

TNS, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 10-CA-17709

March 9, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 22, May 16, and October 23, 1985, the Board issued Orders¹ deferring to non-Board settlement agreements and dismissing portions of an unfair labor practice complaint issued against the Respondent. On petition to review the Board's Orders, the United States Court of Appeals for the District of Columbia Circuit reversed the Board's Orders and remanded the case to the Board for further consideration.² The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board on remand. The General Counsel, the Charging Party, and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On August 18, 1982, the General Counsel issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employees who had engaged in a work stoppage because of their good-faith belief that working conditions at the plant were "abnormally dangerous." The hearing on the merits of the case commenced on November 7, 1983, before Administrative Law Judge Arline Pacht. On January 13, 1984, attorney William K. Shaw Jr. moved to intervene on behalf of approximately 70 employees, and the judge granted limited intervention.

On December 17 and 18, 1984, the final 2 days of the hearing, Shaw presented to the judge for approval non-Board settlement agreements that he had reached with the Respondent and that had been presented to and accepted by 56 employees. The settlement agreements provided that the employees would each receive, depending on seniority, lump-sum payments of between \$2000 and \$12,000 which, according to the settlement, "are not wage payments or backpay within the meaning of the NLRA but the sole consideration for said payments is the release of all claims by the individ-

ual employee listed herein for damages for personal injury or illness arising from the alleged exposures to depleted uranium and its alleged radiological and toxicological effects." In return, the agreements provided that the individual employees would not sue or assert any charge or complaint against the Respondent based on the Act or various other Federal statutes and would release the Respondent from any and all present and future claims arising out of their employment with the Respondent. It was also specified that the agreements and payments were not to be deemed as an admission of liability on the part of the Respondent; that the agreements constituted a compromise "of doubtful and disputed claims"; that the charge before the Board was "of questionable merit" under which employees were "unlikely" to recover any backpay; and that the agreements would be governed by the law of the State of Tennessee. Finally, the agreements provided that for each employee who signed the agreement, the Respondent would pay Shaw \$450, "representing all attorney's fees, costs and/or expenses arising out of his [Shaw's] representation of the undersigned [employees]" and that the monetary payments provided in the agreements would be contingent on the prior approval of the Board or administrative law judge.

At the hearing on December 18, 1984, the judge rejected the settlement agreements, expressing concern that Shaw had no standing as a limited intervenor to negotiate or present to the judge the settlement agreements to the exclusion of and over the objections of the Charging Party and the General Counsel; that Shaw might have engaged in unethical conduct by negotiating for his fee as part of the agreements; that the employees were not properly advised before they signed the agreements; that the agreements stated that they would be governed by the laws of the State of Tennessee; and that not all the employees involved in the work stoppage agreed to the terms of the settlement.

The Respondent filed a request for special permission to appeal the judge's refusal to approve the settlement agreements. On February 22, 1985, the Board granted the request, approved the proposed settlement agreements in principle, and remanded the case for a further hearing with respect to the employees' voluntary and informed consent regarding the execution of the agreements. Regarding the Charging Party's allegation in its opposition to the Respondent's special appeal request, the Board stated that it was not the Board's function or responsibility to pass on the ethical propriety of an attorney's conduct.

On April 22, 1985, the Charging Party, the Respondent, and the Intervenors filed a joint motion

¹ Not reported in bound volumes. Members Babson and Cracraft did not participate in the Board's prior Orders in this case.

² *Chemical Workers International Union v. NLRB*, 806 F.2d 269 (D.C. Cir. 1986).

with the Board asking it to amend its February 22, 1985 order and approve the settlement agreements. In their motion the parties stipulated that the employees executed the settlement agreements with "informed and voluntary consent" and that a hearing on such issues was unnecessary. On May 16, 1985, the Board granted the joint motion.

On October 23, 1985, the Board issued an Order, amending sua sponte its prior orders. The Board noted its longstanding policy of encouraging resolution of disputes without resort to Board process, citing *Combustion Engineering*, 272 NLRB 215, 217 (1984); and *Coca Cola Bottling Co.*, 243 NLRB 501, 502 (1979). The Board also noted that the case involved novel legal and policy issues, the parties stipulated that the agreements were executed by the employees with informed and voluntary consent, the legal issue presented in the case was not affected by these non-Board settlement agreements, and there was a basic risk inherent in litigation. The Board concluded that it would effectuate the policies of the Act to give effect to the agreements. Accordingly, the Board dismissed the complaint insofar as it alleged a violation of the Act in connection with the 56 employees who executed settlement agreements.

The Charging Party filed a petition for review of the Board's Orders with the United States Court of Appeals for the District of Columbia Circuit. On December 2, 1986, the court issued its opinion, finding that the Board failed to explain its departure from established precedent in approving the settlement agreements and remanding the case to the Board for further proceedings.

The court faulted the Board for failing, without explanation, to apply the test articulated in *Clear Haven Nursing Home*, 236 NLRB 853 (1978), for determining whether to approve a settlement agreement. The court pointed out that under the *Clear Haven* test:

First, the Board will assume that the case is meritorious and that the General Counsel is prepared to carry her burden of proof. Second, the Board will determine whether the settlement agreement "substantially remedi[es]" the alleged unfair labor practices. Among the most important of the considerations in assessing whether a settlement agreement substantially remedies the alleged unfair labor practices is a determination whether the agreement provides for traditional Board remedies such as reinstatement, backpay and the posting of a notice. The absence of such remedies will strongly militate against the Board's approval of a proposed settlement. [Footnotes omitted.]

