

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

Jam Productions, Ltd. and Event Productions, Inc.,
a single employer,

Respondent,

and

Theatrical Stage Employees Union, Local 2, I.A.T.S.E.,

Charging Party.

Case No. 13-CA-177838
Judge Rosas

**CHARGING PARTY'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Charging Party Theatrical Stage Employees Union, Local 2 (the "Union") excepts to four aspects of the decision and order of the Administrative Law Judge in this matter:

1. The ALJ erred in finding that the Employer's¹ settlement agreement with the Region was "patently ambiguous," (Concl. of L. 6, ALJ Dec. at 8);
2. Assuming *arguendo* that the settlement was patently ambiguous, the ALJ erred in finding that there was no meeting of the minds between the parties and that the settlement was therefore unenforceable, (Concl. of L. 6, ALJ Dec. at 8);
3. Regardless of whether the settlement was ambiguous, the ALJ erred in failing to find that the Employer's reduction in the discriminatees' work opportunities violated the settlement agreement, (Remedy, ALJ Dec. at 9); and
4. Regardless of whether the settlement was unenforceable, the ALJ erred in failing to reach the merits of the parties' dispute to find that the Employer's reduction in the discriminatees' work opportunities was unlawful. (Remedy, ALJ Dec. at 9.)

¹ "Employer" and "Jam" are used herein to refer collectively to the Respondents Jam Productions, Ltd. and Event Productions, Inc.

Given these errors, and on the basis of the parties' stipulated record, the Board should order the Employer to offer the reinstated employees work in the same manner as before their terminations and to make those employees whole for any lost wages and benefits.

BACKGROUND

The parties proceeded on a stipulated record, consisting of forty-six stipulations of fact and thirty-three stipulated joint exhibits. The facts are summarized at length in the Union's brief to the ALJ; the Union repeats them only summarily here.

The instant case arose out of a settlement of the Union's charge that Jam had unlawfully terminated its entire crew of stagehands at the Riviera Theatre, a music venue in Chicago, in retaliation for their having collected authorization cards and petitioned with the Region for an election. (Stip. ¶ 12-14; Jt. Exs. 3-5.) Jam has work for stagehands only intermittently; it therefore maintains an "on-call list" of regular employees whom it calls in order to staff a show when it needs them. (Jt. Ex. 24 at 4-9; Jt. Ex. 25 at 2.) After firing the entire crew in September 2015, Jam assembled a replacement crew whom it called to fill jobs until the settlement agreement was approved in April 2016. (Stip. ¶ 19-23, 32-33.)

The settlement agreement required Jam to make the terminated crew whole financially, and also required Jam to offer them "immediate and full participation in the on-call list," to "offer them work in a non-discriminatory manner," and not to use the employees' terminations against them "in any way." (Jt. Ex. 5.) Jam implemented the agreement by continuing to use the replacement employees, splitting its crews roughly fifty-fifty between the replacements and the reinstated employees. (Jt. Ex. 24 at 5-9.) This fifty-fifty split between replacement and reinstated employees was deliberate and based on nothing but the employees' falling into one category or the other. (*Id.*) This limitation

resulted in a reduction in work opportunities as compared to before the employees' mass termination. (Jt. Exs. 26-28; U. Br. to ALJ Appx. A-D.)

In the instant case, the General Counsel alleges that Jam's restriction of the reinstated employees to half of all available work was unlawful because it was based entirely on their protected, concerted activity and status as employees reinstated under a Board settlement agreement. (Jt. Ex. 1(b).)

Before the Administrative Law Judge, the parties offered different interpretations of the settlement language. The ALJ ultimately found that the parties had not reached a meeting of the minds on this language and therefore that the settlement agreement was unenforceable and must be set aside. Because he found that the settlement was an "integral element of the allegations in this case," (ALJ Dec. at 9), he declined to reach the merits, instead remanding the case to the Division of Judges. (*Id.*)

THE UNION'S EXCEPTIONS

1. The Union excepts to the ALJ's Conclusion of Law no. 6 that the settlement agreement was "patently ambiguous."

The Union excepts to Conclusion of Law no. 6, in which the ALJ found "patently ambiguous" the requirement in the settlement agreement between Jam and the General Counsel that Jam offer the terminated employees "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner." (ALJ Dec. at 8; Jt. Ex. 5 at 8; Jt. Exs. 20, 21; Stip ¶¶ 14, 16, 18, 20, 22.) Based on this perceived ambiguity, the ALJ examined the parties' bargaining history, concluding that Jam and the Region interpreted this language differently, and

therefore there was no meeting of the minds, and the entire settlement must be set aside. (ALJ Dec. at 7-9.)

