorously in the years following enactment of the Act,¹⁴⁵ the subject has faded from

140. *Id.* at 9-10. See *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 94-96 (1957); *Evening News Ass'n*, 154 N.L.R.B. 1494, 1499-500 & n.19 (1965), enforced sub nom. *Detroit Newspapers Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

141. Stability has been a recurrent and vital theme in Board cases on multiemployer bargaining. In the first case to impose restrictions on withdrawal rights, the Board stated that unlimited withdrawal "would not make for that stability in collective bargaining which the Act seeks to promote." *Engineering Metal Prods. Corp.*, 92 N.L.R.B. 823, 824 (1950). *Retail Associates*, the case which has been the backbone of the Board's withdrawal doctrine since the time it was decided, was based on a stability argument. 120 N.L.R.B. at 393 ("[T]he stability requirement of the Act dictates that reasonable controls limit . . . withdrawal . . . from an established multiemployer bargaining unit."). See also *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093 (1979), enforced, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981); *Connell Type-setting Co.*, 212 N.L.R.B. 918, 921 (1974).

142. Brief for NLRB at 11, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980).

143. *Id.* at 11-12.

144. See note 5 *supra*.

145. See, e.g., J. Backman, *Multi-Employer Bargaining* (1951); G. Bahrs, *supra* note 32; N. Feinsinger, *supra* note 16; W. Fisher, *supra* note 18; J. Freidin, *supra* note 44; S. Garrett & L. Tripp, *Management Problems Implicit in Multi-Employer Bargaining* (1949); C. Kerr & R. Randall, *supra* note 19; B. Levy, *Multi-Employer Bargaining and the Anti-Trust Laws* (1949); F. Pierson, *supra* note 5; O. Pollak, *supra* note 16; R. Tilove, *supra* note 31; *Industry-Wide Collective Bargaining: Promise or Menace* (C. Warne ed. 1950); *Proceedings of the Conference on Industry-Wide Collective Bargaining* (1949). See also note 4 *supra*.

academic consciousness. Recent comments have focused not on the viability of multiemployer policy generally, but on specific aspects of that policy.¹⁴⁶ A critical examination of the public policy bases of current Board doctrine and of the problems created by the doctrine are the bases for the guidelines for change that conclude this section.

A. Analysis of Public Policy and Board Doctrine

The Board has articulated relatively inflexible rules to govern multiemployer bargaining.¹⁴⁷ These rules lead to predictability of result, but do not recognize the multiplicity of policies, both public and private, which influence and shape multiemployer bargaining structures.

The Board doctrine on multiemployer bargaining walks a public policy tightrope. Public policy, in the Board's view, does not require the establishment of multiemployer bargaining structures. A single employer unit is still presumptively appropriate.¹⁴⁸ On the other hand, public policy does require the maintenance of established multiemployer bargaining structures.¹⁴⁹ Presumably then, public policy in favor of multiemployer bargaining structures is sufficiently strong to require the latter, but not the former. Although such an analysis of public policy is not unique,¹⁵⁰ it is both unsophisticated and incomplete.

The Board's public policy analysis is unsophisticated because it fails to distinguish between public policies and private preferences. The Board's discussion of alleged "public" policies is actually a recitation of some of the factors private parties, union or employer, might rely upon when deciding to engage in multiemployer rather than single-employer bargaining.¹⁵¹ For ex-

146. See, e.g., Note, *supra* note 122; Note, *supra* note 108; Note, *Labor Law*, *supra* note 17. Current commentaries that consider multiemployer bargaining more comprehensively focus on Board rules rather than the policies underlying those rules. See, e.g., C. Morris, *supra* note 14; Collins & Freeman, *supra* note 89.

147. See, e.g., *Retail Assocs., Inc.*, 120 N.L.R.B. at 395. See also Collins & Freeman, *supra* note 89, at 64-65; Note, *supra* note 108, at 1297 n.69.

