

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

POTOMAC DISPOSAL, INC.

and

JOSE FLORES AMAYA, AN INDIVIDUAL	Case	5-CA-91629 5-CA-99862
CONSTRUCTION AND GENERAL LABORERS LOCAL 657, AFFILIATED WITH LABORERS INTERNATIONAL UNION OF NORTH AMERICA	Cases	5-CA-92016 5-CA-93890 5-CA-93906 5-CA-94080 5-CA-95609 5-CA-97256 5-CA-99224 5-RC-93887
OSCAR HERNANDEZ, AN INDIVIDUAL	Case	5-CA-92279
BLANCA PORTILLO, AN INDIVIDUAL	Case	5-CA-94082
JORGE A. RIVAS-BONILLA, AN INDIVIDUAL	Case	5-CA-94478

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S REQUEST FOR SPECIAL
PERMISSION TO FILE APPEAL OF ADMINISTRATIVE LAW JUDGE’S APPROVAL
OF NON-BOARD SETTLEMENT AGREEMENT
AND
MOTION TO REMAND MATTER TO REGIONAL DIRECTOR
FOR CLOSING OF CASES**

Pursuant to Section 102.26 of the Board’s Rules and Regulations, Series 8, as amended (the Rules and Regulations), Counsel for the Acting General Counsel requests special permission to appeal an order by Deputy Chief Administrative Law Judge Arthur Amchan (ALJ), dated April 15, 2013,¹ approving a non-Board settlement agreement negotiated by Potomac Disposal, Inc. (Respondent) and the Construction and General Laborers Local 657 (the Union). (UX 1(b)) (Attachment 1) Counsel for the Acting General Counsel further moves that the Board remand this matter to the Regional Director for the purpose of severing Case 05-RC-93887 from the remaining cases captioned above and for processing the withdrawals of said cases.

¹ Unless otherwise noted, all dates referenced in this document occurred in 2013.

On April 15, the ALJ opened the record and received testimony, exhibits, and arguments to determine whether he should permit the cases to be resolved by a non-Board settlement agreement executed by Respondent and four of the five charging parties: the Union, Oscar Hernandez, Blanca Portillo, and Jorge Rivas Bonilla. Charging party Jose Flores Amaya declined to enter into the agreement; both he and Victor Franco Contreras, one of two non-charging party discriminatees, stated their objections to the settlement agreement on the record. Counsel for the Acting General Counsel opposed the approval of the non-Board settlement agreement for the reasons set forth in the record, including Counsel for the Acting General Counsel's Opposition to the Proposed Non-Board Settlement Agreement. (Tr. 9 -16; GCX 2)² (Attachment 2, 3) The ALJ stated on the record that he was satisfied the terms of the non-Board settlement agreement adequately resolved the alleged violations. (Tr. 61:24-25, 62-64, 65:1-22)

Following the administrative hearing, Counsel for the Acting General Counsel advised Respondent that he would agree not to pursue Board review of the ALJ's approval of the non-Board settlement agreement if the parties made certain modifications to the agreement accepted by the ALJ. Respondent agreed to modify the agreement. The amended non-Board settlement agreement provides for the unconditional reinstatement of all named discriminatees, including the removal of the "last chance" condition previously imposed on the reinstatement of Jose Flores Amaya and Jorge Rivas Bonilla; expungement from each discriminatees' personnel file any references to disciplines, discharges, and/or layoffs alleged in the Second Amended Consolidated Complaint; the payment of backpay to all charging party discriminatees; and the recognition of the Union as the collective bargaining representative of Respondent's employees.

² GCX__ refers to General Counsel's Exhibit followed by the exhibit number; RX __ refers to Respondent's Exhibit followed by the exhibit number; UX __ refers to Union's Exhibit followed by the exhibit number.

Respondent and all of the charging parties have executed the amended non-Board settlement agreement, attached hereto as Attachment 4.

On April 22 a conference call was held with the ALJ for the purpose of notifying him of the post-hearing developments. During the conference call, Counsel for the Acting General Counsel advised the ALJ that it was the position of the Acting General Counsel that the terms of the amended agreement appropriately remedied the alleged violations and that each of the discriminatees was satisfied with its terms. Counsel for the Acting General Counsel requested that the ALJ reopen the record to accept the amended non-Board settlement agreement. The ALJ declined Counsel for the Acting General Counsel's request and suggested that Counsel for the Acting General Counsel seek permission to file a special appeal with the Board and thereafter withdraw the request on the basis of the amended non-Board settlement agreement.

Counsel for the Acting General Counsel respectfully requests that the Board grant the request for special permission to appeal the ALJ's approval of the non-Board settlement agreement and remand this matter to the Regional Director for the purposes of severing Case 05-RC-93887, which had been ordered consolidated with the unfair labor practice cases for hearing, and processing the cases pursuant to the withdrawal requests.

Dated at Baltimore, Maryland, this 25th day of April 2013.

Respectfully submitted,

/s/ Pablo A. Godoy

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE ACTING GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO FILE AN APPEAL OF ADMINISTRATIVE LAW JUDGE'S APPROVAL OF NON-BOARD SETTLEMENT AGREEMENT AND MOTION TO REMAND MATTER TO REGIONAL DIRECTOR FOR CLOSING OF CASES, Case 05-CA-091629 et al., was served by E-Filing, E-mail, and USPS First Class Postage, on this 25th day of April 2013, on the following:

Via E-filing:

Gary W. Shinnery, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Room 5400 East
Washington, D.C. 20570

19 Nancy Pl. Apt 3
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Blanca Portillo
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Via E-Mail:

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Shulman, Rogers, Gandal, Pordy & Ecker, P.A.
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Potomac, MD 20854
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E-Mail: sschwaber@shulmanrogers.com

Jorge Rivas-Bonilla
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Silver Spring, MD 20902
E-Mail: rivas-jorge@live.com

Via UPS Overnight:

Brian Petruska
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Oscar Hernandez

Jose Flores Amaya
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Gaithersburg, MD 20877

/s/ Pablo A. Godoy

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SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (“**Agreement**”) is made and entered into by and between the Construction and General Labors Local 657 (“**Local 657**”), Jose Flores Amaya (“**Amaya**”), Oscar Hernandez (“**Hernandez**”), Blanca Portillo (“**Portillo**”), Jorge A. Rivas-Bonilla (“**Rivas-Bonilla**”), (together, “the **Charging Employees**”), and Potomac Disposal, Inc. (“**Potomac Disposal**”).

