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## **Employer Withdrawal from Multiemployer Bargaining--Charles D. Bonanno Linen Service v. NLRB**

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# EMPLOYER WITHDRAWAL FROM MULTIEMPLOYER BARGAINING

*Charles D. Bonanno Linen Service v. NLRB*<sup>1</sup>

Large numbers of employers in this country, particularly small businesses, are members of multiemployer bargaining units.<sup>2</sup> Historically, employers and unions have been able to withdraw from those units when the bargaining process has reached a stalemate.<sup>3</sup> A recent decision of the United States Supreme Court, however, has made it more difficult for employers to withdraw from multiemployer units even in the face of a prolonged bargaining impasse.<sup>4</sup> The decision, which settles a long-standing dispute between the National Labor Relations Board (Board) and several circuit courts of appeals,<sup>5</sup> is a boon to labor unions, for it prohibits employer withdrawal in the face of union "whipsawing."<sup>6</sup> The decision does little to clarify the Board's role as an arbiter of economic weapons, but it may signal increased deference<sup>7</sup> by the Court to the Board's perceived expertise in

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1. 102 S. Ct. 720 (1982).

2. A multiemployer bargaining unit is a group of employers, usually in the same industry or area, who band together to bargain as a group with a larger union. See generally J. ABODEELY, *THE NLRB AND THE APPROPRIATE BARGAINING UNIT* 216-24 (1971); R. GORMAN, *BASIC TEXT ON LABOR LAW* 86-92 (1976).

3. For the gradual development of restrictions on withdrawal, see notes 30-34 and accompanying text *infra*.

4. *Charles D. Bonanno Linen Serv. v. NLRB*, 102 S. Ct. 720 (1982).

5. See notes 43-51 and accompanying text *infra*.

6. "Whipsawing" is a general term which covers several methods of applying pressure unevenly against the members of a multiemployer unit. A union may, for example, call a selective strike against one or more employers, closing some and leaving others fully operational. The union may also call a general strike and then reach interim agreements with individual employers, permitting them to return to operation. The result of each tactic is the same. The stricken employers, seeing their competitors operating normally, "will be under irresistible pressure to yield to the union's demands." 102 S. Ct. at 729 n.1 (Burger, C.J., dissenting). For a graphic illustration of how strikes generally can affect customer relations, consider the plight of the employer in *NLRB v. Custom Sheet Metal & Serv. Co.*, 666 F.2d 454, 456-57 (10th Cir. 1981). See also Note, *The Right to Lock-Out Where a Union Strikes One Member of a Bargaining Association*, 43 GEO. L.J. 426, 426-28 (1955).

7. This deference runs counter to some recent perceptions that the present Court is unwilling to put much stock in the Board's expertise. See *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 789-90 (1979) (expressing doubt that the Board's presumptions adequately took practical considerations into account); *Review of Supreme Court Labor Cases*, 1979 LAB. REL. Y.B. 169-71 (recent cases may reflect "increasing unwillingness" to defer to the Board). *Bonanno* is the second recent case to express deference, however. In *NLRB v. Hendricks Cty. Rural Elec. Membership Corp.*, 102 S. Ct. 216, 228 (1981), the Court said that it would defer since the

balancing the interests of employers and employees.<sup>8</sup>

The employer in the case was Charles D. Bonanno Linen Service, Inc. (Bonanno), a member of the New England Linen Supply Association (Association).<sup>9</sup> The Association was a multiemployer bargaining unit formed to conduct negotiations with Teamsters Union Local No. 25 (Union). In February 1975, Bonanno authorized the Association to represent it in negotiations for a new contract.<sup>10</sup>

Negotiations did not go smoothly. Union members rejected the first negotiated contract; by May 15, the parties were at an impasse.<sup>11</sup> Bargaining continued for another month, but on June 23 the Union began a selective strike<sup>12</sup> against Bonanno. Most of the Association members responded by locking out their drivers.<sup>13</sup> Months passed without progress. Violence

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Board's ruling had a "reasonable basis in law." It is interesting to note that the five-justice majority in *Hendricks County* is the same as that in *Bonanno*.

8. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), does not specify the standard of judicial review applicable to Board decisions, although the Board's findings of fact "if supported by substantial evidence on the record considered as a whole shall be conclusive." *Id.* § 160(e). "Substantial evidence" in this context is that which "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). The Board is usually entitled to deference in areas where its expertise and experience give it special competence, and even in other areas if its findings are reasonable. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In multiemployer cases the Court has held that it is the Board's responsibility to balance "conflicting legitimate interests" and the Court's role should be limited. *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957). *Buffalo Linen* is itself, however, evidence that the Court has not been completely unwilling to substitute its own balancing for that of the Board. *Id.*

9. The Association was made up of ten employers. Bonanno had been a member for several years. *Charles D. Bonanno Linen Serv.*, 229 N.L.R.B. 629, 629 (1977), *aff'd on rehearing*, 243 N.L.R.B. 1093 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 102 S. Ct. 720 (1982).

10. A previous three-year contract had been negotiated in 1972. *Id.*

11. 102 S. Ct. at 722. The parties agreed that there was an impasse and that it had not been caused by Bonanno. *See* note 20 *infra*. It apparently resulted from the Union's demand for a change in the form of compensation. This demand was eventually dropped; agreement was reached almost immediately thereafter. 102 S. Ct. at 722-23.

12. A union bargaining with a multiemployer unit need not call a general strike against all employers but may selectively strike one or more. This tactic allows a union to pressure the weakest link in the employer chain. Such strikes are not considered incompatible with unit bargaining by the National Labor Relations Board or the Supreme Court. *See NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 97 (1957).

