

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

JAM PRODUCTIONS, LTD. and EVENT
PRODUCTIONS, INC.

and

Case No. 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION
LOCAL NO. 2, IATSE

**RESPONDENTS' ANSWERING BRIEF TO
THE GENERAL COUNSEL'S AND THE UNION'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:

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INTRODUCTION

One day after the Employer discharged a group of stagehands from the Riviera Theatre (the “Shaw Crew”), the Union filed a petition to represent the regular, part-time stagehands at the Riviera Theatre, Vic Theatre, and Park West Theatre. (Joint Motion and Stipulation of Facts (“Stip.”) ¶ 11, JX 2.)¹ The next day, the Union filed an unfair labor practice charge alleging that the Employer had discharged the Shaw Crew in retaliation for protected activity. (Stip. ¶ 12, JX 3.) Region 13 issued a complaint based on the allegations in the unfair labor practice charge. (Stip. ¶ 13, JX 4.).

The Employer denied the allegations, but nonetheless agreed to settle the case to avoid the cost, burden and risk of trial. The Settlement Agreement was the product of extensive back-and-forth negotiation over the course of several months. (Stip. ¶¶ 15-18.)² Pursuant to the Settlement Agreement, the Employer agreed to:

offer [the Shaw Crew] immediate and full participation in the on-call list ... without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.

(JX 5, at R00212.) There was no requirement that the Shaw Crew be given any seniority or other preference over the stagehands who worked at the Riviera Theatre following the termination of the Shaw Crew. In fact, during settlement negotiations, the Employer repeatedly rejected any such seniority or preferential treatment and, as evidenced by the Settlement Agreement, the General Counsel ultimately agreed to proceed with the settlement without any requirement that the Shaw Crew be given any seniority or other preferences over the existing crew. (Stip. ¶¶ 17-18.)

¹ For convenience, the respondents Jam Productions, Ltd. and Event Productions will be referred to as the “Employer” or “Jam.”

² Respondents signed the settlement agreement on March 28, 2016 (“Settlement Agreement”). (See JX 5, JX 18.)

As shown in the Stipulation of Facts (and detailed in Jam’s briefs to the ALJ and the Board), Jam fully complied with the Settlement Agreement by offering the Shaw Crew work opportunities in a non-discriminatory manner. Jam documented all of the work offers and assignments, and the Stipulation of Facts shows that members of the Shaw Crew were offered more work opportunities than the other stagehands (the “New Crew”). (Stip. ¶¶ 41-45, JX 19, JX 27, JX 28.)

The General Counsel and the Union do not dispute this. Instead, they seek relief that the General Counsel did not obtain in the Settlement Agreement. Despite the fact that the Settlement Agreement contains no seniority requirement or special rights – because Jam repeatedly rejected any such preferential treatment – the remedy the General Counsel seeks is that Jam be required to “assign work to the [Shaw Crew] in the same order and frequency as their work assignments were made prior to September 21, 2015 without any loss in their seniority.” (JX 1(b) p.3.) Thus, even though the Region and the General Counsel dropped these same demands when it entered into the Settlement Agreement, the General Counsel now requests that the Board grant the Shaw Crew seniority and exclusivity over the New Crew.

The General Counsel and the Union do not have a good faith basis to seek such a “remedy.” There is no seniority requirement in the Settlement Agreement, and the General Counsel and Union stipulated that Jam “repeatedly rejected Region 13’s proposal that the Shaw Crew be reinstated with ‘seniority or any other rights and/or privileges previously enjoyed.’” (Stip. ¶ 17.) The parties also stipulated that Jam “objected to discharging the New Riviera Crew or to giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew.” (Stip. ¶ 17.)

