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Food Services of America, Inc., a subsidiary of Services Group of America, Inc. and Paul Louis Carrington. Case 28–CA–063052

May 26, 2017

SUPPLEMENTAL ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On May 30, 2014, the Board issued a Decision and Order in this case. 360 NLRB 1012. At issue is whether to grant the General Counsel’s motion to remand the case to the Region to permit the withdrawal of the unfair labor practice charge based on a non-Board settlement agreement.

The complaint’s central allegations involve the discharges of employees Elba Rubio and Paul Carrington. In the underlying decision, a Board majority (Members Hirozawa and Schiffer, with then-Member Miscimarra dissenting in relevant part) (hereafter “Board”) reversed the judge and found that the Respondent violated Section 8(a)(1) by discharging Rubio for engaging in protected concerted activities. In instant messages dated February 25, 2011, Rubio warned a coworker, Michelle Aparicio, that her job was at risk based on job performance and advised her about how to do her job and how to handle their supervisor, Merissa Hamilton. When Aparicio gave the Respondent a copy of Rubio’s instant-message string, the Respondent discharged Rubio because of her statements in it. The Board found that Rubio’s instant messages involving Aparicio’s job security were inherently concerted and were for mutual aid and protection, and thus she was discharged for engaging in protected concerted activity in violation of Section 8(a)(1).

After Rubio’s discharge, Rubio asked Carrington (her coworker and boyfriend) to transfer to her private email account any company emails that might help her support her claim that Hamilton had discriminated against her and that the Respondent had retaliated against her for reporting it. In response, Carrington transferred hundreds of emails to Rubio’s personal email account. Many of those emails contained confidential business information, such as information regarding the Respondent’s vendors and customers, product prices, and product specifications. When the Respondent discovered that Carrington had transferred that confidential information to Rubio, it discharged Carrington. The Board adopted the judge’s finding that Carrington’s transfer of emails did not constitute protected concerted activity and there-

fore his discharge was not unlawfully motivated. The Board also rejected the General Counsel’s separate argument that Carrington’s discharge was unlawful, even assuming that the email transfer was unprotected, because the Respondent relied on an overly broad confidentiality restriction when discharging him. See *Continental Group, Inc.*, 357 NLRB 409, 412 (2011). The Board explained that “Carrington’s actions were so egregious that the chilling impact on employees’ . . . Sec. 7 rights due to the Respondent’s reliance on its confidentiality restriction . . . would be minimal.” 360 NLRB at 1012 fn. 4.¹

The Board found that the Respondent had failed to prove that Rubio’s role in the email transfer warranted denying her the traditional remedies for her unlawful discharge. In so finding, the Board noted that, although Rubio had asked Carrington to send emails supporting her discrimination and retaliation claims, the Respondent had failed to point to evidence indicating that Rubio knew or reasonably foresaw that Carrington would transfer confidential business information when doing so. Consequently, the Board found that the Respondent did not establish that Rubio was unfit for further service or a threat to efficiency in the workplace and that she was entitled to be reinstated and made whole.²

On June 9, 2014, the Respondent filed a motion to modify the Board’s Order or, in the alternative, to stay the order pending resolution of a petition for review filed by the Respondent with the United States Court of Appeals for the District of Columbia Circuit.³ In its motion, the Respondent points to record evidence allegedly establishing that Rubio knew or reasonably should have known that in response to her request, Carrington would transfer to her confidential business information. Additionally, the Respondent urges the Board to take administrative notice of certain materials outside the record that arguably support such a finding. Based on this information, the Respondent argues that Rubio and Carrington are equally culpable for the “egregious” email transfer of sensitive company information, and therefore that the Board should modify its Order by deleting the provisions

¹ Then-Member Miscimarra joined in dismissing the Carrington discharge allegation, but explained that he would not apply or rely upon *Continental Group*, supra. 360 NLRB at 1012 fn. 4.

² Because then-Member Miscimarra would have found that Rubio’s discharge was lawful, he did not pass on whether her alleged post-discharge misconduct warranted denying her traditional remedies.

The Board also found that the Respondent violated Sec. 8(a)(1) by maintaining three overly broad rules and, with then-Member Miscimarra dissenting, by unlawfully threatening Carrington.

³ On October 3, 2014, the court of appeals remanded the case to the Board to resolve the Respondent’s motion to modify or stay the Order.

requiring the Respondent to reinstate Rubio and make her whole.