13. A lockout occurs when an employer, for tactical reasons, refuses to use its employees to perform available work. R. GORMAN, *supra* note 2, at 355. An employer may want to lock out employees if, for example, he is afraid a threatened

flared repeatedly.<sup>14</sup>

On November 21, six months after the impasse began, Bonanno revoked its authorization to the Association<sup>15</sup> and announced that it would bargain individually with the Union. Four months later, on April 23, the Union and the Association, without Bonanno's participation, agreed on a contract.<sup>16</sup>

Shortly after the contract was signed, the Union announced that it considered Bonanno bound by the agreement.<sup>17</sup> The Union pursued unfair labor practice charges with the Board, claiming that Bonanno had refused to bargain in good faith.<sup>18</sup> Bonanno's chief defense<sup>19</sup> was that the extended impasse<sup>20</sup> in negotiations justified its withdrawal. The Administrative Law

strike will come at an inopportune time. *See, e.g.*, *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 305 (1965). In the case of multiemployer units, employers frequently respond with a general lockout when the union selectively strikes targeted members. *See, e.g.*, *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96-97 (1957). *See also* note 12 *supra*. During a lockout the employers may continue to operate with temporary replacements. *NLRB v. Brown*, 380 U.S. 278, 286 (1965).

14. Teamsters Local Union No. 25 engaged in "mass picketing, physical assault, window breaking, tire slashing, blocking of [Bonanno's] driveways, and threatening." *Charles D. Bonanno Linen Serv. v. McCarthy*, 91 L.R.R.M. (BNA) 2792, 2793 (1st Cir. 1976). This activity was enjoined by a federal district court and the injunction was affirmed on appeal. *Id.* Local 25's violence, incidentally, was not confined to its negotiations with the Association. *See United Parcel Serv. v. Local 25, Int'l Brotherhood of Teamsters*, 421 F. Supp. 452, 455-58 (D. Mass. 1976) (detailing acts of violence against another employer at about the same time).

15. Bonanno's letter stated: "The Company is withdrawing from the Association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25." 229 N.L.R.B. at 630. There was no allegation in the letter that the Union was trying to fragment the bargaining unit. Although two Association members met secretly with the Union in an apparent attempt to reach separate agreements, there was no evidence of any serious negotiations. *Id.*

16. 102 S. Ct. at 723.

17. *Id.*

18. The Union charged Bonanno with violating sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5) (1976). Section 8(a)(5) makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) provides that employers may not "interfere with, restrain, or coerce employees" in the exercise of their rights.

19. Bonanno also asserted before the Administrative Law Judge that the Union had assented to his withdrawal, since it did not respond for several months. This contention had little merit and was apparently abandoned on appeal to the Supreme Court.

20. "Impasse" is an important term in collective bargaining, but it is not easily defined. The Board says: "A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22,

Judge disagreed and found that the failure to sign the Association contract was an unfair labor practice.<sup>21</sup> The Board affirmed and ordered Bonanno to sign the April 23 agreement.<sup>22</sup> The United States Court of Appeals for the First Circuit granted enforcement,<sup>23</sup> and, in a 5-4 decision, the United States Supreme Court affirmed.<sup>24</sup>

A multiemployer bargaining unit is an aggregation of employers, frequently small businesses, that bargains as a unit with a larger union.<sup>25</sup> Although multiemployer units are nowhere mentioned in the National Labor Relations Act,<sup>26</sup> they have been used for many

23 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974). Such deadlocks are by definition temporary. *Bonanno*, 243 N.L.R.B. at 1093. The term is not defined in the National Labor Relations Act, but § 8(d), which states that neither side in a dispute is required to make concessions or agree to anything, 29 U.S.C. § 158(d) (1976), may imply that stalemates are to be expected. Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1, 3 (1977). Although the existence of an impasse has important ramifications, *see* notes 39-40 and accompanying text *infra*, the Board has never formulated a precise definition.

[The Board's] common decisional method is to list a variety of factors it finds in the record and then conclude, abruptly, that the parties were at an impasse. . . . Closer examination of the cases shows that the finding of impasse comes close to being a visceral reaction of the trial examiner and the Board to the record.

Stewart and Engeman, *Impasse, Collective Bargaining and Action*, 39 U. CIN. L. REV. 233, 241 (1970). *See also* Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769, 777 (1966).

21. 229 N.L.R.B. at 632.

22. *Id.* at 632-33. The Board subsequently reconsidered its summary affirmation but again ruled against Bonanno. Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1097 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 102 S. Ct. 720 (1982).

23. NLRB v. Charles D. Bonanno Linen Serv., 630 F.2d 25, 35 (1st Cir. 1980), *aff'd*, 102 S. Ct. 720 (1982). The Board has no direct authority to enforce its orders if the subjects thereof refuse to comply. It must obtain a court order by petitioning the appropriate United States Court of Appeals. 29 U.S.C. § 160(e) (1976). Aggrieved parties may also seek review of the Board's orders in the appropriate court. *Id.* § 160(f).

24. 102 S. Ct. 720, 728 (1982).

25. *See* note 2 *supra*. *See generally* Rains, *Legal Aspects and Problems of Multiemployer Bargaining*, 34 B.U.L. REV. 159, 161-62 (1954). Although originally thought of as beneficial primarily to employers, unions today have equivalent stakes in multiemployer units since they facilitate "development of industry-wide, worker benefit programs that employers might otherwise be unable to provide." *Bonanno*, 630 F.2d at 28. For a good discussion of the advantages and disadvantages of multiemployer bargaining from the management perspective, *see* N. LEVIN, *SUCCESSFUL LABOR RELATIONS* 373-83 (1978).

