UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of
ENCLOSURE SUPPLIERS, LLC Case 9-CA-46169

And

IRON WORKERS SHOPMEN'S
LOCAL UNION NO. 468 OF THE
INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTURAL, ORNAMENTAL
AND REINFORCING IRON WORKERS

RESPONDENT ENCLOSURE SUPPLIERS, LLC'S STATEMENT IN OPPOSITION TO APPEAL OF ADMINISTRATIVE LAW JUDGE RULING

I. INTRODUCTION

Pursuant to Section 102.26 of the Rules and Regulations of the National Labor Relations Board, Respondent Enclosure Suppliers, LLC ("Respondent" or "Enclosure Suppliers") files its statement opposing the Acting General Counsel's appeal of Administrative Law Judge Ira Sandron's decision to approve an informal Board settlement agreement.

Judge Sandron acted entirely within his discretion in approving the settlement agreement. The settlement agreement meets the requirements of Independent Stave, and Judge Sandron's decision furthers the purposes and policies of the Act. To require the parties to further litigate a case over the addition of 4 words that do not change the substantive meaning of the settlement agreement would be an utter waste of the parties' and the Board's resources. Judge Sandron's decision should be affirmed and the appeal denied.

II. THE ACTING GENERAL COUNSEL'S APPEAL SHOULD BE DENIED.

A. Judge Sandron's Decision and the Standard of Review

The settlement agreement approved by Judge Sandron differs from Region 9's "standard" informal settlement agreement form by 4 words. The "Compliance With Notice" paragraph in the former states that "[t]he Charged Party will comply with all the terms and provisions of said Notice **during the posting period**." (emphasis added). The standard agreement does not contain the phrase "during the posting period."

In approving the settlement agreement, Judge Sandron correctly concluded that it was essentially identical in substance to the one proposed by the Acting General Counsel. Judge Sandron found that the 4 additional words did not diminish Respondent's obligation to comply with the terms of the settlement agreement. Judge Sandron also cited Respondent's lack of any proclivity to violate the Act in support of his decision.

Judge Sandron's decision is reviewed by the Board for an abuse of discretion. See, e.g., George Joseph Orchard Siding, Inc., 325 NLRB 34 (1998). The Acting General Counsel acknowledges this highly deferential standard in its appeal. See Appeal, at 4.

B. The settlement agreement meets the requirements of Independent Stave, and approval furthers the purposes and policies of the Act.

In deciding whether it will effectuate the purposes and policies of the Act to give effect to a settlement, the Board considers the following factors: (1) whether the charging party and the respondent 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. Independent Stave Co., Inc., 287 NLRB 740, 743 (1987).

Judge Sandron did not abuse his discretion in approving the settlement agreement. The settlement agreement meets the requirements of Independent Stave, and approval of it furthers the purposes and policies of the Act.

It is the Board's duty, not the Acting General Counsel's, to decide whether to honor a settlement. Septix Waste, Inc., 346 NLRB 494, 495 (2006). Accordingly, the Acting General Counsel's opposition to the settlement is not a controlling factor. Septix Waste, 346 NLRB at 495. Otherwise, contrary to the Board's authority, "the General Counsel [would have] a veto power over settlements." Septix Waste, 346 NLRB at 495.[1]

Most importantly, the settlement agreement is reasonable in light of the nature of the alleged violations, the risks inherent in litigation, and the stage of the litigation. The Acting General Counsel misstates the standard under this second factor. Appeal, at 3 ("As to the second factor, the Acting General Counsel submits that the settlement as currently worded is patently unreasonable because it does not provide a full remedy

[1] The Charging Party's failure to formally accept is also not a controlling factor, for the same reasons. However, the Charging Party's failure to attend the telephone hearing on the settlement indicates tacit acceptance.

for the unfair labor practices alleged in the complaint."). There is no requirement that a settlement agreement provide a full remedy for the alleged unfair labor practices in order for an ALJ, in his discretion, to approve it. Indeed, Independent Stave states that a full remedy need not be provided in light of other purposes which further both the Act and the public interest.

