

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

UNITED STATES POSTAL SERVICE

and

Case 07-CA-142926

**BRANCH 256, NATIONAL ASSOCIATION
OF LETTER CARRIERS (NALC), AFL-CIO**

**BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION
AS AMICUS CURIAE**

In response to the National Labor Relation Board’s Invitation to File Briefs dated February 19, 2016, Service Employees International Union (SEIU) files this brief as *Amicus Curiae* to answer the questions posed. The invitation asks these questions:

1. May the Board, consistent with Section 3(d) of the National Labor Relations Act, continue to permit administrative law judges to issue a “consent order,” subject to review by the Board, incorporating the terms proposed by a respondent to settle an unfair labor practice case, to which no other party has agreed, over the objection of the General Counsel?
2. If Section 3(d) does allow the Board’s current practice, should the Board alter or discontinue the practice as a matter of policy?

SEIU has an interest in the issues presented in this case because its local, SEIU Healthcare Pennsylvania, has a case involving similar issues currently pending on exceptions before the Board, *UPMC and its Subsidiary, UPMC Presbyterian Shadyside, Single Employer*, Case 06-CA-102465. In that case, the General Counsel and the Union rejected an offer by Respondent UPMC to settle pending single employer allegations on the basis of its representation that it would “guarantee” any Board-ordered remedy against its subsidiary, UPMC Presbyterian Shadyside.¹ Subsequently, Respondent UPMC filed a motion to dismiss the single

¹ In Case No. 06-CA-102465, the ALJ bifurcated the proceedings, hearing the merits of the ULPs against UPMC Presbyterian Shadyside during the early months of 2014, while the single employer issue was held

employer allegations on the basis of the proffered “guarantee.” The administrative law judge (ALJ) granted the motion, issuing a Supplemental Decision holding that Respondent’s unilateral representation of the “guarantee” was “as effective a remedy” as a finding that the Respondents were a single employer, subject to joint and several liability.² The General Counsel and Union filed exceptions. By dismissing the single employer allegations on the basis of a settlement “offer” that had been rejected by the General Counsel and the Union, the ALJ erroneously failed to fully remedy the ULPs, and improperly entered a *de facto* consent order inconsistent with the terms of *Independent Stave Company Inc.*, 287 NLRB 740, 743 (1987).

While the procedural posture of the *UPMC* case differs from that of *United States Postal Service*, in that the ALJ did not actually issue a consent order, the cases raise similar concerns about the propriety of the issuance of an order effectively adopting the settlement proposal of a respondent over the opposition of both the General Counsel and charging party, where that order does not fully remedy the alleged violations.

On this issue, SEIU agrees with the position taken by Member Hirozawa in his concurrence in *LIN Television Corp. d/b/a WIVB-TV*, 362 NLRB No. 197, slip op. 1-2 (August 27, 2015). In *LIN Television*, the Board held that the ALJ erred in entering a consent order adopting the respondent’s unilateral settlement offer, which had been rejected by both the General Counsel and the charging party. Member Hirozawa concurred in the result but criticized

over for further hearing due to ongoing subpoena enforcement proceedings pending in the Third Circuit Court of Appeals. On November 14, 2014, the ALJ issued a decision on the merits of the ULPs, finding that UPMC Presbyterian Shadyside committed multiple violations of the Act, and concluding that it had “engaged in such numerous and widespread misconduct so as to demonstrate a general disregard for employees’ statutory rights,” that a broad cease and desist order was warranted. That decision is pending before the Board on the parties’ exceptions. On July 31, 2015, the ALJ issued a Supplemental Decision summarily dismissing the single employer allegations without trial, over the General Counsel’s and the Charging Party’s objections; that decision is also pending before the Board on the parties’ exceptions. The General Counsel’s and Union’s exceptions to the Supplemental ALJD are pertinent to the issues presented in the instant case.

