El Cerrito Mill & Lumber Co. *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

B-K Mill & Fixture Company *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

Russo Window Frames *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

Larsen Brothers Lumber Co. *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

Acme Fixture & Case Work *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

South City Lumber & Supply *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner

Van Arsdale-Harris Lumber *and* United Brotherhood of Carpenters and Joiners of America, Local 2236, Petitioner. Cases 32–RC–3661, 32–RC–3662, 32–RC–3667, 32–RC–3668, 32–RC–3669, 32–RC–3681 (formerly 20–RC–16889), and 32–RC–3682 (formerly 20–RC–16890)

March 31, 1995

DECISION ON REVIEW AND ORDER DISMISSING PETITIONS

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered the Employers' and the Intervenor's joint request for review of the Regional Director's Order Consolidating Cases and Decision and Direction of Elections issued on September 24, 1993.[1] On November 9, 1993, the Board granted review, but denied the Employers' and Lumber and Mill Employers Association's (the Intervenor's) joint motion to stay the elections. Thus, on November 5 and 12, 1993, the elections were held, and the ballots were impounded.

The issue presented here is whether the Petitioner's untimely withdrawal from the historical multiemployer bargaining unit, after negotiations for a successor contract with the Intervenor had reached impasse, should be honored so as to allow the Petitioner to proceed on its separate representation election petitions seeking certification as the collective-bargaining representative of the Employers' employees in separate single-employer units. The Regional Director found that the Petitioner's withdrawal was permissible under the guidelines of *Retail Associates*.[2] In light of this finding, he determined that each of the petitioned-for units was a separate appropriate unit. The Employers and the Intervenor contend that the Regional Director's decision is contrary to the Supreme Court's decision in *Charles D. Bonanno Linen Service v. NLRB*.[3] They argue that each of the petitioned-for units is inappropriate given the Petitioner's untimely withdrawal from the historical multiemployer unit almost 3 years after bargaining had commenced. We find merit in this argument.

The Intervenor (LAMEA) is a multiemployer association composed of various employers in the woods-products industry.[4] LAMEA represents its employer-members in negotiating and administering collective-bargaining agreements with the Petitioner (the Union). The Union is currently recognized as the collective-bargaining representative within the meaning of Section 9(a) of the Act of a unit of employees employed by the employer-members of LAMEA, which includes the Employers. Since 1981, the Employers have been bound to collective-bargaining agreements between LAMEA and the Union.[5] The Union's most recent contract, by its terms, expired on June 16, 1990, but was extended to September 1992 by the parties' mutual consent.[6]

Between June 1990 and the early part of September 1992, the parties engaged in negotiations for a successor contract.[7] In September 1992, the Union declared an impasse in bargaining. LAMEA then tried unsuccessfully to draw the Union back into the negotiations with a final contract offer in December 1992, but the impasse could not be broken. In early 1993, LAMEA and its employer-members, including the Employers, implemented the terms of their December 1992 final contract offer. Since then, there has been no bargaining, strike activity, lockout, or any separate interim agreements between individual employer-members and the Union. In March 1993, the Union filed separate petitions under Section 9(b) of the National Labor Relations Act to represent, in single-employer units, the employees of the Employers. The Employers and LAMEA opposed the Union's withdrawal from the multiemployer unit and sought dismissal of these petitions.

We begin with the proposition that multiemployer bargaining is a voluntary arrangement which con-

[1] The pertinent part of the Regional Director's decision is attached as an appendix to this decision.

[2] 120 NLRB 388 (1958).

[3] 454 U.S. 404 (1982), approving 243 NLRB 1093 (1979).

[4] The record indicates that, as of May 1990, LAMEA had 18 employer-members.

[5] B-K Mill & Fixture Co. and Acme Fixture & Case Work did not join LAMEA and become signatory to multiemployer collective-bargaining agreements with the Union until 1984 and 1987, respectively.

[6] The parties mutually agreed to extend their last agreement until a new contract was reached, but this arrangement ceased when the Union declared a bargaining impasse in September 1992, as described infra.

[7] There were approximately eight bargaining sessions in 1990, seven or eight sessions in 1991, and three sessions in 1992.

stitutes a vital factor in the effectuation of national labor policy promoting peace through collective bargaining.[8] Prior to 1958, the Board permitted both employers and the union to withdraw from the multiemployer bargaining unit even in the midst of bargaining. However, in 1958, the Board issued its decision in *Retail Associates*, supra, in which it curtailed the parties' ability to withdraw from multiemployer bargaining units.

