In the

Supreme Court of the United States

CHARLES D. BONANNO LINEN SERVICE, INC.,	)	
Petitioner	)	
v.	)	NO. 80-931
NATIONAL LABOR RELATIONS BOARD ET AL.	)	

Washington, D. C.
October 13, 1981

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Petitioner, : No. 80-931

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NATIONAL LABOR RELATIONS BOARD ET AL. :

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Washington, D. C.

Tuesday, October 13, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

SIDNEY A. COVEN, ESQ., Boston, Massachusetts; on behalf of the Petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C.; on behalf of the Respondent.

JAMES T. GRADY, ESQ, Boston, Massachusetts; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Bonanno Linen Service against the Labor Board.

Mr. Coven, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF SIDNEY A. COVEN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COVEN: Mr. Chief Justice, and if the Court please, the question involved in this case is whether and in what circumstances an employer may withdraw from multi-employer collective bargaining after negotiations have commenced.

The Petitioner in this case contends that the occurrence of an impasse during such bargaining, in this case one which had existed for more than six months at the time of the withdrawal, and which had been followed by a selective strike against Petitioner alone, not all the members of the group, justifies its withdrawal from the multi-employer group.

QUESTION: Mr. Coven, you have used the word "impasse".

MR. COVEN: Yes, sir.

QUESTION: Is that a word of art? What is an impasse?

MR. COVEN: Well, the Labor Board has never made

an exact definition of an impasse. They have found in many cases that an impasse has existed, and many cases have turned on the question as to whether there is an impasse, but neither the Board nor the courts have ever precisely defined an impasse.

My definition of an impasse is a situation where the parties have reached the point where there is no longer any progress. They have reached a deadlock or a stalemate, and neither party has indicated any possibility of any movement whatsoever.

QUESTION: Where there is a real breakdown in negotiations, not just a failure to come to terms on one particular issue?

MR. COVEN: That's correct, Your Honor, in my -- in my opinion. The courts -- neither the Board nor the courts have ever said precisely that, but that would be the way I would define an impasse.

QUESTION: And yet in this very case negotiations did resume.

MR. COVEN: Yes, Your Honor. Negotiations did resume, and eventually there was an agreement, but of course we can't tell at this point, looking at it from hindsight, whether such -- whether the impasse would ever have been broken if the Petitioner had not -- had not withdrawn from the bargaining unit. If the parties had remained locked in

that ice jam, possibly this might have gone on for years and years. It might have gone on forever without any movement.

It was only when the Petitioner did withdraw that we had what might be called the first beginning of a thaw in the ice jam, and there were certain actions triggered which I will refer to later, which in our opinion, at least, did provide the circumstances under which the impasse or the log jam or the ice jam was finally broken.

QUESTION: Well, of course, as soon as this company, the employer withdrew, they made an example out of him by striking him, did they not?

MR. COVEN: No, Your Honor. The strike took place five months before the impasse.

QUESTION: Well, were they closed all that time?

MR. COVEN: The employer was not closed. He hired replacements, and he continued to operate under the -- under the handicaps of a strike, and I might add that there were certain factors in the strike which were the subject of litigation in another matter, but are not before the Court here today.

May I make it clear at this point that the employer, in withdrawing from the multi-employer group, had no intent to extinguish its bargaining obligation to the union. It offered to continue bargaining with the union on a single employer basis.

QUESTION: Mr. Coven, at the time of the withdrawal, had all the strikers been replaced?

MR. COVEN: I believe so, Your Honor.

QUESTION: But not until the time of the withdrawal?

MR. COVEN: Well, the record is not clear how long before the withdrawal this happened. The record only shows that at the time of the withdrawal, all of the strikers had been replaced.

QUESTION: Had been replaced.

QUESTION: Well, would you have had -- Why do you say that your duty to bargain hadn't ended? If you had replaced them all -- you had replaced them all permanently?

MR. COVEN: There are certain circumstances under which the Board presumes there is a continuing majority. We never approached the point as to whether or not there was such a continuing majority. The employer --

QUESTION: It may be that all of your employees, your new employees were union members, or might have been.

MR. COVEN: It may be. The record doesn't show that.

The Labor Board in this case, contrary to the petition then held by five Circuit Courts of Appeals, held that the withdrawal constituted an unfair labor practice, and the Circuit Court for the First Circuit has affirmed

this position.

I make note, Your Honors, that since the Court of Appeals decision in this case, two of the five Circuit Courts which had formerly refused to follow the Board position, have adopted the Board's position, and would go along with the Board position. The other three courts are still standing by their positions.

Now, the facts in this case were essentially stipulated. The company is in the business of laundering, rental, and distribution of linens and work uniforms. Over a period of many years, or quite a number of years, the company, the Petitioner here, had engaged in multi-employer bargaining with a group of employers who dealt with the Teamsters Union for the driver employees of each of those companies. Each company had a relatively small number of employees, and they all joined together in collective bargaining.

In 1975, just prior to the expiration of the then current contract, the parties, the employers again joined together in this group, the Petitioner and nine other employers, and commenced bargaining with the union. The president of Petitioner was a member of the group's bargaining committee.

After a number of meetings, a proposed contract was submitted to the employees for ratification. The

contract or the proposed contract provided for an increase in wages, and was based, as the previous contracts had been, on an hourly rate of pay.

The employees rejected that proposed contract, and the union came back at the next meeting and proposed that instead of the hourly rate of pay the employees be paid on a commission basis. This was rejected by the employer's group.