WHEREAS, Local 657 filed 5-CA-92016, 5-CA-93890, 5-CA-93906, 5-CA-94080, 5-CA-95609, 5-CA-97256, 5-CA-99224, and 05-RC-93887, and Amaya filed 5-CA-91629 and 5-CA-99862, and Hernandez filed 5-CA-92279 and Portillo filed 5-CA-94082 and Rivas-Bonilla filed 5-CA-94478 (all charges together “**Charges**”), each alleging that Potomac Disposal engaged in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and following an investigation of the General Counsel, the National Labor Relations Board issued a Second Amended Complaint (“**Complaint**”) captioned **Cases 05-CA-091629, 5-CA-92016, 5-CA-92279, 5-CA-93890, 5-CA-93906, 5-CA-94080, 5-CA-95609, 5-CA-97256, 5-CA-94082, 5-CA-94478, 5-CA-99224, 5-CA-99862**, and consolidated **05-RC-93887** with that Complaint;

WHEREAS, Potomac Disposal denies all of the allegations contained in the Charges and in the Complaint; and

WHEREAS, all parties are asserting their respective contentions in good faith, and all parties realize the uncertainty and the time-consuming nature of litigation and desire to avoid spending additional time incurring additional expense in litigation; and

NOW, THEREFORE, Potomac Disposal, Local 657 and the Charging Employees hereby enter into this Agreement and voluntarily agree to the following terms and conditions in consideration of the promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged:

1. **Release.** In consideration of the terms of this Agreement, including but not limited to the payments and recognition terms described herein, Local 657 and the Charging Employees do fully release and discharge Potomac Disposal and its current and former officers, agents and employees (collectively, “**Releasees**”), from all claims (including administrative agency complaints or charges, and lawsuits) concerning or relating to any of the allegations contained in the Charges or the Complaint, including, but not limited to, the termination of Amaya, Hernandez, Portillo, Rivas-Bonilla, Victor Franco Contreras (“**Contreras**”), Santos Gutierrez (“**Gutierrez**”), Jose Oliva (“**Oliva**”), and Axel Estrada (“**Estrada**”). *This release does not affect in any way the Workers' Compensation case of Portillo.*

*3/p
MBC*

2. **Consideration.**

a. **Recognition:** Potomac Disposal agrees to recognize Local 657 as the employees’ representative for the following unit:

Included: All employees employed in the division of the company working under the garbage disposal contract with the government of Montgomery County, Maryland.

Excluded: All other employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

The parties also agree to hold an initial bargaining session on or before May 31, 2013, and two additional bargaining sessions on or before August 31, 2013. In addition, notwithstanding the above release, any claims on behalf of, or remedies due to Contreras, Gutierrez, Oliva, and Estrada will be a topic for negotiation between Local 657 and Potomac Disposal.

b. Payment: Potomac Disposal agrees to make the payments set forth below:

(i) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,208.00 to Amaya, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

(ii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$650.00 to Hernandez, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

(iii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,990.00 to Portillo, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of her employment.

(iv) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,000.00 to Rivas-Bonilla, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

c. Reinstatement:

(i) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall offer to reinstate Amaya to his previously held position on a last-chance basis. The parties agree that any future policy violation, performance problem, or disciplinary infraction by Amaya shall result in the termination of his employment.

(ii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall offer to reinstate Rivas-Bonilla to his previously held position on a last-chance basis. The parties agree that any future policy violation, performance problem, or disciplinary infraction by Rivas-Bonilla shall result in the termination of his employment.

d. Withdrawal of Charges and of Complaint: Local 657 and the Charging Employees agree that they will request that the Region approve withdrawal of the Charges and that the National Labor Relations Board (“the **Board**”) withdraw the Complaint. The “**Effective Date**” of this Agreement shall be the date on which the Board approves the Agreement. In the event the Board does not agree to approve the withdrawal of the Charges as requested by Local 657 or the withdrawal of the Complaint, the entire Agreement shall be null and void and no payments shall be made.

3. **Covenant of Confidentiality.**

a. Local 657 and the Charging Employees agree not to disclose to or discuss with any third party (including, but not limited to, any Potomac Disposal current or former employee), other than the Charging Employees’ spouse or parent, legal representatives and/or financial advisors, if any, either the financial terms of this Agreement or the negotiations leading up to this Agreement. Neither the Charging Employees nor Local 657 will volunteer the existence of financial terms.

b. The parties agree and understand that this Paragraph 3 is a material term of this Agreement and a material inducement for Potomac Disposal to enter into this Agreement.

c. This Agreement shall not be offered into evidence by Local 657 or the Charging Employees in any action or proceeding in any court, arbitration, administrative agency or other tribunal for any purpose whatsoever other than to carry out or enforce the provisions of this Agreement.

d. In the event that Local 657 or any of the Charging Employees is questioned or receives any inquiry as to the financial terms of the settlement, they may state that they entered into a settlement agreement, but that the financial terms of the settlement were and are confidential.

4. **Non-Admission.** The parties acknowledge and agree that neither the execution of this Agreement nor any of the terms contained in this Agreement shall be construed or interpreted as an admission of liability or wrongdoing on the part of any party. The parties expressly deny any liability or wrongdoing and state that they have entered into this Agreement solely for the purpose of compromising any and all claims, without the cost and burden of litigation.

5. **Notice Posting.** Potomac Disposal agrees to post a notice, for a period of one month commencing on the Effective Date, in the form of the following:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

6. **Non-Presumption.** The parties acknowledge and agree that this Agreement represents the product of negotiations and shall not be deemed to have been drafted exclusively by any one party. In the event of a dispute regarding the meaning of any language contained in this Agreement, the parties agree that the same shall be accorded a reasonable construction and shall not be construed more strongly against one party than the other.

7. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

The parties acknowledge that each has carefully read and fully understands the provisions of this Agreement and is executing this Agreement freely, knowingly and voluntarily.

POTOMAC DISPOSAL, INC.		CONSTRUCTION AND GENERAL LABORERS LOCAL 657	
By: Name and Title <i>Attorney</i> <i>McConnell</i>	Date <i>4/15/13</i>	By: Brian Petruska, Esq. <i>Brian Petruska</i>	Date <i>4/15/13</i>
JOSE FLORES AMAYA		OSCAR HERNANDEZ	
By: Jose Flores Amaya	Date	By: Oscar Hernandez <i>Oscar Hernandez</i>	Date
JORGE A. RIVAS-BONILLA		BLANCA PORTILLO	
By: Jorge A. Rivas-Bonilla <i>Jorge A. Rivas-Bonilla</i>	Date <i>4-15-13</i>	By: Blanca Portillo <i>Blanca Portillo</i>	Date <i>4/15/13</i>

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

POTOMAC DISPOSAL, INC.,

Respondent,

and

JOSE FLORES AMAYA, AN INDIVIDUAL,

Charging Party,

and

**CONSTRUCTION AND GENERAL LABORERS
LOCAL 657, AFFILIATED WITH
LABORERS INTERNATIONAL UNION OF
NORTH AMERICA,**

Charging Union,

and

OSCAR HERNANDEZ, AN INDIVIDUAL,

BLANCA PORTILLO, AN INDIVIDUAL,

**JORGE A. RIVAS-BONILLA, AN
INDIVIDUAL,**

Charging Parties.

Case No. **5-CA-91629**
5-CA-99862

Case No. **5-CA-92016**
5-CA-93890
5-CA-93906
5-CA-94080
5-CA-95609
5-CA-97256
5-CA-99224

Case No. **5-CA-92279**

Case No. **5-CA-94082**

Case No. **5-CA-94478**

The above-entitled matter came on for hearing pursuant to notice, before **ARTHUR J. AMCHAN**, Administrative Law Judge, at the **National Labor Relations Board, 1099 14th Street, N.W., Room 5600, Washington, D.C., on Monday, April 15, 2013, at 10:00 a.m.**

Free State Reporting, Inc.
1378 Cape St. Claire Road
Annapolis, MD 21409
(410) 974-0947

Attachment 2

1 MS. CAMPBELL: -- as to --

2 JUDGE AMCHAN: Well, I agree. I'm inclined to admit it
3 just to, if they're going to file a special appeal to take
4 exceptions. I mean I guess it's a more comprehensive
5 recitation of why they object to the settlement. So I'm
6 inclined to receive it. It's not substantive evidence going
7 to --

8 MS. CAMPBELL: What purpose does it serve?

9 JUDGE AMCHAN: Because the Board can read it and see why
10 they object to the settlement, which I've indicated I'm
11 inclined to approve.

