

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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Nos. 99-4121  
00-3881

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BEVERLY CALIFORNIA CORPORATION f/k/a BEVERLY  
ENTERPRISES, ITS OPERATING DIVISIONS, WHOLLY-OWNED  
SUBSIDIARIES AND INDIVIDUAL FACILITIES  
AND EACH OF THEM

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Company's jurisdictional statement is not complete and correct. This case is before the Court on the petition of Beverly California Corporation f/k/a Beverly Enterprises, its Operating Divisions, Wholly-Owned Subsidiaries and Individual Facilities and Each of Them ("the Company") to review, and the cross-application of the National Labor Relations Board ("the Board") to enforce, a Decision and Order of the Board. The

Board's order issued on November 10, 1999, and reported at 329 NLRB No. 90. (A 1-11.)<sup>1</sup> The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the unfair labor practices occurred in Kokomo, Indiana.

The Company filed its petition for review on December 6, 1999. The Board filed its cross-application for enforcement on November 7, 2000. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

#### STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably exercised its broad remedial discretion by declining to give effect to a settlement agreement purporting to resolve the backpay claims of discriminatees Janet Glenn and Debra Wiley against the Company.

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<sup>1</sup> "A" references are to the Appendix attached to the Company's brief. "Tr" references are to the transcript of hearings before the administrative law judge. "GCX" references are to the exhibits introduced by the General Counsel. "RX" references are to the exhibits introduced by the Company ("respondent" before

STATEMENT OF THE CASE

Based on charges filed by United Food and Commercial Workers Local 917 ("the Union"), the Board's General Counsel issued a complaint against the Company, alleging, inter alia, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). After a hearing, the administrative law judge issued his decision on November 9, 1990, finding merit to the complaint. Beverly Enterprises, 310 NLRB 222, 287-88 (1993) ("Beverly I"). On January 29, 1993, the Board affirmed the judge's findings. Among other things, the Board's remedial order required the Company to make Glenn and Wiley whole for any loss of earnings that resulted from the unlawful discharge. Beverly I, 310 NLRB 222, 287-88. On February 28, 1994, the United States Court of Appeals for the Second Circuit enforced in pertinent part the Board's Beverly I order. Torrington Extend-A-Care Employee Assoc. v. NLRB, 17 F.3d 580 (2d Cir. 1994). (A 1.)

I. THE UNDERLYING UNFAIR LABOR PRACTICE PROCEEDING

The instant case arose out of a 1987 union organizing campaign at the Company's Sycamore Village Nursing Home in Kokomo. About 2 weeks before the election, prounion employees Janet Glenn and Debra Wiley voiced their displeasure to a

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the Board). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

supervisor about favorable treatment accorded a co-worker who was the daughter of the director of nursing. Two days later, on June 25, the Company suspended and ultimately discharged Glenn and Wiley, assertedly for insubordination and physical and verbal abuse toward the supervisor. Beverly I, 310 NLRB at 287. On behalf of Glenn and Wiley, the Union filed charges with the Board alleging unfair labor practices. Glenn and Wiley also filed charges with the Indiana Civil Rights Commission ("ICRC") alleging that their terminations were discriminatorily based on their race. In August 1991, Glenn and Wiley declined the Company's unconditional offers of reinstatement, thus terminating the backpay period. (A 7.)

On July 20, 1988, the Company entered into settlement agreements with the Union, Glenn, and Wiley. The agreements provided for \$1000 for payments to both Glenn and Wiley. On November 30, an administrative law judge of the Board conducting Glenn's and Wiley's pending unfair labor practice case refused to give effect to those settlement agreements. (A 7.) The cases went to trial and in November 1990, the judge issued his recommended decision and order finding their discharges unlawful, which was affirmed by the Board and enforced by the Second Circuit as described above. Beverly I, 310 NLRB at 287-88.

