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Labor Law — Effect of Negotiating Impasse on an Employer's Right to Withdraw from a Multi-Employer Bargaining Association —NLRB v. Beck Engraving

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branch of government. The test should focus on the nature of the alleged conspirators' acts—whether there was a genuine exercise of First Amendment rights or political activity. This in turn may be judged only in the context of the *type* of government function—political or adjudicative—sought to be influenced. The sham exception should be broad enough to allow an examination of the alleged political activity and exercise of the right to petition in order to determine whether the intent of the parties was to influence governmental action, or whether it was to injure the competitor directly through an abuse of governmental function. The former is protected public activity; the latter essentially unprotected private action.

The mere presence of government in the picture cannot end the inquiry. The wide-ranging involvement of "governmental units" in business-related activities suggests that in order for the policies of the antitrust laws to be effectuated, the *Noerr* doctrine must be defined more clearly; it is political activity and First Amendment rights which are to be protected, not anti-competitive *business* activity.[117] At the same time, acts such as bribery should never be immune under *Noerr*, as they are not protected political activity or exercise of First Amendment rights.

Unfortunately, *Metro Cable* is less than instructive in this confusing area. The court did not read plaintiff's complaint as alleging a bribe and thus avoided reaching any conclusion as to whether the presence of an official co-conspirator—as an abuse of governmental process—would remove *Noerr* protection. The court merely held that "campaign contributions" did not make the mayor and alderman co-conspirators. It is thus still an open question whether the presence of an official co-conspirator would remove the *Noerr* protection.[118]

STEPHEN R. LAMSON

Labor—Effect of Negotiating Impasse on an Employer's Right to Withdraw From a Multi-Employer Bargaining Association—*NLRB v. Beck Engraving Co.*[1]— Respondent, Beck Engraving Company, was a member of the Allied Printing Employer's Association (the Association),[2] a multi-employer bargaining unit. As an Association member,

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[117] *See* Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286, 1296-97 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[118] Metro did not apply to the Supreme Court for a writ of certiorari. In fact, an attorney for Metro, when queried, stated that the case had been dropped. Conversation with Richard M. Calkins, Burditt & Calkins, Chicago, Ill., March 23, 1976. CATV, on the other hand, is required by the FCC to come into compliance with federal regulations by 1977. CATV of Rockford, Inc., 38 F.C.C. 2d 10, 14-15 (1972), *petition for reconsideration denied*, 40 F.C.C. 2d 493 (1973). It is possible that Metro may be awaiting a failure by CATV to comply before renewing its challenge.

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[1] 522 F.2d 475, 90 L.R.R.M. 2089 (3d Cir. 1975).

[2] *Id.* at 477, 90 L.R.R.M. at 2090.

Beck had entered into a collective bargaining agreement with Assistants and Offset Workers' Local 4 (the Union) which was due to expire on April 30, 1973.[3] In anticipation of the expiration, the Union and the Association began negotiations on February 28, 1973 for a new agreement and continued regular negotiations after the contract expired in April.[4]

During the first week of June, the Union instituted selective strikes against Beck and four other employer members of the Association.[5] That same week one of the employer members withdrew from the bargaining unit, with the mutual consent of the Association and the Union.[6] Negotiations continued through the rest of June and into July. However, on July 13 and 14, Beck's six union employees, under no pressure from respondent, resigned from the Union, terminated their participation in the strike, and returned to work.[7] Subsequently, Beck informed the Union and the Association of its withdrawal from the Association.[8] Two days later, the Union and the Association reached an agreement, and the Union, asserting that it neither consented to Beck's withdrawal nor considered it timely sought Beck's execution of the new contract.[9] When Beck refused to sign the agreement, the Union initiated proceedings before the National Labor Relations Board (the Board) alleging violations of section 8(a)(1) and (5) of the National Labor Relations Act (the Act).[10]

The Board held that Beck had violated the Act,[11] basing its holding on the rules governing withdrawal from a multi-employer bargaining unit set forth in *Retail Associates, Inc.*[12] Under the *Retail Associates* rules, withdrawal by an individual employer prior to the start of negotiations is allowed only if adequate written notice is given.[13] Once negotiations begin, however, abandonment is allowed only in cases of mutual consent or "unusual circumstances."[14] Since negotiations in the present case had begun and since mutual consent was absent, Beck had to show an "unusual circumstance" to justify its withdrawal. Beck asserted that (1) the resignation of its employees from the Union, (2) the consent by the Union to the withdrawal of another member of the

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[3] *Id.*
[4] *Id.* at 477-78, 90 L.R.R.M. at 2090.
[5] *Id.* at 478, 90 L.R.R.M. at 2090.
[6] *Id.*
[7] *Id.* at 478 & n.6, 90 L.R.R.M. at 2090 & n.6.
[8] *Id.* at 478, 90 L.R.R.M. at 2090.
[9] *Id.*
[10] NLRA §§ 8(a)(1), (5), 29 U.S.C. §§ 158(a)(1), (5) (1970), which provide:

> (a) It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employers in the exercise of the rights guaranteed in section 157 of this title; . . .
>
> (2) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

[11] Beck Engraving Co., 213 N.L.R.B. No. 13, 87 L.R.R.M. 1037, 1038-39 (1974).
[12] 120 N.L.R.B. 388, 42 L.R.R.M. 119 (1958).
[13] *Id.* at 395, 42 L.R.R.M. at 1121.
[14] *Id.*

unit, and (3) the instigation of the selective strike by the Union against Beck, represented "unusual circumstances."[15] Rejecting these facts as insufficient, the Board ordered Beck to accept and sign the agreement.[16] On a motion for reconsideration of the Board's decision, Beck argued that the parties had reached a bargaining impasse, and that this impasse constituted an "unusual circumstance" justifying withdrawal from the unit.[17] The Board disagreed and denied the motion for reconsideration.[18]