Now, thereafter, and the parties have stipulated that, and the Board has found an impasse in bargaining was reached on May 15th, 1975, and the main issue in the impasse was whether or not the employees should be paid on a commission basis or the hourly basis.

QUESTION: Well, Mr. Coven, you say the parties have stipulated that an impasse has been reached, and yet you say there is no generally accepted meaning of the term "impasse".

MR. COVEN: That is correct, Your Honor.

QUESTION: Well, what kind of a stipulation is that?

MR. COVEN: Well, I believe that the parties stipulated that whatever the Board defines as an impasse had been reached. In my view, as I said before, an impasse means that the parties have reached the point where they were just at loggerheads, and nobody was showing any signs of movement, and that is, I believe, what the parties

stipulated to, and that is what the Board found.

On June 23rd, 1975, approximately five weeks or six weeks after the impasse had been reached, the union called a selective strike against only Petitioner, not all the rest of the employers, but only against Petitioner, one of the ten, and all of Petitioner's drivers joined the strike.

Now, there is nothing in the record to indicate why the union chose the Petitioner only, why they didn't strike anybody else, but it stands to reason that we must assume that the union had some purpose in singling out the Petitioner, but as I say, the record doesn't show what that purpose was.

At that point, substantially all the other employers in the bargaining group locked out their employees. Thereafter, the parties all hired replacements, and continued to operate with the limitations of the strike.

Subsequently, there were a number of additional meetings between the union, the union and the negotiating committee of the employers. This went on for several months. There were no results. The parties were simply locked. Neither party would move. The union maintained that it wanted commissions, to be paid on a commission basis. The employers refused to do so. And despite the efforts of a Federal mediator, there was no movement by

either party.

This went on, as I say, for approximately six months. During this period the Petitioner received information that two members of the group had been meeting secretly with the union, and although no separate agreements were reached, the Adminstrative Law Judge of the Board who heard this case specificaly found "that before Petitioner withdrew, two other employees in the group secretly had been in direct touch with the union, presumably in an effort to make a separate settlement".

After the Petitioner learned of the secret meetings, it, by letter dated November 21st of 1975, and as I say, this was more than six months after the impasse, and almost five months after the strike against the Petitioner had started, the Petitioner notified the union and the employers' group that it was withdrawing from the group, and that it would thereafter bargain directly with the union.

Now, on receipt of this notice by the group, the remaining members of the group terminated the lock-out and rehired all of the persons, the employees who had been previously locked out, and they all returned to work. Thereafter, the group and the union continued to meet. At the first meeting held after the withdrawal, the union representative merely noted, without saying anything more, that the Petitioner had withdrawn, and the employers' group

indicated or stated that another employer had been designated as a member of the group's negotiating committee to replace the Petitioner's president.

The parties had a number of meetings. There was no change in positions by either party until April the 13th of 1976, approximately four and a half months later, when the union finally receded from its insistence on payment on a commission basis, and agreement was reached on a new contract.

Thereupon, the union, which had never communicated with the Petitioner after receiving notice of withdrawal, advised the Petitioner that it considered it, the Petitioner, to be bound by the contract reached by the group, and at that point the Petitioner refused to sign the contract, stating that it was not bound since it had withdrawn from the group a long time ago.

The union then filed an unfair labor practice charge with the Labor Board. The Board, after a hearing, found that an unfair labor practice had indeed occurred, although, as I stated before, five Courts which had considered that question prior to that point had held to the contrary.

Now, with respect to the legal principles involved, may I go back to 1950, when the Board in its Morand Brothers decision held that employers have "unlimited

freedom unilaterally to fashion the scope of or to completely destroy multi-employer bargaining at their will or fancy", and squarely ruled that the parties were free to bargain individually after an impasse had been reached in association-wide bargaining.

That was the state of the law until 1958, when the Board in its Retail Associates decision set forth a new policy. The Board said that any employer who is a member of a group can withdraw from that group at an appropriate time before the date fixed for commencement of bargaining, has full latitude, is absolutely free to leave the group at that point without any inhibitions whatsoever, but that once the bargaining is commenced, the employer, an employer may not withdraw from the group absent mutual consent or unusual circumstances.

QUESTION: Did the Board explain its change from its 1958 ruling to its 1950 ruling?

MR. COVEN: No. No, they never referred to the Morand decision at all. They just ignored it.

And it did not address the question of whether an impasse was within the category of what the Board called unusual circumstances. I may state that in a number of cases since then the Board has subsequently limited the "unusual circumstances" to cases where an employer can demonstrate that it is faced with dire economic

consequences, such as bankruptcy, or impending bankruptcy, or to cases where the multi-employer group has been significantly fragmented as a result of consentual withdrawal.

QUESTION: Mr. Coven?

MR. COVEN: In 1964 --

QUESTION: Mr. Coven?

MR. COVEN: I beg your pardon.

QUESTION: Has the Board, either in this case or in other cases, determined basically whether employers do in fact withdraw from bargaining units because other members have reached interim agreements, and to what extent unions in fact use the whipsaw tactics? Now, I know that is the theory on which this decision rests. Now, either in this case or in other cases, has the Board made determinations about those matters?

MR. COVEN: Well, this question as to whether -- as to the effect of so-called interim agreements has been only a fairly recent matter that has been considered by the Board. The Board has said that where there has been a significant fragmentation of the unit, the employer is free to withdraw, but it is not -- they have never made it clear whether there would be significant fragmentation by interim agreements. The Board for the first time in this case discussed the difference between what they call separate

agreements and interim agreements. They had never discussed that before.

Now, it is still not clear as to whether or not they would consider the execution of a number of interim agreements or how many interim agreements as fragmentation of the group.

