

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 21, 2001

TO : Gerald Kobell, Regional Director
Stanley R. Zawatski, Regional Attorney
Michael Joyce, Assistant to Regional Director
Region 6

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Allegheny High Lift, Inc.
Case 6-CA-31742

596-3212-9100

This case was submitted for advice as to whether the Region should continue to process an employee's Section 8(a)(3) charge alleging unlawful discharge based on protected strike activities, where the strike settlement agreement that called for his resignation was reached without his consent and failed to remedy the alleged unlawful discharge violation.

FACTS

Allegheny High Lift, Inc. (the "Employer") is engaged in the non-retail sale, leasing, and repair of construction equipment. On January 5, 1999, Operating Engineers Local 66 (the "Union") was certified as the exclusive bargaining representative for a unit of about 45 drivers, mechanics, parts employees, and other classifications of employees at three Employer facilities. In March 1999, the Employer and Union commenced negotiations on an initial collective bargaining agreement, and for the next year, the parties made significant progress towards achieving a contract. In March 2000,¹ negotiations broke down when the Employer refused to agree to the Union's pension plan and vacation proposals. Around May 23, the Union began picketing and a strike. On August 31, the Union filed a charge alleging that the Employer violated Section 8(a)(1) and (3) by unlawfully terminating employee DuPree (the "Charging Party") for engaging in protected union activities during the strike.²

¹ Unless otherwise noted, all dates are in the year 2000.

² From May until August, the Union filed approximately 66 unfair labor practice charges alleging that the Employer committed various violations of the Act, including surface bargaining and unlawfully refusing to grant wage increases.

On October 5, the Union membership ratified an initial collective bargaining agreement and a strike settlement agreement (the "Agreement"). As part of the Agreement, the Union agreed to withdraw all pending charges, and pledged that it would not refile any additional charges based on matters arising before the date of the initial contract. The Union also agreed that the Charging Party would resign from the Employer.³

Before the ratification meeting, Union representatives informed the Charging Party that the Employer strongly opposed him returning to work, that the Employer wanted the Union to withdraw its unfair labor practice charge alleging his unlawful discharge, and that the issue of his reinstatement might prevent finalizing the strike settlement. The Charging Party responded that the Union "should do what it has to do, and I will do what I have to do." The Charging Party also told the Union that he did not want to resign, but that he also did not want to be a factor preventing a settlement of the strike. He never provided the Union or Employer with a written resignation. Union representatives and Employer counsel acknowledge that they never discussed waiving the Charging Party's right to file an unfair labor practice charge on his behalf.

In an October 10 side letter to the Agreement, the Union identified five employees, including the Charging Party, who would not return to work from the strike. On October 12, after the parties entered into the Agreement, the Union forwarded the Region a copy of the Agreement and requested a withdrawal of its pending charges. On November 22, the Charging Party filed the present Section 8(a)(3) charge alleging unlawful discharge.

ACTION

We conclude that the Region should continue to process the Section 8(a)(3) charge because it would not effectuate the purposes and policies of the Act under Independent Stave to settle an unlawful discharge allegation by denying a charging party employee his employment without his consent and without providing a remedy.

³ The Agreement also contained limited no-subcontracting provisions, and retained accrued vacation benefits for striking employees, health benefits for employees not immediately recalled from layoff, and a few other incidental benefits.

In Independent Stave,⁴ the Board observed that it "has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes." On the other hand, the Board, noting its exclusive power to prevent unfair labor practices, stated that "it will refuse to be bound by any settlement that is at odds with the Act or the Board's policies."⁵ In determining whether to give effect to a non-Board adjustment, the Board stated that it will consider:

all the surrounding circumstances, including, but not limited to: (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.⁶

The Board's articulation of the "reasonableness" test - i.e., whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation - was a change from prior Board law requiring that a settlement "substantially remedy" the violation alleged.⁷

With respect to the first factor above, the Board has always considered whether discriminatees consented to the settlement of their unfair labor practice charges. In Independent Stave, for example, the Board approved the alleged discriminatees' requests to withdraw their unfair labor practice charges, in part, because they had agreed to be bound to the agreement settling the charges.⁸

⁴ 287 NLRB 740, 741 (1987).

⁵ Id.

⁶ Id. at 743.

⁷ See id. at 742, overruling Clear Haven Nursing Home, 236 NLRB 853, 854 (1978).

⁸ See id. at 743. The Union had also approved the settlement, and the Board noted that there was no evidence that the union's interests were not aligned with those of the discriminatees.

In Lectromelt Casting and Machinery Co.,⁹ ten employees filed unfair labor practice charges alleging unlawful discharge after they were fired for participating in an illegal wildcat strike. The employer then entered into an agreement with the incumbent union recognizing it as the employees' bargaining representative and adopting its predecessor's labor agreement. The agreement reinstated the employees in return for their dropping all charges and claims against the employer. The Board held that the employees' failure or refusal to accept the reinstatement offers did not extinguish their right to adjudicate their unlawful discharge claims, because employees who did not accept the offer were free to exercise whatever right of access to the Board's processes that the Act allowed.¹⁰

In Hotel Holiday Inn de Isla Verde,¹¹ the employer discharged 13 striking employees for alleged strike misconduct. The employer and union reached a strike settlement agreement, whereby the employer agreed to reinstate the employees if they signed a stipulation by a certain date.¹² The charging parties returned after the deadline to sign the stipulation and reclaim their jobs, but the employer refused to reinstate them. The Board honored the strike settlement agreement noting, among other things, that 12 of 13 discharged strikers were told of the terms of the agreement and no employee objected to the conditions of reinstatement. Moreover, the charging parties attempted to return to work and sign the

⁹ 269 NLRB 933 (1984), *enfd.* 831 F.2d 295 (6th Cir. 1987).