The Union excepts to this finding because the ALJ should never have reached the parties' bargaining history. A careful analysis of the language reveals that the ALJ erred in finding ambiguity in the phrase "immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner." The language is not ambiguous; the settlement agreement on its face prohibits Jam from reducing the reinstated employees' work opportunities on the basis of their participation in the unfair labor practice case against Jam and having been named in the settlement. The Union excepts to the ALJ's finding of a patent ambiguity in the agreement.

The ALJ found an ambiguity because he found that the parties had proffered two reasonable readings of the phrase of "full participation in the on-call list": (1) "a return to the on-call list previously used for the Shaw Crew" or (2) "inclusion into an on-call list with the New Riviera Crew." (ALJ Dec. at 7.) But the second reading is not reasonable. The settlement language references *the* on-call list; there is only one. Jam's stagehands are *all* on-call employees, and Jam's practice has always been to offer those on-call employees work rather than demand that they be exclusively at Jam's intermittent beck and call. (Jt. Ex. 24 at 5-9; Jt. Ex. 25 at 2.) "Participation in the on-call list" is thus participation in the sole mechanism by which Jam assigns all stagehand work. This much the parties do not dispute; the language the ALJ found susceptible to two reasonable interpretations was the requirement of "*full* participation."

But Jam’s interpretation of “full participation” was unreasonable: Jam claimed that the settlement required them to “include” the reinstated employees on the list along with the replacement employees (to whom the settlement makes no reference whatsoever). The ALJ not only correctly noted the lack of reference to the replacement employees, (ALJ Dec. at 7), but also the agreement’s requirement to make the reinstated employees whole for the entire back pay period, without “any reference to the rights of the New Riviera Crew that replaced the Shaw Crew members during that period.” (*Id.*) It would be inexplicably internally inconsistent for the settlement to require the reinstated employees to be made whole—*i.e.* to be treated as though they had never been fired—but *only up until their actual reinstatement*, whereupon their work opportunities are suddenly cut in half, limited by the competing “rights” of employees mentioned nowhere in the agreement. It is not possible to read the language in question, standing alone, without any reference to extrinsic evidence, and come to this interpretation.

The ALJ’s only basis for deeming Jam’s interpretation plausible is extrinsic evidence that Jam pushed for this view in negotiating the agreement. (ALJ Dec. at 7.) But this itself is an error. The only circumstances in which one may rely upon extrinsic evidence to establish the *existence* of an ambiguity is when a latent ambiguity is hiding in language that misleadingly appears unambiguous on its face—for instance when it turns out there were two ships named *Peerless* leaving the same port, making the seemingly unambiguous reference to the *Peerless* in the contract latently ambiguous. *See, e.g., AM Int’l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 576-77 (7th Cir. 1995), *Colfax Envelope Corp. v. Local No. 458-3M Chicago Graphic Commc’ns Int’l Union, AFL-CIO*, 20 F.3d 750, 752-53 (7th Cir. 1994); *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864). By contrast, in

the present case the ALJ has improperly *created* an ambiguity by resorting to extrinsic evidence to give the language meaning it otherwise does not support. *Central States, S.E. & S.W. v. Joe McClelland, Inc.*, 23 F.3d 1256, 1259 (7th Cir. 1994) (“extrinsic evidence may not be used to create an ambiguity in a pension or welfare agreement subject to ERISA”); *Larry Blake’s Restaurant*, 230 NLRB 27, 38 (1977) (noting applicability of parol evidence rule even in situations where “language apparently clear may sometimes be shown by surrounding circumstances to mean something different from what is apparent”).