QUESTION: Is there any factual finding in this case to the effect that it was the negotiations by the other two employers with the union that triggered the Petitioner's withdrawal?

MR. COVEN: No, Your Honor. There was no finding at all on that question as to what triggered it. The only question was whether or not the employer was free to withdraw at that point because of the impasse situation.

QUESTION: Were these independent negotiations of the two employers, did they take place before or after the Petitioner's withdrawal from the group?

MR. COVEN: They took place before the withdrawal. The evidence -- the evidence shows and the Board found, the Administrative Law Judge found that the -- these separate meetings, these separate secret meetings had been held before the withdrawal took place, and it was after the employer learned about this, and there is no finding as to whether that triggered it or what triggered the withdrawal.

QUESTION: Well, was there a finding that at those meetings interim agreements had been arrived at?

MR. COVEN: No. No, Your Honor.

QUESTIO: We don't know that any action --

MR. COVEN: There was a finding that there were no -- no separate agreements found, but --

QUESTION: All that happened is that there had been these -- you labeled them secret meetings.

MR. COVEN: Yes.

QUESTION: But no agreements reached.

MR. COVEN: No agreements were reached, but as I say, the -- as I said before, the Administrative Law Judge found that there had been these meetings, secret meetings "presumably in an effort to make a separate settlement".

QUESTION: He also added, did he not, that they didn't even reach the level of negotiations?

MR. COVEN: That is correct, Your Honor.

QUESTION: Mr. Coven, suppose when the union struck your client, your client had said, well, let's negotiate an agreement, and the union said, all right, that's exactly what we wanted. This is a selective strike. So you negotiated an agreement. Would that agreement, would you think that you would have had the right to say to the union, well, I will -- we will negotiate an agreement, but I am withdrawing from the unit, and this agreement that I am

negotiating with you will not be subject to revision if you then negotiate with the multi-employer bargaining unit and arrive at a different -- at a different conclusion?

MR. COVEN: That might have been possible, and if the union had agreed, and if the members of the association --

QUESTION: Well, the union says, well, we don't agree with you at all, we will negotiate an agreement with you but if we then negotiate an agreement with the unit, this contract that we are going to sign with you will be subject to -- we will throw it out the window. You would say that you would have the right to hold them to the interim agreement?

MR. COVEN: Well, Your Honor, that would be a matter for negotiations, and if there were no agreement reached there --

QUESTION: The union says, sure, we'll reach an agreement with you, but it is going to be subject to the -- to revision, and you say, well, we will sign the agreement, but it won't be subject to revision.

MR. COVEN: Then we have no agreement, Your Honor.

Now, to go back --

QUESTION: Well, there are interim agreements signed with individual employers --

MR. COVEN: Yes.

QUESTION: -- when there is a selective strike.

MR. COVEN: Yes, Your Honor. There are interim agreements --

QUESTION: Is it always understood then that they will be subject to revision?

MR. COVEN: That depends on whatever the parties agree to in their interim agreements. Now, there have been -- there are a variety of interim agreements which I think have been pointed out in one of the amicus briefs. There are -- the briefs filed by the Graphic Arts Employers group indicates that there are several varieties of interim agreements which are -- have been entered into in that particular type of industry. The -- Most of the interim agreements that I have been familiar with have provided that if and when there is an agreement with the multi-employer group, that those terms will become effective.

QUESTION: Isn't that the Board's position, Mr. Coven, that those interim agreements are subject to displacement by the agreement finally arrived at by the unit?

MR. COVEN: Well, I think the Board -- the Board says that most interim agreements -- I don't --

QUESTION: No. I thought the Board's position was that as a matter of law --

MR. COVEN: As a matter of law.

QUESTION: -- those interim agreements fall as

soon as the unit has negotiated an agreement for the industry.

MR. COVEN: They say if such a type of agreement, what they call an interim agreement, has been reached, that is all right, but if those --

QUESTION: It is all right, but it is subject to displacement by the final agreement reached.

MR. COVEN: Not unless the parties have agreed to it, because otherwise you have what the Board now calls separate agreements.

QUESTION: Well, I will find out from Mr. Come. I thought the Board's position was as I have stated it.

MR. COVEN: Well, I am sorry. That is not the way I read the Board's position.

QUESTION: If the NLRB were subsequently, for example, to determine that it wouldn't permit interim agreements to be reached by individual employers within the bargaining unit, or if at some point this Court were to make that determination so that interim agreements were not possible to be reached, would you then find that the NLRB's unusual circumstance test would be satisfactory on withdrawal?

MR. COVEN: Yes, Your Honor. In the facts -- the facts in this particular case, here, I -- my own feeling is that it isn't necessary really to go into the question of

interim agreements. I think the interim agreement argument that the courts have examined buttresses our argument, but in this particular case, we have a situation where the parties had been locked in deadlock, and there was absolutely no movement for six months. There is no prospect that there is ever going to be any movement. Nobody -- if things had continued that way, this might have gone -- might still be going on.

We say at this point, bargaining has -- or collective bargaining on the multi-employer basis has failed. It has broken down completely, and for all intents and purposes is irretrievable. We say there is no point, there is no reason, there is no logic for the Board to insist that an employer -- that all the employers stay locked in that frozen position.

The Board allows people to withdraw at will before bargaining starts. Why is the multi-employer unit so sacred that at this point, after bargaining has broken down, they don't permit them to withdraw?

QUESTION: Is it your position then at some point of impasse, for instance, after it has lasted a long time, as was the case here, that that in and of itself should be an unusual circumstance, and that you can disregard the interim agreement problem altogether?

