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Richard A. Bock

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MULTIEMPLOYER BARGAINING AND WITHDRAWING FROM THE ASSOCIATION AFTER BARGAINING HAS BEGUN: 38 YEARS OF "UNUSUAL CIRCUMSTANCES" UNDER RETAIL ASSOCIATES

I. INTRODUCTION

It is not too difficult to imagine. Just as a collective bargaining agreement is about to expire and a multiemployer association is engaged in negotiations with a labor organization to come to terms over a new agreement, one of the member employers thinks it can do a better job of bargaining on its own. Should it be allowed to try? When can it try and when does the law prevent it from trying? What are the employer member's obligations to the association? What are those obligations to the union? Do those obligations differ after bargaining has begun and, if so, why do they and why should they?

An examination of these issues must begin with a discussion of multiemployer bargaining, the kind which involves employer associations. Multiemployer bargaining is a process whereby a group of employers join forces to create a single unit or association for the purpose of bargaining collectively with a union or group of unions." This practice dates back to the earliest days of collective bargaining. The process works to the advantage of employers seeking leverage in dealing with larger unions. Furthermore, multiemployer bargaining, if adhered to by the members, allows the employers to combat unions.

1. See ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 86 (1976); see also NBA v. Williams, 45 F.3d 684 (2d Cir. 1995) (rejecting the argument that player restraints in the National Basketball Association violate federal antitrust laws because of the league's status as a multiemployer bargaining unit).

2. See Milton Derber, Employer's Associations in the United States, in EMPLOYERS ASSOCIATIONS AND INDUSTRIAL RELATIONS, A COMPARATIVE STUDY 79 (John P. Windmuller & Alan Gladstone eds., 2d ed. 1986) (noting that when the Philadelphia shoemakers struck for higher wages in 1799, they opposed a society of cordwainers who had organized a full 10 years earlier).

3. GORMAN, supra note 1, at 86.
which engage in whipsaw tactics.\(^4\)

Meanwhile, multiemployer bargaining potentially works to the advantage of the labor union by fostering security, creating a greater standardization of wages and working conditions under a group contract, and by enabling the union to save the time and money typically associated with bargaining with each employer on an individual basis.\(^5\)

To date, Congress has not explicitly authorized the National Labor Relations Board ["Board"] to certify multiemployer bargaining units (units of employers banding together to form these employer associations).\(^6\) Rather, the appropriateness of a multiemployer unit rests upon the mutual consent of both the employers and union(s) to such an arrangement.\(^7\) However, once both parties have consented to multiemployer bargaining, either may desire to withdraw from bargaining on that basis. Whether such a withdrawal is sought prior to or subsequent to the commencement of bargaining is pivotal to a determination of whether that party may effectuate the withdrawal.\(^8\)

Prior to 1958, the Board took the position that any withdrawal, either by a union or employer, would be permissible provided that it was done in good faith.\(^9\) In that year, however, the Board took a different direction when it promulgated a new set of rules to govern the withdrawal situation in the landmark case of Retail Associates.\(^10\) In that case, a retail clerks union engaged in whipsaw tactics\(^11\) before attempting to withdraw from bargaining on a multiemployer basis.\(^12\) However, it had already been engaged in bargaining on that basis at the time of the attempted withdrawal.\(^13\) Citing its responsibility to "foster and maintain[] stability in bargaining relationships"\(^14\) as a fundamental
As to attempted withdrawals undertaken prior to the commencement of bargaining, the Board held that it would "not allow those withdrawals from duly established multiemployer bargaining unit[s], 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."17

However, the Board pronounced a noticeably different standard with respect to those withdrawals attempted “[w]here actual bargaining negotiations based on the existing multiemployer unit have [already] begun.”18 In this situation, the Board held that it “would not permit, except upon mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.”19 Such an abandonment would constitute an unfair labor practice.20

The Board ultimately elaborated on the definition of mutual consent.21 However, the question of what constitutes an unusual circumstance was left to be determined on a factual, case by case basis.22 Thirty-eight years of cases have carved a winding road for the unusual circumstances exception. The definition of unusual circumstances is clearly pivotal, as the exception will enable an employer to disregard consent, unilaterally withdraw from multiemployer bargaining, and free itself from a subsequent agreement reached by the union and multiemployer unit.23 In light of the policy of the Act as pronounced

17. Id.
18. Id.
19. Id. (emphasis added).
20. The abandonment would violate section 8(a)(5) of the Act, constituting a refusal to bargain. Id.
21. See Teamsters Union Local No. 378 (Olympia Automobile Dealer’s Ass’n), 243 N.L.R.B. 1086, 1089 (1979).
22. It has been reasoned that [t]he concept of unusual circumstances cannot be precisely defined in a manner that is readily applicable to all situations. Rather [i]t is dependent on an examination of the facts of each case viewed in light of the parties bargaining conduct and the impact that this conduct may have on the continued viability of multiemployer contract negotiations.
in Retail Associates, namely to “foster[] and maintain[] stability in bargaining relationships,” it is understandable that the unusual circumstances exception has been strictly construed.

Over the last thirty-eight years, the Board and Courts of Appeal have been faced with a variety of situations that employers have argued should constitute unusual circumstances, thus justifying an employer’s untimely unilateral withdrawal from a multiemployer unit. This Note will discuss the situations in which unusual circumstances have been found, as well as some situations in which they have not. The Note then will analyze those landmark cases in which unusual circumstances were first found. Specifically, it will discuss those cases and how they led to further developments in the law of unusual circumstances. It will also attempt to get to the heart of the reasoning behind findings of unusual circumstances.

II. DISCUSSION

As a threshold matter, it is important to indicate that this Note focuses on cases involving employer withdrawal from the multiemployer unit. Although the Note is intentionally confined to these situations, the same rules would apply to unions attempting to effectuate an untimely withdrawal.

An employer attempting an untimely withdrawal creates numerous problems. For instance, the withdrawing employer will, no doubt, refuse to be bound by any agreement reached between the multiemployer unit and the union subsequent to its departure. More importantly, such a withdrawal could have a detrimental effect on the entire collective bargaining process.

24. Supra note 14 and accompanying text.
25. See Chel LaCort, 315 N.L.R.B. 1036 (1994) (holding that failure to be notified of the commencement of bargaining is not a justification for withdrawing from a multiemployer unit).
26. For a discussion of the appropriateness of union withdrawal from multiemployer bargaining, see Status of Multiemployer Bargaining, supra note 4.
27. See Publisher's Ass'n of New York City v. NLRB, 364 F.2d 293 (2d Cir. 1966) (holding that the rule of Retail Associates applies to both employers as well as unions). It should be noted that Retail Associates itself provided that the rule applied to both unions and employers. Retail Associates, 120 N.L.R.B. at 388, 395 (1958).
28. See, e.g., NLRB v. Siebler Heating & Air Conditioning, 563 F.2d 366 (8th Cir. 1977) (where the withdrawing employer refused to be bound to an agreement reached by the union and multiemployer association after that employer had claimed to have withdrawn from the unit).
29. Depending on the employer, an employers association could become significantly weakened if a substantial member withdraws. See infra notes 261-324 and accompanying text for a discussion of unit fragmentation.
It is against this backdrop that the Board has held that the unusual circumstances exception "has been limited to extreme situations."\textsuperscript{30} In the thirty-eight years since \textit{Retail Associates}, the Board and federal courts have recognized four major categories in which unusual circumstances have been found.\textsuperscript{31} In \textit{Charles D. Bonanno Linen Service v. NLRB}, the United States Supreme Court accepted the Board's approach when it pronounced that "unusual circumstances will be found where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented."\textsuperscript{32} Prior to this decision, some courts had held that an impasse in bargaining was sufficient to constitute an unusual circumstance.\textsuperscript{33} The Supreme Court resolved a split in the circuits over this issue when it embraced the Board's view that "impasse is not sufficiently destructive of group bargaining to justify unilateral withdrawal."\textsuperscript{34} Finally, one court, but not the Board, has held that a conflict of interest, which renders the multiemployer unit incapable of fairly representing the withdrawing employer, is sufficient to satisfy the unusual circumstances exception.\textsuperscript{35} This troublesome case provides a launching pad for this Note.

A. Conflict of Interest/Fair Representation of the Employer

In 1977, the United States Court of Appeals for the Eighth Circuit found that where an employer's interests were not fairly represented by the multiemployer unit to which it belonged, that employer could justify withdrawal after bargaining had begun under the unusual circumstances exception.\textsuperscript{36} However, the Board has never found this situation to be an unusual circumstance. No other circuit has ever found so either. In fact, no case has ever cited this decision to support the premise.

\textsuperscript{30} Supra note 25.

\textsuperscript{31} See \textit{NLRB v. Charles D. Bonanno Linen Serv.}, 454 U.S. 402 (1982) (discussing three of these situations, including instances where a withdrawing employer faces extreme financial pressures, where a unit has become substantially fragmented, and where an impasse takes place. The final situation involved the failure of a multiemployer unit to properly represent the interests of the withdrawing employer). Each of these unusual circumstances will be discussed at length.

\textsuperscript{32} Id. at 411.

\textsuperscript{33} See \textit{NLRB v. Independent Assn. of Steel Fabricators}, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979); \textit{NLRB v. Beck Engraving Co.}, 522 F.2d 475 (3d Cir. 1975); \textit{Fairmont Foods v. NLRB}, 471 F.2d 1170 (8th Cir. 1972); \textit{NLRB v. Associated Shower Door Co.}, 512 F.2d 230 (9th Cir. 1975); \textit{NLRB v. Hi-Way Billboards}, 500 F.2d 181 (5th Cir. 1975). But see \textit{Charles D. Bonanno Linen Serv. v. NLRB}, 630 F.2d 25 (1st Cir. 1979).

\textsuperscript{34} \textit{Bonanno Linen}, 454 U.S. at 412 (1982).

\textsuperscript{35} \textit{NLRB v. Siebler Heating & Air Conditioning, Inc.}, 563 F.2d 366 (8th Cir. 1977).