Absent this extrinsic evidence, the settlement language is unambiguous. “If the language of ... an agreement lends itself to one reasonable interpretation only, it is not ambiguous.” *Bulkmatic Transp. Co.*, 340 NLRB 621, 625 (2003) (citing *Young v. North Drury Lane Prods.*, 80 F.3d 203 (7th Cir. 1996)). In the present case, Jam long employed a certain mechanism—the “on-call list”—to assign all stagehand work. The settlement gave the reinstated employees *full participation* in that mechanism. The word “participation,” standing alone, has a straightforward meaning: “taking part.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 903 (11th ed. 2004). Participation in the on-call list is just taking part in the mechanism by which all stagehands are offered work—that is, *being offered work*. The question, then, is whether the word “full,” modifying the word “participation,” is susceptible of more than one reasonable meaning. Employees offered “less than full” participation would be permitted to take part in the mechanism for receiving work only some of the time, or only to a degree; by contrast “full” participation implies that employees are taking part in the mechanism for receiving work to the highest degree or greatest extent. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 505 (11th ed. 2004). Nothing in the words “full participation” can sensibly be read to require that returning employees

should get only “half participation” or “partial participation,” let alone “shared participation with the replacement employees.” As the ALJ correctly noted, the settlement makes *no reference whatsoever* to the replacement employees Jam hired after firing its entire crew in September 2015, and the settlement cannot be read as extending them any rights whatsoever. To read the requirement for “full participation in the on-call list” as permitting Jam to *reduce* the extent to which it offers employees work is not a reasonable interpretation of the language.

In short, there is no ambiguity in the agreement’s requirement to offer the reinstated employees full participation in the on-call list. On the contrary, because Jam deliberately *limited* employees’ participation in the on-call list, with the result of *reducing* their level of participation in the on-call list as compared to before their termination, it did not, under any reasonable reading, fulfill the agreement’s terms.

2. The Union excepts to the ALJ’s Conclusion of Law no. 6 that the settlement agreement “establishes that there was no meeting of the minds between the parties on this issue, and is unenforceable.”

In the alternative, even assuming *arguendo* that the ALJ was correct in finding a patent ambiguity in one phrase in the parties’ settlement agreement, his conclusion that therefore “there was no meeting of the minds between the parties on this issue, and [the settlement agreement] is unenforceable,” (ALJ Dec. at 9), is incorrect as a matter of law and should be reversed. A patent ambiguity in one of many substantive terms in a settlement agreement establishes not that the agreement is unenforceable, but simply that it needs interpretation. “When parties agree to a patently ambiguous term, they submit to have any dispute over it resolved by interpretation. That is what courts and arbitrators

are *for* in contract cases—to resolve interpretive questions founded on ambiguity.” *Colfax Envelope Corp. v. Local No. 458-3M, Chi. Graphic Commc’ns Int’l Union*, 20 F.3d 750, 754 (7th Cir. 1994) (emphasis original). An agreement is properly rescinded for a lack of a meeting of the minds only in the event of a *latent* ambiguity—that is, where seemingly clear, unambiguous contract language is rendered ambiguous due to the context in which the language arose.

[I]t is only where no sensible ground exists for choosing between conflicting understandings of the contractual language, and where the parties agree to terms that reasonably appear on their face to each of them to be unequivocal but in fact are not—as in cases like that of the ship “Peerless” in which the ambiguity is buried—that a voiding of the contract is necessary.

Can. Life Assurance Co. v. Guardian Life Ins. Co., 242 F. Supp. 2d 344, 356 (S.D.N.Y. 2003).

In the present case, assuming *arguendo* that “full participation in the on-call list” is actually ambiguous, that ambiguity must be deemed a patent one. This is not a case in which the parties “agreed to terms that reasonably appear on their face ... to be unequivocal but in fact are not.” On the contrary, the parties intended to reach the agreement that they reached: the Region withdrew the complaint, and Jam reinstated the employees with full back pay and posted a notice. The present dispute is not over whether the parties ever formed an agreement; it is over what *one* of the terms of that agreement means, and to the extent that they agreed to use terms susceptible to more than one reasonable interpretation, the parties accepted the risk of an adverse interpretation by an ALJ or the Board. This is a classic case of contract interpretation; as the Seventh Circuit said in the *Colfax* case, “That is what courts and arbitrators [and ALJs and the Board] are *for*.” *Colfax Envelope*, 20 F.3d at 754. The Board should not rescind the entire settlement agreement

because the parties now claim disagreement over the meaning of one of its terms; it should instead interpret that term.

3. Regardless of whether the settlement was ambiguous, the Union excepts to the ALJ's failure to find that the Employer's reduction in the discriminatees' work opportunities violated the settlement agreement.

