ConAgra Foods, Inc. *and* United Food and Commercial Workers Union, Local 75. Cases 09–CA–062889, 09–CA–062899, 09–CA–068198, 09–CA–089532, and 09–CA–090873

September 7, 2017

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On November 21, 2014, the National Labor Relations Board issued its Decision and Order in this proceeding. *ConAgra Foods, Inc*., 361 NLRB No. 113 (2014). The Board found that, after having entered into an informal settlement agreement with the Union in cases 09–CA–062889, 09–CA–062899, and 09–CA–068198, the Respondent committed postsettlement unfair labor practices by issuing a verbal warning to employee Janette Haines in violation of Section 8(a)(3) of the Act and by posting and maintaining an overly broad rule restricting "discussions about unions" in violation of Section 8(a)(1) of the Act. Id., slip op. at 1–4. Relying solely on the unlawful discipline of Haines, the Board granted the General Counsel's Motion for Default Judgment pursuant to the performance provision of the settlement agreement. Id., slip op. at 4–5.

Thereafter, the United States Court of Appeals for the Eighth Circuit enforced the portion of the Board's Order regarding the unlawful rule, but reversed the Board's finding that the warning issued to Haines was unlawful. *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1090–1091 (8th Cir. 2016). Since the Board relied solely on that warning to grant the General Counsel's Motion for Default Judgment, the court vacated the default judgment and remanded the case to the Board to determine whether the 8(a)(1) finding regarding the overbroad rule restricting "discussions about unions" could serve as a basis for granting the General Counsel's motion. Id. at 1091–1092.

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

The Board has considered the remanded issue in light of the court's opinion, which is the law of the case, and the parties' statements of position. For the reasons discussed below, the Board has decided to deny the General Counsel's Motion for Default Judgment.

Procedural Background

Upon unfair labor practice charges filed by the Union between August 17 and November 4, 2011, in cases 09–CA–062889, 09–CA–062899, and 09–CA–068198, the Charging Party Union and the Respondent (at that time, the Charged Party) entered into an informal settlement agreement, which was approved by the Regional Director for Region 9 on November 30, 2011. Pursuant to the terms of the settlement agreement, the Respondent agreed, among other things, to refrain from (1) enforcing its solicitation/distribution policy in an overly broad manner by applying it to nonwork areas and nonwork time; (2) advising its employees that they may not discuss and voice their opinions on union-related issues in work areas and/or during working time; and (3) interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights in any like or related manner. The settlement agreement also contained the following performance provision:

> The Charged Party agrees that in case of noncompliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

Thereafter, the Union filed separate charges against the Respondent in cases 09–CA–089532 and 09–CA–090873 on September 18 and October 5, 2012, respectively. By email on December 18, 2012, the Region notified the Respondent that by discriminatorily disciplining Haines for her protected concerted activity as alleged in

case 09–CA–090873, the Respondent was in noncompliance with the settlement agreement. The email advised that unless the Respondent remedied its noncompliance by approving a proposed second settlement agreement, a complaint would issue and a motion for default judgment regarding the allegations previously resolved by the settlement agreement would be filed. The Respondent did not reply.

Accordingly, on January 15, 2013, the Acting Regional Director issued an order consolidating charges in cases 09–CA–089532 and 09–CA–090873, and a consolidated complaint and notice of hearing. On January 17, 2013, the Acting Regional Director issued an order consolidating the earlier charges and a consolidated complaint in cases 09–CA–062889, 09–CA–062899, and 09–CA–068198, alleging that the Respondent failed to comply with the terms of the settlement agreement in light of the allegations against the Respondent in cases 09–CA–089532 and 09–CA–090873.

