The Burger Court Opinion Writing Database

Charles D. Bonanno Linen Service, Inc. v. NLRB

454 U.S. 404 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 23, 1981

Re: No. 80-931 Charles D. Bonanno Linen Service, Inc.
v. National Labor Relations Board, et al.

MEMORANDUM TO: Justice Powell
Justice Rehnquist
Justice O'Connor

I will put my hand to a dissent in this case.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 12, 1981

Re: No. 80-931 - Charles D. Bonanno Linen Service, Inc. v. NLRB

MEMORANDUM TO THE CONFERENCE:

I will circulate a dissent in due course.

Regards,

WEB

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: 11/20/81

Recirculated: _____

No. 80-931, Charles D. Bonanno Linen Service, Inc. v. NLRB

CHIEF JUSTICE BURGER, dissenting.

The Court today affirms the National Labor Relations Board's finding that withdrawal of an employer from a multiemployer bargaining unit, after a long drawn out and unproductive bargaining impasse, consitutes an unfair labor practice by the employer in violation of §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5). In addition, the Court indicates that withdrawal is not permissible even after the union has negotiated separate agreements with other members of the bargaining unit in order to "whipsaw" the remaining members into compliance.[1] The Court

[1]"Whipsawing" describes any one of several tactics by which a union creates a situation in which some but not all employers in a multiemployer group are closed or hampered by a strike or lockout. A union may call a strike against one or a few of the employers or, in the face of a lockout, it may negotiate a separate agreement with one or a few employers. Some of the employers are thus unable to conduct business as usual while others are fully operational. The theory behind whipsawing is that the impaired employers, seeing their com-

Footnote continued on next page.

stylistic changes 2, 3, 6, 7

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____

Recirculated: DEC 0 3 1981

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[December ——, 1981]

CHIEF JUSTICE BURGER, dissenting.

The Court today affirms the National Labor Relations Board's finding that withdrawal of an employer from a multi-employer bargaining unit, after a long drawn out and unproductive bargaining impasse, consitutes an unfair labor practice by the employer in violation of §§ 8(a) (1) and (5) of the National Labor Relations Act, 29 U. S. C. §§ 158(a) (1), (5). In addition, the Court indicates that withdrawal is not permissible even after the union has negotiated separate agreements with other members of the bargaining unit in order to "whipsaw" the remaining members into compliance.[1] The Court bases its holding in large part on deference to the

[1] "Whipsawing" describes any one of several tactics by which a union creates a situation in which some but not all employers in a multiemployer group are closed or hampered by a strike or lockout. A union may call a strike against one or a few of the employers or, in the face of a lockout, it may negotiate a separate agreement with one or a few employers. Some of the employers are thus unable to conduct business as usual while others are fully operational. The theory behind whipsawing is that the impaired employers, seeing their competitors enjoying a market advantage and fearing that those competitors will increase their market share at the expense of the impaired employer, will be under irresistible pressure to yield to the union's demands.

CHANGES THROUGHOUT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____

Recirculated: JAN 7 1982

2nd PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[January ——, 1982]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

The Court today affirms the National Labor Relations Board's finding that withdrawal of an employer from a multi-employer bargaining unit, after a long drawn out and unproductive bargaining impasse, consitutes an unfair labor practice by the employer in violation of §§ 8(a) (1) and (5) of the National Labor Relations Act, 29 U. S. C. §§ 158(a) (1), (5). In addition, the Court indicates that withdrawal is not permissible even after the union has negotiated separate agreements with other members of the bargaining unit.[1] The Court bases its holding in large part on deference to the

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Supreme Court of the United States
Washington, D. C. 20543

November 12, 1981

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

RE: No. 80-931 Charles D. Bonnano Linen Service
v. N.L.R.B.

Dear Byron:

I am with you of course, but I have one minor question: wouldn't it be appropriate to provide a little more detail on the Board's earlier practice in regard to separate and interim agreements (and am I right in thinking that only interim agreements based on conditions before dispute, or on the union's last rejected offer, are approved by the Board?). If appropriate, these matters might be addressed by way of footnote on page 9, before you so effectively refute the Beck rationale.