The ALJ, by rescinding rather than interpreting the settlement agreement, erred by not finding that Jam failed to offer the reinstated stagehands full participation in the on-call list as the agreement required. As the ALJ noted, the putative ambiguity cannot be resolved by reference to the parties' bargaining history, which ambivalently suggests both that the Region tried but failed to negotiate explicit protections for employees' seniority into the agreement, and that the Region believed when it signed the agreement that it required the reinstated employees to be offered work ahead of the replacement employees. (ALJ Dec. at 7.) Given this conflict, bargaining history is not a helpful interpretive aid; the Board must look elsewhere to resolve the ambiguity. In the absence of any other extrinsic evidence in the stipulated record, the Board must rely solely on an interpretation of the disputed text.

As discussed above, the only reasonable reading of the disputed language is that Jam has breached it by reducing the reinstated stagehands' work opportunities for no other reason than their protected status. (ALJ Dec. at 5, 6, 8.) The settlement agreement required Jam to offer the reinstated employees "*full* participation in the on-call list," to "offer them work in a non-discriminatory manner," and not to use their terminations "against them in any way." (Jt. Ex. 5.) Each of these phrases in the agreement must be interpreted to actually mean something. As discussed at length above, "full" participation in the on-call

list cannot sensibly be interpreted to mean “partial” or “half” participation. An agreement designed to limit the reinstated employees to only half of the work, reserving the other half exclusively for the newly-hired replacement employees, would have said so, including by making at least *some* reference to the existence of the replacement employees. As the Union argued to the ALJ, if the discriminatees in the present case had worked at a factory from 9 to 5, Monday to Friday, and the Region had settled the case with an agreement to reinstate them, the Employer could hardly tell the returning employees that, because it had hired replacements and did not want to fire them, they would all be sharing the work at twenty hours a week. The replacements would have to make way. *See, e.g., May Aluminum, Inc.*, 160 NLRB 575, 625 (1966) (noting that reinstating strikers is required even though doing so may require discharging replacements).

At the same time, limiting employees’ work opportunities solely because they are named as discriminatees in the settlement agreement is inherently discriminatory and breaches Jam’s obligations both to offer work in a non-discriminatory manner and not to use the employees’ terminations against them. Emami deliberately sought to limit the participation of the terminated and reinstated employees to just half of every crew. (Jt. Ex. 24 at 5-7; Jt. Exs. 26, 28.) That is, Jam made a choice at every show not to offer some employees work solely on the basis of their terminations. Jam undisputedly made work assignments on precisely the basis that the settlement prohibits.

Jam’s interpretation of the settlement agreement—that “full participation in the on-call list,” offering work in a “non-discriminatory manner,” and not using employees’ terminations “against them in any way” combine to authorize Jam to offer the reinstated employees a limited portion of the work, solely on the basis of their prior termination—

is logically unsustainable. Under Jam’s reading of the agreement, just “placing” a reinstated employee’s name “on the list” of on-call employees from which jobs are filled is all it was obligated it to do. The settlement agreement was, under this flawed reading, about defining the pool of potential workers rather than giving the reinstated employees any substantive right to their old jobs. But if this were true, nothing would prevent Jam from limiting the reinstated stagehands’ participation to forty percent, or ten percent, or one percent. This cannot be the remedy that the settlement meant to achieve.

The Board is called upon in this case to interpret not an arms-length agreement between two private parties, but rather a settlement with the Regional Office of a complaint issued by the Regional Director. The phrases “full participation in the on-call list,” “offer[ing] them work in a non-discriminatory manner,” and “the terminations will not be used against them in any way” must be interpreted in light of the remedial purposes of the Act and the Regional Office’s goal of effectuating those purposes in every settlement agreement. *See* Casehandling Manual § 10124.3, in which the General Counsel advises the Regional Offices that

Public confidence is also nurtured by the history of the nature and extent of the settlements sought and obtained by the Regional Office. The Regional Office should seek a settlement agreement which substantially remedies all unfair labor practices deemed meritorious. The proposed remedy generally should not exceed that which would be expected from a fully favorable Board decision.

In the present case, the Regional Office deemed meritorious the allegations in case 13-CA-160319 that Jam fired the entire Riviera crew in September 2015 because of their protected activity of seeking union representation.