\textsuperscript{36} Id. at 371.
While the Siebler Heating & Air Conditioning case may fairly be characterized as an aberration, further analysis is helpful to understanding the pre-Bonanno rationale and construction of the unusual circumstances exception. In Siebler, the respondents were members of the Sheet Metal and Air Conditioning Contractors National Association ("SMACNA"). SMACNA was comprised of both residential and commercial contractors. Siebler and a number of other residential contractors in SMACNA attempted to withdraw from the organization and form their own employers association. However, they attempted this withdrawal while their collective bargaining agreement with the Sheet Metal Workers International Association (the union) was being renegotiated.

The respondents' dispute with SMACNA centered on the issue of journeyman wage rates for residential work, clearly an issue of far more concern to the residential contractor members of SMACNA than to those member employers engaged in commercial and industrial work. A residential addendum to the 1972-73 collective bargaining agreement provided for "journeyman sheet metal employees doing residential work [to be] paid ninety-six percent of the regular journeyman rate." The 1973-74 collective bargaining agreement did not include a residential addendum because the parties could not agree to its terms.

In early 1974, the union and SMACNA agreed to a residential addendum for the 1974 agreement, which lowered the rates for residential installers to seventy-five percent. That seventy-five percent rate, however, was to be applied only to single family dwellings. The addendum's terms were to take effect on April 1, 1974. In March, the union and SMACNA agreed to renegotiate the 1973-74 contract. Siebler's representative "stated that if there was an understanding that the recently negotiated Residential Addendum would [also] be open for renegotiation, he would give SMACNA a bargaining authorization letter.

37. Respondents were heating, air conditioning and sheet metal contractors concentrating on residential work. Id. at 367.
38. Id.
39. Id. at 369.
40. Id.
41. Id. at 367-68.
42. Id. at 367.
43. Id.
44. Id.
45. Id. at 368.
46. Id. The respondents desired that this limitation be removed.
47. Id.
48. Id.
and would serve on SMACNA's negotiating committee."\(^49\) In the initial negotiating session, SMACNA proposed that the residential addendum also be renegotiated, but the union refused.\(^50\) In two subsequent sessions with the union, SMACNA did not propose amending the addendum.\(^51\)

SMACNA's members met separately to discuss the issue of the addendum,\(^52\) as Siebler had already complained to the bargaining committee about SMACNA's failure to raise the addendum issue at the negotiating table following the first meeting.\(^53\) Siebler suggested that a revised addendum be proposed to the union, one that would extend the seventy-five percent journeyman wage rate to include condominiums, apartments and service work.\(^54\) SMACNA's members rejected this.\(^55\) Earlier, the leader of the commercial employers had actually gone on record as suggesting that he "would give the union '85 cents an hour now and just leave the contract as is and forget anything else.'"\(^56\) Other commercial contractors concurred.\(^57\) Shortly thereafter, Siebler and the other residential contractors named as respondents in the case decided to withdraw from SMACNA,\(^58\) which reached an agreement with the union in June.\(^59\) The withdrawing employers later locked out employees for eight days when the union refused to bargain with the new association that Siebler and the other respondents created.\(^60\)

Based on these facts, the Board found no unusual circumstances to justify the untimely withdrawal from SMACNA.\(^61\) However, the United States Court of Appeals for the Eighth Circuit reversed the Board's decision, finding that SMACNA's failure to raise the residential addendum issue at two separate sessions, coupled with the bargaining committee's willingness to "'forget anything else'"\(^62\) was evidence that

\(^{49}\) Id. Siebler ultimately gave the authorization. Siebler's objective was to eliminate the restriction of the 75% wage rate to single family dwellings, and to make it applicable to all residential work. Id.

\(^{50}\) Id.

\(^{51}\) Id. at 368-69.

\(^{52}\) Id. at 369.

\(^{53}\) Id. at 368.

\(^{54}\) Id. at 369.

\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Id.


\(^{62}\) Siebler, 563 F.2d at 369.
SMACNA was not willing to engage in "tough bargaining."\textsuperscript{63}

The court based its finding of unusual circumstances on the premise that "an employer or group of employers has a right to expect that his or their interests will be fairly represented in negotiations and that their interests will not be totally sacrificed in the interests of the majority [of the multiemployer unit]."\textsuperscript{64} The court found that under the facts, "the majority [of the multiemployer unit] made only a feeble effort to protect the respondents’ interests, and threw in the towel at the first sign of opposition.”\textsuperscript{65} This, at least as far as the Eighth Circuit was concerned, constituted unusual circumstances that justified the employer’s untimely withdrawal from the unit.

The Siebler rationale was sharply criticized by the Board in September, 1994, in Atlas Transit Mix.\textsuperscript{66} Atlas Transit Mix involved the untimely withdrawal of a construction contractor from the multiemployer association to which it belonged.\textsuperscript{67} Among the unusual circumstances the employer claimed\textsuperscript{68} was the Siebler conflict of interest/fair representation argument.\textsuperscript{69} Specifically, the employer argued that its interests were not fairly represented because there were members of the multiemployer association willing to settle for a collective bargaining agreement without a variable start time provision, the principal issue in negotiations.\textsuperscript{70}

In his decision, Administrative Law Judge Steven Fish explained that "Siebler is a Circuit Court decision, which is contrary to current

\footnotesize{63. Id. at 370.}
\footnotesize{64. Id. at 371.}
\footnotesize{65. Id. (citations omitted).}
\footnotesize{66. 1994 NLRB LEXIS 760 (1994) (holding that a construction industry contractor violated sections 8(a)(1) and (5) of the Act by “withdrawing from the Association and refusing to abide by the terms of the agreement reached between the Association and the Union.”) Id. at *21. The fact that Atlas Transit Mix involved a construction contractor raises an important peripheral issue. In January 1995, the Board ruled that construction employers which are engaged in section 8(f) relationships (under 29 U.S.C. § 158(f) (1988)) with unions are not governed by the Retail Associates unusual circumstances rule. See James Luterbach Constr., 315 N.L.R.B. 976 (1994). Thus, whether a construction employer is engaged in an 8(f) relationship or a section 9(a) relationship is pivotal to a determination of the appropriateness of an untimely withdrawal. The rules governing the distinctions between 8(f) and 9(a) relationships are set forth in John Deklewa & Sons, 282 N.L.R.B. 1375 (1987). See infra note 74.}
\footnotesize{67. Atlas Transit Mix, 1994 NLRB LEXIS 760 at *2-*3.}
\footnotesize{68. The employer claimed dire economic circumstances, \textit{id.} at *17, impasse, \textit{id.} at *14, and bad-faith bargaining, \textit{id.}, on the part of the union. Interestingly, the Board left open whether bad faith bargaining could constitute an unusual circumstance, instead concluding that the employer failed to establish that the union bargained in bad faith. \textit{Id.}}
\footnotesize{69. Id. at *19.}
\footnotesize{70. Id.}
NLRB law, which I am bound to follow. Judge Fish distinguished the *Atlas Transit Mix* situation from the one presented in *Siebler*, explaining that "the facts herein are substantially different from Siebler." It is important to note that *Atlas Transit Mix* involved a construction employer which, if engaged in a section 8(f) relationship under the Act, would be decided by the rule stated in *James Luterbach Construction*. Pivotal to the untimely withdrawal situation of a construction employer is whether it is engaged in an 8(f) relationship or a section 9(a) relationship, which is governed by the traditional *Retail Associates/unusual circumstances* rule. Regardless of this issue, an examination of the rationale of the conflict of interest/fair representation unusual circumstance serves important historical as well as, perhaps, practical objectives.

The *Siebler* court's finding of unusual circumstances is rooted in the concept that a member of a multiemployer bargaining unit has a right to its own individual interests being represented fairly. The court cited the 1973 decision of *NLRB v. Unelko*, which initially recognized the idea that a conflict of employer interests could constitute an unusual circumstance. In *Unelko*, the central issue was a wage differential that

71. *Id.* at *20.
72. *Id.*
73. *See supra* note 66. The Board set out a two part test to determine whether 8(f) employers were to be bound to the results of multiemployer bargaining. *Luterbach Constr.*, 315 N.L.R.B. at 980. It held that, unlike a 9(a) employer who, by mere inaction during negotiations, would be bound to their results, an 8(f) employer would not be so bound unless "the employer was part of the multiemployer unit prior to the dispute giving rise to the case. . ." *Id.* If so, that employer had "by a distinct affirmative action, recommitted to the union that it [would] be bound by the upcoming or current multiemployer negotiations." *Id.*

74. *See supra* note 66. John Deklewa & Sons sets out four principles discussing 8(f) and 9(a). When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). In the event of an election, a vote in favor of the signatory union, or an [sic] rival union, will result in that union's certification and the full panoply of Section 9 rights and obligations. A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship.

75. *See infra* notes 138-40 and accompanying text for an example of a situation in which the employer's need for fair representation warrants enhanced consideration.

76. *NLRB v. Siebler Heating & Air Conditioning*, 563 F.2d 366, 371 (8th Cir. 1977). The court indicated that the employer had a "right to expect that his [ ] interests [would] be fairly represented in negotiations and [ would] not be totally sacrificed in the interests of the majority." *Id.*

77. 83 L.R.R.M. (BNA) 2447 (7th Cir. 1973).
favored four members of a multiemployer association, yet caused the respondent, also a member, to lose "a significant volume of business to its four favored competitors." The court found that on the basis of the existing conflict of interest in the unit, the respondent employer would have been justified under the unusual circumstances exception to withdraw from that unit during negotiations. However, the court also held that in order to effectuate the withdrawal, the employer was required to "act promptly and decisively" once it was on notice of the posture of negotiations approximately one month prior to the point at which it could have contractually resigned from the association. The employer did not satisfy this burden.