148. See, e.g., *Cab Operating Corp.*, 153 N.L.R.B. 878, 879-90 (1965); *Carbondale Retail Druggists Ass'n*, 131 N.L.R.B. 1021, 1022 (1961); *John Breuner Co.*, 129 N.L.R.B. 394, 396 (1960).

149. See notes 103-19 and accompanying text *supra*.

150. The Supreme Court, for example, has been more willing to allow class actions to continue in the face of an article III challenge when the named plaintiff loses his personal claim after the case is filed (mootness) than when the named plaintiff loses his personal claim before the case is filed (standing). Compare mootness cases, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755-57 & n.9 (1976); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397-407 (1980) with standing cases, e.g., *Duke Power Co. v. North Carolina Env't'l Control Group, Inc.*, 438 U.S. 59, 72 (1978). Arguably, public policy is sufficiently strong to justify continuation of class actions where the named plaintiff's personal claim has been mooted but not strong enough to justify continuation of class actions where the named plaintiff lacks standing. See Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 *Buffalo L. Rev.* 83, 107-09 (1977); Note, *The Mootness Doctrine in the Supreme Court*, 88 *Harv. L. Rev.* 373, 376-77 (1974). But see Willborn, *Personal Stake, Rule 23, and the Employment Discrimination Class Action*, 22 *B.C.L. Rev.* 1, 15-16 (1980).

151. Most commentators have joined the Board in failing to distinguish between public policies and private preferences. See, e.g., Comment, *supra* note 17, at 558-61; Note, *Labor Law*, *supra* note 17, at 1257-58. Few have attempted to translate the readily apparent private preferences into public policy. See, e.g., Taylor, *Public Interest in Establishment of Standard Employ-*

ample,¹⁵² the Board cites the ability of smaller employers to bargain on an equal basis with a larger union.¹⁵³ By itself, that certainly is a reason employers may wish to engage in multiemployer bargaining; it is also a reason unions may wish to refrain from such bargaining. This reasoning does not explain why there should be a *public policy* of support for multiemployer bargaining, and the Board does not explain the nexus between these private interests and public policy. Perhaps by enhancing the economic power of smaller employers, multiemployer bargaining will redress a perceived inequality of bargaining power between employers and unions¹⁵⁴ and thus promote "actual liberty of contract."¹⁵⁵ On the other hand, restrictive withdrawal rules may bind smaller employers to weakened and fragmented multiemployer negotiation units and, as a result, aggravate rather than mitigate imbalances in bargaining power. Moreover, if equality of bargaining power is a goal of the Board's multiemployer bargaining doctrine, the doctrine is woefully inadequate; it does not, for example, prohibit multiemployer bargaining structures that create, rather than redress, bargaining power imbalances.¹⁵⁶ The Board, then, engages in a superficial public policy analysis to support multiemployer bargaining and cites private interests in support of its doctrine without adequate explanation of the nexus between those private interests and the public interest.

Although the Board discusses several private preferences supportive of Board doctrine, it ignores several public policies that deserve consideration in any meaningful analysis of multiemployer doctrine. The Board does not con-

ment Terms, in Proceedings of the Conference on Industry-Wide Collective Bargaining 16-20 (1949).

152. The example discussed in the text is just that—an example. The Board relies heavily on private interests to support its multiemployer bargaining doctrine. The Board says that multiemployer bargaining "facilitates the development of industry-wide programs benefiting employees," Brief for NLRB at 9, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980), but does not explain how that facilitation affects public policy rather than merely the private interests of unions and employees. The Board points to the efficiency of the multiemployer structure, *id.* at 10, but fails to explain how such efficiency benefits the public.

153. *Id.* at 9. See text accompanying note 140 *supra*.