12 MR. GODOY: Your Honor, I would note that off the
13 record, when we were off the record, the parties were
14 allowed the opportunity to review it. So Ms. Campbell and
15 Mr. Schwaber have read it, and it does contain our -- a more
16 thorough --

17 JUDGE AMCHAN: Yeah, I'm going to receive it. It's not
18 substantive evidence. It's a position statement.

19 **(General Counsel's Exhibit 2 received in evidence.)**

20 JUDGE AMCHAN: I mean do you want to -- I mean we had a
21 discussion before, but you can --

22 MR. GODOY: Yeah, I'd like to voice our opposition
23 orally, and that would be that the Acting General Counsel is
24 adamantly opposed to the non-Board settlement agreement as
25 it currently stands. While we acknowledge that it is a step

1 in the right direction, it falls short of meeting the
2 standards set forth in *Independent Stave*.

3 The second amended consolidated complaint contains a
4 number of allegations including the discharge of six
5 employees because of their union and protected asserted
6 activities, and the allegations in the complaint has been
7 over a period of six months, October 12 through March 8, I
8 believe, 2012, and during this short period of time, not
9 only were there six employees that were discharged, but
10 there were multiple and repeated violations of Section
11 8(a)(1) which are reflected in paragraphs 8 through 16, and
12 when I say 8 through 16, I refer to 8(a)(1) violations.
13 Those violations include multiple threats of discharge,
14 threats of unspecified reprisals, threats with calling
15 Immigration on employees, threats of reducing employee pay,
16 threats of plant closure, surveillance and pressure
17 surveillance on employees' union activities, and
18 interrogation of at least a third of its employees.

19 While the Union and Respondent believe that the proposed
20 settlement agreement resolve and -- the allegation of the
21 complaint, one need only compare the complaint to the terms
22 in the settlement agreement to realize how little is covered
23 by it.

24 First, the settlement agreement does not provide for the
25 expungement of the disciplines unlawfully issued to

1 employees, the disciplines which the Respondent relied upon
2 to fire these employees, the fact that the agreement
3 provides for the reinstatement of Jorge Rivas-Bonilla and
4 Jose Flores Amaya on a last chance basis and provides that
5 any future infraction, and it is written in the singular
6 form, in the future, performance problem or any violation of
7 a policy shall result in their termination.

8 Second, the settlement agreement does not provide for
9 the payment of back pay to discriminatees Santos Gutierrez
10 nor Victor Franco Contreras. Both of these employees are
11 alleged in the complaint as being discharged in violation of
12 Section 8(a)(1) and Section 8(a)(3).

13 Third, under the terms of the agreement,
14 Santos Gutierrez is not offered any reinstatement to his
15 prior position, and as of last week, we learned that
16 Mr. Gutierrez had been transferred out of the bargaining
17 unit.

18 Neither Mr. Gutierrez nor Mr. Franco were offered
19 anything out of this agreement other than a sentence in the
20 agreement that provides that any claims on behalf of or
21 remedies due to them will be a topic for negotiation at a
22 later date.

23 Fourth, the agreement does not provide for adequate
24 notice to the employees. The agreement provides for a short
25 notice in English -- that most of Respondent's employees

1 cannot speak much less read. The proposed notice consists
2 of nothing more than boilerplate language that is found in
3 all Board notices, whether they be election notices or ULP
4 notices. It doesn't provide any degree of specificity, and
5 it doesn't offer any assurances to employees to engage in
6 protected activities.

7 Your Honor, we're not asking that the agreement be
8 rejected outright. We recognize that we're very close. We
9 recognize that if this agreement were changed or modified
10 just slightly, we could all agree to it. But the agreement
11 has to be equitable and has to meet the standards under
12 *Independent Stave*.

13 The agreement fails to meet the first factor because the
14 Acting General Counsel is opposed, and in addition to the
15 Acting General Counsel, as far as I understand it, as of
16 this morning, three of the Charging Parties opposed it, and
17 one discriminatee opposed it, and that would be Jose Flores
18 Amaya, Jorge Rivas-Bonilla, Blanca Portillo, and
19 Victor Franco Contreras.

20 I see that Oscar Hernandez is in the audience. I'm not
21 certain what his position is.

22 The agreement also fails to meet the second standard in
23 *Independent Stave* because its terms are unreasonable in
24 light of violations, and avoiding the risk of litigation is
25 not a reasonable tradeoff based on the number of violations

1 that are not addressed in the agreement.

2 Respondent has already reinstated three of the six
3 employees it discharged, but offers an unacceptable offer of
4 reinstatement to Jorge Rivas-Bonilla and Jose Flores Amaya.
5 It provides nothing for Santos Gutierrez and provides no
6 back pay for Mr. Gutierrez or Victor Franco Contreras.

7 The agreement further doesn't expunge the employees'
8 personnel records insofar as they contain disciplines that
9 Respondent relied upon to fire them or impose adverse
10 personnel actions against them. The omissions essentially
11 dismiss the violations and allows Respondent to rely upon
12 them at a later date.

13 The Respondent, in fact, has already done this. On
14 March 8, when it fired Jose Flores Amaya, it relied upon the
15 disciplines that we alleged to be unlawful that were issued
16 on October 10, 11, and 12 when he was first terminated on
17 October 12.

18 Moreover, the allegations are now time barred. So, for
19 example, as I noted, Respondent violated or, I'm sorry,
20 disciplined -- Mr. Flores Amaya was issued disciplines on
21 October 8, I'm sorry, October 10, 11, and 12. Those
22 disciplines are now time barred. So this is the only
23 opportunity Mr. Amaya has to challenge those disciplines.

24 Mr. Oscar Hernandez was terminated -- instructed and
25 discharged on October 15. His claim is also time barred,

1 and any disciplines that were issued to him prior to his
2 termination would be in -- denied.

3 Now, Your Honor, the majority of the 8(a)(1) violations
4 that took place, took place in meetings with all the
5 employees present. So there's really little argument as to
6 how widespread the violations were. In the circumstances
7 where the violations took place in more isolated instances,
8 one can safely assume that employees discussed it, and I say
9 this because employees work in pairs of two and three, and
10 what they spoke about, one I believe can safely assume, that
11 it included the violations that the Respondent gave them.

12 And then finally, Your Honor, the notice lacks any
13 language that would adequately inform employees of their
14 rights. The notice is in a language that most employees
15 cannot speak or read, and the agreement fails to even
16 specify where that notice will be posted or for how long it
17 would be up.

18 And we would also argue that the fourth factor in
19 *Independent Stave* is not met because even though we
20 acknowledge that Respondent has not had a history of
21 committing ULPs, its conduct has displayed a callous
22 disregard for the Act, and we believe that it falls within
23 what the Board contemplated when it developed the factors.

24 Now, while the factors in *Independent Stave* are not
25 entirely clear, there is case law, and one of the cases that

1 we found was *Michels Corporation*, which is an unpublished
2 Board decision which issued on December 19, 2012. In that
3 case, the Board granted the Acting General Counsel's request
4 for special permission to appeal the ALJ's ruling after the
5 ALJ accepted a non-Board settlement agreement.