A hearing was held March 25 and 26, 2013. During the hearing, the Respondent introduced a letter that it had posted on a bulletin board on April 30, 2012, which stated in part: "We also wish to remind employees that discussions about unions are covered by our Company's Solicitation policy. That policy says that solicitation for or against unions or other organizations by employees must be limited to non-working times." At the close of the hearing, the Acting General Counsel moved to amend the complaint to allege that the posted letter violated Section 8(a)(1) on its face. The Acting General Counsel, however, did not advise the Respondent that the posted letter constituted a breach of the settlement agreement. The judge granted the amendment.

On May 9, 2013, the judge issued his decision, finding that the Respondent violated the Act by disciplining Haines and by maintaining the "discussions about unions" rule in the posted letter. On May 17, 2013, pursuant to the performance provision in the settlement agreement, the Acting General Counsel filed this Motion for Default Judgment, along with a supporting memorandum, asserting that the Respondent had engaged in conduct violative of the terms of the informal settlement agreement pursuant to the judge's decision.[1] On the same date, the Acting General Counsel also filed an unopposed Motion to Consolidate the Motion for Default Judgment in cases 09–CA–062889, 09–CA–062899, and 09–CA–068198 with cases 09–CA–089532 and 09–CA–090873.[2]

In its Decision and Order, the Board affirmed the judge's findings that the Respondent violated the Act by disciplining Haines and by maintaining the "discussions about unions" rule in the posted letter. The Board further found that by unlawfully disciplining Haines for purportedly violating the Respondent's no-solicitation rule, the Respondent breached the settlement agreement, in which it had agreed to cease and desist from disciplining employees for engaging in solicitation/distribution in nonwork areas and during non-work times. 361 NLRB No. 113, slip op. at 5. Pursuant to the performance provision of the settlement agreement, the Board accepted the allegations in the previously settled cases as true and entered default judgment against the Respondent as to those allegations. Id. Having so ruled, the Board found it unnecessary to reach whether default judgment was also warranted based on its finding that the Respondent violated the Act by posting the letter discussed above. Id., slip op. at 5 fn. 13.

The Respondent thereafter filed a petition for review of the Board's Order with the United States Court of Appeals for the Eighth Circuit, and the Board filed a cross-application for enforcement. On February 19, 2016, the court issued its decision, enforcing the Board's Order regarding the posted "discussions about unions" rule but denying enforcement of the Board's Order regarding Haines' discipline. 813 F.3d at 1090–1091. Based on its reversal of the discipline violation, which was the sole basis for the Board's entry of default judgment on the allegations of the previously settled cases, the court vacated the default judgment and remanded the case to the Board to determine whether the violation finding for the "discussions about unions" rule, which the court enforced, "constitutes a basis upon which to grant the General Counsel's motion for default judgment." Id. at 1092.

On June 17, 2016, the Board advised the parties that it had accepted the remand and invited the parties to submit statements of position concerning the issue raised by the court's remand. Thereafter, the General Counsel and the Respondent each filed a statement of position.

Discussion

As an initial matter, we recognize that the Respondent breached the terms of the settlement agreement by committing the postsettlement unfair labor practice. The Respondent's letter, as an overly broad rule restricting discussions about unions, clearly violates the terms of the settlement agreement in which it agreed it would not

[1] On May 21, 2013, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent filed an opposition to the General Counsel's motion. The Acting General Counsel filed a response.

[2] The Board granted the Acting General Counsel's unopposed Motion to Consolidate. 361 NLRB No. 113, slip op. at 1.

"advise employees that they may not discuss and voice their opinions on union related issues in working area and/or during working time." See *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52–53 (2006) (employer's postsettlement prohibition of employees discussing the union breached the settlement agreement and warranted setting it aside for noncompliance).