## II. THE COMPLIANCE PROCEEDING

In August 1991, the ICRC proceeding based on Glenn's and Wiley's charges was approaching trial. Frederick Bremer was the ICRC staff attorney handling their case. At the same time, the Company's exceptions to the administrative law judge's decision in the unfair labor practice proceeding (finding that the Company had unlawfully discharged Glenn and Wiley) were still pending before the Board. (A 7; Tr 313-15.) Company attorney Todd Ponder learned of the Board proceeding while deposing Glenn in the ICRC case. Ponder represented the Company in the ICRC matter but was not involved in the underlying unfair labor practice case before the Board. (A 7; Tr 313.)

Nevertheless, Ponder attempted to settle Glenn's and Wiley's ICRC case, as well as the backpay due in the Board case, by negotiating with ICRC attorney Bremer. (A 7; Tr 313, 316-17.) Ponder and Bremer calculated what they deemed "full" backpay for the June 1987 to August 1991 backpay period in both the ICRC and Board cases. (A 7; Tr 320-22; RX 13, 14.) Neither ever contacted or inquired of representatives of the Board as to the amount of backpay that might be due to Glenn and Wiley as a remedy for the unfair labor practices. (A 8; Tr 286, 333-34.) Ponder calculated Glenn's gross backpay and Bremer gathered the information for reductions to backpay from interim earnings and

unemployment benefits.<sup>2</sup> (A 7; Tr 320-22, RX 14.) Lacking Wiley's interim earnings information, they devised a formula that assumed she worked the entire period at minimum wage. They rounded the backpay due Glenn to \$4000 and \$5000 for Wiley. (A 7; Tr 323-27, RX 12, 14.) In fact, the discriminatees were due approximately \$23,000 and \$34,000, respectively. (A 7; 1/13/97 GCX 1(f).)

Company attorney Ponder drafted separate settlement agreements for both Glenn and Wiley. (A 8; Tr 335.) Each of the two agreements consisted of three documents. First, "Negotiated Settlement Agreements," which were uncaptioned, provided for the withdrawal of charges (not involved in the instant case) filed by Glenn and Wiley with the U.S. Equal Employment Opportunity Commission. (A 8; A 15, 26.) Second, Ponder drafted "Settlement Agreements," bearing the ICRC caption, and providing for termination of the ICRC proceedings and the payment of sums represented by Ponder and ICRC Attorney Bremer as "full backpay," but without reference to the Board proceeding. (A 8; A 16-21, 27-32.) Third, "Supplemental Settlement Agreements," that Ponder also captioned as ICRC documents, stated that "nothing in [the Settlement Agreement]

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<sup>2</sup> The Board does not deduct unemployment compensation in figuring net backpay. NLRB v. Gullett Gin Co., 340 U.S. 361 (1951). (A 10.)

operates to waive, release, or withdraw [Glenn's or Wiley's] rights with respect to [their unfair labor practice cases] presently pending before the National Labor Relations Board." The Supplemental Settlement Agreements also provided that entry into settlements did not waive the pending unfair labor practice proceedings. They further stated that the amount paid was "payment in full of any back pay and make whole remedy to which [the employee] may hereafter become entitled in connection with" the unfair labor practice case. (A 8; A 22-23, 34-35.)

In October, ICRC Attorney Bremer presented the agreements to Glenn and Wiley separately. Both told him they were confused by the language of the Supplemental Settlement Agreement, which simultaneously provided that the agreements would not operate to waive their rights in the Board case, but represented a satisfaction of their backpay entitlement before the Board. Bremer replied that the Supplemental Settlement Agreements had "nothing to do" with the Board case. Accordingly, both signed the agreements and received the stated amounts. (A 8; Tr 387-89, 391-92.) Neither was represented by private counsel nor knew the amounts actually owed to them. (A 8; Tr 387-89, 394.) The Settlement Agreements were signed and approved by four ICRC commissioners. The Supplemental Settlement Agreements were not signed by the commissioners, who were unaware of their terms. (A 8; Tr 284, 351.)