The parties settled the underlying dispute; Jam has complied with the Settlement Agreement; and this case should have never been brought. The Region previously admitted as

much when it rejected the Union's unfair labor practice charge. In his letter rejecting the charge, the Regional Director stated:

We have carefully investigated and considered your charge [and] [f]rom the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, *as required by the settlement agreement that was reached in that case*, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, *the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.*

(Stip. ¶ 39; JX 29 (emphasis added).) Thus, after “careful investigat[ion]” the Region found no evidence that the Employer had violated the Settlement Agreement by refusing to offer the Shaw Crew “full participation in the on call list for work assignments.”

Months later, after the Union appealed this decision, the Regional Director changed course and filed this action. But the record was the same. The Regional Director identified no new facts that had been brought to his attention. The Complaint contains no *factual* allegations showing that the Employer breached the Settlement Agreement in any way, and the Stipulation of Facts is likewise devoid of any evidence that the Employer discriminated against the Shaw Crew in offering work assignments.

The only reason this action was brought is because the Union objected that the Settlement Agreement did not give the Shaw Crew any seniority or other preference over the other stagehands, and the General Counsel now apparently regrets settling the underlying dispute without such a requirement. But a change of heart by an agency is no basis for disregarding the terms of a settlement agreement. As the Supreme Court has held in analogous circumstances, when an agency settles a case, it is bound by the settlement regardless of whether the agency subsequently changes its views or contends that the terms do not further the agency's purposes:

Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

United States v. Armour & Co., 402 U.S. 673, 681–82 (1971); *see also United States Gypsum*, 284 NLRB 4, 10 (1987) (rejecting General Counsel’s “*sua sponte* reconsideration” and “reneg[ing]” on “a binding settlement commitment”).

As in *Armour* and *Gypsum*, the Settlement Agreement here represents a compromise of the parties’ respective claims, defenses and positions. The Stipulation of Facts confirms that Jam complied with the terms of the Settlement Agreement. The General Counsel is not permitted to reconsider or renege on the Settlement Agreement – or to seek relief that was purposefully omitted from the Settlement Agreement. This action should have been dismissed based on the Settlement Agreement and the Stipulated Facts.

The General Counsel’s conduct here is no different than that criticized by the Board in *United States Gypsum*, 284 NLRB 4, 10 (1987). By filing a charge and seeking relief that the parties purposefully omitted from the Settlement Agreement, the General Counsel is attempting to abrogate the Settlement Agreement and “has wrongfully compel[ed] Respondent[s] to pursue protracted and expensive litigation that, by entering the settlement, it sought to avoid.” 284 NLRB at 11.

The ALJ compounded the problem by ignoring the express wording and intent of the Settlement Agreement and the Stipulation of Facts. There is nothing in the Settlement Agreement that obligated Jam to discharge the New Crew or to give the Shaw Crew seniority over the New Crew. The Stipulated Facts show the parties deliberately omitted such requirements from the Settlement Agreement. The charge did not seek to rescind the Settlement Agreement. None of the parties asserted that the Settlement Agreement was the result of a mistake or that there had been no “meeting of the minds.” The ALJ’s *sua sponte* decision to set aside the Settlement Agreement and order a trial of the settled charges deprived Jam of the benefit of its bargain and “due process of law.” 284 NLRB at 11.

ARGUMENT

I. A Court May Not Imply a Term That Was Expressly Rejected During the Settlement Negotiations and Purposefully Omitted from the Final Agreement.

In the Settlement Agreement, the parties agreed only that Jam would offer the Shaw Crew “immediate and full participation in the on-call list” (JX 5) – which is exactly what happened. The Stipulated Record confirms that immediately upon settlement, Jam included the Shaw Crew on the on-call list of the Riviera Theatre and that, thereafter, the Shaw Crew was actually offered more opportunities to work than the New Crew. (Stip. ¶¶ 41-45, JX 19, JX 27, JX 28.)

There is nothing in the Settlement Agreement that obligates Jam to offer the Shaw Crew any seniority or preferential treatment over the New Crew. Neither the Region nor the Union identify any such obligation. Instead, they argue that such an obligation should be implied as a matter of board policy or remedial precedent.