6 The complaint in that case alleged the Employer made
7 numerous threats of more onerous working conditions and
8 numerous threats of discharge to an employee for attempting
9 to enforce the provisions of the collective bargaining
10 agreement. The complaint also alleged that the employee was
11 discharged after he attempted to enforce the collective
12 bargaining agreement.

13 In that case, the settlement provided that the Employer
14 would pay the employee \$7500, provide him a neutral
15 employment reference. In return, the employee would waive
16 his reinstatement and agreed not to apply to work for that
17 Employer again.

18 The settlement agreement also provided for a broad
19 confidentiality provision which the Union, the employee, and
20 the Respondent agreed to.

21 The Board shot that back as being unreasonable, said
22 that the absence of a notice, the absence of reinstatement,
23 and the inclusion of the confidentiality provision failed to
24 meet the standards of *Independent Stave* despite the fact
25 that all the parties agreed except for General Counsel.

1 We believe that the factors in *Michels Corporation* --
2 the factors of *Independent Stave* were more in tune with what
3 we have here, to more likely be accepted than what we have
4 here, and we believe that this settlement as it currently
5 stands is inadequate and inappropriate and believe that
6 while we're close enough to close the gap between the
7 parties in terms of where we are in our positions, we're not
8 able to reach an agreement; we're able, willing, and ready
9 to litigate the case on the merits.

10 And we believe we will be successful because, one, the
11 Board has authorized 10(j) and has considered it among the
12 factors for the likelihood of success. Two, we have a
13 number of affidavits which I've shown Your Honor, and I will
14 move for their introduction in a moment, that contain a
15 number of admissions from Respondent's supervisors and
16 managers and they are consistent, the admissions are
17 consistent with the violations that they committed after the
18 affidavits were taken.

19 And for that reason, Your Honor, we are adamantly
20 opposed to the non-Board settlement agreement and would ask
21 that you hold the record open so that we can seek permission
22 to file a special appeal.

23 I would now move for the introduction of General
24 Counsel's Exhibits, I believe it's 3 through 7, which are
25 the affidavits of Edgar Villeda, David Levine. General

1 JUDGE AMCHAN: Yes.

2 MR. GODOY: I'm hoping you would change your mind,
3 Judge.

4 JUDGE AMCHAN: I didn't. Now, the question is whether I
5 can repeat everything that I said when we were off the
6 record, which is probably not the case, but --

7 MR. GODOY: Your Honor, I apologize for interrupting,
8 but I would ask once again that we adjourn the hearing
9 rather than close it to allow an expeditious review of the
10 ruling that's about to take place. I think it would be in
11 the interest of all parties and it would --

12 JUDGE AMCHAN: I think if --

13 MR. GODOY: -- Board's review quicker.

14 JUDGE AMCHAN: I think if they're interested, given what
15 they did in the *Michels* case, they can grant your exceptions
16 and remand the case to me fairly promptly.

17 MR. GODOY: Your Honor, I would point out that in the
18 *Michels* case the record was adjourned.

19 JUDGE AMCHAN: Tell me why it makes a difference to you
20 folks?

21 MS. CAMPBELL: Can we go off the record a second?

22 **JUDGE AMCHAN: Yes, off the record.**

23 **(Off the record from 1:06 p.m. to 1:11 p.m.)**

24 JUDGE AMCHAN: Okay. I'm going to approve the
25 settlement, and let's see if I can remember why.

1 Well, first of all, the settlement agreement does, I
2 think, give a lot to employees. I mean it gives back pay to
3 four of the employees. It gives reinstatement to the
4 employees with a last chance agreement, and I understand the
5 objections that they raised here today, but the fact remains
6 without the agreement, they can be fired for any reason that
7 doesn't violate the Act or other statutes in any event. I
8 mean it doesn't even have to be a good or just reason. From
9 our perspective, as long as it doesn't violate the NLRA,
10 they can be fired. I mean I don't know what the State of
11 Maryland laws are on employment at will, but I mean if
12 somebody has an accident and they get fired for it, as long
13 as it has no connection to protected activity, they can do
14 that. And obviously if there's a question that protected
15 activity had anything to do with their discharge, that's to
16 be litigated for another day.

17 The other thing is that, you know, a lot of this goes I
18 think almost to the philosophical thing as to whether you
19 think employees being represented by a labor organization is
20 any benefit at all. I mean you started out asking for
21 *Gissel* order, which is very difficult to get in these times,
22 and the Company has agreed to recognize the Union and at
23 least start bargaining with it, and I think that's a
24 substantial benefit to all of the discriminatees.

25 I mean I've looked at the *General Stave* [sic], and it

1 doesn't really say that you have to weigh one factor more
2 than another but, you know, some of the Charging Parties
3 have a problem with the agreement, mostly based on the last
4 chance, and I don't really see how my rejecting the
5 agreement helps them in that respect in any way.

6 The risk to inherent litigation, I have no idea how this
7 would play out and, of course, as I said before, the
8 timeframe is a major factor in my decision to approve the
9 settlement.

10 If I reject the settlement, and I think I tried to put
11 you on the spot when we first walked in, Mr. Godoy, and ask
12 you what happens next, and as we well know, this thing
13 probably wouldn't be resolved for years. And I think the
14 unit employees are much better off if I approve the
15 settlement than if I rejected it.

16 I think whether I admitted anything else that I've
17 babbled on about either this morning or on the conference
18 call, but in any event, I'm going to approve the settlement
19 agreement and close the hearing.

20 If the General Counsel desires to file exceptions, he
21 can do so and, you know, there's nothing to prevent you from
22 filing exceptions today, and tell the Executive Secretary
23 that they ought to deal with it immediately, shorten the
24 timeframes for a response. Okay.

25 MR. GODOY: Your Honor, before we go off the record, I

1 would once again ask that the case be adjourned rather than
2 closed, which I know you've already ruled upon.

3 JUDGE AMCHAN: Yeah, I think I want to do it this way.
4 The interpreter's not here anymore, I guess.

5 MR. GODOY: She's right here.

6 JUDGE AMCHAN: Oh, there you are. Yes, I'm sorry. I'm
7 very observant. But since several people who testified
8 don't understand English, do you understand what I said?
9 Can you summarize it? I think that would be best to
10 summarize it in Spanish so they know what I'm doing.

11 THE INTERPRETER: If you permit you, if you want to
12 summarize and I can go next to them.

13 JUDGE AMCHAN: Do you want them to all come up here?

14 MR. GODOY: Yeah, that might be easier.

15 JUDGE AMCHAN: The reason I called you all up here was I
16 understood that a number of you don't understand English all
17 that well. So I've asked this kind lady to explain it to
18 you in Spanish.

19 I'm approving the settlement agreement even though
20 several of you still have a problem with it, and there are
21 several reasons I'm doing that. You are -- most of you are
22 getting something from this agreement, back pay, and in some
23 cases reinstatement. And I know that several of you
24 objected to the settlement because of the conditions placed
25 upon your reinstatement.

1 As I see it, this agreement doesn't put you in any worse
2 situation than you would be if I rejected the settlement
3 agreement because Potomac Disposal can fire you in any event
4 for any reason that is not prohibited by law. They cannot
5 fire you for supporting the Union or engaging in protected
6 activity. But they can fire you for any non-discriminatory
7 reason whether I approve the settlement agreement or not.