After the Second Circuit enforced Beverly I (above, p. 3), the Board's Regional Director for Region 6 instituted compliance proceedings pursuant to the Board's Rules and Regulations (29 C.F.R. § 102.52 et. seq.) to establish the amount of backpay due the discriminatees. On April 28, 1997, at a hearing before an administrative law judge, the Board's General Counsel alleged the backpay due Glenn to be \$23,169, and \$34,203 due Wiley, from their June 25, 1987, discharges up to the Company's rejected offers of reinstatement made on August 19, 1991 (above, p. 4). (A 7; 1/13/97 GCX 1(f).)<sup>3</sup> The Company opposed and argued, inter alia, that the 1991 settlement agreements (above, pp. 5-7), precluded the Board from requiring additional backpay to remedy the discrimination against them. (A 9-10.)

On February 24, 1998, the administrative law judge issued a recommended decision and order declining to give preclusive effect to the settlement agreements, as urged by the Company, and awarding Glenn and Wiley backpay in the amounts of \$19,169 and \$29,903, respectively, representing net backpay offset by the amounts already paid them.

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<sup>3</sup> The first part of the consolidated compliance hearing, pertaining to backpay claimant Suzanne La Framboise, was held on January 13, 1997. The parties resolved compliance issues regarding La Framboise after the administrative law judge's supplemental decision and before the Board's decision issued. (A. 1 n.2.) Unless otherwise specified, record citations refer to the transcript of the April 28, 1997, hearing regarding Glenn and Wiley.

### III. THE BOARD'S CONCLUSIONS AND ORDER

On November 10, 1999, the Board (Members Fox, Liebman and Hurtgen) issued its decision and order adopting the administrative law judge's findings. (A 1.) Accordingly, the Board (id.) ordered the Company to pay Glenn and Wiley the backpay amounts specified by the administrative law judge.

#### SUMMARY OF ARGUMENT

The only issue in this case is whether the Board acted within its broad discretion in rejecting as a remedy for the Board case the settlement agreement negotiated between the Company and the Indiana Civil Rights Commission. In finding that the settlement was an inappropriate remedy, the Board applied the well-established test set forth in Independent Stave Co., Inc., 287 NLRB 741 (1987). Specifically, the Board found that neither the charging party Union nor the General Counsel, who opposes the settlement, was consulted in reaching the agreement. Second, the amounts paid were unreasonable, particularly given the employees' improved bargaining position after they had prevailed at trial, as they represented only 15 and 17 percent of the total owed and were not calculated using the Board's methods. Third, the employees signed the agreement based on misrepresentations. The crucial agreement, drafted by the Company, appeared to be an ICRC document and stated that the employees were receiving full backpay though the sums fell far

short. Further, the ICRC attorney misrepresented that the agreement would have no effect on their Board cases. In the circumstances, the Board reasonably found that the ICRC settlement did not satisfy the Independent Stave factors.

#### ARGUMENT

THE BOARD REASONABLY EXERCISED ITS BROAD REMEDIAL DISCRETION BY DECLINING TO GIVE EFFECT TO A SETTLEMENT AGREEMENT PURPORTING TO RESOLVE THE BACKPAY CLAIMS OF DISCRIMINATEES JANET GLENN AND DEBRA WILEY

##### A. Applicable Principles and Standard of Review

It is settled that the Board's power to issue remedial orders "is a broad discretionary one, subject to limited judicial review." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964). Accord J. Huizinga Cartage Co. v. NLRB, 941 F.2d 616, 622 (7th Cir. 1991). Accordingly, a reviewing court will not disturb a Board remedial order "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.'" Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964) (quoting Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540 (1943)). Accord NLRB v. Aluminum Casting & Engineering Co., Inc., 230 F.3d 286, 289, 2000 WL 151900 (7th Cir. Oct. 13, 2000).

One remedy playing a critical role in the scheme of the Act is an order requiring backpay for employees who have suffered

economic injury as a result of having been unlawfully discharged by an employer. NLRB v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258, 263 (1969). Such an order "vindicate[s] the public policy of the [Act]" by "restoring the economic status quo that would have obtained but for the [employer's] wrongful [conduct]." Id. Accord Golden State Bottling Co. v. NLRB, 414 U.S. 168, 188 (1973). "The power to order backpay 'is for the Board to wield, not for the courts.'" NLRB v. My Store Inc., 468 F.2d 1146, 1149 (7th Cir. 1972) (quoting NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953)), cert. denied, 410 U.S. 910 (1973).