But the Settlement Agreement is not a decree or a remedy based on a finding of wrongdoing. To the contrary, the Settlement Agreement is a *voluntary* contract entered into by the Region and Jam. Thus, the ALJ’s one and only job was to determine and effectuate the intent of the parties.

In their briefs, the Region and the Union do not once refer to the intent of the parties – and for good reason. When the Region dropped its repeated demands that the Shaw Crew be reinstated with seniority and other rights and/or privileges previously enjoyed (because Jam expressly rejected those demands and made clear it would not settle if the Shaw Crew was reinstated with seniority or any special rights) and the parties purposefully omitted these terms from the Settlement Agreement, the parties’ mutual intent that the Shaw Crew would be afforded no seniority or preferential treatment over the New Crew was unmistakable, *i.e.*, “settled.” (Stip. ¶¶ 17-18.)

When, as here, a party explicitly rejects a term and that term is purposefully omitted from the final agreement, the other party cannot come back later and claim that the omitted term should be implied into the agreement. The District Court’s holding in *Lyncott Corp. v. Chem. Waste Mgmt., Inc.* is directly on point:

In the instant case, plaintiffs assert that under the Settlement Agreement and the Maintenance Agreement, defendants impliedly agreed to indemnify them against third-party claims brought by the generators arising out of environmental conditions at the Lyncott site. *The evidence is to the contrary, however, since it demonstrates that defendants expressly rejected any indemnity in favor of the Metzval Group. Under these circumstances, an implied indemnity would defeat the intent of the parties to the agreements.*

690 F. Supp. 1409, 1416 (E.D. Pa. 1988) (emphasis added); *see also Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 206, 23 Cal. Rptr. 2d 793, 794 (1993), (“It would be error for a court to imply a contractual term which the parties themselves had expressly rejected during their negotiations.”).

It is settled law that Courts may not imply an obligation that the parties purposefully omitted from the contract. *See, e.g., Hutter v. Heilmann*, 252 Va. 227, 475 S.E.2d 267 (1996) (the courts may not benefit one of the parties to a contract by using interpretation to insert provisions into a contract “which the parties omitted from their contract by design”) (citing cases); *Holbrook*

v. Lane, 1994 WL 287430, at * 2 (Tenn. Ct. App. 1994) (“The contract simply makes no provision for the condition the defendant urges upon this Court. Moreover, the circumstances surrounding the execution of the contract do not support the conclusion that the parties agreed to such a condition. The plaintiffs specifically objected to such a clause in the draft contract and both parties agreed to delete the provision.”); *In re LAC/InterActive Corp.*, 948 A.2d 471, 506-7 (Del. Ch. 2008) (Where the subject at issue is expressly covered by the contract, or where the contract is intentionally silent as to that subject, the court may not imply duties not expressed in the contract.); *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc.*, 1996 WL 506906, at *5 (Del. Ch. 1996) (court refused to imply a provision where contract was intentionally silent on that point).

Both the General Counsel and the Union now argue that the Board should not consider the Stipulated Facts showing that (i) Jam explicitly and repeatedly refused to discharge the New Crew or to give the Shaw Crew seniority or other special rights, (ii) the General Counsel dropped those demands, and (iii) the parties entered into a Settlement Agreement that did not require that the Shaw Crew be given any seniority or preferences. (Stip. ¶¶ 17-18.) But, both the General Counsel and the Union are seeking to undo the settlement by implying a seniority term that was purposefully omitted from the Settlement Agreement. Evidence that parties deliberately excluded a term during negotiations is always admissible to show that the parties did not intend such term to be included or implied in the agreement. *See Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89, 96 (Tex. Ct. App. 2017) (“[T]he previous drafts and negotiations between the parties inform us that the consent-to-assignment provision was not silent as to the type of consent. ... The qualifying language ... was purposely deleted from an earlier draft. COG's evidence of the

negotiations and preliminary drafts of the agreement was not barred from admissibility by the parol evidence rule. Therefore, the trial court abused its discretion by refusing to admit that evidence.”).³