The Board sought enforcement of its order pursuant to section 10(e) of the Act.[19] The Third Circuit denied enforcement and HELD: A negotiating impasse between a multi-employer bargaining association and a union justifies unilateral withdrawal by an employer member from the multi-employer bargaining unit.[20] The court noted a Board-sanctioned, economic weapon in the union's ability to negotiate interim agreements with individual employer members of a multi-employer unit.[21] The court believed that this ability effectively conferred on the union a unilateral right of withdrawal from the bargaining unit.[22] The court reasoned that this right in the union resulted in an imbalance of power between the union and the employer members of the unit sufficient to justify the court's granting to the employer an equivalent right of unilateral withdrawal.[23]

The effect of an impasse in multi-employer bargaining has evolved into an area of conflict between the NLRB and the judiciary. One of the causes of this conflict was the Board's initial inability to formulate a consistent and well-reasoned doctrine regarding the effect of such an impasse on bargaining obligations. This confusion prompted the circuit courts to act and establish an "impasse doctrine"[24] which is inconsistent with the doctrine finally developed by the Board.[25] The *Beck* case is significant in that it highlights this continuing controversy between the Board and the circuit courts.

This casenote will examine some of the Board's early decisions which created the confusion over multi-employer bargaining unit im-

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[15] 213 N.L.R.B. at___, 87 L.R.R.M. at 1038-39.

[16] 213 N.L.R.B. at___, 87 L.R.R.M. at 1039.

[17] 522 F.2d at 478-79 & n.8., 90 L.R.R.M. at 2091 & n.8.

[18] *Id.* at 479, 90 L.R.R.M. at 2091.

[19] N.L.R.A. § 10(e), 29 U.S.C. § 160(e) (1970). 522 F.2d at 477, 90 L.R.R.M. at 2089-90.

[20] 522 F.2d at 483, 90 L.R.R.M. at 2094.

[21] *Id.* at 482-83, 90 L.R.R.M. at 2094.

[22] *Id.* at 483, 90 L.R.R.M. at 2094.

[23] *Id.*

[24] The term "impasse doctrine" refers to the rules governing a party's withdrawal from a multi-employer bargaining unit after a negotiating impasse has been reached. In Television Artists Kansas City Local v. NLRB, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968), the court accepted the Board's definition of impasse which was "that there was no realistic possibility that continuation of discussion at that time would have been fruitful." *Id.* at 628 & n.17, 67 L.R.R.M. at 3036 & n.17.

[25] See text at notes 57-60 *infra*.

passes and the later judicial responses to that confusion. Also, the Board's decision in *Hi-Way Billboards, Inc.*[26] which ultimately led to the formulation of the Board's position on impasse will be examined. The reasoning of the court in *Beck* will then be critically analyzed and the impact of the court's holding assessed. Finally, the apparent conflict between the circuit court approach and the labor policy embedded in the Act will be discussed.

In its early decisions, the NLRB made no attempt to define the limits of an employer's right to withdraw from a multi-employer bargaining association.[27] Indeed, in one early decision, the Board remarked that "employers [have] unlimited freedom unilaterally to fashion the scope of, or to completely destroy multi-employer bargaining units at their will or fancy."[28] A similar, unfettered right to withdraw was also recognized in the union once a bargaining impasse was reached.[29]

This hands-off approach of the early Board decisions was short-lived, however. In *Retail Associates* the Board sought to establish stability in multi-employer bargaining relationships[30] by setting up guidelines for withdrawal from a multi-employer bargaining unit. In *Retail Associates,* the union withdrew from the multi-employer unit after successfully initiating whipsaw tactics.[31] Pursuant to section 9 of the Act,[32] the employer association petitioned the Board for a hearing

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[26] 206 N.L.R.B. 22, 84 L.R.R.M. 1161 (1973), *supplementing* 191 N.L.R.B. 244, 77 L.R.R.M. 1461, *enforcement denied,* 500 F.2d 181, 87 L.R.R.M. 2203 (5th Cir. 1974).

[27] Association of Motion Picture Producers, Inc., 88 N.L.R.B. 1155, 25 L.R.R.M. 1448 (1950); Johnson Optical Co., 87 N.L.R.B. 539, 25 L.R.R.M. 1135 (1949).

[28] Morand Brothers Beverage Co., 91 N.L.R.B. 409, 418, 26 L.R.R.M. 1501, 1507 (1950), *enforced in part and remanded in part,* 190 F.2d 576, 28 L.R.R.M. 2364 (7th Cir. 1951). In *Morand* the employer bargaining association claimed that the union had violated sections 8(b)(1) and (3) of the Act by sending out individual contract proposals to the association members, 91 N.L.R.B. at 415, 417, 26 L.R.R.M. at 1505, 1506. The association argued unsuccessfully that these proposals constituted a withdrawal from the multiemployer unit and thus represented a refusal to bargain collectively with the association. *Id.* at 417, 26 L.R.R.M. at 1506.

[29] 91 N.L.R.B. at 418, 26 L.R.R.M. at 1506. This parity of rights argument, *id.,* 26 L.R.R.M. at 1507, was based on an inaccurate notion of the employer's rights. In *Morand* the Board cited Johnson Optical Co., 87 N.L.R.B. 439, 25 L.R.R.M. 1135 (1949) and Association of Motion Picture Producers, Inc., 88 N.L.R.B. 1155, 25 L.R.R.M. 1448 (1950) as indicative of the unfettered employer right to unit determination at any time. *Id.* at 418 & n.16, 26 L.R.R.M. at 1507 & n.16. However, neither of these cases dealt with unit determination arising during negotiations. In *Johnson,* the Board granted the employer's uncontested request to become a separate bargaining unit in a unit determination case in which no § 8 violations were charged. 87 N.L.R.B. at 541-42, 25 L.R.R.M. at 1135-36. *Motion Picture Producers* was similarly a unit determination case within the broader framework of an election challenge. 88 N.L.R.B. at 1161, 25 L.R.R.M. at 1450.

[30] 120 N.L.R.B. at 393-94, 42 L.R.R.M. at 1120-21.

[31] *Id.* at 390-91. "Whipsawing is the process of striking one at a time the employer members of a multi-employer association." N.L.R.B. v. Teamster Local 449 (Buffalo Linen), 353 U.S. 87, 90 n.7 (1957).