Further, it is well-established that the Board's discretion extends to approving settlement agreements and "'determin[ing] whether a proceeding, when once instituted, may be abandoned.'" Independent Stave Co., Inc., 287 NLRB 740, 741 (1987) ("Independent Stave"), (quoting Robinson Freight Lines, 117 NLRB 1483, 1485 (1957)). With court approval, the Board acts in the public interest and has no statutory obligation to defer to private settlement agreements. NLRB v. Alwin Mfg. Co., Inc., 78 F.3d 1159, 1162-63 (7th Cir. 1996); NLRB v. International Brotherhood of Electrical Workers, Local Union 112, 992 F.2d 990, 992 (9th Cir. 1993) ("IBEW Local 112"). The Board will refuse to be bound by any settlement that is at odds with the

Act or the Board's policies. IBEW Local 112, 992 F.2d at 992; Independent Stave, 287 NLRB at 741.

In assessing whether the purposes and policies underlying the Act would be effectuated by approving a settlement agreement, the Board will examine all the surrounding circumstances, including,

(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 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, 287 NLRB at 743; American Pacific Concrete Pipe Co., 290 NLRB 623 (1988). Finally, the Board's deferral decisions are reviewed by the courts of appeals under an abuse of discretion standard. Courts are reluctant to find abuse where unfair labor practice remedies are involved. See, e.g., Airport Parking Mgmt. v. NLRB, 720 F.2d 610, 615 (9th Cir. 1983); IBEW Local 112, 992 F.2d at 992.

B. The Board Properly Refused To Approve the Settlement Agreements

In the instant case, the Board upheld the decision of the administrative law judge not to give effect to the settlement

agreements that the Company now relies on to resist enforcement of the remedial order at issue. Thus, the Board found (A 1, 10) that the settlement agreements did not meet the standards set forth in Independent Stave. Specifically, it found (A 10) that as a matter of fact, neither the General Counsel, who opposed approval of the settlement, nor the charging party Union were consulted prior to execution of the agreements. (A 10; Tr 286, 333-34.) Further, it upheld the administrative law judge's determination that the terms of the agreements were not reasonable in the circumstances established by the record. Lastly, the Board found that Glenn's and Wiley's acceptance of the agreements were each brought about by misrepresentations. We show below that the Board's decision here was a reasonable exercise of its discretion and should be enforced.

1. The settlement agreements were not approved by the Charging Party or the General Counsel

The first consideration under Independent Stave is whether the charging party Union, the respondent Company, and individual discriminatees have agreed to be bound by the settlement agreements, as well as the position taken by the General Counsel regarding the settlement. Independent Stave, 287 NLRB at 743. It is undisputed that company attorney Ponder and ICRC attorney Bremer completely circumvented the General Counsel and the Union in negotiating the settlement, giving neither an opportunity to

take a position. That simple fact alone is sufficient cause to reject the settlement under Independent Stave. See, e.g., Weldun Int'l, 321 NLRB 733, 754 (1996) (rejecting "non-Board" settlement based on General Counsel's opposition and lack of charging party involvement); Food Lion, Inc., 304 NLRB 602 n.4 (1991).

Moreover, as the administrative law judge noted (A 10), the General Counsel's objection was and remains "vehement." Opposition by the parties sensitive to the discriminatees' interests was predictable, given the miserly one-sixth backpay and in light of the misrepresentations that lay at the heart of the settlement (discussed below, pp. 19-22).

With respect to the General Counsel's opposition, the Company (Br 16) cites American Pacific Concrete Pipe Co., Inc., 290 NLRB 623 (1988), for the proposition that the weight afforded the General Counsel's position under Independent Stave is diminished when only the amount of backpay (as opposed to the merits) is at issue. To the contrary, nothing in American Pacific supports that argument. Indeed, as the Ninth Circuit has affirmed, the Board is warranted in rejecting of a non-Board settlement in a backpay case based largely on the General Counsel's opposition to the agreement. IBEW Local 112, 992 F.2d at 992-93. See also Weldun Int'l, 321 NLRB 733, 754 (1996).