26. 29 U.S.C. §§ 151-169 (1976). In fact, section 9(b) provides: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision

years<sup>27</sup> and they cover a large part of the unionized workforce.<sup>28</sup>

Multiemployer units can generally be created only by the consent of the parties.<sup>29</sup> Initially, it was not considered an unfair labor practice for either an employer or union to withdraw from multiemployer negotiations, whether bargaining had begun or not.<sup>30</sup> In 1958, however, the Board ruled in *Retail Associates*<sup>31</sup> that no party can withdraw from multiemployer bargaining after negotiations begin<sup>32</sup> except in "unusual

thereof. . . ." *Id.* § 159(b). This language might be read to imply that the employer unit is the largest permissible, but the Board, relying on the definitions of "employer" and "person" found in section 2, decided very early that multiemployer units were permissible. Shipowners' Ass'n, 7 N.L.R.B. 1002, 1024-25 (1938). The Supreme Court has accepted that decision. *See* NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen), 353 U.S. 87, 94-96 (1957) (collecting legislative history).

27. Employer associations sprang up in the United States in the 1880's as a response to growing, militant unionism. S. PERLMAN, *A HISTORY OF TRADE UNIONISM IN THE UNITED STATES* 94-95 (1950). These associations gradually became bargaining units, until by the turn of the century they were widely used in several industries. Note, *Multi-Employer Bargaining and the National Labor Relations Board*, 66 HARV. L. REV. 886, 886 n.1 (1953). For an early case holding such associations legal, see *Cote v. Murphy*, 159 Pa. 420, 430-31, 28 A. 190, 191 (1894). *See also* E. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 207 (1932) (collecting early cases).

28. Some 42% (648 of 1536) of large collective bargaining agreements (1000 or more employees) are multiemployer pacts; they cover about 3,238,000 workers. U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, BULL. NO. 2065, *CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1978*, at 12, table 1.8 (1980).

29. 102 S. Ct. at 725; *Weyerhaeuser Co.*, 166 N.L.R.B. 299, 299 (1967), *enforced sub nom.* *Western States Regional Council No. 3, Int'l Woodworkers v. NLRB*, 398 F.2d 770 (D.C. Cir. 1968). An employer will not normally be bound unless he objectively manifests an unequivocal intent to abide by the final contract. This may be done by express authorization or by participation in the actual bargaining process. *See* LABOR RELATIONS LAW SECTION, AMERICAN BAR ASSOCIATION, *THE DEVELOPING LABOR LAW* 239 (C. Morris ed. 1971). Consent of the parties is not absolutely necessary, however, as the Board can find multiemployer units appropriate even though one side objects. *See, e.g.*, *Checker Cab Co.*, 141 N.L.R.B. 583, 589-90 (1963), *enforced*, 367 F.2d 692 (6th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

30. *Pacific Metals Co.*, 91 N.L.R.B. 696, 699 (1950); *Bercut-Richards Packing Co.*, 68 N.L.R.B. 605, 606-07 (1946). For a general discussion of the evolution of Board policy toward multiemployer units, see Comment, *The Status of Multiemployer Bargaining Under the National Labor Relations Act*, 1967 DUKE L.J. 558, 566-72.

31. 120 N.L.R.B. 388 (1958).

32. *Id.* at 395. The Board presented its rules in dictum:

We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except

circumstances”<sup>33</sup> or when there is “mutual consent.”<sup>34</sup> For the next fifteen years the Board vacillated over whether an impasse is an “unusual circumstance”;<sup>35</sup> it finally decided in *Hi-Way Billboards, Inc.*<sup>36</sup> that it is not.<sup>37</sup> By definition, the Board said, an impasse is a temporary deadlock or hiatus in negotiations<sup>38</sup> which suspends the duty to bargain<sup>39</sup> and allows the parties to resort to economic weapons.<sup>40</sup> Since impasses

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upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin 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*.

*Id.* (emphasis added). The *Retail Associates* rule has been approved by the courts. *See, e.g.*, *Carvel Co. v. NLRB*, 560 F.2d 1030, 1034-35 (1st Cir. 1977), *cert. denied*, 434 U.S. 1065 (1978); *NLRB v. Sheridan Creations, Inc.*, 357 F.2d 245, 247-48 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967).

33. The Board has found “unusual circumstances” in two types of cases. First, where the employer is under extreme financial pressure, such that his business is imperiled. *See, e.g.*, *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968); *U.S. Lingerie Corp.*, 170 N.L.R.B. 750, 751 (1968). Mere economic hardship, even amounting to insolvency, however, may not be “unusual.” *Western Pacific Roofing Corp.*, 244 N.L.R.B. 501, 507 (1979); *Universal Insulation Corp.*, 149 N.L.R.B. 1397, 1403 (1964), *enforced*, 361 F.2d 406 (6th Cir. 1966). Second, where the bargaining unit has become substantially fragmented already by separate agreements or consensual withdrawals. *See, e.g.*, *Connell Typesetting Co.*, 212 N.L.R.B. 918, 921 (1974). Serious loss of long-term business has been held by the courts to justify withdrawal, *see, e.g.*, *NLRB v. Custom Sheet Metal & Serv. Co.*, 666 F.2d 454, 460-61 (10th Cir. 1981) (impending loss of customer that accounted for 75% of business), though in the wake of *Bonanno* it is possible that this situation will no longer qualify as unusual. Some courts have also found unusual circumstances in cases where the multiemployer negotiating committee does not fairly represent the individual employer. *See, e.g.*, *NLRB v. Siebler Heating & Air Cond., Inc.*, 563 F.2d 366, 371 (8th Cir. 1977), *cert. denied*, 437 U.S. 911 (1978). The Board has apparently never so held, and in light of *Bonanno* this exception may also be unavailable.

34. “Mutual consent” at one time meant the consent of the union and the withdrawing party, but today permission of both the union and the multiemployer association may be necessary. *See Teamsters Union Local No. 378*, 243 N.L.R.B. 1086, 1089-90 (1979).

