

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

JAM PRODUCTIONS, LTD., AND EVENT
PRODUCTIONS, INC., A SINGLE EMPLOYER

And

13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION
LOCAL NO. 2, IATSE

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
AND BRIEF IN SUPPORT THEREOF TO THE DECISION AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:

/s/ Kevin McCormick

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn, Room 808
Chicago, Illinois 60604

EXCEPTIONS

Counsel for the General Counsel takes exception to the following conclusions of the ALJ:

1. The portion of the ALJ's decision in which the ALJ admitted the settlement negotiation discussions in Paragraph Numbers 15, 16, 17, 20, and 21 in the Joint Motion and Stipulation of Facts. (ALJD Pg. 7, lines 6-16)
2. The portion of the ALJ's decision in which the ALJ admitted Joint Exhibits 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, and 22. (ALJD Pg. 7, lines 6-16)
3. The portion of the ALJ's decision in which the ALJ found the settlement agreement and notice requirement that Respondent provide the Shaw Crew with "immediate and full participation in the on-call list" as patently ambiguous. (ALJD Pg. 7, lines 19-40)
4. The portion of the ALJ's decision in which the ALJ found that the deletion of the phrase "without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any," rendered the settlement agreement and notice ambiguous. (ALJD Pg. 7, lines 21-34)
5. The portion of the ALJ's decision in which the ALJ found no meeting of the minds as to the Respondents' obligations under the settlement agreement in Case 13-CA-160319. (ALJD Pg. 7, lines 43-45)
6. The failure of the ALJ to find Respondent's recall of the Shaw crew as inherently destructive of Section 7 rights. (ALJD Pg. 7, lines 42-47; Pg. 8, lines 1-43)
7. The portion of the ALJ's decision in which the ALJ recommended that the settlement agreement and notice in Case 13-CA-160319 be set aside and remand the proceeding to the Division of Judges for a trial of both the reinstated allegations in 13-CA-160319 and those in the instant complaint. (ALJD Pg. 9, line 8-21)

8. The failure of the ALJ in his decision to find Respondent violated Section 8(a)(3) and (4) of the National Labor Relations Act. (ALJD p. 1-9)

BRIEF IN SUPPORT OF EXCEPTIONS

In his decision, the ALJ failed to rule on the central issue of this case, that is whether Behrad Emami engaged in conduct that was “inherently destructive” of the Shaw Crew’s Section 7 rights. By examining and making a ruling on a settlement agreement in a case that was not before him, the ALJ ignored the unfair labor practice that was before him. By labeling the settlement agreement language in Case 13-CA-160319 ambiguous, the ALJ based his decision and conclusions on a false premise. The “immediate and full participation” language is not ambiguous and in fact, has been recognized in decades of Board jurisprudence. The ALJ erred in not recognizing well established Board law. By analyzing the previous settlement in a vacuum, the ALJ failed to rule on the merits of the case before him, that is, Case 13-CA-177838 and Respondent’s “inherently destructive” recall of the Shaw Crew.

A. The Settlement Language is Not Patently Ambiguous.¹

The Board has utilized the phrase “immediate and full” for decades in remedying Section 8(a)(3) and (4) violations of the Act. For example, in *The Rudolph Wurlitzer Co.*, 40 NLRB 202, a 1942 case, the General Counsel alleged the employer engaged in interference, threats, interrogations, laying off or terminating employees for their union activities, and failed and refused to reinstate 22 employees to their former or substantially equivalent positions after the employees went on strike because of the employer’s unfair labor practices. *Id.* at 203. The trial examiner issued his intermediate report finding that the employer had engaged in violations of Section 8(a)(1) and (3) of the Act. *Id.* at 204.

After the trial examiner issued his report, the employer, union, and attorneys for the General Counsel entered into a stipulation in settlement of the case subject to the approval of the Board. *Id.* at 204. The stipulation set forth numerous factual and legal conclusions regarding the

¹ Exceptions 3, 4, and 5.

case. One of the affirmative actions agreed to by the employer was to offer several employees “immediate and full reinstatement” to their former or substantially equivalent positions. The Board approved this stipulation and ordered the company to comply with its provisions. *Id.* at 210.

Since the time of its earliest decisions, the Board has adopted “immediate and full reinstatement” as the standard remedy for Section 8(a)(3) and (4) violations. See *Security Plating, Co., Inc.*, 147 NLRB 877 (1964); *United Electric Co.*, 194 NLRB 665, 672 (1971)(ordering immediate and full reinstatement for two 8(a)(3) discharges); *South Shore Hospital*, 229 NLRB 363 (1977)(immediate and full reinstatement for two 8(a)(3) discharges)(reversing one discharge in *NLRB v. South Shore Hospital*, 571 F. 2d 677 (1978)); *Louis Ronca d/b/a Ronca’s Exxon Service*, 268 NLRB 1157 1984(8(a)(4 allegations); *Residential Management, Inc.*, 311 NLRB 1174 (1993); *Park ‘N Go of Minnesota, LP*, 344 NLRB No. 152 (2005).