MR. COVEN: Exactly, Your Honor.

QUESTION: Is that your position?

MR. COVEN: That is our main point here. That is our main argument, that the purpose of the statute is to encourage collective bargaining and to avoid industrial strife by means of collective bargaining. Now, this matter of this multi-employer bargaining unit is something that is not set forth in the Act itself. The Board under the Act must make a determination as to what unit is appropriate. There may be many appropriate units. At certain points, a multi-employer unit may be appropriate, may be the best under the circumstances, but there reaches a point where if the multi-employer unit has become completely ineffectual and goes contrary to the intent of the statute, there is no earthly reason why the Board should insist that that continue. In this --

QUESTION: Can a single employer be forced to join a multi-employer agreement?

MR. COVEN: No, Your Honor. There is no -- it is strictly consentual. The multi-employer unit is created by the consent of the parties. Of course, there may be situations where we'll say that the Teamsters Union has a nationwide or -- a nationwide freight agreement, and there is an independent employer who is organized by the Teamsters, and they say, well, in order to have an agreement, you must adhere to the terms of this

multi-employer group. In that way, he is forced to, but still it is a matter of consent. If he doesn't consent, there is no agreement, and then he gets struck.

QUESTION: Now, the employers themselves could agree, could they not, that they won't permit any of the members of the bargaining unit, the employers in the unit to negotiate a separate interim agreement. Isn't that true?

MR. COVEN: They could.

QUESTION: Couldn't that be a provision of the employer bargaining unit agreement?

MR. COVEN: It could be, Your Honor. In this case --

QUESTION: There wasn't such an agreement here.

MR. COVEN: -- there wasn't -- there is no evidence that there was such -- such an agreement. As a matter of fact, when the employer -- the Petitioner here withdrew from the unit, the employer's group apparently were happy to see it happen because they could then terminate the lockout and get their people back to work, and then they started negotiations again. They weren't unhappy about it.

QUESTION: Counsel, may I ask you a question about the nature of the agreement that caused them to negotiate as a group? The letter of withdrawal in November of '75 refers to an earlier letter of February 19, 1975, authorizing group negotiation.

MR. COVEN: Yes.

QUESTION: Does the February 19 letter appear in the record? I couldn't find it.

MR. COVEN: I am not sure, Your Honor.

QUESTION: Well, if --

MR. COVEN: What it -- before negotiations started, each of the members of the group wrote a letter to the union saying, we are authorizing the group to bargain for us.

QUESTION: Would you-agree that under that letter, if there had been no impasse, but one of the -- say your client just didn't like the final agreement that was negotiated, would it have nevertheless been obligated to sign that agreement if everybody else was willing to sign it?

MR. COVEN: Yes, Your Honor.

QUESTION: You do.

MR. COVEN: Now, if I may, at this point, I would like to talk about one matter that the Board has raised, and where the Circuit Court talks about the deference due the Board decision. In our opinion, Your Honor, the -- I beg your pardon. I believe my time is up.

QUESTION: That point is covered in your brief, counsel.

MR. COVEN: Yes. Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. COME: Mr. Chief Justice, and may it please the Court, in Buffalo Linen, which was decided by this Court 24 years ago, the Court indicated that in 1947, at the time of the Taft-Hartley Amendments, proposals were made to limit or outlaw multi-employer bargaining, but these proposals failed of enactment because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of national labor policy by promoting labor peace through collective bargaining.

The Court concluded that Congress thereby intended to -- that the Board should continue its established practice of certifying multi-employer bargaining units, and intended to leave to the Board -- the Board's specialized judgment the inevitable questions concerning such a relationship that may arise in the future.

QUESTION: Is it your position, Mr. Come, that an unwilling employer can be forced by the Board into a multi-employer --

MR. COME: No, Your Honor. As a matter of fact, Congress enacted Section 8(P)(1)(b) of the Act in '47 which would make it an unfair labor practice for a union to strike an employer for the purpose of forcing him into a multi-employer bargaining unit. A multi-employer bargaining

unit is a consentual arrangement, but once you have that consent, then the Board in -- pursuant to its function of establishing appropriate bargaining units, has devised certain rules for governing that relationship so as not to unstabilize the relationship that has been established, and one year after Buffalo Linen, the Retail Associates' rules were formulated.

Under those rules, either party is free to get out of a multi-employer bargaining relationship which, as I indicated, was voluntary to begin with, at the outset of negotiations, but once negotiations have started, neither party -- and these rules apply to the union as well as to the employers -- can get out absent mutual consent or unusual circumstances.

Now, for the 23 years that these rules have been in effect, every Court of Appeals that has had occasion to pass on them as a general proposition have accepted them. The controversy has been over whether an impasse in bargaining is an unusual circumstance that would warrant an untimely unilateral withdrawal from a bargaining unit.

QUESTION: What is the Board's definition of "impasse"?

MR. COME: The Board, and I think it has stated it as well as anywhere on Page 41 of its opinion in this case --

QUESTION: In its brief or in its opinion?

MR. COME: It is the appendix to the petition. That is the Board decision. And they are quoting from their opinion in Hi-Way Billboards, which was the first case in which they attempted to really spell out why an impasse was not an unusual circumstance, and they point out that an impasse is only a temporary deadlock or hiatus in negotiations, which in almost all cases is eventually broken either through a change of mind or the application of economic force.

Skipping down a bit, suspension of the process as a result of an impasse may provide for reflection and the 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.

QUESTION: Well, then, the Board's view is that an impasse is something that occurs fairly regularly.