[32] NLRA § 9(b), (c)(1)(B), 29 U.S.C. § 159 (b), (c)(1)(B) (1970).

to determine the proper bargaining unit.[33] The Board decided the case on the factual issue of whether the union had effectively removed itself from the unit with a bare disclaimer of representation.[34] The Board held that the disclaimer did not justify the union's unilateral withdrawal from the bargaining unit since the alleged disclaimer was neither in good faith nor consistent with its subsequent conduct.[35] Guidelines were then established to govern withdrawal from multiemployer bargaining. In setting up the guidelines, the Board included an element of flexibility by allowing withdrawal after the start of negotiations and without mutual consent in cases of "unusual circumstances."[36] Since the Board did not define the scope of "unusual circumstances," the question of whether an impasse was to be included in such a category, in light of earlier decisions, remained unanswered.[37]

This important question continued to remain unanswered as the Board, in later decisions, implied that an impasse was not an "unusual circumstance,"[38] only to later imply that it *was* such a circumstance.[39]

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[33] 120 N.L.R.B. at 388-89.

[34] *Id.* at 391-92, 42 L.R.R.M. at 1120.

[35] *Id.* at 392-94, 42 L.R.R.M. at 1120-21.

[36] We would accordingly refuse to permit the withdrawal of an employer or a union from 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.

Id. at 395, 42 L.R.R.M. at 1121.

[37] In NLRB v. Hi-Way Billboards, Inc., 500 F.2d 181, 87 L.R.R.M. 2203 (5th Cir. 1974), the Board argued that after *Retail Associates*, the decision in *Morand* was no longer viable. *Id.* at 184, 87 L.R.R.M. at 2206. However, the court characterized this interpretation of the effect of *Retail Associates* as "new," indicating that the case was not read by them as overruling *Morand*. *Id.*

[38] Teamsters Local 717 (Ice Cream Council), 145 N.L.R.B. 865, 55 L.R.R.M. 1059 (1964). The NLRB skirted the impasse issue in *Ice Cream Council*. One of the charges against the union was that it had coerced certain employers into leaving the association to bargain on an individual basis. *See id.* at 870, 55 L.R.R.M. at 1061. The Board, noting that the employers had initiated the individual negotiations, discarded the employers' argument and held that, "[i]n a situtation such as this, where there has been a breakdown in negotiations leading to an impasse and a resultant strike, an employer, if he so chooses and the union agrees, is not precluded from voluntarily withdrawing from a multiemployer unit." *Id.* This statement is ripe with negative connotations as to whether an impasse alone justifies withdrawal. It would appear that the Board was only applying the *Retail Associates* criteria that allows withdrawal during negotiations with mutual consent. *See Retail Associates*, 120 N.L.R.B. at 395, 42 L.R.R.M. at 1121.

[39] Plumbers Local 323 (P.H.C. Mechanical Contractors), 191 N.L.R.B. 592, 77 L.R.R.M. 1769 (1971). In *P.H.C.* the Trial Examiner focused on the question of whether or not an impasss existed, *id.* at 594-96, concluding that there was no basis to the association's charge that the union had violated § 8(b)(3) by entering into an interim agreement with P.H.C. *Id.* at 596. "In view of our conclusions [that there was] an im-

The confusion of these decisions indicates that as late as 1972 the Board had not formulated a consistent impasse doctrine in the multi-employer bargaining context.

The Eighth Circuit's decision in *Fairmont Foods Co.* v. *NLRB*,[40] although not persuasive, represents the beginnings of the type of analysis that later circuit courts would apply in deciding the impasse question. Respondent employer was charged with violating section 8(a)(5) and (1) of the Act in that it had refused to sign a contract reached during multi-employer bargaining.[41] Respondent denied its obligation to sign, arguing that as a matter of law an impasse in multi-employer bargaining permits withdrawal without consent.[42] Alternatively, respondent contended that the union had given its consent.[43]

In its decision, the NLRB adopted the Trial Examiner's rulings, findings, and conclusions.[44] The Examiner based his decision on a factual determination of whether an impasse had existed. He found that "Respondent's complaint . . . while it reflected disagreement between the Respondent and the other members of the group was not the kind of impasse or other 'special circumstances' which would privilege the Respondent's otherwise untimely withdrawal from the group bargaining."[45] The Board ordered Fairmont Foods Company to sign the collective bargaining agreement.[46] Fairmont refused, and the Board sought enforcement of its order.[47]

The circuit court denied enforcement[48] and, without analysis or explanation, formulated an impasse doctrine: "When an impasse in negotiations is reached, withdrawal by a member of a multi-employer bargaining group is excused."[49] Cited in support of this formulation were two earlier Board decisions,[50] one pre-*Retail Associates* and one post-*Retail Associates,* which arguably reflect opposite Board positions on the effect of impasse.[51]

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passe, further extended discussion is unnecessary." *Id.* Adopting the Trial Examiner's findings, conclusions, and recommendations, *id.* at 592, the Board similarly noted: "As we agree with the Trial Examiner that an impasse did exist prior to the commencement of the separate negotiations between the Union and P.H.C. leading to the interim contract, we need not consider . . . the Trial Examiner's alternate conclusions . . . ." *Id.* at 592 n.1.

[40] 471 F.2d 1170, 82 L.R.R.M. 2017 (8th Cir. 1972), *denying enforcement of,* 196 N.L.R.B. 849, 80 L.R.R.M. 1172 (1972).

[41] Fairmont Foods Co., 196 N.L.R.B. 849, 850, 80 L.R.R.M. 1172, 1174 (1972).

[42] *Id.* at 855, 80 L.R.R.M. at 1174.

[43] *Id.*

[44] *Id.* at 849.

[45] *Id.* at 846.

[46] *Id.* at 856, 80 L.R.R.M. at 1175.

[47] 471 F.2d at 1171, 82 L.R.R.M. at 2017.

[48] *Id.* at 1173, 82 L.R.R.M. at 2019.

[49] *Id.* at 1172, 82 L.R.R.M. at 2018.