Although Siebler and, to a lesser extent, Unelko, recognized the duty of fair representation requirement in a multiemployer unit context, the concept was originated against the backdrop of a union’s relationship to its employee members. The standard for a union’s duty of fair representation to its members was enunciated in Vaca v. Sipes, in the context of a breach of contract suit. In Vaca, a Union member complained that the union failed to fairly process his discharge grievance when it refused to take the complaint to arbitration, the final step in a multi-step grievance procedure provided by the parties’ collective bargaining agreement. The Supreme Court explained that the union took numerous steps, including diligent supervision of the grievance into the fourth step of the collective bargaining agreement’s grievance procedure, before suspending it upon determination that “arbitration would be fruitless.” The Court held that the union’s duty of fair representation is not breached absent conduct toward the employee that is “arbitrary, discriminatory or in bad faith.”

Clearly a union owes a duty of fair representation to its members,

78. Id. at 2448.
79. Id. at 2449.
80. Id. at 2450.
81. Id. The court noted that “[u]nder the Association’s bylaws, a member could resign only during the 30-day period preceding the expiration of the union contract. . . .” Id. at 2449.
82. Id. at 2450.
83. See Robert B. Hoffman, The Trend Away From Multiemployer Bargaining, 34 LAB. L.J. 80, 92 (1983) (noting that the conflict of interest unusual circumstance is a “variation on the U.S. Supreme Court decision in the oft-cited case of Vaca v. Sipes, where the Court found [that] a duty of fair representation is owed by unions [sic] to its members.”).
85. Id. at 193.
86. Id.
87. Id. at 194.
88. Id. at 190.
but does a multiemployer association owe a similar duty to its member employers? The union's duty of fair representation, although judicially developed, is derived from the NLRA.\(^9\) Obviously, the existence of a duty is predicate to that duty being breached. The *Siebler* and *Unelko* courts attempt to create this duty for multiemployer associations on a judicial basis, however, they do not derive the duty from the Act.\(^9\) The *Siebler* opinion does not hold that it is an unfair labor practice for the multiemployer association to breach a duty of fair representation owed to its members.\(^9\) *Siebler* merely holds that when the duty, regardless of its derivation, is breached, the employer may withdraw from the association after bargaining has begun, by hiding behind the unusual circumstances exception.\(^9\) With no statute from which to derive this duty, the Eighth Circuit decision appears suspect. The Eighth Circuit has created a duty out of thin air, which removes a bargaining obligation that an employer would otherwise have had to fulfill.

While *Siebler* and *Unelko* stand alone on the fair representation/conflict of interest oasis, they raise an obvious question. In both cases, the issues that caused fair representation to be questioned were financial in nature; an employer complaining of economic loss resulting from the failure of the multiemployer association to provide it fair representation. If the root of the problems was financial, why then did the courts not find unusual circumstances under the financial pressures exception?\(^9\) Instead, the courts felt compelled to create a duty, argue that it had been breached and conclude that the breach constituted an unusual circumstance that justified an untimely withdrawal. The answer lies in a discussion of the financial pressures unusual circumstance exception.

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89. See Archibald Cox et al., *Labor Law Cases and Materials* 1043 (11th ed. 1991) (noting that "[d]espite the troubling criticisms, the Board adhere[s] to its position that the union's breach of its [duty of fair representation] is an unfair labor practice, and this position has been endorsed by every court of appeals that has considered the matter.").

90. While the Act itself does not specify anything about a union owing a duty of fair representation, the Board has held that certain conduct in breach of that duty is a statutory violation.

91. In *NLRB v. Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963), the Board first held that a breach of the union’s duty of fair representation violated sections 8(b)(1)(A) and 8(b)(2) of the Act. The *Vaca* case later enunciated the standard in the context of a breach of contract suit. See *Vaca*, 386 U.S. at 171.


93. See supra notes 31-32 and accompanying text; see also Hoffman, supra note 83, at 93 (noting that the *Siebler* court “could have just as easily found financial distress.”).
B. Extreme Financial Pressures/Dire Economic Circumstances

The Supreme Court approved of the Board finding the existence of unusual circumstances in cases “where an employer is subject to extreme financial pressures...” Precisely what constitutes these extreme financial pressures was left unaddressed by the Court, which was faced with determining if impasse was an unusual circumstance. Twenty-seven years of Board and court decisions have been answering this question on an evolving basis.

In Hi-Way Billboards, a Board decision subsequently cited by the Supreme Court to assist in determining that impasse was not an unusual circumstance, the Board explained that dire economic circumstances constituted those “in which the very existence of an employer as a viable business entity has ceased or is about to cease.”

The Board proceeded to recognize the existence of three major categories of dire economic circumstances that would constitute unusual circumstances justifying an untimely withdrawal from multiemployer bargaining. First, it ruled that economic hardships that result in bankruptcy satisfy the unusual circumstances standard. Second, it explained that the kind of severe economic problems that would “require [the employer] to close its plant” constitute unusual circumstances. Finally, the Board noted that unusual circumstances also exist “where the employer is faced with the prospect of being forced out of business for lack of qualified employees to do the job and [where] the union refuses to assist the employer by providing replacements for the employees he lost.”

In 1991, the Board cited the Hi-Way Billboards case, among others,

95. Id. at 421. The Court resolved a conflict in the circuits when it embraced the Board’s opinion that an impasse did not constitute an unusual circumstance under Retail Associates.
97. See Bonanno Linen, 454 U.S. at 411.
98. The terms “dire economic circumstances” and “extreme financial pressures” have been used interchangeably by the Board and courts.
100. Id.
101. Id. The Board explained that employer withdrawal would be justified “where the employer is subject to extreme economic difficulties which result in an arrangement under the bankruptcy laws...”.
102. Id.
103. Id.
to explain that ‘“merely business inconvenience or economic hardship, or apprehension that bargaining is progressing toward an agreement which would be economically burdensome [sic], inability to maintain a competitive position or other business exigencies will not justify an untimely withdrawal from group bargaining.”’ In Perrella Gloves, the Board once again approved the Hi-Way Billboards dire economic circumstances breakdown. This Note examines each of the dire economic circumstances in order.

1. Bankruptcy

The Board originally found dire economic circumstances to constitute unusual circumstances in 1968. The Board’s decision in U.S. Lingerie Corp. was decided in March of that year, and was the springboard for a number of later cases. In U.S. Lingerie, the union complained that the employer violated sections 8(a)(1) and 8(a)(5) of the Act by effectuating an untimely withdrawal from the Allied Underwear Association (the multiemployer unit to which the employer belonged) and by failing to adhere to the collective bargaining agreement which resulted from the multiemployer unit’s negotiations with the union. The union also charged that the employer failed to notify and bargain with it over the shutdown of its plant and subsequent relocation. The employer defended the charges by arguing that its withdrawal was qualified under the unusual circumstances exception and that the union had notice of the removal, but failed to raise the issue and thus waived its right to bargain.

Clearly, the withdrawal attempted by the employer was untimely. However, at the time of the withdrawal, the employer was a

109. Id.
110. Id.
111. Id. For a current codification of the Board’s waiver standard, see Intermountain Rural Elec. Ass’n, 305 N.L.R.B 783, 786 (1991), enfd., 984 F.2d 1562 (10th Cir. 1993) (discussing the viability of an employer’s unilateral implementation of proposed changes).
112. U.S. Lingerie had first contacted the Association on May 11 to inquire about withdrawing from that Association. Id. at 751. By that point, negotiations had already begun for an agreement replacing the current contract, set to expire in June. Id. U.S. Lingerie attempted to make its
debtor in possession, having filed a petition for bankruptcy under Chapter XI of the Bankruptcy Code five months prior to the withdrawal.\(^{113}\)

In addition, the evidence showed that the employer had communicated its economic problems to the union less than one month after filing the bankruptcy petition,\(^{115}\) and had actually sought the union’s assistance to deal with the economic dilemma in which it found itself.\(^{116}\)

Although the employer was aware of its financial difficulties prior to the commencement of negotiations,\(^{117}\) the Board concluded that those difficulties constituted unusual circumstances justifying its untimely withdrawal from the multiemployer unit.\(^{118}\) The Board specifically made reference to the fact that the employer sought the union’s assistance, that the employer was bankrupt and, finally, that the relocation was an issue “inherently more amenable to resolution through collective bargaining confined to the parties immediately involved in the dispute than through collective bargaining carried on an associationwide basis. . . .”\(^{119}\)

Essentially, the case stands for the notion that a bankruptcy filing under Chapter XI constitutes unusual circumstances, and rests on firm ground considering the fact that the filing took place prior to the withdrawal, undertaken after negotiations began. Interestingly, U.S. Lingerie took place nearly twenty years before a legal upheaval caused by the clash between the Bankruptcy Code and the NLRA.\(^{20}\)

In 1984, the Supreme Court decision in \textit{NLRB v. Bildisco & Bildisco} ("\textit{Bildisco}") held that an unexpired collective bargaining agreement was an executory contract which, subject to court approval, could be rejected by a debtor in possession.\(^{121}\) Section 365(a) of the Bankruptcy Code\(^{122}\) specifically provides for the rejection of executory contracts by withdrawal retroactive to the date on which it filed its bankruptcy petition in January. \textit{Id.}\(^{114}\)

\(^{114}\) \textit{U.S. Lingerie Corp.}, 170 N.L.R.B. at 750.
\(^{115}\) \textit{Id.}
\(^{116}\) The employer’s president, Swee, and an individual manufacturer, Chemoff, met with the union’s local representative, Schoenwald in February. \textit{Id}. At that time, Swee proposed the creation of a partnership between himself and Chemoff. \textit{Id.} The union rejected this idea on the grounds that it would disrupt a settlement agreement between Chemoff and the union. \textit{Id.}
\(^{117}\) The Trial Examiner’s finding of no unusual circumstances was predicated on precisely this point. \textit{Id}. at 761.
\(^{118}\) \textit{Id.} at 751.
\(^{119}\) \textit{Id}. (emphasis added).
debtor in possession. In *Bildisco*, the Court adopted a standard for approval required for the debtor in possession's rejection of the contract. The Court also held that upon the filing of a petition under the Bankruptcy Code, the collective bargaining agreement was not enforceable within the meaning of section 8(d) of the NLRA. The Court concluded that "the debtor in possession need not comply with the provisions of section 8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement."