MR. COME: That is correct. And that is one of the reasons why the Board concluded that an impasse should not be regarded as an unusual circumstance. It is something that is quite normal in collective bargaining.

QUESTION: Well, what if the Petitioners here, uncertain of the Board's reasoning, and not familiar with the interpretation which you have just given to the word "impasse", felt that there had been a total breakdown in the

bargaining framework, and that nothing more was to be accomplished by the multi-employer bargaining unit?

MR. COME: Well, I think that that would not have availed them under the Board's view, and that is one of the reasons why the Board has concluded that an impasse should not be a basis for getting out.

An impasse may be difficult to determine in a particular set of negotiations. Sometimes it occurs fast, sometimes it occurs after more prolonged negotiations, but the bottom line is that in the Board's view, as the authorities in our brief show, in the view of experienced negotiators and mediators in the field, the impasse, experience shows, is ultimately broken. It does not signal a complete and final breakdown in the negotiations. It is the time when the mediators step in, if there is one. It is the time when the parties may resort to economic pressure, as they did in this case, because you had a strike against Bonanno which is privileged under Buffalo Linen, followed by a lock-out on the part of the rest of the members of the --

QUESTION: Mr. Come?

MR. COME: Yes, Your Honor.

QUESTION: It would help me if you could say whether or not the Board has ever considered that the mere passage of time has brought an impasse as defined to an end so that the employers were free to bargain. Suppose it

happened for a year and a half instead of for half a year.

MR. COME: Well, I think that that would be a factor to be considered, but it is not the -- it is not --

QUESTION: Would that be a factor to be considered in determining whether there were unusual circumstances?

MR. COME: Well, the Board in determining what is unusual circumstances has confined that term basically to two types of situations, one where severe economic hardship, such as bankruptcy or its equivalent, would result to the employer who feels that he has to withdraw, or a situation where, as a result of the union permitting or consenting to withdrawals on the part of a substantial number of employers has so fragmentized the multi-employer unit that you have only a shell of that relationship that remains.

QUESTION: So that if this impasse had lasted, say, for two years, the Board's position would be the same?

MR. COME: Well, all I can say is that I have no case that would --

QUESTION: What is the longest time for a so-called impasse? This six months, is this --

MR. COME: This is not --

QUESTION: Is this in itself very long?

MR. COME: No, it is not. I think that --

QUESTION: Has the Board in this situation ever dealt with one that lasted as long as a year?

MR. COME: Yes, it has.

QUESTION: Anything longer than a year?

MR. COME: Yes, there have been some that have lasted longer than a year. There have been others that have lasted shorter.

QUESTION: Yes, but in each instance where it has lasted a year or longer, your answer still to my brother Powell is that the Board has said that that impasse is not an unusual circumstance?

MR. COME: That is correct.

QUESTION: But the Board might reach a conclusion that a two-year impasse did present an unusual circumstance, might it not?

MR. COME: Well, I think that the Board is -- within these rules does try to look at these things on a case by case basis, and --

QUESTION: It depends on factors such as what kind of an industry, what impact on the public, a whole range of factors, does it not?

MR. COME: I think that it could. We certainly don't have anything atypical in this case.

QUESTION: But an impasse by itself, no matter how long it lasts, never is considered an unusual circumstance which would permit withdrawal by the employer?

MR. COME: That is -- That is the Board's position.

QUESTION: Mr. Come?

MR. COME: Yes.

QUESTION: Is it the Board's position also that it is a policy of the Board to ensure equality of withdrawal rights from these units, both from the standpoint of employers and unions?

MR. COME: Yes, it is.

QUESTION: Then how do you really distinguish between the ability of an employer to withdraw in the event of an impasse versus permitting interim agreements to be signed?

MR. COME: The first thing that I want to make clear is that there were no interim agreements here, but in all candor, that has been the problem with the Courts that have had trouble with not regarding an impasse as an unusual circumstance, so the Board in this case and in subsequent cases has attempted to clarify its position with respect to interim agreements, as distinguished from what may be called final, separate agreements.

The interim agreement that the Board says does not privilege an employer from withdrawing from a multi-employer bargaining unit is an agreement similar to the one that I believe Justice White was discussing, where the union either as a result of its volition or the employer who is hurting --

QUESTION: You mean, for example, if the union

happens to strike one of the employers?

MR. COME: That is right, and Buffalo Linen says that they can do that. The other members are free to lock out. But there are a lot of other economic weapons that parties are free to use in collective bargaining, and what the --

QUESTION: Well, Buffalo Linen didn't say -- it said the union can do that, but it didn't say what the consequence on the employer is with respect to the multi-employer unit.

MR. COME: Well, right.

QUESTION: That is the issue in this case.

MR. COME: That is. The point that I am getting to is, though, that the interim agreement that the Board would say is in the economic weaponry area rather than destructive of the unit is an interim agreement that enables the struck employer to operate either under the prior contract or on the basis of the terms that the union has thus far offered to the association, but it is contingent upon being superseded by the ultimate agreement, whether it is better or worse than the -- than the --

QUESTION: And the Board says that follows, it is superseded, I gather, whether or not the parties agree that it shall be superseded.

MR. COME: That is -- well --

QUESTION: I am speaking now of one of the interim agreements, as you have defined them.

MR. COME: Well, the parties would have to so provide for the Board to regard it as an interim agreement. If they didn't so provide --

QUESTION: I see.

MR. COME: -- then it would be in the category of a --

QUESTION: Of a separate --

MR. COME: -- of a separate agreement, and --

QUESTION: In other words, the interim agreement must say in terms that this shall be superseded by the agreement reached with the multi-employer unit.