Sincerely,

Bill

Justice White

Brennan 81

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1981

RE: No. 80-931 Charles D. Bonanno Linen Service v. N.L.R.B.

Dear Byron:

I agree.

Sincerely,

Bill

Justice White

cc: The Conference

0$0931D 11/5/81 spw

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 6 NOV 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[November ——, 1981]

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a bargaining impasse justifies an employer's unilateral withdrawal from a multiemployer bargaining unit. The National Labor Relations Board (Board) concluded that an employer attempting such a withdrawal commits an unfair labor practice in violation of §§ 8 (a) (5) and (1) of the National Labor Relations Act (Act), 29 U. S. C. § 160 (e), by refusing to execute the collective bargaining agreement later executed by the union and the multiemployer association.[1] The Court of Appeals for the First Cir-

[1] Section 8 (d) of the Act, 29 U. S. C. § 158 (d) states, in relevant part: "[T]o bargain collectively is the performance of 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, or the negotiation of an agreement, . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

Section 8 (a) (5) of the Act, 29 U. S. C. § 158 (a) (5), declares it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." Section 8 (b) (3), 29 U. S. C. § 158 (b) (3), declares it an unfair labor practice for a labor organization "to refuse to bargain collectively with

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

0$0931D, 11/24/81, 2nd rev. Wilma

From: Justice White

Circulated: _____

Recirculated: 25 NOV 1981

pp 13-15

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[November ——, 1981]

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a bargaining impasse justifies an employer's unilateral withdrawal from a multiemployer bargaining unit. The National Labor Relations Board (Board) concluded that an employer attempting such a withdrawal commits an unfair labor practice in violation of §§ 8(a) (5) and 8(a) (1) of the National Labor Relations Act (Act), 29 U. S. C. §§ 158(a) (5) and 158(a) (1), by refusing to execute the collective bargaining agreement later executed by the union and the multiemployer association.[1] The Court of Ap-

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[December ——, 1981]

JUSTICE WHITE delivered the opinion of the Court.

The issue here is whether a bargaining impasse justifies an employer's unilateral withdrawal from a multiemployer bargaining unit. The National Labor Relations Board (Board) concluded that an employer attempting such a withdrawal commits an unfair labor practice in violation of §§ 8(a) (5) and 8(a) (1) of the National Labor Relations Act (Act), 29 U. S. C. §§ 158(a) (5) and 158(a) (1), by refusing to execute the collective bargaining agreement later executed by the union and the multiemployer association.[1] The Court of Ap-

[1] Section 8(d) of the Act, 29 U. S. C. § 158(d) states, in relevant part: "[T]o bargain collectively is the performance of 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, or the negotiation of an agreement, . . . and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 12, 1982

MEMORANDUM TO THE CONFERENCE

Case held for No. 80-931:

Charles D. Bonanno Linen Service, Inc. v. NLRB

No. 80-1498 - NLRB v. H & D, Inc., 105 L.R.R.M. 3070 (CA9 1980).

Resp manufactures aluminum doors and windows. At the time in question, about half of its employees were members of the Ironworkers Shopmen's union, and resp's practice had been to join two other employers for joint bargaining with the union local.

Early in 1977, negotiations for a new contract began. Between February 22 and April 20, seven bargaining sessions were held and two employer proposals were rejected by union members. On April 25, the union membership defeated the third employer proposal. The union then unanimously voted to strike and two days later commenced picketing.

During the negotiations, however, the H & D employees who were union members had expressed dissatisfaction with the union's representation. Indeed, when an employer proposal was rejected on April 2, most of the H & D employees submitted written resignations from the union. None of H & D's employees participated in the strike.