The United States Congress subsequently enacted legislation to remedy what organized labor deemed a damaging decision. Section 1113 of the Bankruptcy Code places a series of requirements on debtors in possession which seek to reject their collective bargaining agreements. Among those requirements, as construed by courts, is the need for the debtor in possession to make a proposal to the union to modify the existing contract, and that the debtor in possession must also meet in good faith with the union subsequent to presenting the proposal but prior to the rejection hearing, in an effort to reach "mutually satisfactory modifications [to the agreement]."

Thus, a bargaining requirement is placed upon the debtor in possession which desires to reject its collective bargaining agreement under section 1113. However, the manner in which that bargaining is undertaken, particularly where a multiemployer unit (to which the debtor in possession belongs) has already commenced negotiations for a new contract on behalf of the entire unit, is intriguing.

Upon a valid withdrawal, whether timely or untimely but under

123. The statute provides that "[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.*
124. The standard was promulgated by the United States Court of Appeals for the 11th Circuit, which held that the "[B]ankruptcy Court should permit rejection of a collective bargaining agreement under § 365(a)... if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *Bildisco*, 465 U.S. at 526 (1984).
130. *Id.* at 908.
131. *Id.* at 909.
unusual circumstances, the debtor in possession would obviously not be bound by the results of multiemployer bargaining.  

In fact, it may be argued that the negotiations mandated by section 1113 actually lend themselves better to individual bargaining than to bargaining on an associationwide basis. Thus, it is clear that a debtor in possession may withdraw from the multiemployer unit after that unit has commenced bargaining for a new contract, but still must proceed to bargain individually with the union as it prepares to reject its current collective bargaining agreement. It also is clear that upon the untimely but valid “unusual circumstances” withdrawal, the employer would not be bound to any new contract negotiated by the multiemployer unit and the union.

However, what about the debtor in possession which does not use the bankruptcy/unusual circumstances exception to withdraw from the multiemployer unit, and actually wishes to have the unit undertake the section 1113-mandated bargaining on its behalf? Nowhere has it been held that unusual circumstances must compel a debtor in possession to withdraw from the multiemployer unit. Could the multiemployer association bargain for the debtor in possession pursuant to section 1113(b)(2) while at the same time engage in negotiations on behalf of the association’s members seeking to carve out a new contract?

There appears to be nothing strictly illegal about this, however, allowing it to take place could well lead to a conflict of interest. The situation would find a multiemployer association negotiating for a new contract on behalf of its employer members, whose interests are vastly different from those of the debtor in possession, for whom the

132. See Seattle Auto Glass v. NLRB, 669 F.2d 1332, 1334 (9th Cir. 1982) (accepting an employer’s argument that a valid withdrawal from the multiemployer unit would result in the withdrawing employer not being bound to the results of multiemployer bargaining).

133. Cf. U.S. Lingerie Corp., 170 N.L.R.B. 750, 751 (1986) (noting that the intention to relocate, a result of the existence of dire economic circumstances, “raised issues inherently more amenable to resolution through ...” bargaining on an individual basis); see also Wheeling Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074, 1086 (3d Cir. 1986) (indicating that under section 1113(b)(1) of the Bankruptcy Code, the debtor’s proposal “must be one that provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and [one that] assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably.”).


135. See supra note 132.


137. In Siebler, the Eighth Circuit discussed the existence of a conflict of interest within the multiemployer association in the context of a duty of fair representation. See supra notes 83-91 and accompanying text.
same association is bargaining over “necessary modifications”\textsuperscript{138} to revitalize that bankrupt employer. It is quite conceivable that the multiemployer association would settle for a less-than-optimum agreement for the debtor in possession, in return for which the union would agree to concessions for the rest of the financially-healthy members of the association on whose behalf that association is bargaining for a new contract. However, without a duty of fair representation,\textsuperscript{139} the debtor in possession would have no claim against the association. In \textit{Siebler}, the United States Court of Appeals for the Eighth Circuit, of course, judicially created just such a duty of fair representation, although it failed to explain the derivation of that duty.\textsuperscript{140} In this context, it is arguable that such a judicially-created duty, even without a statutory base, makes sense.

2. Plant Closure

In addition to the bankrupt employer, the Board has also found dire economic circumstances to exist where an employer is faced with the immediate prospect of having to close its plant.\textsuperscript{141} Shortly after deciding \textit{U.S. Lingerie}, the Board issued an opinion in a similar case involving the same union and roughly the same issue.\textsuperscript{142} In \textit{Spun Jee}, the employer refused to be bound by the results of multiemployer bargaining,\textsuperscript{143} and was found by the Board to have violated the Act.\textsuperscript{144} The United States Court of Appeals for the Second Circuit denied enforcement of the Board order, however, and remanded the case for further consideration of whether the employer effectuated a valid “unusual circumstances” withdrawal from the multiemployer unit. This valid withdrawal would alleviate the employer’s obligation to adhere to the contract.\textsuperscript{145}

On remand, the Board noted that the employer sought out the union, explained its economic difficulties and requested an extension of the

\begin{itemize}
  \item \textsuperscript{139} The duty of fair representation in this context is analogous to the duty discussed by the Supreme Court in \textit{Vaca} v. \textit{Sipes}. \textit{See supra} note 84 and accompanying text.
  \item \textsuperscript{140} \textit{See supra} note 90 and accompanying text.
  \item \textsuperscript{141} \textit{Spun Jee} Corp., 171 N.L.R.B. 557 (1968).
  \item \textsuperscript{142} The \textit{Spun Jee} decision was issued on May 20, 1968, approximately two months after the \textit{U.S. Lingerie} decision. \textit{See id.}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.}
\end{itemize}
current contract, regardless of any agreement reached between the union and multiemployer association.\textsuperscript{146} The union refused to grant the extension and would not offer the employer special treatment.\textsuperscript{147} The employer notified the union that it would “have to terminate the present enterprise at the expiration of the current contract, subcontract [its] production work, and move the remaining operations to avoid New York City taxes.”\textsuperscript{148} On May 17, the employer resigned from the multiemployer association.\textsuperscript{149} An agreement between that association and the union was reached on July 1.\textsuperscript{150}

In light of the union’s knowledge of the employer’s situation and its “economic hardship inherent in [ ] continu[ing] in business in the New York area,”\textsuperscript{151} the Board found that unusual circumstances were present that justified the employer’s untimely withdrawal from the association after bargaining had begun, but before an agreement had been reached.\textsuperscript{152} The case stands for the notion that where an employer is faced with the prospect of being forced to close its plant by staying in the multiemployer association, unusual circumstances exist.\textsuperscript{153} Later cases more clearly define the employer’s burden in establishing dire economic circumstances under \textit{Spun Jee}. In 1986, the Board revisited the imminent plant closure unusual circumstance in \textit{Jo Vin Dress}.\textsuperscript{154} In that case, the employer attempted to resign from the Northeast Apparel Association, its bargaining agent. The employer conceded that its withdrawal took place after contract negotiations began.\textsuperscript{155} The Board explained that the case fell under the \textit{Spun Jee} unusual circumstance exception\textsuperscript{156} and found the withdrawal valid. The Board found that this employer, like Spun Jee, was forced to close its shop due to financial difficulties.\textsuperscript{157} In this case, these difficulties “were aggravated by a contractual requirement that it make payments to

\textsuperscript{146} Id. The employer asked for a one year extension as early as March, 1963, three months prior to the date set for expiration of the contract. \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id. at} 558.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{But see NLRB v. L.B. Priester & Sons, 669 F.2d 355, 361 (5th Cir. 1982) (finding no unusual circumstances where the employer failed to present financial statements nor any other evidence of added cost that remaining in the unit would have imposed).}
\textsuperscript{154} 279 N.L.R.B. 526 (1986).
\textsuperscript{155} \textit{Id. at} 527 n.3.
\textsuperscript{156} \textit{Id. at} 529.
\textsuperscript{157} \textit{Id. at} 527.
[a] health and welfare fund," the result of the employer using "nonunion jobbers." Noting that the financial difficulties were brought to the union’s attention and that the union failed to make any concessions, or help in light of the situation, this left the employer “little choice except to suspend operations.”

Consequently, plant closures constitute the kind of dire economic circumstances that the Board deems unusual enough to justify withdrawing from an employer association after bargaining has begun. It is important to note that the right to withdraw under unusual circumstances in a plant closure/forced relocation case does not affect the employer’s obligation, or lack thereof, to bargain.

While closure of a single plant is considered dire, how dire would the closing of merely one of an employer’s several plants be, and would the situation warrant an unusual circumstance? The issue over whether an employer must bargain over the decision to engage in the partial shut-down of its business was addressed by the Supreme Court in First Nat’l Maintenance Corporation v. NLRB. However, the partial shutdown issue in the context of an employer’s obligations to remain bound to bargaining on a multiemployer basis has rarely been discussed. Specifically, the issue is whether an employer may be permitted to claim unusual circumstances in order to effectuate an untimely withdrawal from the multiemployer unit, but for only one of its plants, while its other plants remain bound to multiemployer bargaining.

