

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

MICHELS CORPORATION

and

Case 30-CA-081206

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 139, AFL-CIO**

ORDER

On October 9, 2012, Administrative Law Judge Christine Dibble, over the objections of the Acting General Counsel, issued an on-the-record oral ruling accepting a non-Board settlement in this proceeding, approving the Union's request to withdraw the charges in the above-captioned case, and dismissing the complaint. Thereafter, the Acting General Counsel filed a timely request for special permission to appeal the Judge's rulings, and the Union and the Respondent each filed opposition briefs.

The Acting General Counsel's request for special permission to appeal the Judge's ruling is granted. After careful consideration of the merits, we find that, on balance, the non-Board settlement does not satisfy the standard set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987).¹ We are mindful that there is an "important public interest in encouraging the parties' achievement of a mutually

¹ That standard includes, but is not limited to, examination of the following factors: "(1) whether the charging party(ies), the respondent(s), and any of the individual discriminatees 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 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."

agreeable settlement without litigation,”² and that the Respondent, the Union, and the alleged discriminatee have fully understood and voluntarily entered into the agreement at issue here. We are equally mindful that there is no evidence of fraud, coercion, or duress and no evidence that the Respondent engaged in a history of violations of the Act or breached previous settlement agreements resolving unfair labor practice disputes. Nevertheless, we find that the absence of a notice-posting provision, the lack of a reinstatement remedy, and the presence of a broad confidentiality provision combine to leave the complaint allegations largely unremedied. Each of these elements standing alone might not be fatal to approval of the settlement agreement; in combination, however, we find that they compel a finding that the agreement does not meet the *Independent Stave* standard.

The complaint in this case alleges that the Respondent repeatedly made numerous threats of more onerous working conditions and or discharge if an employee sought to enforce a provision of the collective-bargaining agreement between the Respondent and the Union. The complaint further alleges that the Respondent imposed more onerous working conditions by changing the employee’s hours and ultimately laying off the employee because he sought enforcement of a provision of the collective-bargaining agreement. The non-Board settlement agreement purports to resolve these issues by providing that the Respondent pay \$7500 to the alleged discriminatee and provide him with a neutral employment reference. In return, the alleged discriminatee

² *Independent Stave*, 287 NLRB at 742.

agrees not to seek reinstatement and not to apply for future employment with the Respondent. All of the parties further agree to a broad confidentiality provision.³

The Acting General Counsel opposes the settlement agreement on the grounds that it leaves numerous allegations in the complaint without any remedy and did not go far enough in protecting employees' rights. We agree that, taken as a whole, the settlement is "not reasonable in light of the nature of the violations alleged."⁴ It "remedies virtually no injury to employee rights other than providing payments to . . . employees and a neutral letter of recommendation" ⁵ This would not have been the case had the settlement agreement provided for a notice to unit employees assuring them that they could exercise their statutory rights without fear of reprisal. Nor would it have been the case had the alleged discriminatee been reinstated; his very presence back at the jobsite would have been an assurance of employees' rights. Cf. *Independent Stave*, 287 NLRB at 743 (non-Board settlement agreement approved despite lack of notice and 10-percent backpay because, among other reasons, it required immediate reemployment with retroactive seniority, which "demonstrated to other employees a recognition of their statutory rights involved"). Finally, had the

³ The provision includes the following agreement: "The Parties agree to keep the terms of this Agreement strictly confidential and will not communicate or disclose to any other person, natural or otherwise, except as required by law, the contents of any term or provision contained herein or any other aspect of this Agreement between the Parties...." Settlement agreement, paragraph 8.

⁴ *Independent Stave*, 287 NLRB at 743.

⁵ *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998), Members Fox and Liebman, joined by Member Hurtgen in a concurring opinion, finding that the non-Board settlement agreement did not satisfy the *Independent Stave* standard, granted the General Counsel's request for special permission to appeal the Administrative Law Judge's approval of the settlement agreement and revoked the judge's approval. Chairman Gould and Member Brame found the settlement agreement met the *Independent Stave* standard in separate dissenting opinions.

confidentiality clause at issue been limited so as to permit the alleged discriminatee and the Union to tell other employees that the matter had been successfully resolved, without regard to the specific monetary terms, the unit employees could have been assured that their statutory rights were protected. Instead, the settlement's failure to include any of these measures creates a situation where the unit employees have no way of knowing whether they would be subjected to threats of adverse consequences and retaliatory actions, should they, like the alleged discriminatee, seek to enforce their rights under the collective-bargaining agreement.⁶

We firmly are committed to promoting the public interest in encouraging mutually agreeable settlements without litigation, but we are equally committed to performing that function "in the public interest and not in vindication of private rights." *Independent Stave*, 287 NLRB at 742, quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957). While the settlement agreement at issue here appears to vindicate the private rights involved, we are compelled to agree with the Acting General Counsel that, taken as a whole, it fails to address in any manner the public interest in protecting statutory rights.

⁶ The Respondent, joined by the Union, argues that this should not matter because the Acting General Counsel has not shown that unit employees were aware of the alleged threats and retaliatory actions. The Acting General Counsel, however, does not have to prove his case as he would at trial in order to oppose the approval of the settlement on this ground. Neither party contradicts the Acting General Counsel's assertions that the alleged discriminatee carpooled with co-workers, that he could no longer participate in the carpool when the Respondent changed his hours, that he was the only employee who was required to start later than other employees, and that he was the only employee laid off from the jobsite. This provides the basis for a reasonable inference that other unit employees were aware of the actions addressed by the complaint and that their statutory rights are implicated.

Accordingly, the Acting General Counsel's request to grant special permission to appeal the Administrative Law Judge's approval of the settlement agreement is granted, the Judge's approval is revoked, and the proceeding is remanded to the Judge for further processing without prejudice to further settlement negotiations consistent with this Order.⁷

Dated, Washington, D.C., December 19, 2012.

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

⁷ In light of this conclusion, we deny the Respondent's motion for a protective order.