However, having duly considered the matter, we find that the overbroad rule finding cannot serve as a basis for granting the General Counsel's Motion for Default Judgment. The fundamental elements of procedural due process are "notice and an opportunity to be heard." *Earthgrains Co.,* 351 NLRB 733, 735 (2007). In this case, at the close of the hearing, the General Counsel moved to amend the consolidated complaint in cases 09–CA–089532 and 09–CA–090873 to allege that the posted letter violated Section 8(a)(1) of the Act as an overbroad rule. But the General Counsel did not advise the Respondent that the maintenance of the allegedly overbroad rule, if found unlawful, would breach the terms of the settlement agreement in cases 09–CA–062889, 09–CA–062899, and 09–CA–068198. Because the Respondent was not put on notice that its maintenance of the overbroad rule could constitute noncompliance with the terms of the settlement agreement, we conclude that it would be a denial of procedural due process at this time to find that maintenance of its unlawful rule constituted noncompliance with the settlement agreement. Accordingly, we deny the General Counsel's Motion for Default Judgment.[3]

ORDER

IT IS ORDERED that the General Counsel's Motion for Default Judgment is denied.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 9 for further appropriate action.

Dated, Washington, D.C. September 7, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, concurring.

In 2011, the Charging Party Union and the Respondent—at that time, the Charged Party, since no complaint had issued—entered into an informal settlement agreement (Settlement Agreement) resolving certain unfair labor practice charges. Under the terms of the Settlement Agreement, if the Respondent failed to comply with any of its provisions, the Settlement Agreement authorized the General Counsel to issue a complaint on the settled allegations and the Board to enter a default judgment on those allegations—provided, however, that the Region first gave the Respondent 14 days' notice of its alleged noncompliance in order to give the Respondent an opportunity to remedy the noncompliance.

In April 2012, the Respondent posted a letter in its workplace reminding employees that "discussions about unions are covered by our Company's Solicitation policy." A Board panel majority found this letter unlawful,[1] and the Eighth Circuit enforced that finding.[2] The same Board panel majority found that the Respondent also violated the Act when it issued a warning to employee Janette Haines for an interaction Haines had with two coworkers, which the Respondent viewed as a violation of its lawful no-solicitation policy.[3] The Board majority found the warning unlawful on the basis that the interaction was not solicitation. Having found Haines' warning unlawful, the Board majority found that the warning constituted noncompliance with the Settlement Agreement,

[1] 361 NLRB No. 113, slip op. at 3–4 (2014).

[2] *ConAgra Foods, Inc. v. NLRB*, 813 F.3d 1079, 1090–1091 (8th Cir. 2016). To evaluate the Respondent's posted letter, the Board panel majority applied prong one of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), under which the Board asks whether "employees would reasonably construe the language" of an employer's rule, policy, or handbook provision "to prohibit Section 7 activity." Applying this standard, the majority found the posted letter unlawful. I dissented from the majority's finding that the posted letter was unlawful. 361 NLRB No. 113, slip op. at 12–13. In doing so, I expressed my disagreement with the "reasonably construe" standard and advocated for a reexamination of the standard in an appropriate future case. 361 NLRB No. 113, slip op. at 8 fn. 2. Subsequently, in my separate opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016), I expressed my view that the "reasonably construe" standard should be repudiated by the Board and the courts, and I believe the Board is required to engage in a balancing that considers both the potential adverse impact of a challenged rule on NLRA-protected activity and the legitimate justifications that may be associated with the rule. Nevertheless, I recognize that the Eighth Circuit applied the "reasonably construe" standard in evaluating the posted letter, see *ConAgra Foods, Inc. v. NLRB*, 813 F.3d at 1090–1091, and I accept the court's opinion as the law of the case.

[3] 361 NLRB No. 113, slip op. at 1–3.

[3] In denying default judgment, we do not pass on Chairman Miscimarra's additional rationale, set forth in his concurring opinion, that the General Counsel failed to provide the Respondent with 14 days' advance notice of noncompliance, as specified in the Settlement Agreement.

and solely on this basis the majority entered default judgment on the previously settled allegations.[4]

The Eighth Circuit reversed the Board majority's finding that Haines' warning was unlawful.[5] Consequently, the court remanded this case to the Board to determine whether the posted 2012 letter, which the court agreed was unlawful, provides a basis upon which to grant default judgment on the settled allegations.[6]

In today's decision, my colleagues find that the Motion for Default Judgment must be denied because the General Counsel never notified the Respondent, prior to filing its Motion for Default Judgment, that the 2012 letter, if found unlawful, would constitute noncompliance with the Settlement Agreement. I agree with my colleagues that the Motion for Default Judgment must be denied on procedural due process grounds for this reason. In addition, I believe that the Board cannot reasonably enter a default judgment based solely on the 2012 letter for the following additional reasons.