This particular question has never been faced by the Board,
however, it has been addressed in the context of a timely withdrawal.\textsuperscript{165} In \textit{North American Refractories}, an employer was faced with being forced to close one of its three plants.\textsuperscript{166} The employer was part of a multiemployer unit which bargained with several unions on that employer's behalf.\textsuperscript{167} The six-to-twelve member employers in the unit each operated several plants (as the employer did) some of which had unrepresented employees and some of which had employees represented by unions.\textsuperscript{168} Employers, by practice, were permitted to withdraw from the unit in a timely manner (prior to the commencement of negotiations) if they so desired.\textsuperscript{169}

The employer advised the unions and the multiemployer unit that its Ironton, Ohio, plant would not be participating in multiemployer bargaining for the upcoming 1976 negotiations "because of [its] concern that the economic impact of an industry settlement will adversely affect the continuance of operation."\textsuperscript{170} The union objected to this withdrawal, even though it was accomplished in a timely manner.\textsuperscript{171} The employer met with the unions and explained that the Ironton plant could not survive the economic effects of an industry settlement.\textsuperscript{172} The employer asked the unions to agree to a separate, no-cost agreement covering Ironton.\textsuperscript{173} The unions refused and the Regional Director for Region 14 "found that Ironton was closed... for valid economic reasons."\textsuperscript{174} The Board found that, although this case involved a timely withdrawal, its facts still fell "squarely within the legal conclusion reached by the Board in \textit{Spun Jee Corp}..."\textsuperscript{175}

Noting that the economic condition of the employer's Ironton plant would have justified an untimely withdrawal under \textit{Spun Jee} in a single plant employer situation, the Board found "no reason to apply a different standard here,"\textsuperscript{176} a case involving only one of three plants withdraw-

\begin{footnotes}
\item[165] Id.
\item[166] Id. The employer operated plants in Curwensville, Pennsylvania, Farber, Missouri, and Ironton, Ohio.
\item[167] Id. The unit bargained for each of its member employer's plants.
\item[168] Id.
\item[169] Id.
\item[170] Id.
\item[171] Id.
\item[172] Id. at 481.
\item[173] Id. at 480.
\item[174] Id. at 481.
\item[175] Id. at 482.
\item[176] Id. at 483. The Board reversed the finding of Administrative Law Judge Sidney J. Barban, who concluded that allowing a partial withdrawal would be tantamount to "permitt[ing] the [employer] at its discretion to alter the character of the bargaining confrontation to its own advantage
\end{footnotes}
ing, while the remaining two continued to bargain as part of the multiemployer unit.\(^\text{177}\)

Only once did the Board face an employer’s partial withdrawal attempted after bargaining had begun.\(^\text{178}\) That case, however, did not involve dire economic circumstances.\(^\text{179}\)

In *North American Refractories*, the Board notes the Regional Director’s finding that the Ironton plant closed for economic reasons,\(^\text{180}\) and sees no reason to apply a different standard to a partial withdrawal,\(^\text{181}\) though observing that the withdrawal presented by the case was timely.\(^\text{182}\) One reason to treat an *untimely* partial withdrawal differently stems from the fact that the multiple-plant owning employer’s economic circumstances clearly cannot be as dire as the single plant owner’s circumstances were in *Spun Jee*.\(^\text{183}\) The multiple plant employer in *North American Refractories* still had two thirds of its plants and to disrupt the bargaining process by so gerrymandering the unit as to make it very difficult or impossible to achieve the uniform conditions of employment conducive to labor relations stability in the industry.” *Id.* at 489. Judge Barban also found that this case was a far cry from a case such as *Spun Jee*, in which the withdrawing employer was “faced with *dire economic circumstances*, i.e., circumstances in which the very existence of the employer as a viable business entity has ceased or is about to cease.” *Id.* (quoting *Hi-Way Billboards*, 206 N.L.R.B. 22, 23 (1973) (emphasis in original)).

\(^{177}\) Region Three also has approved of the Board’s analysis in a case involving the timely withdrawal of seven of nineteen stores from a multiemployer unit when each of the stores was owned by one employer. *See* Big V. Supermarkets, 125 L.R.R.M. (BNA) 1372 (1987)(advice memorandum).

\(^{178}\) *See* Commercial Automotive Corp., 169 N.L.R.B. 394 (1968).

\(^{179}\) Instead, the union’s majority status was implicated, and the Board rested its finding on a case involving a union’s attempted withdrawal. *See* Pacific Coast Ass’n of Pulp and Paper Mfrs., 163 N.L.R.B. 892 (1967) (although not facing the issue of unusual circumstances, holding that neither unions nor employers could effectuate partial withdrawals).

\(^{180}\) *North American Refractories*, 238 N.L.R.B. at 481.

\(^{181}\) *Supra* note 176.

\(^{182}\) *North American Refractories*, 238 N.L.R.B. at 481. The Board found that the employer’s refusal to apply the multipiayer contract to its Ironton plant “did more to *promote* the stability of the multiemployer unit then to detract from it.” *Id.* at 482 (emphasis in original). The Board added that:

- the economic condition of the Ironton plant in 1976 was sufficient to meet the Board’s criteria for *untimely* withdrawal from a multiemployer bargaining unit had Ironton been the only plant of the Respondent within the multiemployer unit. We see no reason to apply a different standard here, where the Respondent sought to exclude from the bargaining unit, in a timely manner, only one of its plants which was in *dire* economic circumstances,” but to leave its remaining plants, which were functioning economically within the bargaining unit.

*Id.* at 483.

\(^{183}\) *Spun Jee*, for instance, dealt with the plant closure, subcontracting and relocation of a single plant employer.
operating in a state of financial stability, whereas the employer in *Spun Jee* was effectively reduced to moving its entire operation. Did the Board intend for its plant closure dire economic circumstance to reach employers which were closing merely one of three plants?

The Board in *North American Refractories* positions the employer’s willingness to allow two plants to remain in the multiemployer association as a positive step toward avoiding a “more serious adverse impact on the stability of the multiemployer unit . . . .” In light of the fact that the withdrawal was timely, the Board does not address the severity and direness required of an employer’s economic circumstances to justify an *untimely withdrawal*. However, a rule providing for an untimely partial withdrawal would allow an employer to circumvent the dire economic circumstances test by shifting its financial losses to the plant it feels will fare more favorably in bargaining on an individual basis. This arguably will not promote stability in bargaining relationships as mandated by *Retail Associates*. Such a rule would stretch the dire economic circumstances standard to a situation for which it was not intended.

Although an employer would not be required to bargain with the union over the economic decision to shut down one of its plants, this does not justify finding that the employer may use the threat of the partial shutdown as an excuse to avoid multiemployer bargaining once that bargaining has begun. Clearly, the multiemployer bargaining would involve a variety of issues and terms unrelated to the employer’s decision to engage in the partial shutdown.

### 3. Loss of Skilled Workforce

A third situation in which dire economic circumstances have been found to justify untimely withdrawal exists when the withdrawing employer is “threatened with the immediate loss of its entire skilled workforce.” In *Atlas Electric*, the employer joined a multiemployer

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184. The Board does indicate that the Ironton plant was very distinct and comprised a separate portion of the employer’s overall business. *North American Refractories*, 238 N.L.R.B. at 483 n.10.
185. *Id.* at 482.
186. 120 N.L.R.B. 388, 393 (1958).
association and arranged for its six employees to join Local 199, the union with which the association had a collective bargaining relationship and agreement. Only days after Atlas signed a new application for membership to the association, it was informed that its employees would leave if it did not sign a collective bargaining agreement with Local 3 of the International Brotherhood of Electrical Workers, whose authorization cards the six employees had signed.

Atlas sought the assistance of both Local 199 as well as the association, but received no help from either. The employer resigned from the association approximately one month later. The Board explained that, due to the reapplication provision which required member employers to reapply to the association, Atlas was not bound to the association until after negotiations were completed. This led the Board to the conclusion that there was no consent on the part of Atlas to be bound to the association. Even more importantly, the Board found that unusual circumstances existed, justifying an untimely withdrawal even in the absence of the reapplication issue.

The Board explained that Mr. Kremer, the sole proprietor of Atlas, had hired unskilled laborers whom he had personally trained to perform the kind of “highly sophisticated electrical work” for which replacements were unavailable. The Board was persuaded by the drastic differences between Atlas’ business and the businesses of the other association members. Faced with an employer which was about to lose its entire skilled labor pool, the Board was willing to find unusual circumstances Justifying the untimely withdrawal.

189. Id. at 828. Atlas proprietor Michael Kremer felt that a union contract was necessary to “facilitate securing work.” Id.
190. Upon the expiration of each contract term but subsequent to negotiations for a new contract, multiemployer members were required to re-apply for membership. Id.
191. Id. at 829.
192. Id.
193. Id. at 829.
194. Id. at 830.
195. Id.
196. Id.
197. Id.
198. Id. Atlas was in a multiemployer unit comprised of construction employers. Whether Atlas was engaged in an 8(f) relationship is unclear, however the Board commented “Atlas’ operations are totally different from those of the other members of the Association who are engaged in construction.” Id. The Board added that Atlas’ operations “which consist primarily of supplying electrical services for the installation of automation controls and printing equipment, remove Atlas from the construction industry.” Id.
199. Id.
This situation is not to be confused with the threat of a drastic decline in business, which would result from an employer being bound to bargain on a multiemployer basis. In *Serv-All Company*, the employer was faced with a decline in business to the extent that its volume was a mere one fourth of an earlier level. Still, the Board found no dire economic circumstances. Moreover, a situation in which only one employee would be covered by a multiemployer contract did not, in and of itself, establish dire economic circumstances. In addition, neither the potential for a protracted strike nor the fact that an industry was in a deeply depressed state of affairs were found to constitute dire economic circumstances in the absence of economic evidence or evidence of economic condition.