35. The Board at first implied, without deciding, that an impasse is not an unusual circumstance. *Ice Cream, Frozen Custard Indus. Employees*, 145 N.L.R.B. 865, 870 (1964). Later, it hinted that it might be. *Plumbers & Steamfitters Union No. 323*, 191 N.L.R.B. 592, 592 n.1 (1971).

36. 206 N.L.R.B. 22 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974).

37. *Id.* at 24.

38. *See* note 20 *supra*.

39. *See NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 315 (4th Cir. 1966).

40. The parties to a labor dispute can use the most common economic weapons either before or after impasse. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223 (1963) (strikes); *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*,

are to be expected in collective bargaining and may be forced by either side, they are not "unusual."<sup>41</sup> In the Board's view, allowing withdrawal on impasse would "herald the demise of multiemployer bargaining."<sup>42</sup>

These assertions were not warmly received by the courts of appeals. The United States Court of Appeals for the Fifth Circuit refused, in fact, to enforce the Board's order in *Hi-Way Billboards*.<sup>43</sup> Several other circuits denied enforcement in similar cases.<sup>44</sup> For example, in *NLRB v. Beck Engraving Co.*,<sup>45</sup> the United States Court of Appeals for the Third Circuit contrasted the Board's approval of interim agreements<sup>46</sup> between unions and some members

353 U.S. 87, 97 (1957) (lockouts); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (hiring replacements for striking workers). The big weapon that comes into play on the finding of impasse is the employer's right to make unilateral changes in employment conditions and compensation. *NLRB v. Katz*, 369 U.S. 736, 741 (1962); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472, 481 (5th Cir. 1963).

41. See note 33 *supra*. An impasse is "merely a momentary eddy in the flow of collective bargaining" and hence is not unusual. *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973), *enforcement denied*, 500 F.2d 181 (5th Cir. 1974).

42. 206 N.L.R.B. at 23. The Board offered no reason for such a dire prediction, except that an employer might "seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impending agreement." *Id.* at 23-24. The Board has never explained how or why this scenario, even if accurate, would severely impair the bargaining unit.

43. 500 F.2d 181, 183-84 (5th Cir. 1974). The Fifth Circuit overruled its own decision in this case prior to the Supreme Court's decision in *Bonanno*. *NLRB v. Marine Machine Works, Inc.*, 635 F.2d 522, 525-26 (5th Cir. 1981).

44. See, e.g., *NLRB v. Independent Ass'n of Steel Fabricators*, 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. 1975), *cert. denied*, 423 U.S. 893 (1975); *Fairmont Foods Co. v. NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972) (alternative holding). For criticism of this line of cases, see *Labor—Effect of Negotiating Impasse on an Employer's Right to Withdraw from a Multi-Employer Bargaining Association*, 17 B.C. INDUS. & COM. L. REV. 525 (1976) (discussing *Beck Engraving*); *Labor Law—Third Circuit Holds Impasse in Bargaining Excuses Employer's Unilateral Withdrawal from Multiemployer Negotiations*, 44 FORDHAM L. REV. 1256 (1976) (same); *From Chains of Iron to Ropes of Sand: Employer Withdrawal from Multiemployer Bargaining After Steel Fabricators*, 45 BROOKLYN L. REV. 1283 (1979) (discussing *Steel Fabricators*).

45. 522 F.2d 475 (3d Cir. 1975), *noted in* 17 B.C. INDUS. & COM. L. REV. 525 (1976); 44 FORDHAM L. REV. 1256 (1976).

46. When a union has called a strike against a multiemployer unit, the Board permits the union to negotiate interim agreements with individual employers. *Plumbers & Steamfitters Union No. 323*, 191 N.L.R.B. 592, 596 (1971); *Sangamo Const. Co.*, 188 N.L.R.B. 159, 160 (1971). The term "interim agreements" covers various types of agreements. The most common is one in which the employer agrees to be bound by the final contract, but in the meantime is permitted to operate with union workers by agreeing to special terms. See 44 FORDHAM L. REV., *supra* note 44, at 1261. The Board believes that interim agreements do not harm the bargain-



of a multiemployer unit with its treatment of employer withdrawal and concluded that the Board was exercising its discretion inconsistently.<sup>47</sup> Interim agreements and selective strikes,<sup>48</sup> said the court, permit a union to shut down some employers while allowing others to operate normally.<sup>49</sup> These tactics, known as "whipsawing,"<sup>50</sup> enable a union to isolate individual employers and pit them against each other.<sup>51</sup> In the court's view, the Board's rule permits whipsawing but prohibits employers from exercising a corresponding tactic: withdrawal from the unit.

The Board countered<sup>52</sup> with the argument that the courts were confusing two distinct issues: the composition of the bargaining unit, over which it claims to have authority,<sup>53</sup> and the balancing of economic weapons, over which it denies authority.<sup>54</sup> In the Board's view, the issue of who is to remain in the bargaining unit is fundamentally different from that of what economic weapons the parties already in the unit may use against each other.<sup>55</sup> In *Bonanno*, the United States Court of Appeals for the First Circuit agreed with the Board, noting that "the balance of economic power

ing unit because all parties contemplate being bound by the final contract. *Bonanno*, 243 N.L.R.B. at 1097.

47. 522 F.2d at 483.

48. See note 12 *supra*.

49. 522 F.2d at 482. Interim agreements and selective strikes both allow the union to whipsaw the employers by permitting some to operate normally while closing others.

50. See note 6 *supra*.

51. A unified multiemployer unit can respond to a selective strike with a lockout, which prevents whipsawing. *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 97 (1957). If, however, one or more members refuses to join the lockout and continues to operate, or reaches an interim agreement with the union, the nonoperating employer may be helpless. His interests at this point are markedly different from those of the employers who are conducting business as usual. See notes 77 & 94 and accompanying text *infra*. The court in *Beck Engraving* found this divergence of interests "tantamount to a rejection of the existence of the multi-employer bargaining unit." 522 F.2d at 483. The First Circuit in *Bonanno* acknowledged the fact that operating and nonoperating employers may well have different goals, but found that since the operating employers cannot "ignore entirely" the negotiations, there is no rejection of the bargaining unit. 630 F.2d at 33 n.17.