While the Respondent's motion was pending, the General Counsel filed a motion with the Board on October 18, 2016, to remand this case to the Regional Director to process and approve a request by the Charging Party to withdraw the unfair labor practice charges. In his motion, the General Counsel contends that a remand is appropriate in light of a non-Board settlement reached among Rubio, Carrington, and the Respondent on February 14, 2014, some 3 months before the Board issued its decision in this case. No opposition to the General Counsel's motion was filed by Rubio, Carrington, or the Respondent.

In the non-Board settlement, Rubio, Carrington, and the Respondent agreed to resolve not only the unfair labor practices in this case but also other charges and claims regarding the email transfer and the discharges. Perhaps the most important of those other settled claims is a lawsuit filed by the Respondent in federal district court alleging, *inter alia*, that Rubio and Carrington violated the Arizona Trade Secrets Act, A.R.S. §44-401 et seq., by misappropriating the Respondent's trade secrets and confidential data during their email transfer. Back on August 13, 2013, the district court found that Rubio and Carrington had misappropriated the Respondent's trade secrets in violation of the Arizona Trade Secrets Act and granted in part the Respondent's motion for partial summary judgment on that claim. *Food Services of America, Inc. v. Carrington*, No. CV-12-00175-PHX-GMS, 2013 WL 4507593 (D. Ariz. Aug. 23, 2013). A trial to determine the damages owed by Rubio and Carrington to the Respondent was scheduled to begin on February 25, 2014. As stated above, the parties reached their global non-Board settlement on February 14, 2014. Consistent with that settlement, the parties filed with the district court a stipulated motion to enter a consent final judgment and permanent injunction preventing Rubio and Carrington from possessing or using the information they had acquired during the email transfer, without requiring Rubio or Carrington to compensate the Respondent for any damages it may have suffered, obviating the need for a trial on that issue. On February 20, 2014, the federal district court entered the consent final judgment and permanent injunction.

In his motion, the General Counsel urges the Board to remand the case to the Regional Director for approval and processing of the Charging Party's withdrawal request in light of "the expressed desire of the parties to be bound by the non-Board settlement agreement resolving this case and other cases, as well as the passage of time." We agree that a remand for approval of the withdrawal

request is appropriate under the unique circumstances presented. Those unique circumstances include the following: (1) the Charging Party, the individual discriminatees, and the Respondent have all agreed to be bound by the settlement; (2) the settlement resolved not only the present unfair labor practice charges but also related state law claims *by the Respondent* as to which a court had previously granted summary judgment *against the alleged discriminatees* and had scheduled a trial to determine economic damages; (3) the General Counsel, the official charged with prosecuting claims under the Act, moves the Board to give effect to the settlement and to remand the case for approval of the Charging Party's withdrawal request, and no opposition was filed by Rubio, Carrington, or the Respondent; (4) the risks inherent in continued litigation, both before the Board on the Respondent's motion for reconsideration and before the court of appeals on review; (5) the long passage of time since the events in question took place; (6) the absence of any fraud, coercion, or duress in securing the settlement; and (7) the absence of proof that the Respondent has a history of violating the Act or breaching settlement agreements. See *Independent Stave Co.*, 287 NLRB 740, 743 (1987) (explaining that the Board considers "all the surrounding circumstances" when evaluating a non-Board settlement); cf. *Saia Motor Freight Line*, 334 NLRB 607 (2001) (vacating Board's decision and order based on an informal settlement agreement reached before the Board's decision, unbeknownst to the Board).

Although we share our dissenting colleague's displeasure regarding the parties' unexplained failure to promptly bring the non-Board settlement to the Board's attention, there is no evidence or allegation that any party has attempted to abuse the Board's processes.⁴

⁴ *Flyte Tyme Worldwide*, 362 NLRB No. 46 (2015), cited by the dissent, is distinguishable. There, the Board denied a charging party's motion to withdraw its charge alleging that an employer had violated the Act by maintaining and enforcing an arbitration agreement policy requiring employees to individually arbitrate all employment related claims and to waive their right to maintain class or collective actions based on a settlement of the alleged unfair labor practice and class and collective lawsuits filed by plaintiffs against the employer for alleged violations of federal and state wage and hour laws. The settlement required the employer to pay to the named plaintiffs and class members \$900,000 for the alleged violations of wage and hour laws, but did not prevent the employer from continuing to maintain and enforce its arbitration agreement policy. *Flyte Tyme* did not involve the unique circumstances presented here involving a settlement of related claims *by a respondent-employer against alleged discriminatees*, much less related claims on which a court had granted partial summary judgment against the alleged discriminatees and had scheduled a trial to determine the amount of monetary damages owed by the employees to the employer. *Flyte Tyme* also did not involve a pending motion for reconsideration of the Board's findings of unfair labor practices settled by the parties.