The parties have stipulated to facts that during settlement negotiations the Region repeatedly demanded that the Shaw Crew be reinstated with seniority and other privileges previously enjoyed, that Jam explicitly and repeatedly rejected that demand and informed the Region that the Shaw Crew would be given no seniority or preferences over the New Crew, and that the Region dropped this demand and entered into a Settlement Agreement that did not provide seniority or preferences for the Shaw Crew. (Stip. ¶¶ 17-18.) This is the end of the issue. It would be plain error to imply or “interpret” into the Settlement Agreement a seniority requirement that Jam rejected and the parties *purposefully* omitted from the final Settlement Agreement.⁴

³ The case cited by the Union on this point, *Larry Blake's Restaurant*, 230 NLRB 27, 38 (1977), is not to the contrary. In that case, neither party was seeking to imply a term that had been rejected and purposefully omitted from the agreement. As all of the cases cited above show, the parol evidence rule does not preclude evidence showing that a term was proposed, rejected, and deliberately omitted from the agreement by the parties.

⁴ Despite having objected to the Settlement Agreement because it did not require the discharge of the New Crew or give seniority to the Shaw Crew (Stip. ¶ 20; JX 20), the Union now contends that “full participation in the on-call list” means that the Shaw Crew must be given *all* of the work to the exclusion of the New Crew. (Union’s Exceptions at 5-8.) Even setting aside the Stipulated Facts showing that the parties purposefully omitted any requirement that the Shaw Crew be reinstated with seniority or other preferences over the New Crew (Stip. ¶¶ 17-18), the Union’s argument depends entirely on a deliberate distortion of the term “full” participation in the on-call list to mean “exclusive.” (Union’s Exceptions at 6-7.) Exclusive means “limited to possession, control, or use by a single individual or group.” (www.merriam-webster.com/dictionary/exclusive) The parties plainly – and purposefully – did not include an “exclusive hiring” provision. And “full participation in the on-call list” cannot even arguably be construed to mean that the on-call list would be exclusively limited to the Shaw Crew or that Shaw Crew would be offered all of the work assignments to the exclusion of the New Crew. (See JX 5; see also Stip. ¶¶ 17-18.) The Merriam-Webster definition of participate is “to take part” or “share in something.” (www.merriam-webster.com/dictionary/participate) The Merriam-Webster for English Language Learners similarly defines participate as “to be involved with others in doing something: to take part in an activity or event with others.” (<http://learnersdictionary.com/definition/participate>.) These definitions likewise make clear that the Settlement Agreement requires only that the Shaw

II. A Negotiated Pretrial Settlement is a Contract; it is Not a Remedial Order Issued by the Board after a Trial and a Finding of an Unfair Labor Practice.

The fundamental flaw in the arguments made by the General Counsel and the Union is they assume that a settlement agreement of disputed charges in a case where there has been no trial, no finding of unfair labor practice, and no remedial order issued by the Board, must nonetheless be interpreted to include *status quo* remedial provisions that might be ordered after trial and a finding of an unfair labor practice. Worse, the General Counsel and the Union make this argument in the face of the stipulated evidence that these very *status quo* provisions were specifically proposed by the General Counsel, explicitly rejected by Jam, and deliberately excluded from the final Settlement Agreement. (Stip. ¶¶ 17-18.) The General Counsel's and the Union's arguments are contrary to Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), and undermine the strong policy in favor of voluntary settlement of unfair labor practice cases.

Section 10(c) provides that an order requiring reinstatement and other affirmative action by the respondent shall be issued if after trial the Board finds the respondent has committed the unfair labor practice alleged in the complaint:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue ... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter ... If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Crew participate *with the New Crew* in the on-call list and share in the work assignments being offered, which is exactly what happened.