154. This policy was evident in the Wagner Act, although at that time the purpose was "to create aggregations of economic power on the side of employees [to countervail] the existing power of corporations . . ." Cox, *The Duty to Bargain in Good Faith*, 71 *Harv. L. Rev.* 1401, 1407 (1958). See also Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *Minn. L. Rev.* 265, 282 & n.56 (1978). Here the policy once again, may be, to balance economic power, but the purpose is to allow aggregations of economic power on the side of employers to counterbalance that of employees. Cf. *Leedom*, Introduction, 29 *Geo. Wash. L. Rev.* 191, 196 (1960) (The aim of the Taft-Hartley Act was to "strike a balance of power between labor and management" by imposing certain limitations on unions.).

155. NLRA § 1, 29 U.S.C. § 151 (1976).

156. The Board's doctrine, for example, does not prohibit large and powerful companies from engaging in multiemployer bargaining with a small and weak union. The Board's multiemployer bargaining doctrine is at best a crude attempt to balance economic weapons, an attempt that approaches the limits of the Board's powers under the Act. See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 317 (1965) (The Act does "not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process . . ."); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960) (The Act does not "contain a charter for the . . . Board to act at large in equalizing disparities of bargaining power between employer and union.").

sider the impact of multiemployer bargaining on the economy or on the inflation rate.¹⁵⁷ Nor does the Board compare the extent and severity of multiemployer work stoppages with the extent and severity of single employer work stoppages.¹⁵⁸ Both are clearly relevant to the formulation of public policy on multiemployer bargaining; the Board's current support of such bargaining is probably inadvisable if multiemployer bargaining results in damage to the economy or in unduly long and severe work stoppages.

Additionally, the Board's public policy analysis is incomplete because it focuses solely on the institutional interests affected. When citing interests opposed to a doctrine of support for multiemployer bargaining, the Board notes only the interests of the institutional parties—unions and employers—in controlling their own labor relations.¹⁵⁹ Individual employees may have an equally significant interest in opposition to a public policy supportive of multiemployer bargaining.¹⁶⁰ Large multiemployer units insulate unions from attacks on their representative status¹⁶¹ and render it more difficult for dissident, individual employees to influence union policy and/or bargaining strategy.¹⁶² The interests of individual employees merit consideration in the Board's public policy analysis.¹⁶³

The Board's analysis of public policy is unsatisfactory, unsophisticated and incomplete. Perhaps partially because of the inadequacy of the Board's public policy analysis, the Board's multiemployer bargaining doctrine results in inequities.

B. Inequity and the Board's Multiemployer Bargaining Doctrine

The Board's rigid multiemployer bargaining policy results in many potential conflicts with national labor policy. These potential conflicts occur primarily at two points in the bargaining process: (1) during the formation and determination of election and/or negotiation units and (2) during attempted

157. See notes 47-49 and accompanying text *supra*.

158. See notes 50-51 and accompanying text *supra*.

159. See Brief for NLRB at 8-9, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980).

160. At least one court of appeals has recognized that the Board's multiemployer doctrine "favor[s] continuity in the bargaining structure over the enhancement of employee free choice." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980). The court, however, supported the Board's policy decision in the narrow factual circumstances presented by the case. *Id.*

161. See notes 30-31 and accompanying text *supra*.

162. *R. Gorman*, *supra* note 10, at 67-68.

163. See *The Structure of Collective Bargaining* at xxxii (A. Weber ed. 1961). This is particularly the case in light of the concern for individual employees expressed in other areas. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967) (union has a duty to represent all employees fairly and without discrimination); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962) (union failure to represent all employees fairly is a violation of the Act), enforcement denied, 326 F.2d 172 (2d Cir. 1963); Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976) (establishes a bill of rights and provides other protections for union members).