52. The Board rejected the court of appeals decision in a number of cases. See, e.g., *Charles D. Bonanno Linen Serv.*, 243 N.L.R.B. 1093, 1095 (1979), *enforced*, 630 F.2d 25 (1st Cir. 1980), *aff'd*, 102 S. Ct. 720 (1982); *Seattle Auto Glass*, 246 N.L.R.B. 94, 96 (1979).

53. The Board has explicit authority to determine the appropriate unit under 29 U.S.C. § 159(b) (1976).

54. See *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957) (Board cannot act as an arbiter of economic weapons). See also note 98 *infra*.

55. *Bonanno*, 243 N.L.R.B. at 1095.

arguably should have little bearing on the question whether impasse justifies withdrawal.''<sup>56</sup>

In affirming the court of appeals decision, Justice White's majority opinion emphasized the broad discretion given the Board by Congress and the limited scope of judicial review.<sup>57</sup> It is the Board's job, said the Court, to balance the competing legitimate interests that arise from multiemployer bargaining.<sup>58</sup> The Board's views, while open to debate,<sup>59</sup> were not arbitrary and thus were "surely adequate to survive judicial review."<sup>60</sup>

The four dissenting justices were less willing to defer to the Board's interpretation of the law. Relying on *NLRB v. Brown*,<sup>61</sup> Chief Justice Burger questioned the majority's view of the Court's role in reviewing Board determinations.<sup>62</sup> In *Brown*, the union had struck one member of a multiemployer unit, and the other employers responded by locking out their employees. The Board refused to permit the nonstruck employers to hire temporary replacements for those workers.<sup>63</sup> The Court affirmed a denial of enforcement,<sup>64</sup> noting that it is not the Board's job to act as an arbiter of economic weapons.<sup>65</sup> The majority in *Bonanno* attempted to distinguish

56. 630 F.2d at 32.

57. 102 S. Ct. at 724.

58. *Id.* The Court said, "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Id.* (quoting *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96 (1957)).

59. Justice White, writing for the majority, noted that the Chief Justice may be "quite right" in his assertion that withdrawals are not inherently destructive. "There is obviously room for differing judgments, however, as the conflicting judgments of the Court of Appeals and the strong views of the Board on the issues now before us make clear." 102 S. Ct. at 728. The majority declined to "substitute [its] judgment for those of the Board with respect to the issues that Congress intended the Board should resolve." *Id.*

60. *Id.* at 726. The majority, in fact, found the Board's reasons "telling." *Id.*

61. 380 U.S. 278 (1965).

62. The Chief Justice referred to the majority's stance as "abject deference" to the Board. 102 S. Ct. at 729 (Burger, C.J., dissenting).

63. John Brown, 137 N.L.R.B. 73, 76-77 (1962), *enforcement denied*, 319 F.2d 7 (10th Cir. 1963), *aff'd*, 380 U.S. 278 (1965). The Board decided that locking out employees was permissible, but allowing employers to hire replacements for those employees was not. If the union was not striking an employer, the employer could have operated with union workers. Locking out nonstriking workers and hiring temporary replacements was, in the Board's view, simply punishing workers for union activities. *Id.* at 76.

64. 380 U.S. 278 (1965), *aff'g* 319 F.2d 7 (10th Cir. 1963).

65. *Id.* at 283 (quoting *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960)). The Court in *Brown* pointed out that employers were not simply punishing strikers. The employers, facing a whipsaw action, were "concerned that one or more of their number might bolt the group and come to terms with the Local,

*Brown*,<sup>66</sup> but the Chief Justice insisted that the situations were analogous.<sup>67</sup> Withdrawal, he said, is a form of economic self-help, akin to a lockout, that the Board has no business forbidding.<sup>68</sup> He challenged the proffered reason for the Board's rule, i.e., that withdrawal by an employer is inherently destructive of bargaining stability while interim agreements are not,<sup>69</sup> by pointing out that withdrawal on impasse may actually facilitate the breaking of a deadlock while interim agreements are themselves likely to result in unit fragmentation.<sup>70</sup>

In a second dissent, Justice O'Connor rejected the "absolute" positions taken by the majority and the Chief Justice.<sup>71</sup> She was particularly critical of what she characterized as the Board's "reason[ing] by definition."<sup>72</sup> In the Board's view, she noted, any deadlock, however long,<sup>73</sup> is an impasse. An impasse is by definition temporary.<sup>74</sup> Therefore, any deadlock is temporary.<sup>75</sup> Justice O'Connor agreed in principle that a temporary deadlock should not justify withdrawal but argued that the Board should examine the facts of each case. The Board, she said, "should be required to analyze, not simply label, a deadlock in negotiations."<sup>76</sup> If an impasse is not likely to be

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thus destroying the common front essential to multiemployer bargaining." *Id.* at 284. Note that this language implies that interim agreements, by destroying the "common front," are inherently destructive of the multiemployer unit, a position the Board vigorously rejects. The *Bonanno* Court was willing to go along with the Board and find interim agreements nondestructive. The majority does not discuss this issue.

66. The majority explained that maintaining the stability of the multiemployer unit was the "key" to *Brown*; in that case "the prospect that the whipsaw strike would succeed in breaking up the employer association was not at all fanciful." 102 S. Ct. at 728 (quoting *Brown*, 380 U.S. at 284). See note 65 *supra*. Again, the Court in *Brown* at least seemed to say that whipsaw tactics were inherently destructive of the unit.