Under the Board's guidelines set forth in *Retail Associates*, an employer or a union is free to withdraw from the multiemployer unit for any reason before the date set for negotiations of a successor contract or the date on which it is given. The Board also ruled that once negotiations for a new contract have begun, a party may withdraw from an established multiemployer unit only if there is mutual consent or ''unusual circumstances.''

In cases after *Retail Associates*, the Board and the courts grappled with the meaning of ''unusual circumstances.''[9] Finally, in *Charles D. Bonanno Linen Service*, supra, the Supreme Court examined whether a bargaining impasse may justify an employer's untimely withdrawal from a multiemployer bargaining unit. In that case, the Court held reasonable the Board's rule that a mere impasse in bargaining does not constitute an ''unusual circumstance.'' In reaching this holding, the Court observed that ''assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment that . . . should be left to the Board.'' According to the Court's analysis, the Board's assessment of these factors in *Bonanno* was not arbitrary or contrary to law, and it therefore upheld the Board's determination that the single employer who had attempted an untimely withdrawal from the multiemployer unit was bound to the multiemployer bargaining.

Significantly, the Court's majority opinion in *Bonanno* did not place any limitation on the duration of the impasse, while dicta appearing in the two separate dissenting opinions by Chief Justice Burger[10] and Justice O'Connor[11] suggested that an impasse of even 2 years in duration would not constitute an ''unusual circumstance'' under the Board's rule. Thus, we think that *Bonanno* can be fairly read to mean that an impasse of any duration, standing alone, does not necessarily constitute an ''unusual circumstance'' within the meaning of the Board's rules set forth in *Retail Associates*.

The Regional Director erroneously considered *Bonanno* to be factually distinguishable from the instant cases. His analysis emphasizes the ''2 years of 'fruitless' bargaining which is succeeded by an additional year [to the time of his decision] without any bargaining at all.'' However, the length of negotiations was not an item of main concern for the Court in *Bonanno*. The focus in *Bonanno* was on the impasse itself. We find that the instant cases and *Bonanno* are quite similar in that essential feature. Here, the period between the impasse and the Union's withdrawal in March 1993 is the same (if the impasse was reached in September 1992) or shorter (if the impasse was reached in December 1992) than the 6-month period in *Bonanno*.

The Regional Director noted that certain economic weapons (a strike and lockout) were used in *Bonanno*, and not here. But, we are not convinced that the presence of this kind of activity was critical to the Court's decision in *Bonanno*. We also recognize that here, unlike the situation in *Bonanno*, a lockout was not considered necessary because the unit employees continued working after the Employers' implementation of the final contract offer in January 1993. Furthermore, unlike the Regional Director, we do not believe that the absence of a strike here necessarily means that the bargaining relationship between the Employers and the Union is over. Rather, a plausible explanation is that the Union may have determined that a strike was simply too risky or would be ineffective in this particular industry during these economic times.

In any event, as the Board emphasized in *Bonanno Linen*, our ''statutory mandate is to balance not economic weapons, but 'conflicting legitimate interest.''' 243 NLRB at 1097, quoting *NLRB v. Teamsters Local 449 (Buffalo Linen)*, supra. All parties to a multiemployer bargaining relationship have an interest in the stability of the multiemployer unit, and we think that interest would be ill served by broadening the ''unusual circumstances'' exception to the *Retail Associates* rule in the manner proposed by the Union. Allowing any of the negotiating parties to withdraw from the unit after an impasse of the length of the one at issue here would be to put the multiemployer bargaining process in jeopardy whenever bargaining reached an impasse phase and one of the participants was unsatisfied with its prospects for getting all that it wished in a multiemployer contract. Thus, while it is conceivable that the ''unusual circumstances'' exception might be met in some future case presenting an impasse of extremely long duration, accompanied by

[8] In *NLRB v. Teamsters Local 449 (Buffalo Linen)*, 353 U.S. 87, 95–96 (1957), the Supreme Court recognized that the preservation of the integrity of multiemployer bargaining units is a policy of the Act.