For these reasons, the General Counsel's unopposed motion to remand this case to the Regional Director to approve and process the Charging Party's withdrawal request is GRANTED, the Board's Decision and Order reported at 360 NLRB 1012 is VACATED, and the Respondent's motion to modify or stay that decision and order is DENIED as moot.

Dated, Washington, D.C. May 26, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

The General Counsel won this case before the Board, in important part. He now seeks to abandon it, based on a private settlement reached months before the Board's decision, but not disclosed until years after. That settlement provides no remedy at all for the violations of the National Labor Relations Act that the Board found. The General Counsel has provided no explanation for this perplexing sequence of events. Relying in part on materials outside the record, the Respondent previously had moved to modify the Board's order. I am concerned by what looks like a possible abuse of the Board's processes—a course of conduct that required the Board to devote significant resources to deciding a case that apparently was moot, as far as the parties were concerned. Unless and until the General Counsel and the Respondent can explain what has happened here, and how it serves the Act for the Board to vacate its order (as the majority now does), the General Counsel's motion to remand the

Relying on *Flyte Tyme*, our dissenting colleague contends that the standard of *Independent Stave*, supra, for reviewing settlements is inapposite. We disagree. In *Flyte Tyme*, the Board declined to apply the *Independent Stave* standard because “the settlement agreement [did] not purport to relate in any way to the alleged unfair labor practices.” Id., slip op. at 2 fn.1. Here, in contrast, the settlement does relate to the alleged unfair labor practices. Pars. H and 5 of the settlement comprehensively describe and settle the unfair labor practice charges. Additionally, the settlement further relates to the unfair labor practices insofar as it resolves the Respondent's state and federal claims against Rubio and Carrington for alleged misconduct that the Respondent, in its pending motion for reconsideration, contends warrants denying Rubio any remedy in this case. For the reasons explained in the text, we find that giving effect to the parties' settlement would effectuate the Act's purposes.

case to the Regional Director to process the Charging Party's withdrawal request should be denied, as should the Respondent's motion. Our precedent makes this clear.

The procedural history and current posture of the case is complicated: The Board issued its Decision and Order on May 30, 2014.¹ That decision found that the Respondent had committed several unfair labor practices violating Section 8(a)(1) of the Act, including: (1) unlawfully discharging employee Ella Rubio, (2) implicitly threatening employee Paul Carrington, (3) maintaining an unlawful compensation provision in its employee handbook, (4) maintaining an unlawful mandatory confidentiality-and-nondisclosure agreement, and (5) maintaining an unlawful no-solicitation rule. The Board accordingly ordered the Respondent to, among other things, reinstate Rubio and make her whole, cease threatening employees, and rescind the unlawful handbook provision, the unlawful confidentiality-and-nondisclosure agreement, and the unlawful no-solicitation rule.

On October 18, 2016—nearly 2 ½ years after the Board's May 30, 2014 decision—the General Counsel moved to remand the case to the Region, so that the Charging Party (employee Carrington) could withdraw his unfair labor practice charge. In the meantime, the Respondent, on June 9, 2014, had moved the Board to modify its decision, arguing that the Board should reconsider its findings with respect to employee Rubio's discharge and the threat against employee Carrington.² The General Counsel has not acknowledged that the Respondent's motion has merit, in any respect.

The General Counsel's remand motion is based on a non-Board settlement reached between the Respondent and Carrington and Rubio on February 14, 2014, resolving various private legal claims against each other (including claims addressed in an August 2013 decision by the United States District Court for the District of Arizona, issued several months before the Board's order here). The General Counsel's motion cites simply “the expressed desire of the parties to be bound by the non-Board settlement resolving this case and other cases, as well as the passage of time.” But the settlement provides for no relief related to the Board case. Nevertheless, the two employees agree to withdraw all unfair labor charges with the Board and to notify the Board that they relin-

¹ *Food Services of America, Inc.*, 360 NLRB 1012 (2014). The Board adopted in part and reversed in part the March 27, 2012 decision of Administrative Law Judge Joel P. Biblowitz.

² The Respondent had first sought review of the Board's decision in the U.S. Court of Appeals for the District of Columbia Circuit, which remanded the case after the Respondent filed its motion with the Board.

quish “any right they might otherwise have had to obtain relief directly benefiting themselves.” The settlement was reached more than 3 months before the Board’s decision here. Inexplicably, no party brought the settlement to the Board’s attention—either before the decision of the Board or after—until the General Counsel filed his remand motion. The Respondent’s June 2014 motion for modification, filed nearly 4 months after the settlement, makes no mention of it.