By ruling that the language of the settlement in 13-CA-160319 is ambiguous, the ALJ ignored decades of Board remedies and reads the settlement in a vacuum. The phrase “immediate and full participation in the on-call list” should be interpreted just as the Board has used it for years and is no more ambiguous than backpay as a remedy for illegal terminations. The situation in the instant case, where an employer has more than one source of employees, is similar to a hiring hall, where the employer can obtain employees from the union, and fill in with other employees once the hiring hall is exhausted. In terms of the settlement, the Shaw Crew functions precisely like an exclusive hiring hall—a source of employees that Respondent must exhaust before obtaining employees elsewhere. Therefore, the language of the settlement in this case is analogous to the remedies in the Board’s longstanding case law regarding hiring halls. In

Island Management Partners, Inc., 362 NLRB No. 158, slip op. (2015), the Board found an employer violated Section 8(a)(5) by failing to seek employees from an exclusive hiring hall operated by the union and subcontracting the unit work without notice to and affording the union an opportunity to bargain. In order to remedy the employer's failure to utilize the exclusive hiring hall arrangement, the Board ordered the employer to offer immediate and full employment to those applicants who would have been referred to the employer by the union for employment were it not for the employer's unlawful conduct and to make them whole. *Id.* slip op. at 4.

The Board further defined what it meant by "full and immediate employment" in *Wise Alloys, LLC*, 343 NLRB 463 (2004). There, the Board ordered the employer to "restore its past practice of *exclusively* using the Union hiring hall to select employees...." *Id.* That is precisely the remedy the General Counsel seeks in this case—an order to Respondent to return to its past practice of selecting employees exclusively from the Shaw Crew before seeking employees elsewhere.

Reinstatement of the prior policy of offering assignments exclusively to the Shaw Crew comports with the Board's established remedial policy of attempting "to restore, so far as possible, the status quo that would have obtained but for the wrongful act." *J.E. Brown Electric*, 315 NLRB 620, 622-23 (1994) (quoting *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 US 258, 265 (1969)). The ALJ's ignoring of the Board's basic remedial policy and his failure to recognize the well-established history of the phrase "immediate and full employment" and applying simple contract interpretation rules deprives the language of its longstanding and unambiguous meaning.

Based on the above, the ALJ's decision to admit evidence of settlement discussions over the objection of the General Counsel is also in error. ALJD pg. 7. While evidence of discussions relating to a settlement agreement are admissible to determine the meaning of its

contents, this analysis is only necessary when the meaning of the terms are in question. Here, as already explained, such an analysis is unnecessary and such evidence should be precluded.

B. The Absence of Seniority Language Does Not Render the Settlement Ambiguous.

The ALJ in his decision places some emphasis on the fact that the settlement agreement in 13-CA-160319 does not contain the phrase “seniority and any other rights and/or privileges previously enjoyed” by Shaw Crew employees. ALJD Pg. 7, Line 18-26. He concludes from this absence that the rest of the wording of the language is ambiguous and examines extrinsic evidence to determine what was intended. The ALJ’s examination of this extrinsic evidence, however, fails to establish in his mind, a conclusive interpretation.

The ALJ’s approach is flawed and again ignores established Board precedent. None of the Board cases mentioned above contain the seniority language the ALJ requires in this case. See *Supra, Security Plating, United Electric Co., South Shore Hospital, Louis Ronca, Residential Management, Inc., Park ‘N Go of Minnesota, LP, Island Management Partners, Inc., Wise Alloys, LLC, and J.E. Brown Electric*. Board law does not require such language in order for discriminatees to receive a full remedy, in a settlement or otherwise, for the unlawful discrimination they have experienced. While seniority language may be preferred for a settlement, it is not a necessary condition. For the ALJ to require it does not encourage the voluntary settlement of unfair labor practice claims which is the well-established policy of the National Labor Relations Board.

This case is also analogous to the Board’s policies of the promotion of voluntary settlement of labor disputes by deferring to arbitrator awards. Just as the Board accepts arbitrator awards under the principles of *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), the ALJ should have rendered a decision on the issues presented. In *Spielberg*, the Board announced

it would defer to arbitrator decisions to encourage the voluntary settlement of labor disputes which are cognizable under the Act. While this case does not involve an arbitrator's decision, by imposing such a high standard on the parties' settlement agreement, the ALJ fails to promote economy of litigation. *Id.* at 1724. The parties have exerted tremendous effort and resources in this case to avoid unnecessary litigation by settling case 13-CA-160319, a case which is technically not before the ALJ. By calling the settlement agreement "patently ambiguous" the ALJ dodges his judicial responsibility to make findings in 13-CA-177838 and expands the litigation to include already settled matters.