8 The other thing is I do believe that Potomac Disposal's
9 agreement to recognize the Union and bargain with the Union
10 provides you with a significant benefit and protection in
11 your employment.

12 And, finally, if I reject the settlement, what happens
13 is we have a trial, and in a couple of months, I would issue
14 a decision, and even if I rule completely in your favor, the
15 Potomac Disposal would have the right to appeal my decision
16 to the full Board, and resolution before the Board is likely
17 to take years. And even then they could take the Board's
18 decision, if it's in your favor, and go to the Court of
19 Appeals, and that could take even more time.

20 So I think there is enough benefit in this settlement
21 agreement that it is in your interest for me to approve it,
22 and I have decided to do that.

23 Okay. I think that's it. Thank you.

24 MR. PETRUSKA: Your Honor, before we close the record,
25 the agreement that we have in there isn't signed by myself

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

POTOMAC DISPOSAL, INC.

and

JOSE FLORES AMAYA, AN INDIVIDUAL

Case 5-CA-91629
5-CA-99862

CONSTRUCTION AND GENERAL LABORERS
LOCAL 657, AFFILIATED WITH LABORERS
INTERNATIONAL UNION OF NORTH AMERICA

Cases 5-CA-92016
5-CA-93890
5-CA-93906
5-CA-94080
5-CA-95609
5-CA-97256
5-CA-99224

OSCAR HERNANDEZ, AN INDIVIDUAL

Case 5-CA-92279

BLANCA PORTILLO, AN INDIVIDUAL

Case 5-CA-94082

JORGE A. RIVAS-BONILLA, AN INDIVIDUAL

Case 5-CA-94478

**ACTING GENERAL COUNSEL OPPOSITION TO PROPOSED
NON-BOARD SETTLEMENT AGREEMENT**

On Tuesday, April 9, 2013, Potomac Disposal, Inc., (Respondent) and the Construction and General Laborers Local 657 (the Union) notified the Counsel for the Acting General Counsel (Acting General Counsel) that they had completed negotiation of a non-Board settlement agreement that adequately resolved the allegations contained in the Second Amended Consolidated Complaint (Complaint). After reviewing the proposed agreement, the Acting General Counsel notified Respondent and the Union, in writing, to a number of objectionable terms contained in the agreement and a number of omissions that render the agreement inadequate. That afternoon a conference call was held with Deputy Chief Judge Amchan, Respondent, the Union, and the Acting General Counsel, wherein the terms of the non-Board

settlement agreement were discussed and the parties stated their positions on the matter. On Wednesday, April 10, 2013, the Acting General Counsel filed a Motion to Open the Hearing on April 15, 2013 for arguments on the non-Board settlement agreement. The Motion was granted the same day.

The Acting General Counsel respectfully submits that the non-Board settlement agreement should not resolve the litigation because its terms do not effectuate the purpose and policies of the Act and do not satisfy the standard set forth in *Independent Stave Co.*, 287 NLRB 740 (1987). As will be discussed more fully herein, (1) the settlement is opposed by several discriminatees and the Acting General Counsel; (2) the settlement fails to provide any concrete remedy for victims of unlawful discrimination the Acting General Counsel has alleged and is fully prepared to prove for which they are entitled to backpay and reinstatement; (3) other discriminatees receive reinstatement under tenuous last chance terms; (4) records of the numerous adverse actions would remain in employees' files; (5) the vague English-language notice provides no meaningful assurances to employees that their Section 7 rights will be respected; and (6) Respondent has engaged in a callous campaign of pervasive and insidious unfair labor practices for which the Board has directed the Regional Director to seek interim injunctive relief. Its approval would effectively serve to dismiss a number of unfair labor practices committed by Respondent and empower Respondent use the unlawful disciplines against the very employees the non-Board settlement agreement purports to benefit.

I. Background

On March 26, 2013, the Regional Director of Region Five issued the Complaint. The Complaint consists of 10 separately filed unfair labor practice charges filed by five separate parties: (1) the Union; (2) Jose Flores Amaya, an individual; (3) Oscar Hernandez, an individual;

(4) Blanca Portillo, an individual; and (5) Jorge Rivas Bonilla, an individual. The charges were filed following the commencement of an organizing campaign which was embarked on by the Union and Respondent's employees.

The Complaint alleges that Respondent made multiple and repeated threats of discharge, threats of unspecified reprisals, threats of reduce employee pay, solicited grievances and made promises of benefits, engaged in surveillance, and interrogated employees to discourage and coerce employees from engaging in union and protected concerted activities. The Complaint further alleges that Respondent made threats of plant closure to employees on social media site Facebook.com, imposed more onerous working conditions on employees Oscar Hernandez and Jorge Rivas Bonilla, and subsequently discharged them because of their union and protected concerted activities. Respondent is alleged to have discharged employee Jose Flores Amaya on two separate occasions; on October 12, 2012 and on March 8, 2013, after he was reinstated, because of his union and protected concerted activities. Moreover, the Complaint alleges that Respondent discharged and/or laid-off employees Blanca Portillo, Santos Gutierrez, and Victor Franco Contreras because of their union and protected concerted activities. Finally, the Complaint alleges that Respondent unilaterally laid-off employees without affording the Union an opportunity to bargain over the decision and effects of said layoffs. Based on Respondent's pervasive and outrageous conduct, the Complaint seeks a bargaining order to remedy, some, though not all, of the allegations contained therein.

II. Legal Standard

In *Independent Stave Co.*, 287 NLRB 740, the Board reiterated its guiding principles in analyzing settlement agreements, but also set out various factors that may be used in the analysis of private settlements. Referencing prior decisions, the Board recognized its longstanding policy

of encouraging the peaceful, non-litigious resolution of disputes and encouraging parties to resolve disputes without the need to resort to the Board's processes. Notwithstanding its strong commitment to settlements, the Board noted that it is not required to give effect to all settlements reached by the parties to a dispute whether the settlement is reached with or without the General Counsel's approval. *Id.* at 741. The Board explained that its power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of public "rights." *Id.*

In setting out the factors to be considered, the Board acknowledged that it would be impossible to anticipate every possible factor which would be relevant to review non-Board settlement agreements and therefore did not find it necessary to provide an "exhaustive" list of all the factors. Instead, the Board explained that it would examine all of the surrounding circumstances. Such analysis would include, but not be limited, to the following factors:

(1) whether the charging party(ies), and 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 agreement is reasonable in light of the nature of the violations alleged, the risk of 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 respondent has engaged in a history of violations of the Act or has breach previous settlement agreements resolving unfair labor practice disputes.

Id. at 743.

III. Analysis

a. The Acting General Counsel and Several Discriminatees Oppose the Non-Board Settlement Agreement

The Board has long held that the opposition of the General Counsel and the charging party is a significant factor to be considered in determining whether a non-Board settlement is to be accepted. *Copper State Rubber*, 301 NLRB 138 (1991); *TNS, Inc.*, 288 NLRB 20, 22 (1988).

While there are circumstances where the Board has accepted settlements agreements entered into by the respondent and the discriminatees which were opposed by the General Counsel, including in *Independent Slave Co.*, the Board has always carefully considered the terms of such agreements to ensure its adequacy.