It should be noted that this critique of the incompleteness of the Board's public policy analysis is also incomplete. It is not intended as a comprehensive review of the public policies relating to multiemployer bargaining; rather, it is intended to expose the shallowness of the Board's inquiry.

withdrawals from established multiemployer units.¹⁶⁴

Perhaps the starkest conflict between the Board's multiemployer policy and national labor policy arises during the formation of election units. Assume, for example, that Incumbent Union has negotiated collective bargaining contracts for a number of years with a multiemployer unit consisting of Employers A, B and C. Assume further that Rival Union petitions to displace Incumbent Union as the representative of the employees of Employer A. As we have seen,¹⁶⁵ if Employer A continues in the multiemployer group, the Board is "likely to rule that the unit has metamorphosed into a multiemployer unit and that [Rival Union] may only petition for all of the employees encompassed by the multiemployer group."¹⁶⁶ If Employer A withdraws from the multiemployer group, Rival Union's single employer election petition will be entertained.¹⁶⁷ This application of the Board's multiemployer doctrine conflicts with the national labor policy of protecting the free choice of workers to select their representatives.¹⁶⁸ If Rival Union is more militant than Incumbent Union and Employer A perceives Rival Union as having little or no support among employees of Employers B and C, Employer A may decide to remain in the multiemployer group to make it more difficult for Rival Union to gain representative status. This tactic may frustrate the ability of Employer A's employees to be represented by the union of their choice. Perhaps Employer A would prefer to negotiate with Rival Union (or, even more ominously, perhaps a decertification petition, rather than an election petition, is filed). Employer A may then decide to withdraw from the multiemployer group, once again creating the potential of undue influence on its employees'

164. Less obvious conflicts may also arise during the process of normal multiemployer bargaining. Although it is beyond the scope of this Article to discuss the issue fully, multiemployer bargaining increases the danger that employers and unions will engage in illegal anti-competitive conduct. See Leslie, *supra* note 18, at 1211-12 & n.100; St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 Va. L. Rev. 603, 614 (1976).

165. See notes 57-61 and accompanying text *supra*.

166. D. Leslie, *supra* note 72, at 102. Rival Union's election petition would be dismissed and the Board would entertain an election petition only with respect to a multiemployer election unit. See note 61 and accompanying text *supra*.

167. Although the Board has intimated that it may disapprove an otherwise valid withdrawal if the employer acts with other than good faith, see, e.g., *Town & Country Dairy*, 136 N.L.R.B. 517, 523 (1962) ("withdrawal was more a tactical bargaining maneuver than a bona fide attempt to withdraw from multiemployer bargaining"); *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 394 (1958) ("good faith is a necessary requirement in any . . . decision to withdraw"), the Board has permitted employer withdrawal after the filing of an election petition even though the withdrawal changes the election unit. See *Bell Bakeries*, 139 N.L.R.B. 1344, 1345-46 (1962); *Bearing & Rim Supply Co.*, 107 N.L.R.B. 101, 102-03 (1953) (even though employer withdrawal occurred after filing of decertification petition, withdrawal was effective and employer's reason for withdrawal was "immaterial"). Cf. *Dittler Bros.*, 132 N.L.R.B. 444, 446 (1961) (attempted withdrawal was untimely when employer attempted to withdraw when election petition was filed by a rival union after negotiations had begun with incumbent union); *Blue Ribbon Prods. Co.*, 106 N.L.R.B. 562, 564-65 (1953) (attempted withdrawal was ineffective when employers attempted to withdraw to create single employer election units, but intended to bargain as a multiemployer group if the union won any of the elections).

168. See NLRA § 1, 29 U.S.C. § 151 (1976) ("It is . . . the policy of the United States to . . . [protect] . . . the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . ."). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); Klare, *supra* note 146, at 283, 311-12.

choice of a bargaining representative.¹⁶⁹

Conflicts between the Board's multiemployer bargaining doctrine and national labor policy may also arise in connection with attempted withdrawals from multiemployer negotiation units. If an employer abandons a multiemployer negotiation unit and the Board later determines that the withdrawal was improper, the employer will be bound by the multiemployer contract even though he had no hand in its negotiation. This may occur in circumstances where it was extremely difficult for the employer to determine in advance whether withdrawal would subsequently be determined to be proper or improper.¹⁷⁰ This result conflicts with the freedom of contract policies of the Act¹⁷¹ and undermines the "mediating" or "therapeutic" effect of bargaining envisioned by the Act.¹⁷²