MR. COME: That is correct. That is correct, and in the Board's view, that is no more destructive of the multi-employer unit than a situation where you have a selective strike and the employers lock out, but then after a while one of them feels that he can no longer take the heat, and he resumes operations.

QUESTION: What is the situation if the parties agree? Then I gather it is not an interim agreement.

MR. COME: That is right.

QUESTION: They make the agreement, and they say, and this shall not be superseded by any final agreement reached by the unit. Then what is the position of the

employer?

MR. COME: What would be the position of the Board then?

QUESTION: As to the employer. May the employer now pull out? Is he guilty of an unfair labor practice?

MR. COME: The Board would find that such separate agreements do provide an unusual circumstance, at least where they would be substantial enough to --

QUESTION: Well, then, that says to me the Board would not find him guilty of an unfair labor practice.

MR. COME: If he withdrew --

QUESTION: For making that kind of agreement and withdrawing.

MR. COME: Yes. More than that. The Board in a case called Olympia that we have cited in our brief here has found that in that situation, the association can file an unfair labor practice charge against the union and the offending employer for refusing to bargain, so that I think in terms of these separate agreements, they are not going to be a very frequent occurrence, if at all, in view of the Board's present clarification of the total area, and the only thing that we are left with are the interim agreements which are contingent upon the ultimate association-wide agreement, and we don't even have that in this case.

QUESTION: Mr. Come, could we decide this case

without discussing interim agreements? And if so, should we?

MR. COME: I think that you can decide it without reaching interim agreements. Judge Campbell, who concurred in the court below, thought that you could do so. The majority of the Court of Appeals felt that it was necessary to reach the question because the Third Circuit in the Beck case had held that even though there wasn't any interim agreements in that case, the mere possibility of interim agreements required that the court had to address the interim agreement question.

From the Board's standpoint, and from the standpoint of the -- of the parties engaged in multi-employer bargaining, I think it would be helpful to get the entire area clarified. However, it is not essential for the Court to decide that question in order to sustain the Board in this case.

QUESTION: But we do have to -- we will certainly have to consider what the impact of a selective strike is.

MR. COME: Well, but I think that Buffalo Linen answered that question.

QUESTION: No, I said the impact, though, what the consequence is on the employer with respect to the multi-employer bargaining unit.

MR. COME: Well, with Buffalo Linen, the argument that the Second Circuit made in Buffalo Linen, and it was

rejected by this Court, was that the mere fact that in a multi-employer bargaining relationship the union selected one employer as a strike was tantamount to withdrawing from that unit or destroying the unit.

CHIEF JUSTICE BURGER: Your colleague can resume there at 1:00 o'clock.

MR. COME: Thank you, Your Honor.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Come, your time has expired, but several of the Justices have some questions for you, so will you return for some questions on the Court's time, not on your colleague's time?

MR. COME: Thank you.

QUESTION: You thought you were home free.

MR. COME: No.

QUESTION: Justice O'Connor?

QUESTION: Thank you.

Mr. Come, I would like to ask you something about the Hi-Way Billboards case, which indicated that when an impasse is reached, that the parties under those circumstances can take certain action. The union can call for a strike, the employers can engage in a lockout, the employer could hire replacements, the employer could make unilateral changes in working conditions rejected by the union.

Now, in this particular case, all those things except maybe the working conditions, which didn't appear to be an issue, had been done, and yet the impasse continued. Now, under those circumstances, isn't it reasonable to say that it was an unusual circumstance, after all those other things have been tried, because that is the purpose of letting them be tried?

MR. COME: Well, those are merely examples of some of the things that could be done. They don't exhaust the -- either the arsenal of the economic weapons that are available to the parties or what could be done to break the impasse. A mediator, for example, was not brought in, which is often the case, and does result in breaking the impasse, and the fact is that an agreement was ultimately reached here in the -- in the multi-employer bargaining unit.

I know my brother would suggest that that was due to the withdrawal of Bonanno, but I submit that it is equally possible that that is not so, because the parties did not prior to Bonanno's leaving the unit, the record shows that there were those within the unit that thought that the way to break the impasse was to increase the wage offer that was being given to the union, and that was what was ultimately one of the ways in which the log jam was broken. At that point the union withdrew its demand for compensation. So, it is equally as fair an inference.

I submit that Bonanno's departure retarded the forces that were building up, because it wasn't until several more months after he left that they finally got back on the track and worked out a solution to the problem.

The point of it is that the Board leaves insofar as possible to the parties the bargaining process, and doesn't sit in judgment in the economic weapons that they

can use. As this Court has indicated many times, the use of economic weapons is part and parcel of the system of collective bargaining, and the Board's rule with respect -- not regarding impasse as an unusual circumstance, I submit, is consistent with that general philosophy, and also with the practice of collective bargaining as it works in the -- in the real world.

QUESTION: Why isn't the withdrawal from a multi-employer bargaining unit an economic weapon which a party may use without the Board's supervision?

MR. COME: Well, if you start with the premise which we submit Congress declared, that there is a positive value in multi-employer bargaining, insofar as its making for efficient collective bargaining and industrial peace. It follows that you need some rules to govern the conduct of that relationship, because if you can withdraw at will after negotiations have started, the unit becomes a bargaining lever in the negotiations, and experience has shown that that is not conducive to effective and efficienct collective bargaining, because the parties have to know what the dimensions of the unit are before they can determine what offers they have to make, how much strength they have in the unit, and so on.