[50] *Id.*, 82 L.R.R.M. at 2018-19, *citing* Morand Brothers Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501 (1950), and Teamsters Local 717 (Ice Cream Council), 145 N.L.R.B. 865, 55 L.R.R.M. 1059 (1964).

[51] See text at notes 28-29 & note 38 *supra.*

In *Hi-Way Billboards, Inc.*,[52] the Board finally enunciated what seemed to be a forceful and logical impasse doctrine. However, the court, based on the Board's past decisions, rejected the Board's doctrine. Respondent employer was charged with violating sections 8(a)(5) and (1) of the Act, stemming from a refusal to sign a multi-employer bargaining agreement.[53] Respondent defended by asserting that it had withdrawn from the association prior to the reaching of an agreement and that such withdrawal was justified by a negotiating impasse.[54] The Board held that no impasse had been reached and ordered the respondent to sign the agreement.[55] In the ensuing enforcement action the Fifth Circuit disputed this factual determination, and after ruling that an impasse had been reached, remanded the case to the Board for a determination of the legal consequences of the impasse on the parties' obligation to bargain in good faith.[56]

On remand, the Board held that an impasse was not an "unusual circumstance" within the meaning of *Retail Associates*.[57] The Board viewed an impasse as an expected part of negotiations which calls into play the use of economic weapons by both sides in an attempt to restart the flow of negotiations.[58] The Board logically noted that multi-employer bargaining could, as a practical matter, be destroyed if members of the unit were permitted to withdraw upon a bargaining impasse, since a member could then avoid his bargaining obligations by intentionally creating an impasse if an impending agreement was unfavorable.[59] The Board reaffirmed its original order directing the employer to sign and implement the bargaining agreement.[60]

The Fifth Circuit denied enforcement of the Board's order.[61] The court agreed with the Board that only upon mutual consent or unusual circumstances can an employer withdraw from a multi-employer bargaining unit.[62] However, the court parted company with

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[52] 206 N.L.R.B. 22, 84 L.R.R.M. 1161 (1973), *supplementing* 191 N.L.R.B. 244; 77 L.R.R.M. 1461, *enforcement denied*, 500 F.2d 181, 87 L.R.R.M. 2203 (5th Cir. 1974).

[53] *See* 191 N.L.R.B. at 246, 77 L.R.R.M. at 1463

[54] *Id.* at 245, 77 L.R.R.M. at 1462.

[55] *Id.* at 245, 246, 77 L.R.R.M. at 1462, 1463.

[56] 473 F.2d 649, 655, 82 L.R.R.M. 2529, 2531-32 (5th Cir. 1973).

[57] 206 N.L.R.B. at 23, 84 L.R.R.M. at 1163.

[58] *Id.*, 84 L.R.R.M. at 1162.

[59] Were we to hold otherwise, we would be denying the practical reality of collective-bargaining negotiations, we would herald the demise of multi-employer bargaining, we would effectively negate the benefits of such bargaining to all parties and to the employees, and we would allow an employer to seize upon such an occurrence and use it as a ground for withdrawal merely because it was dissatisfied with the impeding agreement, as Hi-Way did in the instant case. Consequently, we hold that it would not effectuate the purpose or policies of the Act to allow an employer member of such an association to withdraw solely on the ground that an impasse in negotiations has been reached.

Id., 84 L.R.R.M. at 1163.

[60] *Id.*, at 24, 84 L.R.R.M. at 1163.

[61] 500 F.2d 181, 184, 87 L.R.R.M. 2203, 2206 (5th Cir. 1974).

[62] *Id.* at 182, 87 L.R.R.M. at 2204.

the Board in apparently concluding that the existence of a bargaining impasse constitutes an "unusual circumstance" which justifies unilateral withdrawal from the bargaining unit.[63] The court based its conclusion on considerations of fairness. In prior Board decisions[64] the court discerned a Board-sanctioned, union right of withdrawal at impasse.[65] Since the Board had established a principle of applying the *Retail Associates* criteria equally to both employers and unions,[66] the court held that an employer could also unilaterally withdraw from a bargaining unit upon an impasse in negotiations.[67] The court's reasoning seems unpersuasive, particularly since it misread one of the decisions claimed to establish the union's right to unilateral withdrawal.[68] Furthermore, the vitality of a second decision relied on for the same proposition,[69] in light of the confusion shown by the NLRB in subsequent decisions, seems an inadequate foundation for the court's conclusion.[70]

After the Board's formulation of its impasse doctrine in *Hi-Way Billboards,* but prior to the Fifth Circuit's refusal to enforce the order issued in that decision, the Board decided *Beck Engraving Co.*[71] In its initial consideration of the case, the Board held that none of the three facts asserted by Beck constituted "unusual circumstances" justifying withdrawal from the multi-employer bargaining unit.[72] The Fifth Circuit subsequently rendered its decision in *Hi-Way Billboards* that a bargaining impasse does justify withdrawal from the bargaining unit. Beck then sought reconsideration by the Board of its decision based on an impasse argument. Beck's motion for reconsideration was prompted by the favorable Fifth Circuit decision in *Hi-Way Billboards.*[73] The Board denied the motion, however, and sought en-

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[63] *See* 500 F.2d at 182-84, 87 L.R.R.M. at 2204-06.

[64] Pacific Coast Ass'n of Pulp Mfrs., 163 N.L.R.B. 892, 64 L.R.R.M. 1420 (1967); Morand Brothers Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501 (1950).

[65] 500 F.2d at 183-84, 87 L.R.R.M. at 2205.

[66] *See* Evening News Ass'n, 154 N.L.R.B. 1494, 60 L.R.R.M. 1149 (1965), *enforced sub nom.* Detroit Newspaper Publishers Ass'n v. NLRB, 372 F.2d 569, 572, 64 L.R.R.M. 2403, 2406 (6th Cir. 1967). On the issue of whether the union could withdraw from a unit if it adhered to the *Retail Associates* criteria, the Board in *Evening News* stated: "[W]e believe that the existing rules governing employer withdrawal from multi-employer units should be applied on an equal basis to union withdrawal from such units." 154 N.L.R.B. at 1501, 60 L.R.R.M. at 1152.

