

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

KISS ELECTRIC LLC

And

Cases 04-CA-163451, 04-CA-
166954, and 4-CA-180051

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION #98

OPPOSITION TO JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT

Pursuant to Section 102.24(a) of the National Labor Relations Board's Rules and Regulations, Counsel for General Counsel (hereafter, General Counsel) respectfully files this Motion in Opposition to the joint motion for approval of settlement agreement (hereafter, the joint motion) filed on December 2, 2016, by Kiss Electric LLC (hereafter, Kiss Electric, LLC) and the International Brotherhoods of Electrical Workers, Local Union # 98 (hereafter IBEW Local 98).

The General Counsel opposes the joint motion by Kiss Electric and IBEW Local 98 to approve a bilateral settlement agreement of the above referenced cases because the proposed settlement is deficient as a Board settlement in two respects: (1) the joint motion does not contain the standard default language for Board settlement agreements; and (2) it does not contain any form of backpay.

I. RESPONDENT'S HISTORY OF UNFAIR LABOR PRACTICE COMPLAINTS

It is important to note at the outset that the Region has found that Respondent has repeatedly violated the Act since early last year. Briefly, the first series of merit cases were in Cases 4-CA-138564, 4-CA-139062, 4-CA-139958, and 4-CA-140666. On January 7, 2015, the Region issued Complaint in these cases alleging Respondent: (1) violated Section 8(a)(1) and (3) of the Act by disciplining an employee because of the employee's Union activities; and (2) violated Section 8(a)(1) of the Act by discharging an employee because of his protected, concerted activities, threatening employees with job loss, interrogating employees about Union sympathies, creating the impression of surveillance, and other coercive statements during an organizing campaign. On January 16, 2015, the Region issued a Complaint in Case 22-CA-136729 alleging Respondent violated Section 8(a)(1) and (3) of the Act by discharging two employees who were on strike, threatening employees and making numerous coercive statements. On April 17, 2015, the Regional Director approved a trilateral (IBEW Local 269 was also involved) Board settlement agreement, which did not contain default language.

Then, in Case 4-CA-153954, the Region issued Complaint on August 12, 2015 on the allegation that Respondent unlawfully discharged an employee for his Union activity. That case settled with a non-Board settlement without default language.

With the latest round of merit cases, a Consolidated Complaint issued in Cases 04-CA-164351 and 04-CA-166954 on April 29, 2016. A hearing was scheduled for July 12, 2016, and was later rescheduled for September 21, 2016. On July 12, 2016, the Union filed the charge in Case 4-CA-180051 alleging Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire and consider for hire two Union applicants, and Complaint issued on these allegations on October 27, 2016. The new consolidated hearing is scheduled for December 7, 2016.

II. GENERAL COUNSEL'S REASONS FOR OBJECTING TO THE JOINT MOTION

On December 2, 2016, Kiss Electric and IBEW Local 98 submitted the current joint motion. The joint motion is deficient for two reasons. First and foremost, the settlement agreement does not contain standard default language typical of Informal Board settlements, especially with repeat offenders. It is the General Counsel's strong preference that Board settlements include default language in the "Performance" requirements of the settlement. Moreover, where a party repeatedly violates the Act, to best effectuate the Act and serve public policy, General Counsel must insist on more stringent terms for successive settlements. Here, the above cases represent the third series of merit charges against Respondent since early 2015. To protect the integrity of the Act and deter Respondent from continued violations of the Act, General Counsel must insist on more stringent settlement terms. Counsel for the General Counsel is guided by ICG 16-09 which directs Regional Directors to insist on default language in these circumstances. With the first two settlements omitting default language, there is a need to insist on such language here.

Secondly, General Counsel opposes the settlement agreement on the grounds that it does not include any backpay award. General Counsel's calculations estimate full remedy backpay to be \$3,787 for one of five discriminatees (Thomas McAnally) and approximately \$80 for a second (Timothy Murphy). With no backpay at all, this settlement would not constitute a full board remedy.