In the instant matter, the Acting General Counsel opposes the non-Board settlement proposed by the Union and Respondent for the reasons stated below. Moreover, as of the time this Opposition brief was drafted at least three charging parties and one discriminatee object to the terms of the agreement as it applies to them and to their co-workers. The opposition voiced by the Acting General Counsel and several discriminatees reflects the deficiencies of the agreement and suggests that its approval is not in the public interest.

b. The Non-Board Settlement Agreement is Unreasonable and Fails to Adequately Remedy the Violations

i. Backpay Amounts are Insufficient and Reinstatement is Not Offered to all Discriminatees

The non-Board settlement agreement consists of seven paragraphs and seeks to resolve all of the allegations contained in the Complaint. The agreement was negotiated exclusively by Respondent and the Union with no involvement or input from the four individual Charging Parties, discriminatees, or the Acting General Counsel. Under the terms of the settlement agreement, Respondent agrees to pay employees Jose Flores Amaya, Oscar Hernandez, and Blanca Portillo the full amount of backpay owed. Respondent however, offers employee Jorge Rivas Bonilla (Rivas Bonilla) a fraction of the total amount of backpay owed to him. Respondent asserts that the amount offered to Rivas Bonilla is based on a Worker's Compensation award given to Rivas Bonilla and prevents him from "double dipping." Respondent's argument, however, is undermined by the fact that it is appealing Rivas Bonilla's

Worker's Compensation award. If successful in reversing the award, Rivas Bonilla would receive significantly less than the amount owed to make him whole for Respondent's unlawful conduct. Respondent's attempt to argue that Rivas Bonilla is ineligible for backpay during the period that he was injured is inconsistent with its appeal, which challenges his eligibility for the award. The Acting General Counsel has proposed that if Respondent withdraws its appeal of the Worker's Compensation award, the backpay amount offered would be sufficient. Counsel for Respondent, however, contends that she does not represent Respondent in that matter despite Respondent being a party to the proposed settlement agreement.

Moreover, the settlement agreement does not provide for the payment of backpay or the reinstatement of employee Santos Gutierrez (Gutierrez). The agreement also does not provide for the payment of backpay to employee Victor Franco Contreras (Franco Contreras). Both employees are named in the Complaint and alleged as having been unlawfully discharged in violation of Section 8(a)(1) and (3) and unilaterally laid off in violation of Section 8(a)(5). Respondent contends that payment of backpay and reinstatement is unnecessary because the Union and Respondent have agreed to bargain over "any claims on behalf of, or due to" Gutierrez and Franco Contreras. Respondent's contention, however, is premised on the mistaken presumption that because the Union filed the charges on their behalf, the Union can decide the remedy due to them without any consultation from the employees themselves. In fact, the first factor discussed in *Independent Stave Co.*, clearly distinguishes "charging party(ies)" from "individual discriminatees" and makes no distinction between the weight accorded to each. Of particular concern is the fact while the settlement agreement provides for the bargaining of any claims or remedies as to Gutierrez, the Acting General Counsel recently learned that Respondent

has transferred him out of the bargaining unit thereby diminishing the Union's ability to seek any redress for him.

The settlement agreement also fails to provide an adequate remedy for those employees whom Respondent unilaterally laid off. Respondent acknowledges it laid-off employee Jose Oliva (Oliva) and Axel Estrada (Estrada) without bargaining with the Union over the decision or effects. While the settlement agreement does provide that "any claims on behalf of, or due to" Oliva and Estrada will be "a topic of negotiation" between the Union and Respondent, it falls short of the Board remedy for such violations. See *Lapeer Foundry and Machine, Inc.*, 289 NLRB 952 (1988).

ii. The Settlement Agreement Does Not Provide for the Expungement of Employee Records

The settlement agreement fails to provide for the expungement of personnel records, including unlawfully issued disciplines and discharges. Respondent is alleged to have discharged six employees because of their union and/or protected concerted activities. One of the six employees, Flores Amaya, to be unlawfully discharged by Respondent was terminated on two separate occasions; the first on October 12, 2012 and again on March 8, 2013. In terminating five out of the six employees, Respondent relied on violations of policy, rules, laws, and/or performance to issue written warnings, suspensions, impose more onerous working conditions, and ultimately discharge employees. Each of the disciplines it issued to the five employees were pretextual and given to coerce and restrain employees from continued engagement in protected activities.

For example, in terminating Flores Amaya on October 12, 2012, Respondent relied on confrontations that Flores Amaya allegedly had with other employees, an October 10 traffic citation, and an October 11 traffic accident. The alleged confrontations, however, took place

months before the decision was made to terminate Flores Amaya, while the traffic accident did not directly involve Flores Amaya or his vehicle. Flores was discharged for a second time on March 8, 2013, for his involvement in a traffic accident. In discharging him for a second time, Respondent relied on the unlawfully issued disciplines which it unlawfully issued and relied upon the first time he was fired. In reassigning, Oscar Hernandez to a position with more onerous working conditions on October 15, 2012, Respondent admits that its decision was based on the fact that he was observed “talking to other employees.” Similarly, in reassigning Rivas Bonilla and imposing more onerous working conditions upon him on November 6, 2012, Respondent admits that it did so because he “refused to help” and because he got a flat tire. He was subsequently discharged because of poor work performance. In discharging driver Blanca Portillo (Portillo), Respondent asserts that it did so after she failed to provide a medical certificate authorizing her to return to work. Respondent, however, imposed this requirement on Portillo in response to her protected activities, as she was not previously required to provide medical certification as a condition of returning to work. Similarly, on February 6, 2013, Franco Contreras was discharged by Respondent. While Respondent claims that Franco Contreras was laid-off because of lack of work, Franco Contreras was nonetheless issued a written warning by Respondent which notes his removal from his assigned route.

Most troubling of all is the agreement’s explicit dismissal of the disciplines issued to Flores Amaya and Rivas Bonilla. Paragraph 2(c)(i) and (ii) of the agreement labeled “Reinstatement” contains the following provisions:

- (i) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall offer to reinstate Amaya to his previously held position on a *last-chance basis*. The parties agree that *any future policy violation, performance problem, or disciplinary infraction by Amaya shall result in the termination of his employment*. (Emphasis added)

- (ii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall offer to reinstate Rivas-Bonilla to his previously held position on a *last-chance basis*. The parties agree that *any future policy violation, performance problem, or disciplinary infraction by Rivas-Bonilla shall result in the termination of his employment.* (Emphasis added)

Paragraph 2(c) of the settlement agreement serves to dismiss the disciplines issues to Flores Amaya and Rivas Bonilla that are alleged in the Complaint as having been unlawfully issued and relied up to discharge them. Accordingly, approval of the settlement agreement would require the Board to tacitly accept that the disciplines were lawfully issued and permit Respondent to rely upon them to discharge Flores Amaya and Rivas Bonilla in the future. Respondent's tolerance for any errors, regardless of fault, committed by these two employees is evident by the fact that Rivas Bonilla was previously discharged, at least in part because of poor "performance." Similarly, Flores Amaya was discharged just months after he was reinstated following his first alleged discharge for an accident that other employees who committed the same or similar violations have not been discharged.