It is for that or those policy reasons that the Board has formulated the Retail Associates rules and why it

has concluded that impasse alone is not an unusual enough circumstance to --

QUESTION: Mr. Come, is it clear that, bearing in mind the consentual nature of the formation of the multi-employer unit, if at the time the employers agreed to bargain as a group, each of them put in his agreement with the others that should there be a period of three months where no progress is made in negotiations, then each of us shall have the right to withdraw and bargain separately, and that was made known to the union, there would be nothing wrong with that, would there?

MR. COME: I don't see anything wrong with it. I don't know that I have seen such a case. There may be one after this case.

QUESTION: Mr. Come, aren't multi-employer bargaining units certified? Are they ever?

MR. COME: They can be, yes.

QUESTION: Well, are they?

MR. COME: Yes.

QUESTION: Well, in that event, you wouldn't think that the agreements would hold, would they, upon withdrawal?

MR. COME: In that case, such a limited agreement might run into conflict with --

QUESTION: With the Board's rule about units.

MR. COME: Well, with the principle of Ray Brooks

that says that for a certification year --

QUESTION: Yes.

QUESTION: Was the unit in this case certified?

MR. COME: No, it was not certified.

QUESTION: But the Board sort of treats it like a certified unit, doesn't it?

MR. COME: Well, that is true when you have a contract that is negotiated, but --

CHIEF JUSTICE BURGER: Very well, Mr. Come. Thank you.

Mr. Grady, you may proceed. You have ten minutes.

ORAL ARGUMENT OF JAMES T. GRADY, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GRADY: Mr. Chief Justice, and may it please the Court, if I might, I would like to just trace these facts, because they seem to be running together. When the union struck Bonanno on June 23rd, 1975, the -- immediately the remaining employers locked out in support of Bonanno, locked out their employees, so that what started for one day as Bonanno only strike, the second day of the strike became all nine employers, including -- in addition to Bonanno, there was a strike, so the multi-employer strike was taking place. It wasn't Bonanno. It was in support of Bonanno that these other employers locked out their employees.

They -- the parties continued to meet during the

summer of 1975, and the strike went on. Some of the employers were able to hire replacements, some were not. Some's business, I am sure, was adversely impacted as a result of the strike.

The only thing that happened on -- between June 23rd, when the strike started, and November 21st, when Bonanno sent his letter to the association effectively withdrawing, the only thing that happened that is in the record is that he successfully had replaced all his struck employees with non-union or at least non-Teamster employees, so he was effectively running a non-union shop, and had effectively beaten the strike. That is, he had beaten the Teamster's union and was now non-union.

At this juncture, at this point it was no longer to his interest, economic interest to continue in this multi-employer situation, so he just withdrew, leaving those employers who had come, in effect, to his rescue, out on -- with their employees out on the street. What did they do? They immediately ended the strike.

QUESTION: They were free to do just what he did, though, were they not?

MR. GRADY: No, Your Honor. The multi-employer negotiations were continued, continuing, so they could -- they could lift their lockout at any time they saw fit. So they did. Negotiations continued from November until

April --

QUESTION: Having locked out, what was to prevent them from hiring on the open market?

MR. GRADY: They could have, Your Honor.

QUESTION: Well, that was my first question.

MR. GRADY: I am sorry, Your Honor. Yes.

QUESTION: Precisely what -- will you pinpoint precisely what is the reason why that is an impermissible economic weapon on the part of an employer who withdraws? I am speaking now of this Petitioner.

MR. GRADY: Well, precisely, Your Honor, it just weakens the whole fabric of multi-employer bargaining. The glue that keeps multi-employer bargaining together from the union point of view is the realization that down the end of the road when we finally reach an agreement all the employers in this association are going to be bound by the terms and conditions of that collective bargaining agreement.

QUESTION: Then my next question would be, do you agree with Mr. Come's response to, I believe, Mr. Justice Stevens that employers going into a multi unit could condition it that 90 days after the negotiations had been going, if no result was achieved, they would be able to withdraw?

MR. GRADY: I believe he also -- Justice Stevens indicated that there would be notice to the union of this

condition. In my opinion, the union would not participate in such negotiations, because it would be counterproductive. What happens in this -- in the situation of an impasse alone --

QUESTION: I mean, that they must get an agreement, and they couldn't get such an agreement from a union.

MR. GRADY: We would say that conditioning the bargaining with such a condition precedent as a term to commence negotiations, we would say would be improper and unrealistic, because what happens, if I may further answer your question, when these -- when we find that the negotiations, if an employer can withdraw, as the Petitioner would have it, we would then have to follow that employer and have individual negotiations with that employer, and then the next one goes, individual negotiations.

Our resources are limited. We have only so many business agents. Instead of having one set of negotiations for nine employers, we would have nine separate sets of negotiations being carried on simultaneously, with the possible result of uneven terms and conditions being negotiated. As this Court well knows, we have a duty of fair representation. So if Employer A has different terms than Employer B, and the employees are doing the exact same work, we will get -- organizationally it would be a matter

of great concern to us.

QUESTION: Your response suggests that there may be some right on the part of the union to multi-party bargaining units.

MR. GRADY: It is a consentual matter, Your Honor. We don't have to accept it. If the employers wish it and we agree with it, then -- and everyone is voluntarily getting into it, just as Bonanno did in this case, right at the outset -- he volunteered in February -- but we say, once you are in, and the Board says, you've got to conform to the rules, and the rules are, you don't quit in the middle of negotiations.