[67] 500 F.2d at 183-84, 87 L.R.R.M. at 2205-06.

[68] The court cited Pacific Coast Ass'n of Pulp and Paper Mfrs., 163 N.L.R.B. 892, 64 L.R.R.M. 1420 (1967), for the proposition that the Board had granted the union a unilateral right to withdraw. 500 F.2d at 183, 87 L.R.R.M. at 2205. However, in *Pacific Coast,* union withdrawal was allowed because *timely notice,* prior to the start of negotiations, had been given. 163 N.L.R.B. at 896, 64 L.R.R.M. at 1423.

[69] Morand Brothers Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501 (1950).

[70] See note 37 *supra.*

[71] 213 N.L.R.B. No. 13, 87 L.R.R.M. 1037 (1974). *Beck* was decided on August 26, 1974, *id.;* the Fifth Circuit denied enforcement in *Hi-Way* on September 11, 1974, 500 F.2d at 181, 87 L.R.R.M. at 2203.

[72] 213 N.L.R.B. at ___, 87 L.R.R.M. at 1038; see text at note 15 *supra.*

[73] *Beck,* 522 F.2d at 479 n.8, 90 L.R.R.M. at 2091 n.8.

forcement of its order that Beck sign and give effect to the agreement between the Association and the Union.[74]

The Third Circuit was faced with a line of conflicting and confusing Board decisions on the effect of impasse on withdrawal and several poorly reasoned circuit court decisions, including *Fairmont Foods* and *Hi-Way Billboards.* The only reasonably lucid statement of NLRB policy available to the Third Circuit was the Board's *Hi-Way Billboards* decision. Unfortunately, the court chose to ignore this clear statement and to focus instead on the Board's past confusion. Consequently, the court's decision perpetuates the confusion that has characterized the impasse doctrine.

The Third Circuit initially noted the withdrawal rules set forth by the Board in *Retail Associates* and stated that, "[s]ince Beck withdrew unilaterally during contract negotiations, the issue presented us is whether 'unusual circumstances' justified respondent's action."[75] The Board argued that this exception to the employer's bargaining obligations should be limited to situations of extreme financial hardship and instances of near total unit fragmentation.[76] The court, however, would not accept these stringent limitations. Instead, the court reasoned that past Board decisions created a situation of unequal treatment of employers vis-à-vis the union within the multi-employer bargaining process.

The court noted an imbalance of economic weapons as the first area of unequal treatment. Under the Act, the union is expressly given

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[74] *See* 522 F.2d at 478-79, 90 L.R.R.M. at 2091. The Third Circuit's threshold question in deciding the *Beck* case was whether the issue of impasse could be raised on appeal since the issue was not argued before the Board. Controlling on this question was 29 U.S.C. § 160(e) (1970), which provides in part: "No objection that has not been argued before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court held that prior to the Fifth Circuit's decision in *Hi-Way*, the impasse doctrine was in "embryonic form;" however, after that decision was handed down, the impasse issue was promptly raised by Beck in a motion for reconsideration. 522 F.2d at 479 n.8, 90 L.R.R.M. at 2091 n.8. The court therefore held that it would be unfair to treat as a waiver the respondent's earlier failure to vocalize the issue. *Id.*

The court was obviously eager to use this case as a vehicle for asserting its impasse doctrine. It is arguable that the court misread § 160(e) in order to consider the impasse question. It seems likely that Morand Brothers Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501 (1950), Teamsters Local 717 (Ice Cream Council), 145 N.L.R.B. 865, 55 L.R.R.M. 1059 (1964), Plumbers Local 323 (P.H.C. Mechanical Contractors), 191 N.L.R.B. 592, 77 L.R.R.M. 1769 (1971), and *Fairmont Foods* contain sufficient discussion of the impasse question to take Beck's omission out of the common understanding of "extraordinary circumstances." Indeed, the ruling effectively changes the wording of the statute from "extraordinary circumstances" to "ordinary circumstances." This change weakens the Board's power of original review by opening the door wide to argument of new issues at the enforcement proceedings as long as there is a related, intervening decision in some other court.

[75] 522 F.2d at 481, 90 L.R.R.M. at 2093.

[76] *Id.*

a statutory right to strike.[77] The strike is an economic weapon which is used by a union to exert pressure on an employer or employers in an effort to force capitulation in negotiations. The Act does not, however, expressly create a corresponding defensive right in the employer which he may utilize if the union calls a strike. This statutory imbalance was magnified by early decisions of the Board[78] and the courts.[79] In *NLRB* v. *Teamster Local 449 (Buffalo Linen),*[80] however, the Supreme Court corrected this imbalance by upholding a Board ruling that, absent an independent showing of antiunion animus, non-struck employers in a bargaining association could temporarily lock out their union employees as a defensive measure against a selective strike in order to protect the integrity of the bargaining unit.[81] As the Board had noted in the initial action, the bargaining unit is threatened by a selective strike because "[t]he calculated purpose of maintaining a strike against one employer and threatening to strike others in the employer group at future times is to cause successive and individual employer capitulations."[82] Thus, to counteract this threat to multi-employer bargaining vitality occasioned by the union's statutory right to strike, the Court implied a right in the non-struck employers of the bargaining association to lock out their own union employees.[83]

The Third Circuit in *Beck* apparently incorrectly gleaned from *Buffalo Linen* the rule that an imbalance of economic weapons in favor of the union requires, as a judicial response, the implication of a corresponding defensive right in the employer.[84] The court found that a

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[77] *See* NLRA § 7, 29 U.S.C. § 157 (1970). The Supreme Court in NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), held:

> Section 7 guarantees, and § 8(a)(1) protects from employer interference the rights of employees to engage in concerted activities, which, as Congress has indicated, includes the right to strike. . . . Section 13 makes clear that although the strike weapon is not an unqualified right, nothing in the Act except as specifically provided is to be construed to interfere with this means of redress . . . . This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.

Id. at 233-34 (citations omitted).