*C. The ALJ Erroneously Failed to Exclude Irrelevant Evidence.*²

In his decision, the ALJ, over the objection of the General Counsel, admitted the settlement discussions in determining the meaning of the settlement agreement. The ALJ first mischaracterized the General Counsel's argument as a FRE Rule 408 objection. ALJD Pg. 7, line 9-10. Counsel for the General Counsel never relied on FRE Rule 408 as the basis for his objection. Secondly, the ALJ admitted the discussions based on his view that the parties reasonably disagreed as to the meaning of "immediate and full participation in the on-call list." As already demonstrated above, the phrase is not ambiguous. Thus, the discussions, both written and verbal, pre-settlement are completely irrelevant and should be excluded pursuant to FRE 402. By admitting irrelevant evidence and describing the settlement as ambiguous, the ALJ failed to discuss the central issue of this case; that is whether Behrad Emami's conduct was inherently destructive of the employees' Section 7 rights.

*D. The ALJ Failed to Address the Respondent's Inherently Destructive Conduct.*³

² Exceptions 1 and 2.

³ Exceptions 6, 7 and 8.

In his decision, the ALJ failed to address the central issue in this case as presented by the Counsel for the General Counsel in his trial brief. By Respondent, through its supervisor Behrad Emami, recalling the Shaw Crew to work in a roughly 50/50 rate with the New Riviera Crew, Respondent engaged in conduct “inherently destructive” of the Shaw Crew’s Section 7 rights. In fact, nowhere in the ALJD are the words “inherently destructive” even mentioned.

As explained in the Counsel for the General Counsel’s Brief to the Administrative Law Judge, to show a violation of Section 8(a)(3) and (4), the General Counsel has the initial burden to show that protected conduct was a motivating factor in an employer’s decision. The elements commonly required to support a finding of unlawful motivation are union activity, the employer’s knowledge of that activity, and evidence of animus. *Hawaiian Dredging Construction Company, Inc.*, 362 NLRB No. 10 slip op. at 3 (2015)(citing *Wright Line*, 251 NLRB 1083 (1980)). The burden then shifts to the employer to demonstrate that it would have taken the same action even in the absence of the employees’ union activity. *Id.* In certain circumstances an unfair labor practice may be committed even in the absence of an unlawful motivation. Where an employer's discriminatory action is “inherently destructive” of employees' rights no proof of unlawful motivation is required. *Id.* slip op. at 5 (citing *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967)). In this case, the Shaw Crew’s union activities and the Respondent’s knowledge of those activities are undisputed. The remaining issue, which the ALJ completely failed to discuss was Emami’s “inherently destructive” recall.

Conduct is deemed to be “inherently destructive” if it “would inevitably hinder future bargaining or create visible and continuing obstacles to the future exercise of employee rights.” *Hawaiian Dredging, Id.* slip op. at 5 (citing *D & S Leasing*, 299 NLRB 658, 661 (1990)). As fully explained by the Counsel for the General Counsel in his brief, Emami’s method of recall

will inevitably hinder future bargaining and create obstacles to the future exercise of the Shaw Crew's rights. Because the Shaw Crew now receives roughly half as much work as they did before they engaged in union activities, they will forever be reminded that if they support the union, they will be punished by the Respondent. Such a result is clearly repugnant to the purposes of the Act and cannot be permitted. As explained in the Counsel for the General Counsel's trial brief, in order to comply with Board law, the Respondent should have called back the Shaw Crew before the New Riviera Crew for all shows after March 28, 2016. Any other method of calling the Shaw Crew for work is "inherently destructive."

Conclusion

The ALJ's decision is legally flawed by mischaracterizing the settlement agreement in 13-CA-160319 as patently ambiguous. As shown above, the ALJ failed to incorporate Board precedent and completely failed to address the central issue of the case. The stipulated record establishes that Respondent violated the terms of the settlement agreement and Section 8(a)(3) of the Act by splitting the work between the discriminatees and other employees because of the Shaw Crew's union and protected concerted activities.

DATED this 10th day of July, 2017.

Respectfully Submitted,

/s/ **Kevin McCormick**

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Room 808
Chicago, Illinois 60604
(312) 353-7594

CERTIFICATE OF SERVICE
13-CA-177838

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Exceptions and Brief in Support Thereof to the Decision and Recommended Order of the Administrative Law Judge have been e-filed with the Executive Secretary and served this 10th day of July, 2017, in the manner indicated, upon the following parties of record.

ELECTRONICALLY

Office of the Executive Secretary
Mr. Gary Shinnars, Executive Secretary
National Labor Relations Board
1099 14TH Street, N.W.
Washington, D. C. 20005-3419

Greg Shinall
Sperling & Slater
55 W. Monroe Street, Suite 3200
Chicago, IL 60603-5072
Shinall@sperling-law.com

Steven L. Gillman
Holland & Knight LLP
131 South Dearborn Street
30th Floor
Chicago, IL 60603
Steven.gillman@hklaw.com

David Huffman-Gottschling, Esq.
Jacobs, Burns, Orlove & Hernandez
150 N. Michigan Ave., Ste 1000
Chicago, IL 60601-7569
DavidHG@jbosh.com

/s/ Kevin McCormick

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Room 808
Chicago, Illinois 60604
(312) 353-7594