67. 102 S. Ct. at 730-31 (Burger, C.J., dissenting).

68. *Id.* at 730 (Burger, C.J., dissenting).

69. 243 N.L.R.B. at 1097. See note 46 *supra*.

70. 102 S. Ct. at 731 (Burger, C.J., dissenting). The Chief Justice argued that "an employer's withdrawal from the multiemployer group is no more disruptive of the bargaining process than [a] union's decision to use 'divide and conquer' tactics." *Id.*

71. *Id.* at 733 (O'Connor, J., dissenting).

72. *Id.*

73. In oral argument the Board conceded that it would not regard an impasse as unusual even if it lasted for two years. *Id.* at 730 n.3 (Burger, C.J., dissenting).

74. 243 N.L.R.B. at 1093. See note 20 *supra*.

75. 102 S. Ct. at 733 (O'Connor, J., dissenting). The Justice was unimpressed by this reasoning process. "[W]hile an impasse may be a temporary deadlock, a deadlock cannot be made temporary simply by calling it an impasse. Thus, while the rule may be efficient, it does not contribute to principled decision-making." *Id.* at 733-34 (O'Connor, J., dissenting).

76. *Id.* This case-by-case approach is, interestingly enough, very similar to

broken, withdrawal should be permitted. Justice O'Connor also took issue with the Board's conclusion that interim agreements do not fragment bargaining units, pointing out that this is also a question of fact requiring case-by-case resolution.<sup>77</sup>

Much of the disagreement in *Bonanno* springs from the different conceptions of withdrawal held by the majority and the dissenters. The dissenters, the Chief Justice in particular, see the multiemployer unit as a tool for achieving labor peace, not an end in itself,<sup>78</sup> and view withdrawal from a multiemployer unit as an economic weapon.<sup>79</sup> They see little prac-

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the approach used by the Board in cases where the union negotiates separate final agreements with some members of a multiemployer unit. *See* note 85 *infra*.

77. Justice O'Connor pointed out that the Board itself has admitted that an employer operating under an interim agreement is less likely to push for settlement of the dispute. 102 S. Ct. at 734 (O'Connor, J., dissenting). The Justice relied on *Connell Typesetting Co.*, 212 N.L.R.B. 918 (1974), in which the union had reached interim agreements with 12 of 36 employers and entirely separate agreements with 11 others. The Board, perhaps surprisingly, noted that the employers who had signed interim agreements "were, as a practical matter, no longer able to contest [the] issues at the bargaining table. Thus, their strength had been removed from the multiemployer unit and they, in effect, had withdrawn from further multiemployer bargaining as to this contract." *Id.* at 921. These words seem to be echoed in *Brown*, 380 U.S. at 284 (notion that allowing interim agreements would "succeed in breaking up the employer association [is] not at all fanciful"). Both decisions seem to regard the negotiation of interim agreements as tantamount to withdrawal. But in *Bonanno* the Board argued precisely the opposite, calling the distinction between interim and separate agreements "vital." 243 N.L.R.B. at 1096. That the Board may in fact treat the distinction as more apparent than real can be seen from *Tobey Fine Papers v. NLRB*, 245 N.L.R.B. 1393, 1395 (1979), *enforced*, 659 F.2d 841 (8th Cir. 1981), where the Board held that even negotiation of separate final agreements with a large percentage of the employers does not "*ipso facto*" fragment the unit. *See* note 85 *infra*.

78. 102 S. Ct. at 731 (Burger, C.J., dissenting). The Chief Justice felt that industrial peace is the primary objective of the federal labor laws and that multiemployer bargaining is simply one of several tools to reach that result. "When a union and a group of employers have reached an impasse and further negotiations would appear to be an exercise in futility, it is more consistent with that goal to permit withdrawal and allow negotiation of separate agreements than to force the parties into escalated economic warfare." *Id.* Though the Chief Justice's argument is cogent, it should be noted in the Board's defense that it is sometimes difficult in individual cases to determine exactly what rule will promote industrial peace.

79. *Id.* at 730 (Burger, C.J., dissenting). The Fifth Circuit in *Beck Engraving* saw the issue in a similar light: "The union, under the Board's own policy, should not have been given two weapons for its economic arsenal (i.e., the selective strike and individual negotiations) while the employer is given only one (viz., the lockout)." 522 F.2d at 483. That court apparently felt obligated to give the employer another weapon: the right to withdraw. *Id.*

tical difference between withdrawal by an employer and interim agreements negotiated by a union.<sup>80</sup>

The majority, on the other hand, accepts the Board's view that withdrawal is simply not an economic weapon.<sup>81</sup> The Board *seems*<sup>82</sup> to reason that because multiemployer units promote stability, preservation of the unit itself is the most important goal.<sup>83</sup> Viewed in this light, employer withdrawal is undesirable because it impairs stability, while selective strikes and interim agreements, which contemplate adherence by all parties to the final pact, do not.

The Board's approach is ultimately unsatisfying. It focuses on the stability of the *unit* rather than that of the bargaining process. The Board forbids withdrawal even in cases where it might facilitate agreement, such as after prolonged deadlock.<sup>84</sup> The Board arrives at the questionable conclusion that withdrawal by an employer whose employees comprise two percent of a bargaining unit would fragment that unit, while interim agreements with employers whose workers make up forty percent of the unit would not.<sup>85</sup>

80. 102 S. Ct. at 730 (Burger, C.J., dissenting).

81. *Id.* at 726. *See also* 243 N.L.R.B. at 1094; notes 52-56 and accompanying text *supra*.

82. The word "seems" is used advisedly. In none of its statements on the subject has the Board spelled out the analysis it used in reaching its conclusions.

83. *See Bonanno*, 243 N.L.R.B. at 1093-94.