[78] Carter Carburetor Corp. v. NLRB, 140 F.2d 714, 14 L.R.R.M. 512 (8th Cir. 1944), *enforcing* 48 N.L.R.B. 354, 11 L.R.R.M. 701 (1943); NLRB v. Barrett Co., 135 F.2d 959, 12 L.R.R.M. 768 (7th Cir. 1943), *enforcing* 41 N.L.R.B. 1327, 10 L.R.R.M. 161 (1942); Moanalua Dairy, Ltd., 65 N.L.R.B. 714, 17 L.R.R.M. 252 (1946).

[79] *See, e.g.,* NLRB v. Star Publishing Co., 97 F.2d 465, 2 L.R.R.M. 762 (9th Cir. 1938). The Ninth Circuit, responding to an "economic exigencies" argument by the employer, held: "It [the Act] permits no immunity because the employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by the employer. *Id.* at 470, 2 L.R.R.M. at 767.

[80] 353 U.S. 87 (1957).

[81] *Id.* at 97.

[82] Buffalo Linen Supply Co., 109 N.L.R.B. 447, 448, 34 L.R.R.M. 1355, 1356 (1954). Such union activity is termed "whipsawing." See note 31 *supra.*

[83] 353 U.S. at 89, 97.

[84] *See* 522 F.2d at 482, 90 L.R.R.M. at 2094.

second weapon had been given to the union by the Board's decisions in *P.H.C. Mechanical Contractors*[85] and *Sangamo Construction Co.*:[86] "[I]t [the Board] has given its imprimatur to the union's negotiation of interim, separate agreements with individual members of the multi-employer bargaining unit."[87] However, the court found no corresponding right in the employer to counterbalance this right created by the Board in the union.[88] The court therefore reasoned, apparently from its understanding of the *Buffalo Linen* holding, that the bare existence[89] of this second weapon justified an equivalent employer right to withdraw at impasse:

> 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 employers are given only one (viz., the lockout). We believe that the Board's approval of individual, interim agreements during multi-employer bargaining and without requiring withdrawal from the multi-employer bargaining unit is sufficient cause for according the employer an equivalent right.[90]

The second area of unequal treatment, created by the Board, was based on the existence of unequal withdrawal rights for the employer and the union. The court cited several Board decisions[91] to emphasize that "the Board has enunciated the even-handed principle that its regulations for withdrawal from multi-employer bargaining units are the same for the unions and the employers."[92] The court then cited the decisions in *Sangamo* and *P.H.C.* as indicative of the Board's approval of union withdrawal at impasse.[93] Applying these decisions and the policies of the Board, the court concluded that a "negotiating impasse justifies unilateral withdrawal from a multi-employer bargaining unit."[94] Although the court spoke in terms of the *Retail Associates*

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[85] 191 N.L.R.B. 592, 77 L.R.R.M. 1769 (1971).

[86] 188 N.L.R.B. 159, 77 L.R.R.M. 1039 (1971).

[87] *Beck*, 522 F.2d at 482, 90 L.R.R.M. at 2094.

[88] *Id.* at 483, 90 L.R.R.M. at 2094.

[89] "The employer's right to withdraw during a bargaining impasse cannot be made contingent upon the union's exercise of its right to negotiate individual interim agreements. The rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse)." *Id.* at 483, 90 L.R.R.M. at 2095.

[90] *Id.*, 90 L.R.R.M. at 2094 (emphasis omitted).

[91] Pacific Coast Ass'n of Pulp and Paper Mfrs., 163 N.L.R.B. 892, 64 L.R.R.M. 1420 (1967); Evening News Ass'n, 154 N.L.R.B. 1494, 60 L.R.R.M. 1149 (1965), *enforced sub nom.* Detroit Newspaper Publishers Ass'n v. N.L.R.B., 372 F.2d 569, 572, 64 L.R.R.M. 2403, 2406 (6th Cir. 1967).

[92] 522 F.2d at 482, 90 L.R.R.M. at 2094.

[93] *Id.* "Moreover, allowing individual negotiations even on an interim basis is tantamount to a rejection of the existence of the multi-employer bargaining unit." *Id.* at 483, 90 L.R.R.M. at 2094.

[94] *Id.*

criteria when it spoke of "unusual circumstances,"[95] it is clear that the court believed that both it and the Board had moved beyond the *Retail Associates* guidelines.[96]

It is submitted, first, that the Third Circuit's balancing analysis in *Beck* is inconsistent with applicable Supreme Court decisions and fundamental labor policy, and second, that the court's finding of a Board-sanctioned, union right of unilateral withdrawal from a multi-employer unit at impasse is erroneous. The court's balancing analysis is in conflict with the Supreme Court's post-*Buffalo Linen* decision in *NLRB* v. *Insurance Agents' International Union.*[97] In *Insurance Agents,* the union was charged with violating section 8(b)(3) of the Act:[98] "refusal to bargain collectively with the employer."[99] The charge stemmed from the union's use of harassing activities during negotiations.[100] The Board held that such tactics were inconsistent with good faith bargaining as defined by section 8(d) of the Act[101] and issued a cease and desist order.[102] The District of Columbia Circuit denied enforcement, holding[103] that it would not overrule its earlier decision that the use of economic force was in no way inconsistent with a good faith desire to reach an agreement.[104]

The Supreme Court affirmed the judgment of the court of appeals, similarly finding no inconsistency between the application of a maximum amount of economic pressure and the obligation to bargain in good faith.[105] Rather, the Court feared that under the guise of enforcing the good faith bargaining obligation, the Board would regulate the use of economic weapons in such a manner as to influence substantially the substantive terms of the contract.[106] "Our labor policy is not presently erected on a foundation of governmental control of

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[95] *Id.* at 481, 90 L.R.R.M. at 2093.

[96] *See id.* at 484 n.15, 90 L.R.R.M. at 2095 n.15:

> We reiterate that many of the ultimate policy judgments in this area should be made by the Board because of its expertise. We merely seek to redress an imbalance created by the Board's decisions and recognize that we cannot and should not dictate to the Board the manner in which the balance should be achieved. In this regard, the Board may well decide that the impasse doctrine and the right of the union to negotiate individual, interim agreements form part of a less desirable equilibrium than a return to the *Retail Associates* rule.