The Board's rigid withdrawal rules may even conflict with the very policies they were designed to further. The Board views multiemployer bargaining as a "vital factor in the effectuation of national [labor] policy"¹⁷³ and forwards its withdrawal rules as necessary to preserve and protect such bargaining.¹⁷⁴ It is equally plausible, though, that rigid withdrawal rules inhibit multiemployer bargaining. As the Board itself has recognized in approving union withdrawals prior to the commencement of negotiations, "[u]nions, like employers, would understandably be reluctant to initiate multiemployer bargaining if the decision to do so were virtually irrevocable."¹⁷⁵ Unions and employers may be more willing to give multiemployer bargaining a try if they

169. Multiemployer bargaining doctrine may also infringe on employee choice of a bargaining representative in other circumstances. In *Sheridan Creations, Inc.*, 148 N.L.R.B. 1503 (1964), enforced, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967), for example, an employer attempted to withdraw from a multiemployer negotiation unit after negotiations had begun because it believed that a majority of its employees no longer supported the union. *Id.* at 1505. The Board held that the attempted withdrawal was improper *even if* a majority of the employer's employees did *not* support the union; the test of the obligation to bargain, explained the Board, is whether a majority of the employees of *all* employer-members of the multiemployer group supports the union, not whether a majority of the employees of *one* employer-member supports the union. *Id.* at 1505-06. See also *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980).

170. In *McAx Sign Co. v. NLRB*, 576 F.2d 62 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), for example, an employer was bound by a multiemployer contract after an attempted withdrawal when the Board determined that the employer had evidenced an "unequivocal intent" to bargain on a group basis even though. "There was no evidence of a pre-bargaining agreement among employers that the group was negotiating as a unit, no pronouncement at bargaining sessions that negotiations were conducted on a group basis, no formal employers' association, and prior contracts were signed by individual employers designated as such [*sic*]." *Collins & Freeman*, supra note 89, at 53. See notes 84-98 and accompanying text supra.

171. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) ("One of [the] fundamental policies [of the Act] is freedom of contract."). See generally *Klare*, supra note 154, at 293-310 (identifying and criticizing the Act's freedom of contract policy).

172. See *Cox*, supra note 154, at 1408-09; *Klare*, supra note 154, at 282 n.54. See also *First National Maintenance Corp. v. NLRB*, 101 S. Ct. 2573, 2578 (1981) ("A fundamental aim of the National Labor Relations Act . . . is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management.").

173. *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 95 (1957). See Brief for NLRB at 9, *NLRB v. Charles-D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980).

174. Brief for NLRB at 11, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980).

175. *Evening News Ass'n*, 154 N.L.R.B. 1494, 1499 (1965), enforced sub nom. *Detroit Newspapers Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

know they will not be bound to the multiemployer group (and to a multiemployer contract) if the relationship turns sour.¹⁷⁶ Thus, under the Board's withdrawal rules negotiations begun on a multiemployer basis will more probably be consummated in a multiemployer contract than would be the case without such rules. The rules, however, may inhibit the parties from initiating negotiations on a multiemployer basis.¹⁷⁷

There are, then, conflicts between the Board's multiemployer bargaining doctrine and national labor policy. In addition, there are shortcomings in the Board's analysis of public policy. The following suggestions for the further development of Board doctrine on multiemployer doctrine are offered to help to alleviate the present shortcomings in that policy.

C. Guidelines for the Future Development of Multiemployer Bargaining Doctrine

The Board's multiemployer bargaining doctrine is not, and should not be, static. Since it accommodates so many potentially conflicting policies, the Board should periodically reevaluate its doctrine. Any reevaluation by the Board should contain a more sophisticated analysis of the public policies bearing on multiemployer bargaining and a sensitive consideration of the problems fostered by Board doctrine in the area. The courts of appeals should refuse to grant deference to Board decisions in the absence of such an analysis. A warning shot in this regard has already been fired by the courts of appeals. Until the Board clearly articulated the policy basis for its impasse withdrawal rule,¹⁷⁸ the courts of appeals rejected it.¹⁷⁹ Subsequently,¹⁸⁰ the courts of appeals have been more deferential.¹⁸¹

176. The Board itself has recognized this interest in a case in which the Board eased withdrawal restrictions. *Id.* at 1501 (in permitting unions the same withdrawal rights as employers rather than more restricted ones, the Board recognized that rigid restrictions on withdrawal "would preclude possible future experimentation with and expansion of [multiemployer] bargaining").