Next, there is no merit to the Company's assertion (Br 17) that the Union's position was "immaterial," notwithstanding Independent Stave, because its failure to appear at the backpay hearing held in January 1997 indicated a lack of further interest in the case. To the contrary, the Union was involved at the time of the 1991 settlement, and was actively involved in the case at least as late as 1993, when it intervened in the Second Circuit proceeding brought by the Board to enforce its unfair labor practice order. Torrington Extend-A-Care Employee Assoc. v. NLRB, 17 F.3d 580 (2d Cir. 1994), enforcing Beverly I, 310 NLRB 222 (1993). In the circumstances, the Union's decision not to further expend its resources by appearing at the backpay proceeding cannot be taken as the expression of a lack of interest in the case.<sup>4</sup>

Finally, it is true, as the Company points out (Br 16-19), that Glenn and Wiley did agree to each of their three agreements, including the Supplemental Settlement Agreements. The record is clear, however, that they did so only after they

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<sup>4</sup> The Company further speculates (Br 17) that the Union would have approved the settlement had it been consulted, because it previously approved the \$1000 1988 settlements for Glenn and Wiley (discussed above, p. 4), which were rejected by the administrative law judge in the unfair labor practice proceeding. The record shows, however, that the Union approved that \$1000 settlement to get something right away for the discriminatees, rightly assuming that the General Counsel would reject the agreements, and continue with the case, and that the

both expressed confusion about crucial terms to ICRC attorney Bremer, and only after receiving "unequivocal[]" assurances from him (A 8) that the relevant agreement had "nothing to do with" the Board case. (Above, p. 7) The Board could reasonably infer from those assurances that the discriminatees were led to believe, wrongly, that the settlement being offered would not affect their right to recover the balance of what they were due in the Board's then-pending unfair labor practice case. (A 9; Tr 387-89, 391-92.)

Nor is there merit to the Company's claim (Br 19) that the Supplemental Settlement Agreement, by explicitly cutting off additional backpay, put the discriminatees on notice that they were waiving any more money when they signed. The Company ignores the agreements' language, to the effect that "nothing . . . operates to waive, release, or withdraw Complainant's rights with respect to [the Board case] . . . ." <sup>5</sup> (A 8; A 22,

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employees would receive full backpay pursuant to Board procedure. (Tr 370, 375-77.)

<sup>5</sup> Contrary to the Company's claim (Br 18) that the Board's reliance on the agreement's language involved "contract interpretation," the Board merely applied the Independent Stave analysis to the facts and found the agreement misleading. In any event, it is settled that ambiguities in contractual language are generally resolved against the drafter, in this case the Company. Stone Container Corp. v. Hartford Steam Boiler Inspection and Ins. Co., 165 F.3d 1157, 1161-62 (7th Cir. 1999). Similarly, ambiguities in fashioning a remedy are resolved against the wrongdoer. U.S. Marine Corp. v. NLRB, 944

34.) From the perspective of the discriminatees who did not want reinstatement, it is hard to imagine a more important remedial right than backpay. Moreover, contrary to another of the Company's claims (Br 19 n.4), the lesson the discriminatees (and the Company) would have learned from the \$1000 payments made to them by the Company in 1988 (A 7) is that the General Counsel must approve a non-Board settlement and, without that, the right to recover full backpay in Board proceedings continues, regardless of the language of an outside settlement agreement.

2. The settlement was not reasonable

The second Independent Stave factor examines whether the settlement is reasonable in light of the violations found, the risks presented in litigation, and the stage of litigation when the agreement is entered into. 287 NLRB at 743. The agreement reached by company attorney Ponder and ICRC attorney Bremer was not reasonable in the circumstances of the case. First, their calculations were ill-informed. Although purporting to determine a "full" backpay figure under Board remedies, Ponder and Bremer neither consulted Board personnel nor even attempted

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F.2d 1305, 1321 (7th Cir. 1991), cert. denied, 503 U.S. 936 (1992).