[97] 361 U.S. 477 (1960).

[98] *See* 119 N.L.R.B. at 769, 41 L.R.R.M. at 1178.

[99] *See* NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1970).

[100] 119 N.L.R.B. at 769, 41 L.R.R.M. at 1177.

[101] NLRA § 8(d), 29 U.S.C. § 158(d) (1970) defines the duty to bargain as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

[102] 119 N.L.R.B. at 774, 41 L.R.R.M. at 1178.

[103] 260 F.2d 736, 736, 43 L.R.R.M. 2003, 2003 (D.C. Cir. 1958).

[104] Textile Workers Union v. NLRB, 227 F.2d 409, 410, 36 L.R.R.M. 2778, 2779 (D.C. Cir. 1955).

[105] 361 U.S. at 494-96.

[106] *Id.* at 497-98.

the results of negotiations. Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union."[107]

There seems little doubt that this policy of non-interference into the use of economic sanctions to influence the bargaining process applies beyond Board decisions to judicial actions, for the Court in *Insurance Agents* placed the restriction on "any governmental power."[108] Furthermore, even though the Court in *Insurance Agents* was not ruling on activities within a multi-employer situation, the Supreme Court in *NLRB* v. *Brown*[109] applied the same limitations to a multi-employer situation.[110]

Insurance Agents and *Brown* reflect a Supreme Court policy of determining the legitimacy of a bargaining tactic isolated from any notion of relative bargaining strength. Specifically, the Court determined that the Board cannot deny the existence of an economic right on the basis of relative bargaining power. The same principle should be equally applicable where the Board, or a court, acts to grant an economic right. These determinations should be made solely on the basis of the pertinent statutory standard; they should not be based on an assessment of relative bargaining strength. The Third Circuit in *Beck* violated this policy when it granted withdrawal rights based not on a thoughtful analysis of the Act, but rather on an assessment of the parties' relative bargaining position. This form of balancing improperly affects the substantive terms of the ultimate collective bargaining agreement, an effect denounced in *Insurance Agents.*[111]

Even if the Third Circuit's balancing analysis were proper, its inaccurate view of the economic weapons available to each party would make the analysis in *Beck* unpersuasive. To achieve a proper balance between the bargaining weapons available, it is necessary to consider *all* the weapons available, not just the three mentioned by the court. It has already been noted that, to a certain extent, union harassing tactics while on the job are allowed.[112] The Supreme Court has also allowed the struck members of a multi-employer unit to lock out their union employees and hire temporary replacements,[113] the non-struck

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[107] *Id.* at 490 (citation omitted).

[108] *Id.* at 488.

[109] 380 U.S. 278 (1965).

[110] *Id.* at 283. The non-struck members of a bargaining association were charged with violating §§ 8(a)(1) and (3) of the Act stemming from the lock-out of their union people and the hiring of temporary replacements. *Id.* at 279-80. The Board upheld these charges. However, the Court of Appeals denied enforcement. *Id.* at 280. The Supreme Court began their affirmance by postulating, "[w]e begin with the proposition that the Act does not constitute the Board as an 'arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.'" *Id.* at 283, *quoting Insurance Agents,* 361 U.S. at 497. Thus, the Court in *Brown* made its decision based on the limits on Board power established in *Insurance Agents.*

[111] 361 U.S. at 497-98.

[112] *Insurance Agents,* 361 U.S. at 490-92.

[113] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

members to lock out their union people and hire temporary replacements,[114] and all association members to use the lockout offensively when no selective strike has occurred.[115] This incomplete list[116] of sanctioned weapons adequately demonstrates that the balancing done by the Third Circuit is questionable and imprecise.

The Third Circuit's finding of Board approval for union unilateral withdrawal from a multi-employer unit at impasse, based on the Board's holdings in *Sangamo* and *P.H.C.*,[117] does not seem ultimately acceptable in light of the more recent Board decision in *Hi-Way Billboards* and the congressional policy embedded in the Act. Indeed, *Sangamo* does not stand for the proposition that a union may withdraw from the bargaining unit as to some employers at an impasse. Sangamo was charged with violating section 8(a)(5), and the union, section 8(b)(3) of the Act stemming from their entering into an interim agreement during an association-wide strike.[118] Sangamo initiated the negotiations which led to the interim agreement.[119] In the Board's decision there was no finding of an impasse.[120] Furthermore, the Board expressly stated that "there is no contention that the interim agreement was a contract covering a separate bargaining unit."[121] The interim agreement represented a type of reverse selective strike. The terms of the agreement called for a continuation of the prior pay scale, continued multi-employer bargaining, and retroactive pay after agreement was reached.[122] Other than the retroactive pay provision, this contract merely represented a situation identical to the one which would have existed had the union struck every employer but Sangamo. The Board could thus find no attempt on the part of the union to fragment the bargaining unit by whipsawing the members.[123] For these reasons, *Sangamo* does not support the Third Circuit's conclusions.

P.H.C., on the other hand, does support the Third Circuit's conclusions. The union was charged with violating section 8(b)(3) as a result of its entering into an interim agreement with P.H.C.[124] The Board, in dismissing the charge,[125] suggested that the existence of an impasse justifies the union's withdrawal from the multi-employer bar-

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[114] *Brown*, 380 U.S. at 283.

[115] American Shipbldg. Co. v. NLRB, 380 U.S. 300, 318 (1965).

[116] *See Brown*, 380 U.S. at 283: "Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another even if he thereby makes himself 'virtually strikeproof.' "

[117] See text at notes 92-94 *supra*.

[118] 188 N.L.R.B. at 159-60, 77 L.R.R.M. at 1039-40.

[119] *Id.*, 77 L.R.R.M. at 1040.

[120] *Id.* at 160, 77 L.R.R.M. at 1041.

[121] *Id.*, 77 L.R.R.M. at 1040.

[122] *Id.*

[123] *Id.*, 77 L.R.R.M. at 1041.