The union refused H & D's request that it be permitted to withdraw from negotiations on the basis of its employees' resignations. On May 3, when the union suggested a second reconsideration vote on a proposal which the membership had already rejected, H & D notified the union by letter that a bargaining impasse had been reached and that because of the impasse, it was withdrawing from negotiations.

The union filed charges with the NLRB. The ALJ found that no unfair labor practice had been committed because no multiemployer bargaining unit existed. The Board reversed this finding on the basis of the employer's established practice. It went on to conclude that no impasse existed and that no unusual circumstances, such as the employees' resignation, justified withdrawal.

The CA overturned the Board's factual finding that no impasse existed. It rejected the Board's position in Hi-Way Billboards that impasse does not justify unilateral withdrawal from a multiemployer bargaining unit. That is, the CA concluded that the impasse was an unusual circumstance justifying withdrawal. It did not reach the issue of whether there was a multiemployer bargaining unit or whether the resignation of H & D's employees constituted an "unusual circumstance" permitting withdrawal.

The SG contends that the question here is identical to that in Bonanno. I agree. Although other issues, which the CA did not reach, distinguish this case from Bonanno, the CA's decision is inconsistent with the holding in Bonanno, and I would GVR in light of our decision.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 16, 1981

Re: No. 80-931 - Charles D. Bonanno Linen Service v. National Labor Relations Board

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 23, 1981

Re: No. 80-931 - Charles D. Bonanno Linen Service, Inc.
National Labor Relations Board

Dear Byron:

Please join me.

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1981

80-931 Bonanno Linen v. NLRB

Dear Chief:

I am awaiting Sanda's circulation.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

December 15, 1981

80-931 Bonanno Linen Service v. NLRB

Dear Sandra:

Thank you for the opportunity to comment on your proposed dissent.

It is extremely well written, and I fully agree with your two major points. (i) Some impasses may fragment a unit; therefore, the Court's view that an impasse, no matter how long, does not justify unilateral employer withdrawal, is analytically unsound and also unfair. (ii) The Court also errs in assuming that interim agreements may not have a fragmenting effect.

As to the first point, my understanding is that the Board has not yet taken the position that "unusual circumstances" - following an impasse - will never justify withdrawal. Rather, I believe its position is that neither an impasse in itself nor an impasse accompanied by the use of the economic weapons approved in Buffalo Linen, constitute "unusual circumstances" that would justify withdrawal. This position is seriously flawed by the fact that the Board attaches no weight whatever to the duration of the impasse - as you point out so forcefully in your opinion.

If I am correct about the Board's position, I suggest that you consider omitting or modifying the sentence near the bottom of page 2 that commences "As a result, . . .". The Board does examine situations in which there are impasses if the employer faces bankruptcy or if unilateral actions by the union or other employers have substantially fragmented the unit.

As to "interim agreements", I agree with you that the Court's position (interim agreements never fragment the unit) is nonsense. You might emphasize the far-reaching consequences of the Court's position by noting that even the Board has not yet adopted a per se rule that interim agreements may never fragment the bargaining unit. Indeed,

in its brief to this Court (at 30) the NLRB argued that it does allow withdrawal when interim agreements lead to unit fragmentation. There, it cited two cases in which the Board considered the effect of interim agreements in determining that units were fragmented: Typographic Service Co., 238 NLRB 211 (1978) and Connell Typesettinbg Co., 212 NLRB 918 (1974). There are Board cases that appear to hold the contrary, but I believe they have not done so on the basis of a per se rule. In sum, I am afraid the majority opinion will be read as approving a rule even more favorable to unions than the Board itself has adopted. As your opinion suggests, this is hardly the way to encourage multi-employer bargaining or industrial peace.

The foregoing comments are for your consideration. If you can accommodate them generally, I will be happy to join your dissent. I particularly like the crisp way in which it is written, and also the avoidance of the absolute positions in both the majority and the dissent of the Chief.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 30, 1981

Re: No. 80-931 Bonanno v. NLRB

Dear Chief:

Please join me in your dissenting opinion.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 12, 1981

Re: 80-931 - Bonanno Linen v. NLRB

Dear Byron:

Please join me.