177. The author has been unable to locate any articles that have urged an easing of the Board's withdrawal rules as a means of encouraging experimentation in bargaining structure. Rather, the commentators have generally urged a tightening of the withdrawal rules to enhance "stability," while ignoring the disincentive created. See, e.g., Note, *supra* note 108, at 1318; Comment, *supra* note 17, at 590-92.

178. For an explanation of the Board's impasse withdrawal rule, see notes 17-18 and accompanying text *supra*.

179. See *NLRB v. Acme Wire Works, Inc.*, 582 F.2d 153, 156-57 (2d Cir. 1978); *NLRB v. Independent Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 146 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *NLRB v. Beck Engraving Co.*, 522 F.2d 475, 483 (3d Cir. 1975); *NLRB v. Associated Shower Door Co.*, 512 F.2d 230, 232 (9th Cir.), cert. denied, 423 U.S. 893 (1975); *NLRB v. Hi-Way Billboards, Inc.*, 500 F.2d 181, 183-84 (5th Cir. 1974) (overruled by *NLRB v. Marine Mach. Works, Inc.*, 635 F.2d 522 (5th Cir. 1981)).

180. The Board clearly articulated the policy basis for its impasse withdrawal rule in *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093 (1979), enforced, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981).

181. See *NLRB v. Marine Mach. Works, Inc.*, 635 F.2d 522 (5th Cir. 1981) (overruling *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974)); *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980), cert. granted, 101 S. Ct. 1512 (1981). But see *H & D, Inc. v. NLRB*, 633 F.2d 139 (9th Cir. 1980); *Authorized Air Conditioning Co. v. NLRB*, 606 F.2d 89 (9th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

The Board's re-examination of public policy must consider the *public* interests in multiemployer bargaining, as well as the preferences of private parties. It must also survey those interests more comprehensively than the Board has to date. That is, the Board must consider the effect multiemployer bargaining may have on the economy,¹⁸² on the extent and severity of work stoppages and on the legitimate interests of individual employees. It is ironic, at the least, that the Board has considered the effect of multiemployer bargaining on the relative bargaining power of unions and employers¹⁸³ even though the Supreme Court has held such considerations improper,¹⁸⁴ and yet has virtually ignored the effect of multiemployer bargaining on the interests of individual employees even though Congress and the courts have attempted to actively protect such interests.¹⁸⁵ This important topic requires a more sophisticated public policy analysis.

A more sophisticated analysis may lead to a reconsideration of the Board's active support and protection of multiemployer bargaining. For example, the Board may decide that it would be advisable to recognize only single employer election units. Such a doctrinal change may provide better protection for individual employees and remove undesirable motivations for engaging in multiemployer bargaining.¹⁸⁶ In addition, it would provide more direct employee participation in the bargaining structure decision.¹⁸⁷ Similarly, the Board may decide to abandon its rigid withdrawal rules in favor of more flexible withdrawal rules that consider the intent and effect of the withdrawal.¹⁸⁸ Revised withdrawal rules might encourage bargaining structure

182. Changes in Board policy on multiemployer bargaining will, of course, have only a minimal effect on the economy. Collective bargaining, no matter how well structured, will not solve this nation's economic problems. See Brown & Schultz, *Public Policy and the Structure of Collective Bargaining*, in *The Structure of Collective Bargaining* 307, 322 (A. Weber ed. 1961). Nevertheless, economic consequences are a relevant consideration in the formulation of a multiemployer bargaining doctrine. See notes 47-49, 157 and accompanying text *supra*.