First, the Settlement Agreement not only required 14 days' advance notice of noncompliance with the terms of the Settlement Agreement before default judgment could be entered on the settled allegations, the Settlement Agreement also permitted the entry of default judgment only if the Respondent *failed to remedy its noncompliance* after being given the opportunity to do so.[7] The Region gave the Respondent 14 days' notice and opportunity to remedy its noncompliance with regard to the allegedly unlawful warning issued to employee Haines (i.e., the violation that the Eighth Circuit reversed). However, as previously noted, the Region did not provide the Respondent with the required 14 days' notice of noncompliance regarding the 2012 letter. Therefore, not only was the Respondent denied the 14 days' notice of noncompliance required by the Settlement Agreement regarding the 2012 letter, the Respondent was denied the opportunity to remedy this alleged noncompliance as required under the terms of the Settlement Agreement.[8] For this reason as well, I believe the Board cannot reasonably find the Respondent failed to comply with the terms of the Settlement Agreement.

Second, the 14-day notice and opportunity-to-remedy-noncompliance provisions are essential elements of the Settlement Agreement's performance clause. A settlement agreement is a contract, and the Board's role is to ensure that the agreed-upon terms are given effect and that each party receives the benefit for which it bargained, in accordance with applicable legal principles. See *Outokumpu Stainless USA, LLC*, 365 NLRB No. 127, slip op. at 9–10 (Chairman Miscimarra, dissenting in part). For this reason, the Board has recognized that "[i]n a default judgment proceeding" based on noncompliance with a settlement agreement, "the Board should be reluctant to impose a remedy by default in the absence of clear language in the noncompliance clause." *Bartlett Heating & Air Conditioning*, 339 NLRB 1044, 1046 (2003). Because no provision in the Settlement Agreement authorizes default judgment absent the Region's prior fulfillment of its contractual duty to furnish the Respondent 14 days' notice and opportunity to remedy any alleged noncompliance, granting default judgment in these circumstances would improperly deprive the Respondent of the benefit for which it bargained—namely,

[4] Id., slip op. at 4–5. The majority found it unnecessary to reach the Respondent's argument that default judgment could not properly be based on the 2012 letter violation. Id., slip op. at 5 fn. 13.

[5] 813 F.3d at 1084–1090. Similar to the Eighth Circuit, I also disagreed with the Board majority's finding that the Respondent violated the Act based on its warning to Haines that her interaction with two coworkers was prohibited by the Respondent's no-solicitation policy. See *ConAgra Foods*, 361 NLRB No. 113, slip op. at 7–12 (Member Miscimarra, dissenting in part).

[6] 813 F.3d at 1091–1092.

[7] The performance provision in the Agreement stated, in relevant part:

> The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, *and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party*, the Regional Director will issue the complaint that will include the allegations spelled out above in the Scope of Agreement section. Thereafter, the General Counsel may file a motion for default judgment with the Board on the allegations of the complaint. The Charged Party understands and agrees that all of the allegations of the aforementioned complaint will be deemed admitted and it will have waived its right to file an Answer to such complaint. The only issue that may be raised before the Board is whether the Charged Party defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte after service or attempted service upon Charged Party/Respondent at the last address provided to the General Counsel.

(Emphasis added.)