Respectfully,

JPS

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: NOV 23 '81

Recirculated: _____

80-931 Bonanno Linen Service v. NLRB

JUSTICE STEVENS, concurring.

The Court's holding today does not impair an employer's freedom to structure the manner in which it will conduct collective bargaining. Its opinion, which I join, recognizes the voluntary nature of multiemployer bargaining, see ante, at 8, and notes that the Board "neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." Ibid.

The mere fact that an employer bargains in conjunction with other employers does not necessarily mean that it must sign any contract that is negotiated by the group. The Board requires that, to be bound by the terms of group negotiation, the members of an employer association must "have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and the union representing their employees must "[have] been notified of the formation of the group and the delegation of bargaining authority to it, and [have] assented and entered upon negotiations with the group's representative." Weyerhaeuser Co., 166 N.L.R.B. 299, 299 (1967), enf'd, 130 U.S. App. D.C. 176, 398 F.2d 770 (1968). This test is

well established in the Courts of Appeals. See, e.g., NLRB v. Beckham, Inc., 564 F.2d 190, 192 (CA5 1977); Komatz Construction, Inc. v. NLRB, 458 F.2d 317, 321 (CA8 1972); NLRB v. Hart, 453 F.2d 215, 217 (CA9 1971), cert. den. 409 U.S. 844 (1972); NLRB v. Dover Tavern Owners' Ass'n, 412 F.2d 725, 727 (CA3 1969). Absent such an unequivocal commitment to be bound by group action, an employer is free to withdraw from group negotiation at any time, or simply to reject the terms of the final group contract. See Komatz Construction, supra; Ruan Transport Corp., 234 N.L.R.B. 241 (1978). In the instant case, petitioner has never questioned the unequivocal character of its commitment to participate in and to be bound by the results of group negotiation.

The Court's holding does not preclude an employer from explicitly conditioning its participation in group bargaining on any special terms of its own design. Presumably, an employer could refuse to participate in multiemployer bargaining unless the union accepted the employer's right to withdraw from the bargaining unit should an impasse develop. The union or the other members of the bargaining unit of course may reject such a condition; in such a case, however, the employer simply would be forced to choose between agreeing to be bound by the terms of group negotiation without a right of withdrawal at impasse, or forgoing the advantages of multiemployer bargaining and bargaining on its own.

0$0931I 11/24/81 spw

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: NOV 25 '81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[November ——, 1981]

JUSTICE STEVENS, concurring.

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The mere fact that an employer bargains in conjunction with other employers does not necessarily mean that it must sign any contract that is negotiated by the group. The Board requires that, to be bound by the terms of group negotiation, the members of an employer association must "have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action," and the union representing their employees must "[have] been notified of the formation of the group and the delegation of bargaining authority to it, and [have] assented and entered upon negotiations with the group's representative." *Weyerhaeuser Co.*, 166 N. L. R. B. 299, 299 (1967), *enf'd*, 130 U. S. App. D. C. 176, 398 F. 2d 770 (1968). This test is well established in the Courts of Appeals. See, *e. g.*, *NLRB* v. *Beckham, Inc.*, 564 F. 2d 190, 192 (CA5 1977);

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 7, 1981

No. 80-931 Charles D. Bonanno Linen Service, Inc. v. National Labor Relations Board

Dear Byron:

I shall await the draft of a dissent from the Chief in this case.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 3, 1981

No. 80-931 Bonanno Linen Service, Inc. v.
National Labor Relations Board

Dear Chief,

I plan to try writing a brief separate dissent in the referenced case which would indicate my preference for a rule which would examine the circumstances of the particular impasse and related events in order to determine whether an unfair labor practice has occurred. I am uncomfortable with the "all or nothing" approaches of both the majority and your proposed dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 14, 1981

No. 80-931 Bonanno Linen Service v. NLRB

Dear Lewis,

Attached is my proposed separate dissent in the referenced case. I have not yet circulated it, and would welcome your thoughts, changes or additions.