Absent a trial and finding of an unfair labor practice, there can be no remedial order under 10(c). And if there was good cause for discharge, there shall be no remedial order. Here, there was no trial and no finding of an unfair labor practice. Jam's position that it had good cause to discharge the Shaw Crew was not decided, and the Settlement Agreement contained an explicit no-admission provision. (JX 5 p.1 ("Non-Admissions").

By entering into a pretrial settlement, the General Counsel waived any factual and legal arguments that he might have otherwise made at trial, and gave-up demands made and rejected earlier in the negotiations. *Armour*, 402 U.S. at 681–83 (“the instrument must be construed as it is written, and *not as it might have been written had the plaintiff established his factual claims and legal theories in litigation*”) (emphasis added); *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975) (“[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation.”). Implying *status quo* relief provisions when the Settlement Agreement does not include them and the Stipulated Facts show that the parties purposefully omitted them from the final agreement would violate the letter and spirit of Section 10(c).

The General Counsel's and Union's contention that settlements must be interpreted to restore the status quo ante would discourage settlements. The Board has stated that the Act's purposes include “encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest.” *Independent Stave Co.*, 287 NLRB 740, 743 (1987). These purposes are advanced by enforcing the terms of the agreement the parties make in a pretrial settlement where there has been no finding of any violation and no remedial order. These purposes are defeated if the General Counsel is permitted to subsequently

modify a pre-trial Settlement Agreement to include *status quo* provisions that were rejected and intentionally excluded from the final agreement, simply because such provisions might be appropriate if there had been a trial, a finding of violation and a remedial order. Under the General Counsel's and the Union's theory, the only "settlements" would be those in which the respondent capitulated and agreed to a remedial order restoring the *status quo*—which is the opposite of what happened here. What happened here was a compromise, not a capitulation. The General Counsel knows this. Section 10124.3 of the Board's Case Handling Manual provides: "Practical considerations, such as the quality of the evidence regarding certain allegations or the desires of the charging party, may, however, result in the approval of a settlement agreement with a *lesser remedy* if it will effectuate the policies of the Act to do so (emphasis added)." Settlements avoid the time, expense and risks of litigation. Many if not most settlements before trial are achieved through give and take, *i.e.*, a compromise, that results in less than full relief as was the case here.

For these reasons, the cases cited by the General Counsel and the Union are irrelevant. As shown below, those cases involve remedial orders issued by the Board after a trial and finding of discrimination, which is not the case here.

A. The Cases Cited By The General Counsel Have No Bearing On The Interpretation Of A Negotiated, Pre-Trial Settlement Agreement.

The case the General Counsel cites first and discusses the most, *The Rudolph Wurlitzer Co.*, 40 NLRB 202 (1942), does not involve the interpretation of a negotiated pre-trial settlement agreement. To the contrary, the *Wurlitzer* case was tried and the trial examiner found the respondent had committed an unfair labor practice. The parties then entered into a stipulation of settlement, subject to approval of the Board, requiring the respondent to "offer [the discriminatees] immediate and full *reinstatement* to their former ... position, without prejudice to [their] *seniority*

and other *rights and privileges*.” 40 NLRB at 206-07, 210-11 (emphasis added).⁵ The Board issued the order based on the stipulation. Here, by contrast, there was no trial, finding of discrimination, or remedial order. Moreover, the Stipulation of Facts shows that Jam rejected the reinstatement and seniority terms proposed by the General Counsel (Stip. ¶¶ 17-18; JX 7)⁶ and the final Settlement Agreement does not include any “reinstatement” or “seniority” or requirements. (JX5.) If anything, the *Wurlitzer* opinion confirms that if reinstatement and seniority provisions are intended, they must be explicitly set forth in the Settlement Agreement. Here, the Stipulated Facts show that the parties deliberately excluded reinstatement and seniority requirements from the final Settlement Agreement.