[9] Situations found by the Board to constitute an ''unusual circumstance'' are summarized in *Hi-Way Billboards*, 206 NLRB 22, 23 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974). For purposes of clarification, we note that, although the Board's decision in that case was rejected, the Fifth Circuit later supported the same Board rationale in granting enforcement in *NLRB v. Marine Machine Works*, 635 F.2d 522 (1981). See *Bonanno v. NLRB*, supra, 454 U.S. at 411 fn. 7.

[10] *Bonanno v. NLRB*, supra, 454 U.S. at 422 fn. 3.

[11] *Bonanno v. NLRB*, supra, 454 U.S. at 428.

indicia of instability or defunctness, this is not such a case.

Under these circumstances, we reverse the Regional Director and find that under *Bonanno* the parties' bargaining impasse does not constitute an ''unusual circumstance'' within the meaning of *Retail Associates*. Accordingly, we shall dismiss these petitions.

ORDER

The Regional Director's Order Consolidating Cases and Decision and Direction of Elections is reversed and the petitions are dismissed.

APPENDIX

Regional Director's Order Consolidating Cases and Decision and Direction of Elections

Each of the Employers is engaged in the wood-products industry, either as a retail/wholesale lumber yard, a manufacturer of wood products, or a combination of both. As members of LAMEA, they have been bound to various collective-bargaining agreements between LAMEA and various administrative subdivisions of the Carpenters Union that date back at least as far as 1981. The term of the most recent agreement was from May 1, 1987 through June 16, 1990. There is no evidence that any of the Employers has ever negotiated or otherwise signed an agreement with Petitioner on a single-employer basis.

Following the expiration of the 1987–1990 agreement, the parties attempted, without success, to negotiate a new agreement. These efforts began in June of 1990 and continued until the early part of September 1992. At that time, an impasse was declared by Petitioner. Thereafter, LAMEA tried unsuccessfully to draw Petitioner back into negotiations. However, the impasse could not be broken and, in December 1992, LAMEA conceded that the parties were at impasse. In early 1993, LAMEA implemented the terms of its final offer. Despite some correspondence from LAMEA to Petitioner, there is no evidence that any bargaining occurred from September 1992 until the April 27, 1993 hearing herein, either on a multi-employer or any other basis. Nor do the briefs reflect any renewal of bargaining since the hearing. The record does reflect that some of the Employers were approached by the Petitioner about bargaining on an individual basis, but there is no evidence that any such bargaining ever took place.

It is well established that multi-employer bargaining is consensual in nature and that both employers and unions can elect to withdraw from such an arrangement by providing clear and unequivocal notice to that effect. It is equally well established that such notice must be given in a timely fashion prior to the commencement of negotiations, absent the consent of all parties or the existence of unusual circumstances. See *Retail Associates*, 120 NLRB 388 (1958); *The Evening News Association*, 154 NLRB 1494 (1965).

''Unusual circumstances'' permitting the otherwise untimely, unilateral withdrawal from multi-employer bargaining have been found to exist where, for instance, an employer is subject to extreme financial pressures or where the multi-employer bargaining unit has become substantially fragmented. See, e.g., *Connell Typesetting Co*., 212 NLRB 918 (1974); *U.S. Lingerie Corp*., 170 NLRB 750 (1968). While the Board and courts repeatedly have found that a mere impasse in bargaining does not constitute an unusual circumstance excusing an otherwise untimely, unilateral withdrawal from multi-employer bargaining (*Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404 (1982), enfg. 243 NLRB 1093 (1979); *Hi-Way Billboards*, 206 NLRB 22 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974)), I am not aware of any case in which the Board has had occasion to consider whether an impasse, unaccompanied by a strike or lockout, which follows 2 years of fruitless bargaining and which is succeeded by an additional year without any bargaining at all, despite the employer having unilaterally implemented its final offer, constitutes an ''unusual circumstance'' warranting an otherwise untimely withdrawal. For the following reasons, I find that it does.

In establishing and enforcing rules governing withdrawal from multi-employer bargaining by individual employers or unions, the Board has acted to preserve the integrity and stability of consensual multi-employer bargaining relationships. In *Bonnano Linen Service v. NLRB*, 243 NLRB at 1093–1094, in holding that a simple impasse does not constitute an unusual circumstance, the Board explained, as follows:

> An impasse is only a temporary ''deadlock'' or ''hiatus'' in negotiations which in almost all cases is eventually broken through either a change of mind or the application of economic force. Indeed, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those wage increases or benefits it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation. And much the same may be true even of impasses which arrive without being intended by either side. Consequently, there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways.