84. The Chief Justice felt that *Bonanno's* withdrawal had, in fact, provided the impetus for the eventual settlement between the Union and the Association. He pointed out that, contrary to the Board's warnings, the withdrawal did not result in "the immediate 'disintegration' of the bargaining unit." 102 S. Ct. at 731 (Burger, C.J., dissenting).

85. In *Tobey Fine Papers*, 245 N.L.R.B. 1393 (1979), *enforced*, 659 F.2d 841 (8th Cir. 1981), the Board refused to permit an employer to withdraw even though the union had negotiated separate final agreements with two other members of the multiemployer unit who together employed 42% of the workers in the unit. The Board said that this did not "necessarily" fragment the unit. *Id.* at 1395. In light of its arguments in *Bonanno* for certainty and predictability, the Board's position in *Tobey Fine Papers* is interesting. It rejected a flat rule that negotiation of separate final agreements is an unusual circumstance:

In our view, it does not follow *ipso facto* that execution of individual separate final contracts with former Association members either proves an intention to destroy, or necessarily cause the fragmentation of, a multiemployer unit. Rather, the facts of each case must be assessed in order to ascertain the impact of the parties' conduct upon the continued viability of multiemployer bargaining.

*Id.* This case, decided only two months after the Board's supplemental decision in *Bonanno*, takes a drastically different approach than the Board's argument before the Supreme Court in the latter case and appears to be entirely consistent with the dissenting view of Justice O'Connor. *See also* *Wm. Chalson & Co.*, 252 N.L.R.B. 25, 32-33 (1980); *Birkenwald, Inc.*, 243 N.L.R.B. 1151, 1155 (1979). The Board is willing to look at the particular facts when the issue is negotiation of separate con-

The Board defends its position by asserting, without explanation, that a contrary position would destroy multiemployer bargaining.<sup>86</sup> This fear is exaggerated. Before 1958, employers and unions could withdraw from multiemployer units at will;<sup>87</sup> before 1973, the Board did not explicitly oppose withdrawal on impasse;<sup>88</sup> and since 1973, the Board's orders in this area often have not been enforced anyway.<sup>89</sup> Nevertheless, multiemployer bargaining did not die; it is probably as strong today as ever.<sup>90</sup> This is not surprising, since it is usually in the best interest of the employer to remain in the unit even when it is legally entitled to withdraw.<sup>91</sup>

The Board's reasoning may not be easy to defend, but its rule is at least more predictable and easier to apply than the case-by-case approach advocated by Justice O'Connor.<sup>92</sup> Yet the concerns expressed by the dissenters, and by several courts of appeals are real. When a union reaches interim agreements with some employers in a multiemployer unit, the other employers are faced with a quandary: if they continue to resist, they may

tracts, but not when the issue is withdrawal from the unit. It fails to explain why a flexible test is more easily administered in the former context than in the latter.

86. See note 42 and accompanying text *supra*.

87. See note 30 and accompanying text *supra*.

88. See note 35 and accompanying text *supra*.

89. For representative cases denying enforcement, see note 44 *supra*.

90. In 1956, 32% (557 of 1737) of all major union contracts (1000 or more employees) were multiemployer pacts; they covered 3,881,900 workers. *Characteristics of Major Union Contracts*, 79 MONTHLY LAB. REV. 805, 807, table 3 (1956). In 1961, the percentage of major contracts climbed to 36% (619 of 1733) and the number of workers covered, 3,870,500, was about the same. *Major Union Contracts in the United States, 1961*, 85 MONTHLY LAB. REV. 1136, 1137, table 1 (1962). By 1978, a year when the circuit courts were refusing to enforce Board orders against employers who withdrew on impasse, the percentage of major contracts had risen to 42% (648 of 1536), though the number of workers covered fell slightly to 3,238,400. U.S. DEP'T OF LABOR, *supra* note 28, at 12, table 1.8. These figures suggest that the Board's restrictions on withdrawal have had little impact on the decisions of unions and employers to use multiemployer bargaining. It seems unlikely that the continued existence of this institution would have been jeopardized by letting Bonanno out of the Association.

91. Multiemployer pacts, after all, were created to help small employers stand up to strong unions. See J. ABODEELY, *supra* note 2, at 217; N. LEVIN, *supra* note 25, at 378-79; Comment, *supra* note 30, at 559-60. It would seem an exceptional case where a small employer would prefer to bargain individually with, say, the Teamsters rather than as part of a larger and more powerful group.

92. The decisions of the various circuits, notably *Beck Engraving*, created what was essentially an equitable doctrine. The courts saw a situation they considered to be unfair, and they moved to remedy it. 522 F.2d at 483. The doctrine was rooted in fairness, not predictability, as the *Beck Engraving* court acknowledged, and predictability may have suffered. *Id.* Contrast, however, the Board's goal of predictability in this type of case with its case-by-case analysis in situations where separate final agreements are involved. See note 85 *supra*.

suffer not only loss of business during the strike, but (especially in highly competitive industries) the long-term loss of customers to competitors who have signed the agreements. At this point the interests of the struck employer and the operating employer are fundamentally different, as even the Board has acknowledged.<sup>93</sup> The plight of these employers is perhaps the real reason behind creation of the impasse doctrine.<sup>94</sup>

The easiest way to solve this problem is for the Board to simply prohibit signing of interim agreements.<sup>95</sup> Even if it was inclined to do so, however, the Board denies having the requisite authority.<sup>96</sup> The decision in *Brown*, if it retains any validity, lends support to that contention, since it prohibits the Board from denying economic weapons based on perceived imbalances.<sup>97</sup> But there is authority for the proposition that the Board *can* regulate certain economic weapons based on fairness, and those cases may take on new significance in light of *Bonanno*.<sup>98</sup> Such a solution would do much to alleviate the concerns of the dissenters and the various courts of appeals.