Recently, the Board reaffirmed the principle that, where an employer is claiming dire economic circumstances to justify an untimely withdrawal, that employer must have first asked for special treatment or concessions from the union. In *Perrella Gloves*, the Board conceded that the employer suffered from the kind of dire economic circumstances which would justify an untimely withdrawal. However, the Board also found that the employer failed to notify the union of its economic difficulties, or request concessions or assistance. By failing to do this, the Board held, the employer "forfeited its right to be excused from this late withdrawal for financial reasons." In addition, the employer had attempted to withdraw four days after an agreement had been reached by the multiemployer association and the union. Citing earlier precedent the Board recognized that, irrespective of the existence of unusual circumstances, the employer could not evade being bound to

201. *Id.* at 1141.
202. *Id.* But see NLRB v. Custom Sheet Metal & Serv., 666 F.2d 454 (10th Cir. 1981) (holding that the loss of 75% of an employer's business constituted an unusual circumstance justifying an untimely withdrawal from a multiemployer association).
204. NLRB v. Acme Iron Works, 582 F.2d 153 (2d Cir. 1978).
205. *Id.* at 158.
207. *Id.* at 492. The employer had debts in excess of $800,000 with accounts receivable of $7,000. Administrative Law Judge Joel Biblowitz commented that "if this does not constitute 'dire economic circumstances' or 'extreme financial pressures' I don't know what does." *Id.*
208. *Id.* The employer not only failed to notify the union of its economic problems, but was silent when the question of economic difficulties was posed. *Id.*
209. *Id.* The Board also found the employer to be in violation of section 8(a)(5) of the Act, for failing to bargain over the effects of its closing. *Id.* at 493.
210. *Id.*
the agreement by attempting a withdrawal after it had been reached.\textsuperscript{211}

The requirement that the withdrawing employer ask the union for help was first recognized in \textit{Seattle Auto Glass},\textsuperscript{212} which involved four separate cases\textsuperscript{213} and was decided shortly after the Supreme Court decision in \textit{Bonanno Linen}.\textsuperscript{214} The third of the four cases\textsuperscript{215} involved an employer which argued that both an impasse as well as dire economic circumstances justified its untimely withdrawal from multiemployer bargaining.\textsuperscript{216} In light of the decision in \textit{Bonanno Linen}, the Board found that the impasse was inapposite to the determination of whether unusual circumstances existed.\textsuperscript{217} Neither was the Board persuaded by the employer’s allegation of dire economic circumstances, as it noted that the employer “entered into negotiations knowing of its [own] financial problems and did not demand special treatment.”\textsuperscript{218} While the Board failed to specify from which party the employer should demand the special treatment, the association or the union, both logic and the \textit{Perrella Gloves} decision suggest that it is the union that the employer should be approaching.\textsuperscript{219}

Thus, the dire economic circumstances exception appears limited to bankruptcy, forced plant closure in a single and perhaps a multiple-plant operation, and the loss of an entire uniquely-qualified workforce where no replacements are available. The only exception to this general proposition is embodied in \textit{NLRB v. Custom Sheet Metal & Service Company}.\textsuperscript{220} In \textit{Custom Sheet Metal}, the United States Court of Appeals for the Tenth Circuit reversed a Board determination that an employer’s inability to fill the orders of its primary customer would not satisfy the dire economic circumstances standard.\textsuperscript{221}

The case saw the Sheet Metal Contractors Association and the union engaged in bargaining for a new contract. The expiring contract had

\begin{footnotes}
\item[211] The Board cited Co-Ed Garment Co., 231 N.L.R.B. 848, 854 (1977) (holding that “unusual circumstances” may justify withdrawal from bargaining for a multiemployer agreement but not from an agreement already reached.”).
\item[212] 669 F.2d 1332 (9th Cir. 1982).
\item[213] \textit{Id.} at 1334.
\item[214] The \textit{Seattle Auto Glass} decision was issued on Feb. 25, 1982. The \textit{Bonanno Linen} decision was decided on January 12, 1982.
\item[215] Western Pac. Roofing v. NLRB, No. 79-7476, (9th Cir. 1982).
\item[216] \textit{Seattle Auto Glass}, 669 F.2d at 1336.
\item[217] \textit{Id.}
\item[218] \textit{Id.}
\item[219] \textit{See supra} notes 208-09 and accompanying text.
\item[220] 666 F.2d 454 (10th Cir. 1981).
\item[221] \textit{See Custom Sheet Metal & Serv.,} 243 N.L.R.B. 1102, 1110 (1979).
\end{footnotes}
actually been modified for Custom Sheet only. Custom Sheet’s business had substantially changed from construction to assembly line work, and it managed to secure an accommodation from the union. While bargaining for a new contract, the Association asked the union to extend the modification to the other employers. The union refused and a strike ensued. A few days after the strike began, Custom Sheet’s largest client asked about the status of its most recent order, only to be told of the strike. Displeased, the client threatened to take its business elsewhere, thus creating the prospect of Custom Sheet losing a full seventy-five percent of its business. Faced with this potential loss, Custom Sheet attempted an untimely withdrawal and resigned from the Association. The court found that the loss of seventy-five percent of Custom Sheet’s business satisfied the dire economic circumstances standard. The court found that this kind of loss threatened Custom Sheet’s very existence. It distinguished an earlier Tenth Circuit case, noting that Custom Sheet’s loss of seventy-five percent would cause the employer the kind of severe economic difficulties not encountered in other cases.

The Tenth Circuit appears to have misunderstood the Board’s dire economic circumstances standard. A loss of seventy-five percent of one’s business was claimed, but not that the business would be forced to close nor that the loss would cause bankruptcy. Furthermore, the Board made note of the fact that the union, provided it ended its strike, offered to have Custom Sheet’s employees return immediately in order to get the production moving. The employer refused this gesture.

222. Custom Sheet Metal, 666 F.2d at 455-56. The employer had negotiated for an addendum to the first contract which “reduced the wage rate to be paid to assembly line employees . . . and which extended the time in which employees were to become members of the union from eight to thirty days.” Id. at 456.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id. at 457.
228. Id. at 458.
229. Id. The court was surprised by the Board’s failure to find unusual circumstances. It stated that “[t]he Board’s decision does not indicate the percentage of business loss which would satisfy the ‘extreme financial hardship’ test, but if 75% was deemed insufficient, one can only wonder as to the percentage the Board would have found sufficient — 85%, 90% . . . 100%?” Id.
231. Custom Sheet Metal, 666 F.2d at 459.
233. Id.
Custom Sheet Metal situation appears closer to the sharp decline in business which the Board found was not an unusual circumstance in Serv-All.\textsuperscript{234}

The situations which threaten the very existence of an employer, as enunciated by the Board in Hi-Way Billboards, have been limited by the Board to the three major categories discussed in this Note.\textsuperscript{235} The Tenth Circuit’s extension of this standard to encompass the loss of a major client is a judicial aberration. The court based its finding on the idea that a seventy-five percent loss of business “especially in an era of high interest rates and heavy debt financing”\textsuperscript{236} did threaten the employer’s very existence.\textsuperscript{237} The Board, however, has not considered the ebbs and flows of the economy in determining whether an employer’s very existence is threatened such that dire economic circumstances should be found. The nation’s economy has never been an element in the Board’s dire economic circumstances analysis. Whether it should be and whether it is appropriate for a court and not the Board to determine that it should be is an issue best left for another day.

C. Impasse

In 1982, the Supreme Court resolved a conflict in the appellate courts when it held that an impasse in bargaining did not constitute an unusual circumstance that would justify an untimely withdrawal from multiemployer bargaining.\textsuperscript{238} The Court explained that “impasse is only a temporary deadlock or hiatus in negotiations, which in almost all cases is eventually broken, through either a change of mind or the application of economic force.”\textsuperscript{239}

Prior to the Court’s holding, as many as five circuits had found that an impasse did, in fact, constitute an unusual circumstance,\textsuperscript{240} one of them reversing the Board’s Hi-Way Billboards decision, which codifies the current state of the law.

\textsuperscript{234} 199 N.L.R.B. 1131 (1972).
\textsuperscript{235} See Hi Way Billboards, 206 N.L.R.B. at 22, 23 (1973), enf.d denied 500 F.2d 181 (5th Cir. 1975). The categories have been limited by the Board to bankruptcy, plant closure and loss of skilled employees. See supra notes 106-99 and accompanying text.
\textsuperscript{236} Custom Sheet Metal, 666 F.2d at 458.
\textsuperscript{237} Id.
\textsuperscript{239} Id. (quoting Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1094 (1981)).
\textsuperscript{240} See supra note 33. Prior to the Bonanno Linen decision, the second, third, fifth, eighth and ninth circuits all found that impasse was an unusual circumstance justifying an employer’s untimely withdrawal from multiemployer bargaining.
Still, even after the Supreme Court decision in *Bonanno Linen*, the Board has continued to wrestle with the question of whether an impasse is an unusual circumstance. As recently as April, 1995, the Board revisited the impasse/uneusual circumstances issue. In *El Cerrito Mill & Lumber Co.*, the Board was faced with a situation that the Regional Director called "[two] years of fruitless bargaining . . . succeeded by an additional year . . . without any bargaining at all." The Director opined that this case was distinguishable from *Bonanno Linen*, where an impasse was merely considered a "temporary deadlock or hiatus," and that a finding of unusual circumstances should be made in order to allow the parties to proceed to an election. The Board, however, disagreed with the Director’s analysis, finding that "*Bonanno* can be fairly read to mean that an impasse of any duration, standing alone, does not necessarily constitute an ‘unusual circumstance’ . . .").

The Board also found that, contrary to the reasoning of the Director, the absence of a strike or lockout — apparent in *Bonanno Linen* — was not "critical to the [Supreme] Court’s decision." The Board dismissed the Director’s order and direction of election. However, the Board did leave open the possibility that an impasse could, at some point, constitute an unusual circumstance. It specifically stated that "while it is conceivable that the ‘unusual circumstances’ exception might be met in some future case presenting an impasse of extremely long duration, accompanied by indicia of instability or defunctness, this is not such a case."