In order for the above-described dynamics to operate successfully in the multi-employer context, both sides must be secure in the belief that the multi-employer arrangement will remain intact throughout the bargaining process. Thus, preventing unilateral withdrawal by either side during the bargaining process insures the integrity and stability of the relationship and effective bargaining.

However, the rationale explained in *Bonnano*, supra, has no application here, where the bargaining process has ceased completely. In this case, the bargaining began in June of 1990. In September 1992, after over 2 years of fruitless negotiations, Petitioner declared an impasse and refused to meet further with LAMEA. The declaration of impasse had

no inmmediate effect whatsoever. There was no strike or lockout. It was not even until January 1993, that LAMEA implemented the terms and conditions of its last offer. This action by LAMEA elicited no response at all from Petitioner. When the petitions here were filed in March 1993, there had been no face-to-face bargaining since September 1992, and there is no contention that the parties have met and bargained or otherwise changed their positions since then.

In these circumstances, I cannot conclude that the impasse between the Petitioner and LAMEA is merely a temporary ''deadlock'' or ''hiatus'' in negotiations which eventually will be broken. Rather, it appears that neither party is particularly interested in reaching a collective-bargaining agreement or, for that matter, expending any effort in that direction. The Board's observation in *Bonnano*, 243 NLRB at 1094, that a multi-employer bargaining relationship cannot suddenly be ruptured by a simple impasse, should not be read to mean that a multi-employer bargaining relationship may not die a slow death through 2 years of fruitless bargaining and a third year of impasse with neither party taking any initiative to break the impasse. It is hard to imagine how the goals of preserving the integrity and stability of multi-employer bargaining would be advanced by failing to permit the Petitioner's otherwise untimely, unilateral withdrawal from the multi-employer bargaining relationship in the unusual circumstances of this case.

In reaching this result, I am not unaware of certain references made in the dissenting opinions in the Supreme Court's decision in *Bonnano v. NLRB*, supra, to the position taken by the Board during oral argument in that case. In their respective dissenting opinions, Chief Justice Burger and Justice O'Connor observed that, during oral argument, the Board conceded that it would not regard an impasse as an unusual circumstance even if it continued for 2 years. Id. at 422 fn. 3 and 428 fn. 1. Such a representation by counsel, with no reference to the context in which it was made, constitutes an insufficient basis for dismissing the instant petitions. In light of the Board's analysis in *Bonnano*, supra, the remarks made by Board counsel most likely were intended to convey the idea that the mere *length* of the impasse is not the controlling factor; rather, the critical factor is whether the actions of the parties, both before and during the impasse, offer some reason to believe that the impasse eventually will be broken. For example, in *Bonnano*, supra, the parties had bargained for only 4 months when impasse was declared and the union selectively struck certain employer-members of the multi-employer unit. Other members locked out their employees. Over the next 5 months, the parties remained at impasse but continued to meet sporadically. In addition, several employer-members were attempting to obtain individual agreements with the union. Thus, the multi-employer relationship during the 5-month impasse in *Bonnano*, supra, was still in a dynamic state and, arguably, could have remained so for as long as 2 years if the strikes and lockouts continued and the parties continued to meet.

The dynamic relationship in *Bonnano*, supra, stands in stark contrast with the moribund relationship between the Petitioner and LAMEA. To reiterate, in this case impasse was not declared until the parties had already bargained without result for over 2 years. There were no strikes or lockouts, no Employers sought individual deals, the parties have not met since September 1992, LAMEA did not even implement its final offer until January 1993, and that action did not breath[e] any new life into the dying relationship. With the filing of the instant petitions and statements by counsel during the hearing and in its brief, Petitioner has clearly and unequivocally announced its intention to withdraw from its multi-employer bargaining relationship with LAMEA. While the withdrawal is untimely under *Retail Associates*, supra, I find that the above facts constitute unusual circumstances which permit withdrawal at this time and that it will effectuate the purposes and policies of the Act to permit the Employers' employees—who have been without a contract since June 1990—to express their choice about whether they now wish to be represented by Petitioner in separate bargaining units.

Accordingly, I find that each of the bargaining units set forth above is a separate appropriate unit and shall direct an election in each unit.