Furthermore, approval of the settlement agreement will serve to preclude employees from seeking redress from the Board if Respondent attempts to rely on any of the unlawful disciplines it previously issued to the discriminatees to issue further disciplines because of statutory time limitations under Section 10(b). For example, in firing Flores on October 12, 2012, Respondent relied on a traffic citation and traffic accident which occurred on October 10 and 11. In the absence of the Complaint, both disciplines are now time barred. Similarly, Oscar Hernandez was reassigned to a position with more onerous working conditions after he engaged in protected activities on October 15, 2012. In the absence of the Complaint, Oscar Hernandez will be barred from challenging the employer's reliance on this past "misconduct" unless he agrees to waive that right by joining the settlement agreement or filing a charge on April 15, 2013.

iii. The Settlement Agreement Does Not Provide for an Adequate Notice to Employee

Paragraph 5 of the settlement agreement provides for the posting of a Notice. The text of the Notice is wholly inadequate and fails to address the numerous violations not remedied through affirmative acts such as reinstatement of employees. The proposed Notice consists of the general heading contained in all Board notices with one sentence that notes that Respondent will not prevent employees from exercising the rights described in the heading. The proposed Notice consists of the following text:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights

The proposed Notice fails to acknowledge or address the numerous Section 8(a)(1) allegations contained in paragraphs 8 through 16 of the Complaint, including interrogations, threat of discharge, threat of plant closure, threat of immigrations, surveillance, and solicitation of grievances and promise of benefits. The proposed Notice lacks any degree of specificity and fails to inform employees of the specific rights that Respondent violated and fails to assure them of their ability to exercise their statutory rights without fear of reprisal. The language offered by the parties in the proposed settlement agreement is boilerplate language contained in all Board notices to employees. Board notices, however, are always supplemented with more specific language so as to inform employees of the specific statutory rights that their employer or union violated. The proposed language requires that one blindly assume that Respondent's employees,

men and women who haul waste and have limited educational and language skills, understand the complexities of the Act and the types of activities that are otherwise protected by the Act. Respondent committed numerous violations of the Act which a person untrained in the law would be unaware were violations of their Section 7 rights. Moreover, the majority of Respondent's employees are native Spanish speakers with little to no proficiency in the English language. The proposed Notice, however, is only in English. Finally, the agreement does not provide for where the proposed Notice is to be posted and for how long it is to be posted.

In *Michels Corporation*, 30-CA-081206 (unpublished – December 12, 2012) (Attachment A), the Board granted to the Acting General Counsel's request for special permission to appeal the Administrative Law Judge's (ALJ) approval of a non-Board settlement, revoked the ALJ's approval, and remanded the matter back to the ALJ. In *Michels Corporation*, the complaint alleged that the employer 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 alleged that the respondent imposed more onerous working conditions by changing the employee's hour and ultimately laying him off because he sought to enforce a provision of the collective bargaining agreement. Under the non-Board settlement agreement, the respondent agreed to pay the employee \$7500 and provide him with a neutral employment reference. In return the employee agreed to waive reinstatement and not apply for future employment with the respondent. The parties further agreed to a broad confidentiality provision. With the exception of the Acting General Counsel, all parties agreed to the terms of the agreement. In granting the Acting General Counsel's request for special appeal, the Board reasoned that the agreement failed to provide a notice to employees, did not provide for the reinstatement of the employee, and contained a confidentiality

provision that was too broad. According to the Board, the agreement created a “situation where the unit employees have no way of knowing whether they would be subjected to threats of adverse consequences and retaliatory action, should they, like the alleged discriminatee, seek to enforce their rights under the collective-bargaining agreement.” The terms of the instant matter are far less reasonable than those contained in the agreement in *Michels Corporation*, where the terms were more in tune with the standard set forth in *Independent Stave Co.*

Similarly in *Flint Iceland Arenas*, 325 NLRB 318 (1998), the Board granted the General Counsel request to file special appeal after the accepted a non-Board settlement over the objection of the General Counsel. The complaint in *Flint Iceland Arenas*, alleged that the respondent violated Section 8(a)(1), (3) and (5) by, among other things, threatening employees with physical harm and discharged reducing hours; interrogating employees; promising benefits and raises if employees would decertify the union; discharging two employees; and refusing to provide information. Under the terms of the settlement agreement, the respondent agreed to pay the two discharged employees \$7500 in return for their resignations and \$7500 to another employee who was the subject of much of the unlawful conduct in return for his resignation. The union also agreed to file disclaimer of interest in representing the respondent’s employees. In granting the General Counsel’s request for special appeal, the Board reasoned that the unlawful conduct was directed at the entire work force and that based on the number of “untouched” 8(a)(1) and (3) violations, “we cannot find that avoiding the risks of litigation was a reasonable trade off.” *Id.* at 319. The facts in *Flint Iceland Arenas*, while not identical to the facts in the instant case, establish the Board’s reluctance to acceptance settlement agreements that do not adequately remedy all of the alleged violations and ensure that public interest, not just private interests are served.

c. Respondent Has Engaged in a Callous Campaign of Unfair Labor Practices

One of the factors considered by the Board in determining whether a non-Board settlement agreement is appropriate is whether the respondent has engaged in a history of violations of the Act or has breach previous settlement agreements resolving unfair labor practice disputes. Respondent admittedly has no history of committing unfair labor practices. However, by its conduct, Respondent has demonstrated a callousness to the Act which should not be overlooked or discounted.

Over the course of approximately six months, Respondent has committed numerous violations of Section 8(a)(1) and discharged a total of six employees in violation of Section 8(a)(1) and (3). Through its actions, Respondent has coerced and restrained employees and done so knowing that the effects of each discipline, reassignment, suspension, and discharge it unlawfully issued was magnified by the fact that Respondent's employees work in pairs of two to three employees. The termination of one employee, therefore, had a ripple effect on those employees who worked directly with the discharged employee and the employees who replaced him or her. Respondent's disregard for employee's Section rights and the blatant and outrageous violations committed by Respondent are relevant and important when considering whether the settlement agreement is reasonable in light of the alleged violations.

IV. Conclusion

For the forgoing reasons, the proposed non-Board settlement agreement is contrary to Board policy and the Act, and fails to meet the standard of reasonableness set forth in

Independent Stave Co. The agreement is not in the public interest and serves to vindicate the private rights of some, though not all of those involved in this matter.

Dated at Washington, D.C., this 15th day of April 2013.

Respectfully submitted,

/s/ Pablo A. Godoy

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**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.

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE (“**Agreement**”) is made and entered into by and between the Construction and General Labors Local 657 (“**Local 657**”), Jose Flores Amaya (“**Amaya**”), Oscar Hernandez (“**Hernandez**”), Blanca Portillo (“**Portillo**”), Jorge A. Rivas-Bonilla (“**Rivas-Bonilla**”), (together, “the **Charging Employees**”), and Potomac Disposal, Inc. (“**Potomac Disposal**”).