The pre-*Bonanno Linen* cases which found impasse to constitute an unusual circumstance were concerned with a union’s ability to engage in whipsaw tactics or cause whipsaw effects. Such a situation occurred in *NLRB v. Independent Association of Steel Fabricators*. In that case, the United States Court of Appeals for the Second Circuit explained that, having reached an impasse, the union struck and subsequently

242. Id. at 1007.
243. Id. at 1008.
244. Id. at 1005.
245. Id. at 1006.
246. Id.
247. Id. at 1007.
248. Id. at 1006-07.
249. See supra note 4 (describing the union whipsaw).
250. 582 F.2d 135 (2d Cir. 1978) (holding that an impasse constituted an unusual circumstance justifying an untimely withdrawal).
negotiated separately with four members of the association. While this union did not "selectively picket or otherwise pressure any particular [employer] member, its willingness to negotiate separately with several members had something of a whipsaw effect on the remaining members who watched certain of their withdrawing competitors resume business while they themselves were still in the throes of an economic strike." Even more than a mere whipsaw effect was at issue when the United States Court of Appeals for the Ninth Circuit held that an impasse was an unusual circumstance. In Associated Shower Door, the parties reached impasse, the union struck and subsequently negotiated individual agreements with several of the association members. One month later, three members attempted to withdraw from the association — this after multiemployer bargaining had already begun. The court held that the impasse should constitute an unusual circumstance allowing for the untimely withdrawal, and noted that "[w]ere the rule otherwise, a union could reach an agreement with one or more employers and then whipsaw the remaining members of the significantly fragmented and weakened multi-employer unit." The whipsaw argument was discussed by the Supreme Court in Bonanno Linen, which adopted the Board's reasoning on the matter. The Board, the Court explained, was of the opinion that selective strikes were not unique to impasse, nor were the interim agreements that some courts deemed so destructive. More importantly, in Bonanno Linen, the Court noted the Board's distinction between temporary interim agreements as opposed to permanent individual agreements. An interim agreement would have no impact on the member employer's obligation to abide by the ultimate result of multiemployer negotiations, whereas permanent individual agreements would be the kind that would "effectively fragment[] and destroy[] the integrity of the bargaining unit. . . ." This distinction, which was important in the determination that an impasse is not an

251. Id. at 147.
252. Id.
253. See NLRB v. Associated Shower Door Co., 512 F.2d 230 (9th Cir. 1975).
254. Id. at 231.
255. Id. at 232.
256. Id.
258. Id.
259. Id.
260. Id. at 414-15 (citing Charles D. Bonanno Linen Serv., 243 N.L.R.B. 1093, 1096 (1979)).
unusual circumstance, is the basis for the final situation that the Board has recognized as satisfying the exception.

D. Unit Fragmentation

Clearly, the Supreme Court was concerned with the fragmentation of the multiemployer unit, though it refused to find that impasses caused such fragmentation. Unit fragmentation takes place when, after negotiations have commenced, a substantial number of employers in a multiemployer association properly withdraw from that unit. Numerous permanent agreements, signed by employers which properly withdraw from the multiemployer association after bargaining has begun, could cause the unit to lose its viability. Such a loss of viability could justify an untimely and otherwise improper withdrawal of other unit members.

In order to properly examine the unit fragmentation issue, it is helpful to start with a recognition of why unusual circumstances is the exception to a general rule making it impermissible, absent mutual consent, to withdraw from multiemployer bargaining after that bargaining has begun. The concern is over the promotion and maintenance of stability in collective bargaining relationships. The stability of the relationship between the multiemployer association and the union would obviously be disrupted where the signing of permanent agreements would cause that association to lose its viability as a bargaining agent.

Just how many of these permanent agreements would it take to sufficiently fragment a multiemployer association? Case law does not provide a clear answer to this question. It appears, however, that the Board inquires into the degree to which the fragmentation itself has destroyed the unit, regardless of the cause of that fragmentation. The proper inquiry is whether the fragmentation has destroyed the ability of the multiemployer unit to act as a unit. Permanent agreements are merely one cause of this destruction.

In the fourth of the Seattle Auto Glass disputes, the employer, a beer and wine distributor called Birkenwald, was a member of Allied,

261. NLRB v. Hartman, 774 F.2d 1376, 1386 (9th Cir. 1985) (holding that an employer nullified its withdrawal from multiemployer bargaining by subsequently participating in negotiations).
263. See Hoffman, supra note 83, at 88-89 (noting that "it is unclear . . . as to how many permanent or separate agreements it takes to fragment a group unit.").
265. 669 F.2d 1332 (9th Cir. 1982).
a multiemployer association comprised of eleven employers.\textsuperscript{266} Midway through negotiations,\textsuperscript{267} one of the eleven employers signed a separate, permanent agreement with the union,\textsuperscript{268} causing Birkenwald to withdraw from Allied.\textsuperscript{269} Birkenwald refused to be bound to the contract reached by the union and Allied nine days later.\textsuperscript{270} The court found that the withdrawal of only one member fragmented the unit, an unusual circumstance justifying Birkenwald's untimely withdrawal, but was particularly persuaded by the fact that the employer which signed the permanent agreement was the largest employer in the association, employing the largest number of employees of any member.\textsuperscript{271}

This case indicates that it is insufficient merely to make an inquiry into the number of employers signing permanent agreements; consideration also must be given to how large and substantial those employers are, with the analysis centered on the number of employees they employ. This inquiry is pivotal to a determination of whether the association has retained its ability to act as a unit, a factual inquiry at its essence.\textsuperscript{272}

Other cases also prove that the issue of permanent versus interim agreements is not the only consideration in an analysis of whether a multiemployer unit retains its ability to act after suffering some fragmentation.\textsuperscript{273} In Connell Typesetting, the multiemployer association consisted of thirty-six employers.\textsuperscript{274} Some signed permanent agreements,\textsuperscript{275} however some merely signed interim agreements.\textsuperscript{276} The Board allowed the withdrawal of four employers, not because a certain number of the other employer members had signed permanent agreements, but rather because the permanent and the interim agreement

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{266} Id. at 1336.
\item\textsuperscript{267} The court noted that the existence of an impasse was not relevant to the case in light of the Supreme Court's decision in Bonanno Linen. Id.
\item\textsuperscript{268} Id.
\item\textsuperscript{269} Id.
\item\textsuperscript{270} Id.
\item\textsuperscript{271} Id. The court noted that the employer which signed the permanent agreement employed a full 30% of the employees in the unit. Id.
\item\textsuperscript{272} See Tobey Fine Papers of Kansas City, 245 N.L.R.B. 1393, 1395 (1979) (commenting that the "facts of each case must be assessed in order to ascertain the impact of the parties conduct upon the continued viability of multiemployer bargaining," and rejecting a unit fragmentation argument even in the face of an association's loss of employers comprising 42% and 14% complements of employees respectively).
\item\textsuperscript{273} See Connell Typesetting Co., 212 N.L.R.B. 918 (1974) (finding unit fragmentation and allowing an employer to withdraw under unusual circumstances).
\item\textsuperscript{274} Id.
\item\textsuperscript{275} Id. at 919.
\item\textsuperscript{276} Id. at 921.
\end{enumerate}
\end{footnotesize}
signers had, together, created a situation in which only thirteen of the original thirty-six employer members remained "as a practical matter, as active participants in the bargaining." 277

The fact that seventeen employers had merely signed interim agreements prior to the respondent employers' untimely withdrawal did not dictate that the unit remain intact. Rather, the Board explained that the nature of the interim agreements was such that the employers which signed them had conceded to adopt the union's proposals on four unresolved issues over which the union and multiemployer association had been deadlocked.278 Thus, the interim contracts themselves represented "agreements under the terms of which they [the signatory employers] capitulated as to all of the items remaining in issue." 279

The Board explained that

[i]t is true that these employers after signing the interim agreement remained obligated to sign any final [multiemployer] agreement, and to that extent remained part of the multiemployer unit. However, having agreed with the union on all the remaining issues they were, as a practical matter, no longer able to contest those issues at the bargaining table. Thus their strength had been removed from the multiemployer unit and they, in effect, had withdrawn . . . . 280

In Tobey Fine Papers,281 the Board explained that "[i]t does not follow ipso facto that execution of individual separate final contracts with former association members either proves an intention to destroy, or necessarily causes the fragmentation of, a multiemployer unit[,]" 282 the Bonanno Linen decision notwithstanding.283 In Tobey Fine Papers, the union and association consented to withdrawals of two association members and executed final, permanent agreements with them.284 The

277. Id.
278. Id. at 919.
279. Id. at 921.
280. Id.; see also Hoffman, supra note 83, at 89 (noting that "whether the permanent contracts alone were sufficient for 'unusual circumstances' is uncertain in light of the Board's characterizing the interim contracts as reducing the strength of the bargaining unit.").
281. 245 N.L.R.B. 1393 (1979) (in which respondents argued that an impasse constituted unusual circumstances and, in the alternative, that the bargaining unit had become substantially fragmented, thus satisfying the rule).
282. Id. at 1395.
283. See Bonanno Linen, 454 U.S. at 414-15 (discussing the distinction between interim and permanent agreements).
284. Tobey Fine Papers, 245 N.L.R.B. at 1395.
consented-to withdrawals amounted to losses of forty-two percent and fourteen percent complements of the unit.\textsuperscript{285} Shortly after the proper withdrawals, the respondent employers attempted to withdraw.\textsuperscript{286} The Board refused to find the existence of unusual circumstances and was persuaded by the fact that a collective bargaining agreement was reached by the association and union after the two respondents attempted to withdraw.\textsuperscript{287} The Board rested its finding on the fact that, in actuality, the respondents’ untimely withdrawal had nothing to do with a fragmentation, but rather was rooted in a doubt of the union’s majority status.\textsuperscript{288} The Board has long held that a situation such as the doubt of majority status does not constitute an unusual circumstance under \textit{Retail Associates}.\textsuperscript{289}

The Board faced a substantially similar situation in \textit{William Chalson & Co.},\textsuperscript{290} where once again, it measured whether an untimely withdrawal could be excused due to unit fragmentation by an analysis that realized that “the facts of each case must be assessed in order to ascertain the impact of the parties’ conduct upon the continued viability of multiemployer bargaining.”\textsuperscript{291}

The distinction between permanent and individual agreements in the unit fragmentation context was also addressed in \textit{Typographic Service Co.}.\textsuperscript{292} In that case, the Board found the unit fragmented where the union, \textit{inter alia}, “offered to conclude [ ] ‘interim’ agreements with final agreements which differed from the interim agreements, differed from each other, and differed from [the employer association’s] proposals and from proposals essential to [the employer association’s] bargaining position.”\textsuperscript{293} The union had bargained individually with seven of seventeen employers in the association, after striking against all seventeen.\textsuperscript{294} It sought to reinstate terms of an expired contract.\textsuperscript{295}

\footnotesize{\textsuperscript{285} Id. at 1396.  
\textsuperscript{286} Id.  
\textsuperscript{287} Id. The Board noted that “we view the Union’s and Association’s continued bargaining efforts and successful conclusion as a forceful rebuttal to Respondent’s charge that the Union’s earlier conduct [consent to the earlier withdrawals] manifested a rejection of multiemployer bargaining and had a fatal impact upon it.” \textit{Id.}  
\textsuperscript{288} Id.  
\textsuperscript{289} Cf. NLRB v. Custom Wood Specialties, 622 F.2d 381 (8th Cir. 1980) (holding that the filing of a decertification petition is not an unusual circumstance).  
\textsuperscript{290} 252 N.L.R.B. 25 (1980).  
\textsuperscript{291} Id. at 32.  
\textsuperscript{292} 238 N.L.R.B. 1565 (1978).  
\textsuperscript{293} Id. at 1566.  
\textsuperscript{294} Id. at 1565.  
\textsuperscript{295} Id.
The dissent viewed the interim agreements as truly interim in nature and found that the unit had not been fragmented. The dissent noted that, of the seven employers which agreed to reinstate the old terms on an interim basis, two were given the option to adopt the ultimate association-union contract or agreements based on contracts negotiated with two other companies not in the association. Other variations in the offers were deemed by the dissent as "in the nature of trial balloons to explore various bargaining possibilities or areas of agreement."