Call it impasse if you will, but impasse is a common factor. In fact, the statute contemplates 30 days before the end of the agreement you must notify Federal mediation conciliation. Well, in practice, before the mediator comes in, you are already at odds. You have said, well, I guess we are not going anywhere, let's get the mediator in here and see if he can. Now, technically, that is an impasse.

QUESTION: You say those are the rules, but if I understand Mr. Come's explanation of the law, the law is that the parties can make any rules they want to, if everybody agrees.

MR. GRADY: It is consentual, right. And we would

say in the Bonanno situation, the rules are what the Board law was in effect at the time Bonanno started, and the rules at that time, as they are now, were, and are, that you can't draw solely because of impasse, and I think Justice -- Judge Campbell in his concurring opinion was quite accurate in this --

QUESTION: Or because of a strike.

MR. GRADY: Right, strikes are, unfortunately, also part of negotiations, just like impasses. It is the use of economic strength by the lockout and the strike. They are to be expected in negotiations in the private sector. Judge Campbell said that it was not necessary to address this whole question of interim agreements. He says, this interesting but nonessential matter. There was no interim agreements in this case. An attempt to raise meetings to negotiations and to an interim agreement, it is just not there. It is not in the record. There were no interim agreements. This is strictly an employer, when he saw the appropriate opportunity for him withdrawing from the association, abandoning his fellow employers, as it were, and the important thing is, we did reach a contract with the remaining employers in April, and the reason we reached it, in almost a year of negotiations, and what some would describe during an impasse period, is, the union gave up its demand for commissions.

QUESTION: Well, at the very first formal negotiations session, don't you have what is in effect an impasse?

MR. GRADY: No, because the parties -- usually at the first session the ground rules are developed, and the first proposals are exchanged. Then the issues are narrowed, and typically the parties will say, all right, we can agree on this clause, we can agree on that, what is left? And then you go over -- and then you make moves. You may increase -- or the union side would reduce its wage proposal, the employer may increase its wage offer, so you may be --

QUESTION: Well, at what point do you know you have an impasse?

MR. GRADY: I would say a genuine impasse is when there are no meetings scheduled and no plans to discuss anything any further, in my opinion.

QUESTION: Is there anything to prevent the union from singling out one employer and negotiating with him privately?

MR. GRADY: Well, if we did that, we would again get back to the question whether it would be an interim agreement or not. The Board says, if it is an interim agreement and subject to being modified and solely dependent on what the ultimate association agreement is, that is

permissible. If, on the other hand, it is an absolute agreement, regardless of what ultimate contract is reached with the association, then the Board seems to be saying that that is improper, and if you have enough of them, particularly if you have -- then it is disruptive of the entire association, because it is inconsistent with having an association --

QUESTION: Do you mean, and therefore an unfair labor practice?

MR. GRADY: I wouldn't characterize it --

QUESTION: Well, it is not an interim agreement. They arrive at a separate one which they regard as final. What is the consequence for the employer in terms of unfair labor practice?

MR. GRADY: I don't see any.

QUESTION: Then he is home free, is he?

MR. GRADY: It is just broken up. The parties are back to Square One again, individual negotiations will take over from there.

QUESTION: I see. You mean that automatically breaks up the multi unit?

MR. GRADY: I don't think the law is that clear, Your Honor. I think one agreement wouldn't do it, but if you had -- half your employers had signed solid agreements that are not subject to change, then it seems to me you

don't have an association any more. It is gone.

QUESTION: But under that view, then the union is free any time it wants to to make a separate agreement with an individual employer.

MR. GRADY: I think they do so. There is another issue that has not been raised that I am cognizant of, and that is some possible restraint of trade considerations with an interim agreement.

QUESTION: Well, forget the antitrust, but just as a matter of your view of the Labor Act, a union is free to make a binding, long-term agreement with one member of the multi-employer unit any time it wants to?

MR. GRADY: It wouldn't be long-term, Your Honor. It would say by its terms, the preamble would say, this agreement is an interim agreement, subject --

QUESTION: No, no, no. Putting interim agreements to one side.

MR. GRADY: Oh, okay.

QUESTION: As I understand your view of the law, it would not be an unfair labor practice for the union to enter into a binding, long-term agreement with one member of the bargaining unit.

MR. GRADY: I would prefer to have the consent of the remaining employers.

QUESTION: But if you didn't get it.

QUESTION: I understand you would prefer that, but it would not violate any rule that you know of for the union to do that.

MR. GRADY: I would -- if we did that, it would not violate the law, but I would anticipate that it is the end of multi-employer bargaining.

QUESTION: The Board doesn't agree with you, does it?

MR. GRADY: The Board has yet to define how many of those let's call them solid-agreements add up to breakup --

QUESTION: I thought the Board in its brief here -- I thought the Board in its brief here had said that they only recognized interim agreements pending the execution of the unit-wide contract.

MR. GRADY: The case that they cite, I believe, was consentual in terms of the remaining employers. They didn't --

QUESTION: Well, it may be that they haven't got any case, but they certainly say that is their position now.

MR. GRADY: Yes, Your Honor.

QUESTION: Doesn't that give the union an economic weapon here that you suggest is denied, the counterpart of which is denied to the employer?

MR. GRADY: I don't see that at all, Your Honor.

It is all consentual to start off with, so that if the parties want to have multi-employer bargaining, they can have it. If they want to end it, they may do it. The interim is not ending it. Clearly, just walking out on impasse is improper, and that is what we are here for, and that is the only issue before this Court.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:18 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

CHARLES D. BONANNO LINEN SERVICE, INC., vs. NATIONAL LABOR RELATIONS BOARD, ET AL.

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BY Suzanne Young