[124] 191 N.L.R.B. at 596.

[125] *Id.* at 592, 77 L.R.R.M. at 1770.

gaining context and negotiation of individual interim agreements.[126] As was noted earlier, the Trial Examiner's ruling in *Fairmont Foods Co.* indicated that he believed that an impasse was an unusual circumstance sufficient to justify withdrawal by the employer under the *Retail Associates* guidelines.[127] It thus seems that at the time *P.H.C.* was decided, the Board itself felt that either the employers or the union could withdraw at impasse.[128] However, since the court in *Beck* evidenced a concern with reaching a result consistent with the Board's decisions and policies, it is curious that the court did not consider and apply the Board's decision in *Hi-Way Billboards.*[129] In *Hi-Way Billboards,* the Board formulated a well-reasoned impasse doctrine: Impasse is not an "unusual circumstance" and should not serve as an excuse for fragmenting and destabilizing multi-employer bargaining.[130] While the Fifth Circuit did deny enforcement in *Hi-Way Billboards,* it nevertheless seems doubtful that, as the Third Circuit concluded in *Beck,* the "Board's own policy" at the time of the *Beck* decision permitted union withdrawal at impasse.[131] The Board's holding in *Hi-Way Billboards* is clearly contrary to such a conclusion.

The court's decision in *Beck* also unnecessarily weakens multi-employer bargaining and conflicts with congressional policy. The court itself realized the effect of its holding in these areas: "[W]e cannot avoid the conclusion that this additional incremental instability, however unfavorable to the policy aimed at stabilization of these units, is a necessary concomitant of insuring that the parties have equal rights and that the existence and implementation of such rights do not grant unfair advantage to either party."[132] Stability and vitality within the multi-employer bargaining context cannot exist, however, where an employer can create an impasse and subsequently withdraw from the unit whenever the terms of the proposed agreement seem unfavorable.[133] In such a situation the employers enjoy the benefits of

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[126] See note 39 *supra.*

[127] See text at notes 44-46 *supra.*

[128] See note 39 *supra.*

[129] See text at notes 57-60 *supra.*

[130] See note 59 *supra* & accompanying text.

[131] In its brief in *Beck,* the Board argued that impasse does not constitute an "unusual circumstance" and thus does not justify withdrawal from a multi-employer unit. Brief for Petitioner at 11-12. In so arguing, the Board claimed that Morand Brothers Beverage Co., 91 N.L.R.B. 409, 26 L.R.R.M. 1501 (1950), is no longer good law, implying that they would no longer allow union withdrawal at impasse. *Id.* at 12-13.

[132] 522 F.2d at 484, 90 L.R.R.M. at 2095.

[133] In cases following *Beck,* the withdrawing party will probably be required to show that the terms it sought in the negotiations were presented in good faith and not merely sought in order to create a deadlock. It is suggested, however, that such a test is unworkable because of the inherent problems in proving a party's motive and intent. *See generally* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality,* 77 YALE L.J. 1269 (1968).

association bargaining without incurring any of its responsibilities.[134] Stability in the bargaining relationship has been recognized as central to the national labor policy for many years,[135] and the importance of this consideration to the issue of unilateral withdrawal from multi-employer bargaining units cannot be ignored. As the Sixth Circuit stated in *Detroit Newspaper Publishers' Association* v. *NLRB*:[136]

> Thus, while fear of being "locked in" a unit might discourage entrance by a union as the Board has argued, it must be equally clear that a virtually unfettered right of withdrawal, even if available to both sides in parity, might also destroy the attractiveness of such arrangements. The Board might well find that the instability resulting from such conditions had undermined the multi-employer unit as an effective tool of labor relations.[137]

Both Congress and the Supreme Court have stressed the importance of stability in multi-employer bargaining. Congressional support for multi-employer units surfaced during the Taft-Hartley Amendments debate,[138] and the preservation of bargaining unit stability was the basis for the Supreme Court's sanction of employer lockouts in *Buffalo Linen*.[139] It is submitted that the court in *Beck* failed to give proper weight to this policy. Moreover, it ignored a Board ruling—*Hi-Way Billboards*—which it could have applied to arrive at a decision consistent with the concern for multi-employer bargaining unit stability. Based on these infirmities, it appears that the Third Circuit has simply perpetuated the confusion which has historically surrounded the impasse doctrine. The Board must now wait until another interim agreement case arises before it may "effectuate national labor policy" in the area of the impasse doctrine.

CONCLUSION

After *Beck*, the role of impasse in multi-employer bargaining remains unclear, the product of many years of confusing and conflicting decisions. Consequently, the vitality of the multi-employer unit as "an

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[134] The employer presumably will withdraw only if he can negotiate a more favorable agreement as a single-employer unit.

[135] *See Buffalo Linen*, 353 U.S. at 95.

[136] 372 F.2d 569, 64 L.R.R.M. 2403 (6th Cir. 1967).

[137] *Id.* at 572, 64 L.R.R.M. at 2406.

[138] 93 Cong. Rec. 4030-4031 (1947) (remarks of Senator Murray):

> Because numerous employers are covered by a single collective-bargaining agreement, less time is lost in the bargaining process. Settlements are made simultaneously for these employers rather than on an individual employer-by-employer basis. Industrial peace is achieved in one step rather than over a prolonged period of time. Bargaining with hundreds of individual firms for the same things is both wasteful and unfair to both sides.

[139] *See* 353 U.S. at 95-97.

effective tool of labor relations" is in doubt. Having uncovered the weaknesses in the other circuit court impasse doctrine decisions,[140] the Third Circuit was in a position to lead the courts and the Board back to an impasse doctrine which would have given due consideration to the policy of stability in bargaining relationships. However, in joining the other circuits which allow unilateral withdrawal by the employer in an impasse situation, the court has merely beclouded the area further. The gap between the Board and the courts has been widened, and until a consistent resolution of the withdrawal issue is reached in both forums, the future of multi-employer bargaining is suspended in an uncertain state.

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[140] *See* 522 F.2d at 483 n.13, 90 L.R.R.M. at 2094 n.13.