In Independent Stave, the Board overruled its prior test for approving settlement agreements (set forth in Clear Haven Nursing Home, 236 NLRB 853 (1978)), because Clear Haven wrongly concluded that "any settlement providing a less than full remedy of the violations alleged was not in accord with 'the public interest in the vindication of statutory rights'." Independent Stave, 287 NLRB at 742. "When we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act." Independent Stave, 287 NLRB at 743. The Board in Independent Stave concluded that approving the non-Board settlement, even though not a full remedy, "advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." Independent Stave, 287 NLRB at 743.

Thus, while there is a public interest in the vindication of statutory rights, the Acting General Counsel in its appeal glosses over the fact that there is an "**equally important** public interest" in encouraging settlement without litigation. Union Local 1814, International Longshoreman's Ass'n., 301 NLRB 764, 765 (1991) (emphasis

added); see Ribbon Sumyoo Corp., 1992 NLRB LEXIS 1411 *21 (1992) (it effectuates the purposes and policies of the Act "to accept the quietus of settlement rather than to remit the parties . . . to further litigation with its certain costs, risks, delays and controversies."). The Board has noted that "if it could not dispose of the majority of cases without recourse to litigation, through informal mechanisms including settlements, the Board simply could not function effectively." Septix Waste, 346 NLRB at 495 (quoting Independent Stave Co., 287 NLRB 740, 741 (1987)).

The settlement agreement approved by Judge Sandron is reasonable, and his decision to approve it furthers the purposes and policies of the Act. The complaint alleges unlawful interrogation of employees about their union sympathies, allegations that Respondent has denied and continues to deny. Nevertheless, Respondent has agreed to post a notice for 60 days stating that it will not engage in like or related conduct. Respondent has also agreed as part of the settlement to the onerous default language contained in the "Performance" paragraph of the settlement agreement.

The Acting General Counsel argues that the settlement agreement "conveys the impression that this respondent need only comply with the provisions of the Act during the posting period of the Notice." Appeal, at 4. That is not the case. Respondent at all times has a statutory obligation to comply with the provisions of the Act, during and after the posting period. The phrase "during the posting period" refers only to the terms and provisions of the Notice; there is no reference to the Act, no can any such reference reasonably be implied.

The Acting General Counsel is also incorrect in stating that the settlement agreement renders the "like or related" language and default provisions meaningless or

a nullity. Appeal, at 3-4. All provisions contained in the settlement agreement and the Notice apply throughout the posting period. If a violation occurs during the posting period, the Acting General Counsel can obtain summary judgment on the original charge under the default provision.

In sum, the second Independent Stave factor supports giving effect to Judge Sandron's decision. And the Acting General Counsel concedes that the third and fourth Independent Stave factors also support the decision. Appeal, at 4 n.5 (the settlement agreement was not obtained through fraud, duress, or coercion and Respondent has no history of violations of the Act or of breaching previous settlement agreements). Accordingly, Judge Sandron's decision should be affirmed. See National Telephone Services, Inc. 301 NLRB 1 n.2 (1991) (adopting the ALJ's recommendation to accept the settlement presented unilaterally by the Respondent, explaining that it "settles all the allegations of the complaint by providing for the appropriate remedies, including notice posting, and that the Respondent has not been shown to be a recidivist violator of the Act."); see also Ribbon Sumyoo Corp., 1992 NLRB LEXIS 1411 *21 (1992) (ALJ decision approving a settlement over the General Counsel's objections—the settlement was "reasonable in light of the nature of the relatively narrow remaining alleged violation, the risks inherent to, and the stage of, the litigation; there has been no fraud, coercion or duress upon any of the parties; and there is no history of Respondent engaging in the history of violations of the Act or having breached prior settlement agreements.")

III. CONCLUSION

Administrative Law Judge Sandron acted within his discretion in approving the informal Board settlement agreement. Respondent Enclosure Suppliers, LLC therefore requests that his decision be affirmed and that the appeal be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served the foregoing Respondent Enclosure Suppliers, LLC's Statement in Opposition to Appeal of Administrative Law Judge Ruling this 28th day of March, 2011 upon:

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