In exercising its authority under 10(c), the Board is guided by the principle that remedial orders should “restor[e] the situation, as nearly as possible, to that

which would have obtained but for” the unfair labor practice. Thus, since the Act’s inception, a make-whole remedy for employees injured by unlawful conduct has been “part of the vindication of the public policy which the Board enforces.”

Pressroom Cleaners, 361 NLRB No. 57, slip op. at 2 (2014) (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941), citations omitted).

In short, given the purposes of the Act and the Regional Director’s charge with enforcing those purposes, the *default* reading of the settlement agreement in this case should be that it was intended to make the terminated employees whole (a reading supported by the fact that Jam was instructed to make them whole monetarily). That is, if “full participation in the on-call list” is read as ambiguous, the Board should presume that language to reflect the usual aim of making employees whole in the unusual situation of an entirely on-call workforce working an intermittent schedule, rather than the unusual aim of effectively replicating the alleged unfair labor practice by permitting Jam to continue giving work to replacement employees at the expense of the reinstated employees.

In short, the ALJ could and should have interpreted the settlement agreement as requiring Jam to offer the reinstated employees work to the fullest extent possible, and therefore necessarily ahead of the replacement employees. His failure to do so on the grounds that the agreement was “ambiguous” and required rescission was erroneous and should be overturned.

4. The Union excepts to the ALJ’s failure to reach the merits of the parties’ dispute to find that the Employer’s reduction in the discriminatees’ work opportunities was unlawful.

Regardless of whether the ALJ was correct that the settlement agreement was unenforceable and must be rescinded, the ALJ erred by not reaching the merits of the case

before him. The General Counsel's complaint, and the primary thrust of the Union's argument, was not that Jam had breached the settlement agreement, but that Jam had unlawfully reduced employees' work opportunities because of their protected, concerted activity and their having been named as discriminatees in the settlement agreement. It was Jam that raised the settlement as a *defense* to the allegations that it discriminated against the reinstated employees. (Jt. Ex. 1(c) at 5.) If the settlement agreement is rescinded as unenforceable, no element of the General Counsel's case is defeated; instead, Jam loses its sole defense to liability. In the absence of the settlement agreement as a defense to liability, Jam has no good-faith justification for reducing the work opportunities of the reinstated employees.

Jam cannot be heard to protest that, but for the settlement agreement voided by the ALJ, it would never have reinstated these employees in the first place, and it should not be liable for *how* it did something it did not have to do. But once Jam rehired these employees, it became obligated to treat them lawfully in every way: for example, to pay minimum wage and overtime, not to discriminate on the basis of race or sex, and to abide by the Act. Once Jam made these individuals its employees, it became unlawful to discriminate against them in violation of Sections 8(a)(3) and (4).

As argued at length before the ALJ, and as the ALJ properly found, the reinstated employees experienced a significant reduction in work opportunities following their reinstatement, and Jam has expressly admitted that this reduction in work opportunities occurred for no other reason than the employees' having been the same employees it previously fired. Because Jam has offered no justification for its conduct other than that the settlement agreement permitted it, its reduction of employees' work opportunities

was discriminatory and violated Sections 8(a)(3) and (4) of the Act. The ALJ erred by failing to make this determination on the basis of the parties' stipulated record once he set aside the settlement agreement.

CONCLUSION

For all the foregoing reasons, and for all the reasons argued at length in the Union's brief to the ALJ, the Board should reject the conclusion of the ALJ that the parties' settlement agreement presented an impediment to finding a violation of the Act. While it is plain that the parties had a meeting of the minds and that the only reasonable reading of the settlement agreement required offering work to the reinstated employees before any replacements, even if the agreement is set aside Jam's conduct in restricting the work opportunities of the reinstated employees solely because of their prior terminations and identification as discriminatees on the settlement agreement was nonetheless discriminatory and violated Sections 8(a)(3) and (4) of the Act. Jam should be ordered to give the reinstated employees priority over the replacements for work opportunities and be made whole for all lost wages and benefits.

Respectfully submitted,

/s/ David Huffman-Gottschling
One of the Union's Attorneys

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CERTIFICATE OF SERVICE

I, David Huffman-Gottschling, an attorney, certify that I caused a copy of the foregoing document to be served by email upon the following persons, in addition to filing it with the Office of the Executive Secretary via the Board's e-filing system, on July 10, 2017:

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