[8] I reject the General Counsel's contention that the Region's notice regarding the warning issued to Haines satisfied the Region's duty under the Agreement to furnish the Respondent 14 days' notice regarding the 2012 letter. The allegation that the warning issued to Haines violated Sec. 8(a)(3) was separate and distinct from the allegation that the 2012 letter violated Sec. 8(a)(1), and the two allegations involved different sections of the Act. Cf. *Pergament United Sales v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990) (stating that "notice must inform the respondent of the acts forming the basis" of the unfair labor practice), enfg. 296 NLRB 333 (1989). Further, as noted previously, the Eighth Circuit found that Haines' warning was lawful, so the warning did not constitute noncompliance with the Agreement.

a 14-day window period within which to act voluntarily in order to avoid a default judgment.

Finally, I believe there is no merit in the General Counsel's argument that it would have been futile to provide the 14-day notice regarding the 2012 letter because, even if the 14-day notice had been provided (as required by the express language of the Settlement Agreement), the Respondent would not have cured its alleged noncompliance. The General Counsel supports this "futility" argument based on (i) the Respondent's position that the 2012 letter was lawful, and (ii) the fact that Respondent did not rescind the 2012 letter after the complaint was amended to allege that the letter violated the Act. For several reasons, I believe the General Counsel's "futility" argument must itself be dismissed as an exercise in futility.

First, as a factual matter, there is absolutely no record evidence that sheds light on what the Respondent would have done in response to 14 days' notice that the 2012 letter was considered to constitute noncompliance with the Settlement Agreement and might warrant entry of default judgment against the Respondent. When the Board issues or amends a complaint, the respondent has a right to defend against the alleged violations, and here, the Respondent's defense was ultimately successful as to the warning administered to Haines (which the Eighth Circuit and I both concluded was lawful).[9] There is a qualitative difference between the issuance or amendment of a complaint (which places a party on notice that it must defend against alleged violations of the Act) and a 14-day notice and opportunity-to-remedy-noncompliance required under a settlement agreement (which places the party on notice that its right to raise *any* defense against the settled allegations may be extinguished). Accordingly, I do not believe one can reasonably interpret the Respondent's failure to rescind the 2012 letter after the complaint was amended to allege the letter was unlawful as proof that a 14-day notice and opportunity-to-remedy-noncompliance would have been futile. I believe the Board could reach such a conclusion only by engaging in rank speculation, which would fall short of the "substantial evidence" required to withstand review of the Board's factual findings.[10]

Additionally, as I have stated elsewhere, "[s]ettlement agreements play an important role in effectuating the policies of the Act. The prompt and voluntary resolution of unfair labor practice charges promotes industrial peace, conserves the Board's resources, and serves the public interest."[11] However, the General Counsel's futility argument disregards what is perhaps the most fundamental aspect of settlement agreements: they do not merely bind the respondent, they bind all parties, including the Board (as represented by the Regional Director, who signs the agreement on behalf of the General Counsel). It would clearly undermine the role played by settlement agreements—and unquestionably damage the willingness of parties to enter into such agreements—if the Board relieved the General Counsel of its obligations based on arguments that fulfilling those obligations was unnecessary or rendered superfluous by the Respondent's denial of liability. The essence of any agreement, including Board settlement agreements, is that all parties are bound by the terms that have been voluntarily entered into. It would be all the more unreasonable if the Board permitted the General Counsel to obtain a default judgment against the Respondent based on its purported noncompliance with the Settlement Agreement, while excusing the General Counsel's own noncompliance with the Settlement Agreement's express provisions governing the entry of default judgments.

For these reasons in addition to those set forth by my colleagues, I agree that the General Counsel's Motion for Default Judgment should be denied.

Dated, Washington, D.C. September 7, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD

[9] See fn. 8 supra and accompanying text.

[10] Sec. 10(e) and 10(f) of the Act provide that the Board's findings shall be upheld on appeal only to the extent they are supported by "substantial evidence on the record considered as a whole."

[11] *Outokumpu Stainless USA, LLC*, supra, slip op. at 11 (Chairman Miscimarra, dissenting in part) (citing *Independent Stave Co.*, 287 NLRB 740 (1987)).