Nor is there merit to the Company's assertion (Br 17) that "it is hard to imagine a way to write the settlement agreement's language more clearly." The Company, for example, imagined much clearer language in its brief (p. 17).

to ascertain the Board's methods of calculation. Instead, as the administrative law judge observed (A 10), they "calculated the backpay amounts without knowing, in Bremer's case or caring in Ponder's case, how the Board in fact calculates backpay." (A 10; Tr 286, 333-34, 338.) As noted, their resulting figures amounted to 17 percent of the total backpay owed Glenn and 15 percent for Wiley.<sup>6</sup>

Further, as the administrative law judge pointed out (A 10), it is significant that another judge had already determined that the Company had unlawfully discharged Glenn and Wiley at the time they signed the agreements. The fact that each asked Bremer about her backpay in the Board case before signing shows that they were determined to preserve the rights they could anticipate being vindicated by the Board. (A 9; Tr 387-89, 391-92.) Although it was possible that the Board or court of appeals could have overturned the judge's decision, the employees nevertheless were in a strong negotiating position when the ICRC settlement was reached. The "risks of litigation" at that time were therefore hardly so unfavorable that one-sixth backpay represented a reasonable settlement. Moreover, had Glenn and Wiley but known how far off the mark were Ponder's and

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<sup>6</sup> In response, the Company merely argues (Br 19-20) that the amount satisfied ICRC procedures: apparently, the Company is suggesting that, if the settlement meets the standards of any other agency, the Board should ignore its own.

Brewer's miscalculations of backpay and had they not been misled into thinking that the Company would not later use the agreements to attempt to cut off the additional backpay, it is highly unlikely that they would have signed off on the agreements. In the circumstances, the Company fails to support its claims (Br 16, 21) that Glenn's and Wiley's decisions to take the settlements were "calculated," in the sense that they represented informed decisions based on objective considerations.

3. Glenn's and Wiley's agreements to the settlements were based on misrepresentations to them

The third factor examined is whether there has been "any fraud, coercion, or duress by any of the parties in reaching the settlement." Independent Stave, 287 NLRB at 743. Here, as the Board found (A 10), the discriminatees signed the agreements in the context of misrepresentations. Thus, the pertinent language of the agreements, drafted by company attorney Ponder, falsely represented that the amounts paid fully reimbursed Glenn and Wiley for both the ICRC and Board cases, when in fact, they bore no true relation to full reimbursement. As discussed above, the employees received far short of the full backpay award owed in the Board case.

Moreover, Ponder put the ICRC caption at the top of the Supplemental Settlement Agreements before passing them to

Bremer, who then presented them to Glenn and Wiley. (Above, p. 7.) By that sequence of events, Ponder and Bremer created an impression that a governmental agency--brought into being to safeguard individual rights--stood behind Bremer's assertion to the discriminatees that the Supplemental Settlement Agreement would not affect their rights to the rest of the backpay they were owed. In fact, the contents of the official-looking Supplemental Settlement Agreements were not endorsed by any agency commissioner. Nevertheless, Bremer's assertion left Glenn and Wiley with the impression that they could trust that the documents they were signing would not later be used by the Company to deny them a complete unfair labor practice remedy. In the circumstances, the record amply supports the Board's determination that the third Independent Stave factor was not satisfied. (A 10; Tr 387-89, 391-92.)

In contending (Br 21-22) otherwise, the Company attempts to use the ICRC as a shield, asserting that the third Independent Stave factor is relevant only if directly involving a recognized agent of a party. It reasons that this test is not met here because company attorney Ponder acted only indirectly through Bremer, by having him urge acceptance of the agreements, some of which bore the imprimatur of his agency and purported to represent just compensation. To the contrary, the Board properly examines whether any party involved in a settlement

engaged in the conduct described in the third Independent Stave factor, not just those parties dealing face-to-face with discriminatees. 287 NLRB at 743. In any event, it is clear that both the Company and the ICRC were parties to the settlement, of which the Supplemental Settlement Agreement is an integral part, and made the material misrepresentations described above. (A 8; Tr 279.)