The United States Court of Appeals for the Ninth Circuit also distinguished between interim and permanent agreements with regard to their effects on the fragmentation of a unit. In Hartman, the employer alleged that the unit became fragmented upon the execution of interim agreements with eight of fifteen association members. The court explained that interim, temporary agreements do not effect the strength of the multiemployer unit, as employers which sign these agreements remain bound to the results of multiemployer bargaining.

However, the employer also argued that the unit was substantially fragmented as a result of the actions of six other employers in the association. The court did not agree, and proceeded to provide a very pertinent discussion addressing the issue of whether permanent agreements substantially fragment a unit:

Even were we to assume that these six employers signed separate, permanent agreements that placed them outside the [association to which the employer belonged], we would not find 'substantial fragmentation' that effectively destroyed the integrity of the bargaining unit. Although the six contractors were approximately a third of the employers bound by the negotiations, they employed only three unit employees, or less than seven percent of the total of those employees bound by the negotiations.

296. Id. at 1567 (Member Fanning, dissenting).
297. Id.
298. Id. The dissent noted that the interim agreements "resulted in no signed individual contracts and in my view they constituted bargaining techniques to which the union was entitled in its effort to pursue further bargaining on the multiemployer basis." Id.
299. See NLRB v. Hartman, 774 F.2d 1376 (9th Cir. 1985).
300. Id. at 1386.
301. Id. at 1386-87.
302. The employer alleged that these six employers signed a permanent agreement, the terms of which were equal to those the union negotiated with a different employers association. Id. at 1386.
303. Id. at 1387.
Just as in the Birkenwald situation in *Seattle Auto Glass*, the determining factor here was not the permanence of the agreements signed, but rather the effect of those agreements on the viability of the association as gauged by the number of employees employed by the signatory to the permanent agreement.

In spite of the Supreme Court's discussion of the destructive nature of permanent agreements, it is clear that at least some courts require the withdrawing employer to demonstrate that the permanent agreements actually fragmented the unit in order for the employer to successfully argue for the unusual circumstances exception.

As to the effect of interim agreements on the unit, at least when they are not coupled with some permanent agreements as well, the Supreme Court noted that "the Board's view is that interim agreements, on balance, tend to deter rather than promote unit fragmentation since they preserve a continuing mutual interest by all employer members in a final associationwide contract." However the Court did not discuss the effects of interim agreements when they are combined with other activity such as the permanent agreements in *Connell Typesetting*.

The United States Court of Appeals for the Eighth Circuit opined that when interim agreements are coupled with strike activity, the situation might present an unusual circumstance justifying another employer's untimely withdrawal. In *NLRB v. Callier*, the Eighth Circuit did not have to reach the issue of whether interim agreements constitute an unusual circumstance, because the court found that the withdrawing employer failed to provide sufficient notice of the withdrawal to the union.

In *Callier*, the employer refused to be bound to the contract which resulted from multiemployer bargaining, arguing that its untimely withdrawal from the employer's association was justified under the unusual circumstances exception. Specifically, the employer argued that the unit became fragmented due to numerous interim agreements

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304. See supra notes 265-71 and accompanying text.
305. This was the situation in *Connell Typesetting*. See supra notes 273-80 and accompanying text.
307. See NLRB v. Callier, 630 F.2d 595, 598 (8th Cir. 1980).
308. Id. Regardless of the presence of unusual circumstances, a withdrawing employer must always give notice of the withdrawal to the union. See NLRB v. Dover Tavern Owner's Ass'n, 412 F.2d 725 (3d Cir. 1969).
309. Callier, 630 F.2d at 596-97. The court noted that over 40 of the 65 Association members had signed interim agreements. Id. at 597.
signed by the other members of the association.310

The union had attempted to secure an interim agreement with the employer, but the employer refused.311 Subsequently, the refusing employer’s employees went on strike.312 This caused the employer to attempt the untimely withdrawal.313 The court314 found that, irrespective of the existence of unusual circumstances, the employer’s failure to notify the union of the withdrawal meant that the employer was bound by the multiemployer-union collective bargaining agreement. However, the court began its legal analysis with the following discussion:

[w]e note at the outset that we disagree with the Board’s limited view of the circumstances under which an employer may withdraw from a multi-employer bargaining unit once negotiations have begun. Callier [the employer] argues persuasively in this case for an expanded view of the unusual circumstances exception, and in our opinion, there is strong logic and authority for the proposition that in a situation such as this, a union’s negotiation of interim agreements with individual members of a multiemployer bargaining association, coupled with strikes, can fragment the bargaining association to the extent that it provides sufficient grounds for according an employer the right of withdrawal.315

The interim agreement, in tandem with the strike, might well have justified unusual circumstances for the Eighth Circuit, had the employer properly notified the union of the withdrawal. The Board’s decision in Callier316 specifically discussed the distinction between interim and permanent agreements, and decided the case on that basis.317

310. Id.  
311. Id. The terms of the interim agreement were ones that the association had rejected in multiemployer bargaining. Id.  
312. Id.  
313. Id.  
314. Interestingly, the court was the United States Court of Appeals for the Eighth Circuit which, only three years before Callier, had reversed the Board in the Siebler case, truly an aberration in unusual circumstances law. Callier, like Siebler, stands alone in its analysis.  
315. Callier, 630 F.2d at 598 (citations omitted).  
317. Id. at 1117. The Board explained that interim agreements not only failed to survive multiemployer negotiations, but they also served a “necessary and useful purpose of encouraging movement and compromise . . .” Id. at 1118. Interestingly, the Board noted that “no effort was made by the Union to separate individual employers from the multiemployer fold through offers and execution of separate final agreements.” Id. at 1117. This distinguishes Callier from Typographic Services, where interim agreements were to be turned into permanent agreements. See notes 292-95 and accompanying text.
In 1988, the Board was faced with an interesting unit fragmentation situation, in which it found unusual circumstances. In *Universal Enterprises*, a multiemployer association of seven employers reached a tentative agreement with Local 1414 of the International Longshoreman’s Association. However, the International informed the Local that the agreement was unacceptable, and insisted that its own master agreement be signed by the Association. The Association accepted the master agreement under protest, however two of the seven Association members refused to be bound and immediately withdrew to negotiate individual contracts. Subsequently, the respondent employer refused to sign the master agreement as well, withdrew from the association, and was sued by the union upon refusal to make a trust fund payment.

The Board found that the respondent was put in the difficult position of being compelled to accept an agreement substantively different from the one the Association originally negotiated. The Board held that “the particular and unique facts present here warrant a finding that unusual circumstances existed and worked to undermine the integrity of the multiemployer bargaining unit.” Thus, the respondent’s untimely withdrawal was acceptable under the unusual circumstances exception.

The Board relegated to a footnote the fact that the record did not indicate the percentage of employees that the two early withdrawing employers represented. However, even in the absence of a serious inquiry, the Board was satisfied that in a small association such as this one, withdrawal of two or three members “can and does substantially fragment the bargaining unit.”

**III. CONCLUSION**

Although the unusual circumstances exception has been reserved for extreme situations, it has continued to raise new questions. As recently as December, 1994, the Board was faced with determining

319. Id.
320. Id.
321. Id.
322. Id. at 671.
323. Id. at 671 n.3.
324. Id.
325. Some of these questions remain unanswered, such as whether bad faith bargaining constitutes an unusual circumstance or whether an invalid provision of a collective bargaining agreement could constitute an unusual circumstance, discussed by the United States Court of Appeals for the Second Circuit in *O’Hare v. General Marine Transp. Corp.*, 740 F.2d 160 (2d Cir. 1984).
whether an unusual circumstance existed where the multiemployer association failed to notify one of its employer members that bargaining had begun.\textsuperscript{326}

The Board held that this was not an unusual circumstance, explaining that the situation was "an internal association matter which is properly and readily resolved by and between the multiemployer association and its members."\textsuperscript{327} The Board issued its decision in the section 8(f) context in \textit{Luterbach Construction}.\textsuperscript{328} on the same day.

Interestingly, the issue of failing to notify a member was raised in the context of an 8(f) employer approximately ten years ago in an Arizona state court.\textsuperscript{329} That court refused to address the 8(f) issue, noting that it was being raised for the first time on appeal.\textsuperscript{330} The court did, however, find that the employer member’s lack of notice was an unusual circumstance, a conclusion with which the Board disagreed in \textit{Chel LaCort}.\textsuperscript{331}

Limited, but sprinkled with aberrations and always presenting new questions, the unusual circumstances exception appears destined to continue to raise intriguing issues.

\textit{Richard A. Bock}

\begin{flushright}
327. \textit{Id.} at 1036.
328. See supra notes 66, 73-74 and accompanying text.
330. \textit{Id.} at 939.
331. \textit{Id.} at 942.
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