Sincerely,

Sandra

Justice Powell

Enclosure

DRAFT DISSENT

80-931
CHARLES D. BONANNO LINEN SERVICE, INC. v. NLRB

JUSTICE O'CONNOR, dissenting.

I join the CHIEF JUSTICE in the introductory comments and part I of his dissent. However, I write separately because I believe labor peace would be advanced by avoiding the absolute positions adopted both by the majority and by the dissent of the CHIEF JUSTICE. Because I am convinced that the Board should examine the circumstances surrounding and following an impasse to determine whether an unusual circumstance sufficient to justify withdrawal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 16, 1981

No. 80-931 Bonanno Linen Service v. NLRB

Dear Lewis,

Thank you for your suggestions. They are valid and have been incorporated in the draft by omitting the sentence on page 2 and adding a footnote on page 6. If it meets with your approval, I shall circulate it.

Sincerely,

Sandra

Justice Powell

Revised draft

DRAFT DISSENT

CHARLES D. BONANNO LINEN SERVICE, INC. v. NLRB

JUSTICE O'CONNOR, dissenting.

I join the CHIEF JUSTICE in the introductory comments and part I of his dissent. However, I write separately because I believe labor peace would be advanced by avoiding the absolute positions adopted both by the majority and by the dissent of the CHIEF JUSTICE. Because I am convinced that the Board should examine the circumstances surrounding and following an impasse to determine whether an unusual circumstance sufficient to justify withdrawal

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: DEC 17 1981

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-931

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER, *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

[December ——, 1981]

JUSTICE O'CONNOR, with whom JUSTICE POWELL joins, dissenting.

I join THE CHIEF JUSTICE in the introductory comments and part I of his dissent. However, I write separately because I believe labor peace would be advanced by avoiding the absolute positions adopted both by the majority and by the dissent of THE CHIEF JUSTICE. Because I am convinced that the Board should examine the circumstances surrounding and following an impasse to determine whether an unusual circumstance sufficient to justify withdrawal has occurred, and because I cannot accept the Court's conclusory statements concerning the effects of all interim agreements, I respectfully dissent.

I

The Court agrees with the Board that an impasse is not an unusual circumstance "sufficiently destructive of group bargaining to justify unilateral withdrawal." The Board adopted that position after identifying an impasse as (1) simply a "temporary deadlock or hiatus in negotiations" (2) which may be brought about intentionally by one of the parties and (3) which in almost all cases is "eventually broken either through a change of mind or the application of economic

TM Draft?

Re: Charles D. Bananno Linen Service, Inc., v. NLRB, No. 80-931

Dear Byron,

I am in general agreement with your opinion in this case. However, I am troubled by one sentence. On page 10, the first sentence of the first full paragraph states: "On the other hand, where the union, not content with interim agreements that expire with the execution of a unit-wide contract, executes separate agreements that will survive unit negotiations, the union has so 'effectively fragmented and destroyed the integrity of the bargaining unit,' id., as to amount to an 'unusual circumstance' under Retail Associates rules." I believe that this sentence can be read to equate one, or perhaps two, final agreements with sufficient unit fragmentation ~~as~~ to justify withdrawal by an employer. While this may generally be the case, I understand the Board's position to be that when final agreements are made, both the union and the employer executing the agreement may be found to have committed unfair labor practices, but that it is a factual matter for the Board to decide, after considering the number of final agreements and the size of the employer(s) executing final agreements, whether sufficient "fragmentation" has occurred to justify withdrawal. I think that your statement may create a per se rule allowing withdrawal whenever any employer executes a final agreement, regardless of how

insignificant the executing employer may be in relation to the entire multiemployer bargaining unit.

If you could modify this sentence to make it clear that execution of final, separate agreements does not automatically justify withdrawal, I would be glad to join your opinion.

Sincerely,

To: Justice White

cc: Conference