Moreover, the Company's attempts (Br 22-23) to shift the blame away from Ponder, and onto the employees and Bremer, miss the point. First, the Company did not prove that Bremer represented Glenn and Wiley in the Board case; moreover, Bremer was unfamiliar with Board procedures. (A 7, 8; Tr 274-75, 286.) As the judge noted (A 9), Bremer was interested in disposing of the ICRC case, and conducted himself accordingly. (A 9, 10; Tr 387-89, 391-92.)

The Company's suggestion (Br 23)--that the discriminatees accept their comparative pittance from the Company and then seek satisfaction against Bremer and the ICRC in separate litigation--is a further attempt to persuade the Court to eviscerate the Board's authority to protect its remedial processes. Indeed, "the Board's settlement policy is intended to promote the peaceful nonlitigious resolution of disputes, not the shifting of those disputes to other forums. . . ." Flint

Iceland Arenas, 325 NLRB 318, 319 (1998) (overturning judge's approval of non-Board settlement).

Finally, the Company repeatedly implies (Br 21-23) that ICRC attorney Bremer was Glenn's and Wiley's "attorney." Obviously, they neither retained nor compensated him and he had no involvement in the unfair labor practice case. Indeed, with respect to the Board proceeding, Bremer's only apparent interest was to do whatever was necessary in order to facilitate a final settlement of the ICRC charges. Equally unworthy of consideration is the Company's rebuttal (Br 23), that the discriminatees could have retained their own attorney if they did not trust Bremer or Ponder. In other words, the Company's ultimate defense is that the unreasonable nature of the settlement would have been exposed much earlier if only the discriminatees had been smart enough, or rich enough, to hire an attorney.

4. The Company's remaining contentions lack merit

In light of its findings on the first three factors, the Board found it (A 10) unnecessary to reach the fourth factor in Independent Stave, that is, whether the Company has a history of unfair labor practices or breaches of settlement agreements. The Company nevertheless contends (Br 24) that the fourth factor favors it, because the Second Circuit declined to enforce the Board's corporate-wide cease and desist order and notice posting

in Beverly I. Torrington Extend-A-Care Employee Assoc. v. NLRB, 17 F.3d 580, 586-87 (2d Cir. 1994) (upholding the Board's finding of numerous unfair labor practices against other facilities of the Company). The Board, however, does not require the presence of each Independent Stave factor, including an unfair labor practice history by the Company. 287 NLRB at 743.

The Company also repeatedly emphasizes (Br 16, 24) that the settlement here was a "private" agreement, implying that the Board's non-participation in the settlement negotiations is sufficient ground to force the agreement's acceptance, Independent Stave notwithstanding. As fully discussed above, however, such settlements are not solely the concern of private litigants. Statutory rights under the Act, vindicated by Board remedial orders, are public, and no party may circumvent Board authority, by inducing a settlement that fails to pass muster. Service Merchandise Co., 299 NLRB 1125, 1125-26 (1990) (citing J.I. Case Co. v. NLRB, 321 U.S. 332 (1944)). NLRB v. Alwin Mfg.

Co., Inc., 78 F.3d 1159, 1162-63 (7th Cir. 1996); IBEW Local 112, 992 F.2d at 992.<sup>7</sup>

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<sup>7</sup> Contrary to the Company's assertion (Br 16), the fact that the settlements here dealt only with backpay is irrelevant to the Independent Stave analysis. See, e.g., IBEW Local 112, 992 F.2d at 992; Weldun Int'l, 321 NLRB 733, 754 (1996); Frontier Foundries, Inc., 312 NLRB 73 (1993) (overruling judge's acceptance of monetary settlement). The Board in American Pacific Concrete Pipe Co., Inc., 290 NLRB 623 (1988), upon which the Company relies (Br 13-17), adhered to the Independent Stave analysis to determine if the settlement was acceptable even though it was limited to backpay. The facts of the instant case, moreover, warrant a different result than that in American Pacific. There, the employee was informed of the full backpay owed, the charging party union was involved, no coercion or misrepresentations occurred, and the employee received about 50 percent of the total backpay owed.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that judgment should enter denying the Company's petition for review and enforcing the Board's order in full.

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