¹⁰ See *id.* at 934; see also Airport Parking Mgmt. Co., 264 NLRB 5, 13 (1982), *enfd.* 720 F.2d 610 (9th Cir. 1983) (Board declined to defer to a strike settlement agreement because, among other things, there was no evidence that discharged employees understood that the agreement waived their rights to pursue a remedy with the Board); APD Transport Corp., 253 NLRB 468, 470 (1980), *enf. denied*, 672 F.2d 323 (3d Cir. 1982) (declining deferral to the settlement of a charge alleging the refusal to bargain over the closure of a facility, in part, because a number of employees objected to the settlement agreement).

¹¹ 278 NLRB 1027, 1028 (1986).

¹² See *id.* at 1027 (by signing the stipulation, the employees agreed to a brief suspension and to drop any charges against the employer).

stipulation, which demonstrated that they assented to the settlement agreement.¹³

Here, the Charging Party did not assent to the Agreement effecting his resignation. His response to the Union representative that "the Union should do what it has to do, and I will do what I have to do" does not evince a clear intent to be bound by the terms of the Agreement. If anything, the statement demonstrates that the Charging Party intended to reserve his right to take action on his unlawful discharge allegation. Moreover, the Union and the Employer acknowledge that, in negotiations, they did not consider that the Agreement would preclude the Charging Party from filing a charge on his behalf. Consequently, the application of the first Independent Stave factor to the facts here supports the Region continuing to process the Charging Party's Section 8(a)(3) charge.

The Agreement also does not satisfy the Independent Stave factor calling for a reasonable remedy in light of the nature of the violation alleged. We recognize that both the risks involved with and the stage of this litigation may support an argument that the charge should be dismissed. First, the Charging Party has proffered minimal evidence in support of his unlawful discharge claim, so there is a reasonable chance that he might not succeed on the merits. Additionally, the General Counsel has not issued complaint, so the Agency has not yet expended valuable time and resources. Nonetheless, because the Agreement affords the Charging Party no remedy whatsoever for the alleged unlawful discharge, the settlement of the charge is unreasonable.

In Hotel Holiday Inn de Isla Verde,¹⁴ the Board deferred to the strike settlement agreement, in part, because the employer and union agreed to reach "some middle ground" on two employees' unlawful discharge allegations. In settling the strike, the employer agreed to conditionally reinstate discharged strikers, and the union agreed to give up rights it might have had in an unfair labor practice adjudication on the discharges. Although

¹³ See *id.* at 1028. Cf. Energy Cooperative, 290 NLRB 635, 637 (1988) (although an employee sought to litigate his claim seeking benefits withheld by the employer during a strike, the Board deferred to the strike settlement agreement settling such claims, in part, because the union was authorized as exclusive bargaining representative to bargain for employees regarding the receipt of benefits).

¹⁴ 278 NLRB 1027, 1028 (1986).

part of the Board's reasoning in deferring to the agreement relied upon the charging party employees' acquiescence to the settlement agreement, above, the Board also stressed that the agreement provided the employees with a remedy for the alleged unfair labor practice.¹⁵

On the other hand, in Frontier Foundries, Inc.,¹⁶ the Board refused to give effect to the settlement of an unlawful lay-off charge, in part, because the agreement provided affected employees with only 6% backpay and contained no assurances against future misconduct. The Board stressed that the usual remedy for such a serious Section 8(a)(3) violation is full backpay.¹⁷

Here, the Agreement reached a beneficial outcome for virtually all parties, including unit employees; it returned most employees to work and helped the Employer and Union reach an initial contract. Thus, the Agreement should withstand a broad attack from the employees as a class because they benefited from the compromises made by the Union on their behalf. Nonetheless, it is clear that the Agreement also provided the Charging Party with no remedy for the alleged unlawful discharge violation. This contrasts with the situation in Hotel Holiday Inn, where the Board noted the "middle ground" reached in settling the unfair labor practice charge.

We acknowledge that the Employer committed no fraud, coercion or duress in reaching the Agreement. Moreover, the Employer does not have a history of unfair labor practices, and has not breached previous settlement agreements. In light of the first two Independent Stave factors, however, the Region should continue to process the Charging Party's Section 8(a)(3) charge because it would not effectuate the purposes and policies of the Act to defer to an agreement settling an unlawful discharge allegation by surrendering the employee's right to continued employment without receiving his or her consent and without providing a reasonable remedy.

In reaching our conclusion, we decided that the question of whether a union can legally waive a

¹⁵ See *id.*

¹⁶ 312 NLRB 73, 74 (1993).

¹⁷ See *id.*; see also TNS, Inc., 288 NLRB 20, 22 (1988) (Board declined to defer to settlement agreement because, among other things, it provided "no remedy whatsoever" to the employees for the employer's commission of the alleged unfair labor practice charge at issue).

discriminatee's right to reinstatement is irrelevant under the above Independent Stave analysis. Assuming the Union effectively waived the Charging Party's reinstatement rights in the Agreement, the Board, in deciding whether to defer to such a private unfair labor practice resolution, considers whether all the parties, including the individual discriminatees, have agreed to be bound and whether the settlement is a reasonable resolution of the violation.

Accordingly, the Region should issue a Section 8(a)(3) complaint, absent settlement.

B.J.K.