183. See Brief for NLRB at 9, *NLRB v. Charles D. Bonanno Linen Serv., Inc.*, 630 F.2d 25 (1st Cir. 1980) ("By joining multi-employer bargaining units, smaller employers are able to bargain 'on an equal basis with a large union . . .'").

184. See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 317 (1965); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960). See also note 156 *supra*.

185. See note 163 *supra*.

186. A union may engage in multiemployer bargaining to enhance its security, see note 30 and accompanying text *supra*, while employers may agree to continue multiemployer bargaining to favor one union over another, see notes 64-68 and accompanying text *supra*.

187. The Board's current doctrine of recognizing multiemployer election units is largely one of deferral to the bargaining structure decisions of unions and employers. See notes 84-86 and accompanying text *supra*. Recognizing only single employer election units would often result in direct employee participation in the bargaining structure decision. In deciding between an incumbent union that has been negotiating on a multiemployer basis and a rival union that would bargain on an individual employer basis, the employees would have direct influence on the bargaining structure in subsequent negotiations.

188. See, e.g., *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966) (Lumbard, C. J., dissenting) (withdrawal should be permitted at any time so long as the withdrawing party acts in good faith and does not prejudice the rights of those remaining in the multiemployer unit), cert. denied, 385 U.S. 1005 (1967). See also Note, *supra* note 108, at 1297 n.69. Cf. *Industrial Eng'r Co.*, 173 N.L.R.B. 77, 81 (1968) (claim that employer violated Section 8(a)(5) by refusing to sign a multiemployer agreement is rejected because union acted in bad faith in reaching the agreement).

experimentation and avoid conflict with the freedom of contract policies of the Act.¹⁸⁹ These types of revisions of Board policy would reduce governmental involvement in bargaining structure decisions and, conversely, recognize the competence of the private parties involved to determine the most appropriate and effective negotiation unit.¹⁹⁰

On the other hand, a more sophisticated public policy analysis may lead the Board to reaffirm its current multiemployer bargaining doctrines. Even if that is the case, the sophisticated analysis is desirable. The courts of appeals might be justifiably more inclined to defer to Board doctrine, and a greater degree of uniformity in national labor policy might be achieved. In addition, uniformity could be achieved with greater certainty as to the doctrine's policy objectives.

IV. CONCLUSION

This Article has reviewed the many factors influencing the bargaining structure decisions of unions and employers, delineated current Board doctrine on multiemployer bargaining, examined the weak public policy analysis supporting the Board's doctrine and problems created by that doctrine, and suggested that the Board undertake a new, more sophisticated look at the area. This "new look" may lead to substantial revisions of the Board's doctrine, or it may result in a reaffirmation of the doctrinal status quo. What the "new look" will do, however, is provide a clearer articulation of the policy underpinnings of the Board's developing multiemployer bargaining doctrine. In addition, it will spark renewed debate on issues central to this nation's national labor policy. Debate on these issues, for some reason, fell into an historical crevasse¹⁹¹ and is only now beginning to climb back into the academic consciousness. That ascent is important to the development of labor law in this country.

189. See notes 171-77 and accompanying text *supra*.

190. The problem of formulating public policies that would help to shift the various substantive issues to the most appropriate level of negotiation proves . . . [resistant to] suggestion, let alone solution. Since only the parties themselves can know which level is most "appropriate" for a given issue, any governmental fiat may be wholly unreasonable. Perhaps the soundest approach to this problem is to create an environment sufficiently permissive so that the parties themselves may determine where and how each issue is best treated. In effect this means a negative role for government.

The Structure of Collective Bargaining at xxxi (A. Weber ed. 1961). See also *Evening News Ass'n*, 154 N.L.R.B. 1494, 1500-01 (1965), enforced *sub nom.* *Detroit Newspapers Publishers Ass'n v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

191. See notes 44-45 and accompanying text *supra*.