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93. See note 77 *supra*. *But cf.* *Tobey Fine Papers*, 245 N.L.R.B. 1393, 1395 (1979), *enforced*, 659 F.2d 841 (8th Cir. 1981); *Joseph J. Callier*, 243 N.L.R.B. 1114, 1117 (1979). See also note 85 *supra*.

94. The Board is, after all, correct in asserting that impasses are not really unusual. There appears to be no logical reason to pick impasse, in particular, as an event releasing the employer, for whipsawing can occur either before or after impasse. *Beck Engraving*, the case most clearly articulating the impasse doctrine, seems to focus more on the unfairness of whipsawing than on the logic of selecting impasse as a proper point to permit withdrawal. 522 F.2d at 483. The court was probably responding to the plight of the individual employer rather than the dictates of logic. If the goal is to protect against unit fragmentation, it makes more sense to focus on the actual negotiation of an interim agreement by the union and an employer as an event releasing the other employers, but the courts have not used this approach.

95. This idea is advocated in Hickey & Sauntry, *When is Employer Justified in Leaving the Fold?*, *Legal Times of Washington*, Jan. 5, 1981, at 11, col. 2.

96. *Bonanno*, 243 N.L.R.B. at 1096.

97. 380 U.S. at 283. See notes 63-65 and accompanying text *supra*.

98. In denying authority to regulate interim agreements, the Board relies on *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 497 (1960), which states that the Board may not act as "an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." This language has often been quoted but has never been precisely accurate. The Board frequently acts as an arbiter of such weapons. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), *rev'g International Union of Elec. Workers, Local 613 v. NLRB*, 303 F.2d 359 (3d Cir. 1962), the employer gave replacement workers "super-seniority" over striking workers who had returned. In the opinion below, the Third Circuit had upheld the employer's right to do so, finding it a legitimate economic weapon similar to the right to hire replacements. 303 F.2d at 364. The Supreme Court disagreed, calling super-seniority an unacceptable method of resisting the economic impact of a strike, 373 U.S. at 232, and pointing out that it discriminates between strikers and nonstrikers, *id.* at 231. In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the employer denied vacation pay (which he

One of the most interesting questions raised by *Bonanno* is the continued significance of *Brown* as a check on the Board's authority. The majority in *Brown* would not defer to the Board where the issue was whether or not an economic weapon could be used,<sup>99</sup> but the *Bonanno* Court was willing to defer to the Board on the issue of bargaining unit composition.<sup>100</sup> The two cases are perhaps distinguishable on that basis, although it is certainly possible to argue, as the Chief Justice does, that withdrawal is an economic weapon.<sup>101</sup> Significantly, Justice White, the author of the majority opinion in *Bonanno*, had dissented in *Brown*, calling the latter holding a "severe" restriction on the Board's ability to regulate the conduct of the employer.<sup>102</sup> While *Bonanno* does not purport to limit *Brown*, it may at least indicate that the more stringent *Brown* limitations will apply only in cases where traditional economic weapons, such as the hiring of replacement employees, are denied by the Board.<sup>103</sup>

Employers considering multiemployer bargaining must now be aware that they will not be allowed to withdraw from the unit after bargaining has begun except in cases of extreme financial hardship or when the other parties consent.<sup>104</sup> Still, multiemployer bargaining is probably beneficial for many small employers.<sup>105</sup> The hardships imposed by *Bonanno* will only be

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was not obliged to give) to workers who had struck, but gave it to nonstrikers. The Court held this to be an improper economic weapon. *Id.* at 32, 35. Neither super-seniority nor withholding of vacation pay is expressly precluded by statute, yet the Board is permitted to forbid them. The Board is thus, in some cases, an arbiter of economic weapons. The line beyond which it may go is, however, unclear.

99. 380 U.S. at 283.

100. 102 S. Ct. at 728.

101. *Id.* at 729 (Burger, C.J., dissenting).

102. 380 U.S. at 294 (White, J., dissenting).

103. If Justice White's view now commands a Court majority, it is possible that *Brown* may in fact be overruled or severely limited. The *Bonanno* split is so close, however, that the decision probably does not indicate such an extreme shift. All of Justice White's supporters, for example, have been on the Court for several years and have at times been unwilling to show much deference to the Board. *See, e.g.*, *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 789-90 (1979).

104. *Retail Associates*, 120 N.L.R.B. 388, 395 (1958). *See* notes 33 & 34 *supra*.

105. Employers who are dissatisfied with the *Bonanno* holding may wish to try a tactic emphasized by Justice Stevens in his concurring opinion. Absent an unequivocal commitment to be bound by group action, an employer may freely withdraw at any time, even after negotiations have begun. *Komatz Constr., Inc. v. NLRB*, 458 F.2d 317, 321 (8th Cir. 1972). An employer could take part in negotiations while making it clear that he does not intend to be bound. In this way he can gain the benefits of the multiemployer process while not binding himself to an unfavorable contract. Of course, the union is not obligated to let the employer do this, and it seems unlikely that most unions would agree to such tactics. In that case, the employer is again faced with the choice of binding himself unequivocally or negotiating alone.

There are other possible approaches which may avoid the dangers of multiemployer bargaining. The association itself may simply agree to bargain on



felt if the employers become fragmented. Union whipsawing will be ineffective if the employers maintain a united front. The Court's decision in *Bonanno* has not seriously damaged the usefulness of multiemployer bargaining for most employers.

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a form contract, without binding any of the members to sign it. The members of the association also may agree that none will sign a contract more favorable to the union than the agreement negotiated by the association but allow each member of the group to reserve the right to reject it. Finally, even if the employers agree to be bound to the final contract, union whipsawing can be minimized by the type of self-insurance that is common in certain industries. For a general discussion of these strategies, see N. LEVIN, *supra* note 25, at 374-79.