III. LEGAL ARGUMENT

The Board's recent analysis in *United States Postal Service and Branch 256(USPS)*, 364 NLRB No. 116 (August 27, 2016), should apply here: In that case, a settlement agreement approved by the Administrative Law Judge, over the objections of the General Counsel and the Charging Party, was deficient for omitting default language. The Board outlined that the appropriate standard for evaluating orders approving and incorporating the settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party (also referred to as unilateral consent orders), "is whether the order provides a full remedy for all of the violations alleged in the complaint." *Id.* at 2. In *USPS*, the Board overruled the application of *Independent Stave Co.*, 287 NLRB 740, 743 (1987) to evaluate unilateral consent orders, and subsequent cases applying that standard to unilateral consent orders, and re-adopted the standard enunciated in *General Electric Co.*, 188 NLRB 855 (1971). *Id.* at 2-3.

The logic of *USPS* should extend to scenarios where the General Counsel objects to a joint motion to approve a *Board* settlement agreement. The public interest is served by having consistency for all employers in Board settlements. Parties should be free to negotiate less than a

full remedy in private agreements, but Board agreements should be held to a higher standard of providing a full remedy. It is also important to note that in *USPS* the Board made clear that *Independent Stave* analysis was “explicitly formulated to analyze non-Board settlement agreements.” *Id.* This language is a retreat from previous decisions that extended *Independent Stave* analysis to informal Board settlement agreements. *Woodworkers Local 3-433 (Kimtruss Corp.)*, 304 NLRB 1, 2 (1991). Accordingly, the *USPS* standard should be applied in this case since the parties seek a *Board* settlement.

Applying the *USPS* standard, the joint motion should be denied because it does not adequately provide a full remedy for all the violations alleged as it provides no backpay and no default language. The absence of standard default language makes the settlement agreement an inadequate board remedy. See *USPS*, slip op. at 4; see generally *Courier-Journal*, 342 NLRB 1148, 1149 (2004) (holding that encouraging peaceful settlement of disputes can only be achieved if the parties to agreements cannot later revive those disputes). If the General Counsel litigated the case to a successful conclusion, the Respondent would no longer be able to raise its defenses in subsequent litigation. Backpay is one of the staple remedies in Board discharge and refusal to hire cases. The Board has rejected non-Board settlements with inadequate backpay awards. See *Frontier Foundries, Inc.*, 312 NLRB 73 (1993) (rejecting a non-Board settlement that provided only 6 percent backpay, even though it also provided for additional amounts as “liquidated damages,” allegedly to avoid being taxed as income). Accordingly, the General Counsel opposes any joint motion to approve a Board settlement that does not contain full backpay and standard default language.¹

Counsel for the General Counsel posits that the *Independent Stave* standard does not apply here, given that this is a Board settlement and not a non-Board resolution. However, even if the *Independent Stave Co.* standard is applied, the facts of this case would argue against approving the joint stipulation. 287 NLRB 740, 743 (1987).

Independent Stave provides that the Board will approve consent orders based on four criteria:

(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 reach the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave Co., 287 NLRB 740, 743 (1987).

In this instance, three of the four factors support denying the joint motion. Although the Charging Party and Respondent agree to the settlement, the General Counsel objects. Furthermore, the settlement is not reasonable in light of the violations because it does not contain any provisions for backpay, nor does it contain standardized default language. Although the Board has approved a fraction of the total backpay award in the past, this is an instance where

¹ Counsel for the General Counsel’s opposition here does not rule out the General Counsel recommending a withdrawal request be approved based on a non-Board agreement similar in every other respect to the one at issue.

Kiss Electric is demanding the aggrieved applicants forgo backpay altogether. Finally, Respondent has demonstrated a repeated propensity to violate the Act, with this now the third series of merit cases in less than two years. Respondent's history of meritorious unfair labor charges argues against approval of this settlement agreement without default language. A default judgment is important here in saving government resources and preventing further unlawful conduct. Accordingly, the General Counsel argues that even under an *Independent Stave* standard, the joint motion should be rejected.

IV. CONCLUSION

For the foregoing reasons, the General Counsel respectfully requests your honor to deny the joint motion to approve the settlement. The settlement fails to provide adequate backpay or standard default language. In these circumstances, an informal Board settlement agreement should not be approved over the General Counsel's objections.

Dated at Philadelphia, Pennsylvania this 5th day of December 2016.



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