The court noted that once an unfair labor practice proceeding is instituted, the Board proceeds "in vindication of the public interest, *not* in vindication of private rights," and that therefore private settlements will not be found acceptable "merely because the private parties to the labor dispute are satisfied with its terms."

The court asserted that:

In its three orders in this case, the Board made no attempt either to apply the above principles, or to reassess the standards it will use in determining whether to approve a private settlement of an unfair labor practice complaint. Indeed, the Board approved the settlements without any reference whatsoever to its *Clear Haven* precedent. In so doing, the Board approved settlement agreements that provided for *none* of the traditional remedies ordered by the Board for unfair labor practices. It goes without saying that the Board failed in its recognized obligation to ensure that unfair labor practices have been *substantially* remedied. [Emphasis in original.]

The court distinguished the cases cited by the Board in its final order on the ground that the settlement in those cases were negotiated by the union and the employer pursuant to an established grievance-arbitration procedure whereas the settlements in the instant case were negotiated by the Respondent and its "*individual employees* in derogation of the bargaining relationship between the Company and the Union."

Accordingly, the court remanded the case to the Board "for further consideration (or explanation) of its reasons for approving the settlement agreements." In addition, the court directed the Board to address several other questions. First, the court found it "disturbing that the Board foreclosed all inquiry into the ethical conduct of the attorney for the individual employees, who was paid \$450 by the Company for each employee who signed a settlement agreement." The court stated that, "[a]t a minimum, in discharging its responsibility for approving the settlements, the Board had an obligation to ensure that the agreements were not procured through unethical attorney conduct."

Second, the court found it "highly questionable—especially outside the grievance-arbitration context—for the Board to approve settlements and dismiss unfair labor practice charges *merely* on a showing that the settlements were 'voluntary.'" According to the court, "[i]f the Board is not going to insist that the settlements provide 'substantial' relief for the unfair labor practices—as mandated

by *Clear Haven*—it must, at a minimum, inquire into whether the settlement terms are reasonable.”

Finally, the court observed:

[W]e find it especially disturbing that the settlements in this case provided no remedy whatsoever for the Company’s alleged unfair labor practices. The monetary payments received by the employees were solely in consideration for the release of personal injury claims; the employees received neither reinstatement nor backpay (nor any other consideration) for the dismissal of their unfair labor practice charges. So far as we can discern, the Board has never, even in the grievance-arbitration context, approved a settlement providing no remedy for an alleged unfair labor practice. [Emphasis in original; footnote omitted.]

Recognizing that the court’s opinion is the law of the case, we shall apply the court’s observations and reasoning to the issue of whether to approve the settlement agreements.

The Board has recently in *Independent Stave Co.*, 287 NLRB 740 (1987), addressed the issue of the test to be applied by the Board in reviewing settlement agreements.³ The Board, overruling *Clear Haven*, rejected “the limited approach to settlement agreements set forth in *Clear Haven* in favor of an expanded approach which will evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement.” In this regard, the Board stated that it will “examine 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.”

³ The complaint in *Independent Stave* alleged that the respondent violated Sec. 8(a)(1) and (3) by refusing to hire four employees because they had held offices with the union. Three of the discriminatees entered into settlement agreements with the respondent, accepting employment, retroactive seniority, and \$350 in return for requesting the withdrawal of the unfair labor practice charges. The agreements were approved by the union. The Regional Director refused to approve the withdrawal requests of the unfair labor charges because the agreements did not fully remedy the alleged unfair labor practices. The respondent then filed a Motion for Summary Judgment with the Board.

Examining the settlement agreements in *Independent Stave* in light of these factors, the Board approved the agreements. The Board noted that the three discriminatees, who were also the charging parties, the respondent, and the union, all approved the settlement, and the case was settled 10 days after issuance of the complaint. Viewing the settlements against the customary risks inherent in any litigation and in light of the early stage of the proceedings and the nature of the allegations, the Board found the settlements to be reasonable. Noting also that there was no evidence of fraud, coercion, or duress or of prior violations or breaches of prior agreements committed by the respondent, the Board concluded that “honoring the parties’ agreements advances the Act’s purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest.”

Examining the present settlement agreements in light of *Independent Stave* and the court’s opinion, we find that the policies underlying the Act would not be effectuated by our approving them. Unlike *Independent Stave*, both the Charging Party and the General Counsel oppose the settlement agreements. Further, particularly given the court’s determination, by which we are bound, that the agreements provided “no remedy whatsoever” for the alleged unfair labor practices, we find the agreements to be unreasonable. In this regard, we also note that the agreements were reached more than 2 years after complaint issued and at the conclusion of a lengthy hearing. Although we recognize that this case presents novel and complex issues of law which may involve unusual litigation risks, we find this factor outweighed by those enumerated above in the determination of reasonableness. We additionally are cognizant that the Respondent has no history of violating the Act or of breaching prior settlement agreements. Nevertheless, in light of the opposition of the General Counsel and the Charging Party and our finding that the settlement agreements were not reasonable, we cannot approve them.⁴ Accordingly, we vacate the Board’s prior Orders of February 22, May 16, and October 23, 1985, and reinstate the complaint insofar as it alleges a violation of the Act in connection with the 56 employees who have executed settlement agreements.

ORDER

The National Labor Relations Board orders that its prior Orders of February 22, May 16, and October 23, 1985, are vacated and that the complaint in-

⁴ In light of this finding it is unnecessary to inquire into the ethical propriety of attorney Shaw’s conduct as directed by the court.

sofar as it alleges a violation of the Act in connection with the 56 employees who have executed settlement agreements is reinstated.