WHEREAS, Local 657 filed 5-CA-92016, 5-CA-93890, 5-CA-93906, 5-CA-94080, 5-CA-95609, 5-CA-97256, 5-CA-99224, and 05-RC-93887, and Amaya filed 5-CA-91629 and 5-CA-99862, and Hernandez filed 5-CA-92279 and Portillo filed 5-CA-94082 and Rivas-Bonilla filed 5-CA-94478 (all charges together “**Charges**”), each alleging that Potomac Disposal engaged in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and following an investigation of the General Counsel, the National Labor Relations Board issued a Second Amended Complaint (“**Complaint**”) captioned **Cases 05-CA-091629, 5-CA-92016, 5-CA-92279, 5-CA-93890, 5-CA-93906, 5-CA-94080, 5-CA-95609, 5-CA-97256, 5-CA-94082, 5-CA-94478, 5-CA-99224, 5-CA-99862**, and consolidated **05-RC-93887** with that Complaint;

WHEREAS, Potomac Disposal denies all of the allegations contained in the Charges and in the Complaint; and

WHEREAS, all parties are asserting their respective contentions in good faith, and all parties realize the uncertainty and the time-consuming nature of litigation and desire to avoid spending additional time incurring additional expense in litigation; and

NOW, THEREFORE, Potomac Disposal, Local 657 and the Charging Employees hereby enter into this Agreement and voluntarily agree to the following terms and conditions in consideration of the promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged:

1. **Release.** In consideration of the terms of this Agreement, including but not limited to the payments and recognition terms described herein, Local 657 and the Charging Employees do fully release and discharge Potomac Disposal and its current and former officers, agents and employees (collectively, “**Releasees**”), from all claims (including administrative agency complaints or charges, and lawsuits) concerning or relating to any of the allegations contained in the Charges or the Complaint, including, but not limited to, the termination of Amaya, Hernandez, Portillo, Rivas-Bonilla, Victor Franco Contreras (“**Contreras**”), Santos Gutierrez (“**Gutierrez**”), Jose Oliva (“**Oliva**”), and Axel Estrada (“**Estrada**”). This release does not affect in any way the Workers’ Compensation case of Portillo.

2. **Consideration.**

a. **Recognition:** Potomac Disposal agrees to recognize Local 657 as the employees' representative for the following unit:

Included: All employees employed in the division of the company working under the garbage disposal contract with the government of Montgomery County, Maryland.

Excluded: All other employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

The parties also agree to hold an initial bargaining session on or before May 31, 2013, and two additional bargaining sessions on or before August 31, 2013. In addition, notwithstanding the above release, any claims on behalf of, or remedies due to Contreras, Gutierrez, Oliva, and Estrada will be a topic for negotiation between Local 657 and Potomac Disposal.

b. **Payment:** Potomac Disposal agrees to make the payments set forth below:

(i) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,208.00 to Amaya, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

(ii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$650.00 to Hernandez, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

(iii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,990.00 to Portillo, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of her employment.

(iv) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall pay \$2,000.00 to Rivas-Bonilla, less withholdings and deductions required by law, in full satisfaction of all claims concerning or relating to the termination of his employment.

c. **Reinstatement and Expungement:**

(i) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall offer to reinstate Amaya and Rivas-Bonilla to their respective previously held positions.

(ii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall return Gutierrez to a full-time position in the bargaining unit.

(iii) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall expunge all references to the discharge(s) and/or layoffs from the personnel files of employees Amaya, Hernandez, Portillo, Gutierrez, and Contreras.

(iv) Within ten business days following the Effective Date of this Agreement, Potomac Disposal shall expunge all references to the discharge of Rivas-Bonilla from his personnel file and the two written disciplines issued to Rivas-Bonilla dated November 5, 2012 and the two written disciplines issued to Rivas-Bonilla dated November 7, 2012.

d. Withdrawal of Charges and of Complaint: Local 657 and the Charging Employees agree that they will request that the Region approve withdrawal of the Charges and that the National Labor Relations Board (“the Board”) withdraw the Complaint. The “Effective Date” of this Agreement shall be the date on which the Board approves the Agreement. In the event the Board does not agree to approve the withdrawal of the Charges as requested by Local 657 or the withdrawal of the Complaint, the entire Agreement shall be null and void and no payments shall be made.

3. Covenant of Confidentiality.

a. Local 657 and the Charging Employees agree not to disclose to or discuss with any third party (including, but not limited to, any Potomac Disposal current or former employee), other than the Charging Employees’ spouse or parent, legal representatives and/or financial advisors, if any, either the financial terms of this Agreement or the negotiations leading up to this Agreement. Neither the Charging Employees nor Local 657 will volunteer the existence of financial terms.

b. The parties agree and understand that this Paragraph 3 is a material term of this Agreement and a material inducement for Potomac Disposal to enter into this Agreement.

c. This Agreement shall not be offered into evidence by Local 657 or the Charging Employees in any action or proceeding in any court, arbitration, administrative agency or other tribunal for any purpose whatsoever other than to carry out or enforce the provisions of this Agreement.

d. In the event that Local 657 or any of the Charging Employees is questioned or receives any inquiry as to the financial terms of the settlement, they may state that they entered into a settlement agreement, but that the financial terms of the settlement were and are confidential.

4. **Non-Admission.** The parties acknowledge and agree that neither the execution of this Agreement nor any of the terms contained in this Agreement shall be construed or interpreted as an admission of liability or wrongdoing on the part of any party. The parties expressly deny any liability or wrongdoing and state that they have entered into this Agreement solely for the purpose of compromising any and all claims, without the cost and burden of litigation.

5. **Notice Posting.** Potomac Disposal agrees to post a notice to employees in English and Spanish on Potomac Disposal, Inc. letterhead, for a period of one month commencing on the Effective Date, with the following language:

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT spy on you, interrogate you, threaten you with unspecified threats of reprisals, or threaten to call Immigration on you because of your union activities;

WE WILL NOT discharge or lay you off for supporting the Construction and General Laborers Local 657 (Union);

WE WILL pay José Flores Amaya, Oscar Hernandez, Blanca Portillo, and Jorge A. Rivas-Bonilla for the wages and other benefits they lost because we caused their termination by disciplining them, firing them, laying them off, or otherwise causing their separation from employment; and will remove from our files all references to the discharges of José Flores Amaya, Oscar Hernandez, Blanca Portillo, and Jorge A. Rivas-Bonilla, the two disciplines of Jorge Rivas-Bonilla dated November 5, 2012, the two disciplines of Jorge Rivas-Bonilla dated November 7, 2012, and will negotiate with the Union over the remedy due to Santos Gutierrez and Victor Franco Contreras; and

WE WILL NOT do anything to prevent you from exercising the above rights.

6. **Non-Presumption.** The parties acknowledge and agree that this Agreement represents the product of negotiations and shall not be deemed to have been drafted exclusively by any one party. In the event of a dispute regarding the meaning of any language contained in this Agreement, the parties agree that the same shall be accorded a reasonable construction and shall not be construed more strongly against one party than the other.

7. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute but one and the same instrument.

The parties acknowledge that each has carefully read and fully understands the provisions of this Agreement and is executing this Agreement freely, knowingly and voluntarily.

POTOMAC DISPOSAL, INC.		CONSTRUCTION AND GENERAL LABORERS LOCAL 657	
By: Name and Title <i>M. Campbell attorney</i>	Date <i>4/23/13</i>	By: Brian Petruska, Esq. <i>Brian Petruska</i>	Date <i>4/22/13</i>
JOSE FLORES AMAÑA		OSCAR HERNANDEZ	
By: Jose Flores Amaya <i>Jose Flores Amaya</i>	Date <i>4/22/13</i>	By: Oscar Hernandez <i>Oscar Hernandez</i>	Date <i>4/23/13</i>
JORGE A. RIVAS-BONILLA		BLANCA PORTILLO	
By: Jorge A. Rivas-Bonilla <i>Jorge A. Rivas-Bonilla</i>	Date <i>4-22-13</i>	By: Blanca Portillo <i>Blanca Portillo</i>	Date <i>4/22/13</i>