² Supplemental ALJD at 5:5-26.

the Board's practice of referring to one-sided "agreements" as "consent orders," as a misnomer.³ He reasoned that, although the majority described the judge as "approving a unilateral non-Board settlement agreement," a "unilateral non-Board settlement" is actually no settlement at all when no other parties have agreed to the terms proposed by the respondent. He urged that:

We should not permit a judge to truncate the statutory procedures for adjudicating unfair labor practices in the absence of a settlement agreement entered into by the General Counsel, the charging party, or at least the alleged discriminatee, except for entry of an order, agreed to by the respondent, providing a full remedy for the alleged violations.

Id., slip op. at 1-2.

Member Hirozawa went on to explain that it was improper for the Board to have relied upon the factors set out in *Independent Stave*, supra, in reviewing a "consent order" that lacked any sort of agreement between at least two parties as its foundation because those factors "are designed to evaluate true settlement agreements between parties other than the General Counsel." *Id.*, slip op. 1-2.

In *Independent Stave*, the issue before the Board was whether to affirm the grant of summary judgment for the respondent as to three of the four charging parties who agreed to settlement terms over the objection of the General Counsel rather than proceeding to a hearing. The allegations that were not settled by mutual agreement proceeded to hearing. The Board articulated a four-factor test in *Independent Stave* for "review of non-Board settlement agreements." 287 NLRB at 743.

...[I]n evaluating such settlements ... the Board 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

³ Member Hirozawa explained that, "A consent order is essentially a settlement agreement that, with the consent of the parties, is entered as an order by a judge." This is consistent with the definition in Black's Law Dictionary: "consent decree - A court decree that all parties agree to. - Also termed *consent order*." Black's Law Dictionary (10th ed. 2014), available at Westlaw BLACKS.

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.

Id.

Consistent with Member Hirozawa’s analysis in *LIN Television, Independent Stave* is the appropriate standard for the review of actual settlement agreements. By definition, purported “agreements” that do not include the consent of the charging parties, respondents and individual discriminatees to be bound, are inconsistent with *Independent Stave*. By the same logic, “consent orders” in cases where *neither* the General Counsel nor the charging parties approve the terms are inherently inconsistent with the policies underlying the Act.

Accordingly, the Board should find that the practice at issue should be discontinued as a matter of policy.⁴

Dated: March 18, 2016

Respectfully submitted,

/s/ Judith A. Scott

Judith A. Scott

General Counsel, SEIU

1800 Mass. Ave. NW

Washington, DC 20036

⁴ The practice at issue is also inconsistent with Section 3(d) of the Act. Approving a settlement over the objection of the General Counsel is inconsistent with well-settled law that the General Counsel possesses unreviewable prosecutorial discretion to file, withdraw or dismiss allegations in a complaint prior to the commencement of hearing. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (consideration and approval or rejection of a pretrial settlement are the sole province of the General Counsel, subject to the review procedures provided to parties adversely affected by the rulings). However, after commencement of hearing, an administrative law judge may approve a non-Board settlement over the objection of the General Counsel, assuming a true agreement between parties exists. *See Flint Iceland Arenas*, 325 NLRB 318 (1998) (the judge and Board reviewed a non-Board settlement that was introduced at the beginning of the hearing but before evidence was introduced, over the objection of the General Counsel).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2016, I caused a copy of the foregoing brief in Case 07-CA-142926 to be served, electronically by email, upon:

Nathan T. Solomon

Counsel for Respondent

Law Department – NLRB

United States Postal Service

1720 Market Street, Room 2400

St. Louis, Missouri 63155-9948

Email: Nathan.t.solomon@usps.gov

Donna M. Nixon

Counsel for the General Counsel

National Labor Relations Board

Patrick V. McNamara Federal Building

477 Michigan Avenue – Room 300

Detroit, Michigan 48226

Email: donna.nixon@nlrb.gov

Noel LaBreque

Charging Party

National Association of Letter Carriers
Branch 256

2483 S. Linden Road

Suite 50

Flint, Michigan 48532-5435

Email: my3sons.wg@gmail.com

Terry Morgan, Regional Director

National Labor Relations Board, Region 7

477 Michigan Avenue, Room 300

Detroit, Michigan 48226

Email: NRLBRegion7@nlrb.gov

/s/ Johnda Bentley

Johnda Bentley

Assistant General Counsel, SEIU

1800 Mass. Ave. NW 20036

Johnda.bentley@seiu.org