It appears that the General Counsel, in seeking remand for withdrawal of the underlying unfair labor practice charge, envisions that the Board would vacate its May 2014 order. (He has not said that the order was erroneous in any respect, however.) The non-Board settlement hardly seems to be a proper basis for that step: It does not remedy Rubio’s unlawful discharge, as found by the Board. It does not require the Respondent to cease threatening employees. And it leaves the Respondent’s unlawful handbook provision, unlawful confidentiality-and-nondisclosure agreement, and unlawful no-solicitation rule in place.

The Board properly has rejected settlements that fail to address and remedy alleged violations of the Act. As the Board explained in *Flyte Tyme Worldwide*:

Although the Board is firmly committed to promoting the public interest in encouraging mutually agreeable settlements without litigation, “[i]t is well established that the Board’s 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 private rights. Thus, the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.”

362 NLRB No. 46, slip op. at 1 (2015), quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (footnote omitted), *enfd.* 251 F.2d 639 (6th Cir. 1958).

The *Flyte Tyme* Board denied the charging party’s motion to withdraw his charge, while the case was pending before the Board on the respondent employer’s exceptions, because while a settlement resolved the employee’s private legal claims, it left in place a mandatory arbitration policy alleged to violate the Act. Here, of course, we are dealing not with alleged violations, but with unfair labor practices already found by the Board, in a decision that the General Counsel has not otherwise questioned. It seems even clearer, then, that the settlement does not “effectuate the policies of the Act.” *Flyte Tyme*, 362 NLRB No. 46, slip op. at 1.³

³ *Flyte Tyme* did not apply the standard established by *Independent Stave Co.*, 287 NLRB 740 (1987), “[b]ecause the settlement agreement [did] not purport to relate in any way to the alleged unfair labor practice-

Of course, the settlement was reached before the Board’s decision. But that fact raises its own separate concerns. In granting the General Counsel’s motion, the Board effectively condones the waste of the Board’s resources in deciding a case that was moot. Indeed, there is reason to question whether the parties manipulated the Board into issuing a decision for some purpose other than to resolve the case. What else explains the long delay—more than 2 1/2 years—in bringing the settlement to the Board’s attention?

Without an answer from the General Counsel, and without a persuasive explanation for how the settlement effectuates the policies of the Act despite failing to address any of the violations found by the Board, I believe that the Board is required to deny the General Counsel’s motion to remand. The majority instead grants the motion, applying the Board’s inapposite *Independent Stave* standard (see fn. 3, *supra*)⁴ and citing the “unique circumstances presented”—essentially that no one involved in the proceeding objects to the settlement and that the Board’s order here, if not modified, might be vulnerable

es.” 362 NLRB No. 46, slip op. at 2 fn. 1. But even assuming that the settlement here *did* remedy in some measure the unfair labor practices actually found by the Board, and that the *Independent Stave* standard applies, the General Counsel has not explained why the Board should approve the settlement.

In *Independent Stave*, the Board announced that in evaluating non-Board settlements, it would examine

all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties; 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.

287 NLRB at 743.

As suggested, the settlement here would seem to fail the second prong of the *Independent Stave* standard, inasmuch as it provides for no relief at all for violations of the Act that the Board has already found.

⁴ The majority does not persuasively distinguish *Flyte Tyme*, *supra*, by citing the factual differences between this case and that one. The fact remains that the Board here is vacating its own order and all of the relief that it granted, based on an undisclosed settlement, reached by the private parties *before* the Board’s order, which did not in any way remedy the unfair labor practices that the Board has since found.

Saia Motor Freight Line, Inc., 334 NLRB 607 (2001), cited by the majority, hardly compels the result reached here. In that case, the Board vacated an order based on a settlement reached before the order, observing that “[if] the Regional Director had sought Board permission for the approval or Board remand of the case back to the Regional Director, it is likely that the decision would not have issued.” *Id.* at 607. Such a conclusion in this case is highly debatable.

on appeal.⁵ My colleagues express their “displeasure regarding the parties’ unexplained failure to promptly bring the non-Board settlement to the Board’s attention.” They assert, however, that “there is no evidence or allegation that any party has attempted to abuse the Board’s processes.” To the contrary, the parties’ course of conduct here raises just that concern, and I would require them to explain their actions before taking any steps to undo the Board’s order. Therefore, I respectfully dissent.

Dated, Washington, D.C. May 26, 2017

Lauren McFerran,

Member

NATIONAL LABOR RELATIONS BOARD

⁵ In this respect, my colleagues supply a rationale that the General Counsel did not advance and grant relief—vacating the Board’s order—that the General Counsel did not expressly seek.