The General Counsel also repeatedly cites *Security Plating Co.*, 147 NLRB 877 (1964); *United Electric Co.*, 194 NLRB 665, 672 (1971); *South Shore Hospital*, 571 F.2d 677 (1978); *Louis Ronca d/b/a Ronca’s Exxon Serv.*, 268 NLRB 1157 (1984); *Residential Management*, 311 NLRB 1174 (1993); and *Park ‘N Go of Minnesota*, 344 NLRB No. 152 (2005). (GC’s Exceptions and Br., 5, 7.) But those opinions also involved orders entered after a finding of an unfair labor practice. None of these opinions address negotiated pre-trial settlements of disputed charges. In

⁵ The General Counsel argues that the parties’ deliberate exclusion of a seniority provision in the Settlement Agreement is of no moment because “[n]one of the Board cases mentioned above contain ... seniority language.” (GC’s Exceptions and Br. at 7.) That is incorrect. The stipulated order in *Wurlitzer* included a seniority requirement like the one that was rejected and omitted from the Settlement Agreement here.

⁶ The General Counsel’s initial proposal was for “*immediate and full reinstatement to [the alleged discriminatees’] former jobs and [2] restore their names to the work assignment roster [3] in accordance with seniority ... [4] without prejudice to their seniority or any other rights and/or privileges previously enjoyed.*” (Stip. ¶ 16; JX7 (emphasis added).) Respondents’ Brief in Support of their Exceptions filed 7/10/2017 (“Respondents’ Initial Brief”) outlines in detail the stipulated evidence showing that Jam rejected all of the reinstatement, seniority, and rights and/or privileges terms proposed by the Region and General Counsel, and Respondents incorporate that summary here. (See Respondents’ Initial Br. pp. 12-17.)

addition, the remedial orders in those cases required “immediate and full reinstatement.” Here, Jam explicitly and repeatedly rejected the General Counsel’s proposals that the Shaw Crew be “reinstated” (*see* Respondents’ Initial Brief pp. 12-13 incorporated herein and JX 7-11), and explicitly and repeatedly rejected the General Counsel’s proposals that the Shaw Crew be conferred “seniority” (*see* Respondents’ Initial Br. pp. 14-16 incorporated herein and JX 12-18). Those terms were purposefully omitted from the final Settlement Agreement. (Stip. ¶¶ 17-18.) The final Settlement Agreement does not require reinstatement or seniority. It only requires that Jam offer “immediate and full *participation in the on-call list* without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner” (JX 5), which is exactly what happened. None of the cases cited by the General Counsel hold that reinstatement to the *status quo ante* is required to settle a case, or that a return to the *status quo ante* must be implied in all settlements – even when, as here, the Employer did not agree to reinstatement or seniority and the parties purposefully omitted those terms from the Settlement Agreement.

The General Counsel does not cite a single case involving a settlement provision like the one agreed to here: “full participation in the on-call list without discrimination.” (JX 5.) Instead, he wrongly tries to analogize the obligation to offer the Shaw Crew “full participation in the on-call list” to exclusive hiring hall provisions contained in collective bargaining agreements. (GC Exceptions and Br. 5-6.) *Island Management Partners*, 362 NLRB No. 158, 2015 WL 4647967, at *5 (2015), *Wise Alloys*, 343 NLRB 463 (2004), and *J.E. Brown Electric*, 315 NLRB 620, 622-23 (1994), all involved collective bargaining agreement (“CBA”) provisions requiring the

employer to seek workers from the union’s “exclusive hiring hall.”⁷ These cases are not even remotely applicable to the Settlement Agreement here. There is no CBA, and there is no provision requiring an exclusive Union hiring hall. Under the Settlement Agreement, Jam had no obligation to use the Shaw Crew exclusively. To the contrary, the stipulated evidence shows that Jam refused to discharge the New Crew and repeatedly rejected the General Counsel’s proposals that the Shaw Crew be given seniority or other preference over the New Crew. (Stip. ¶¶ 17-18.)

By relying on these cases, the General Counsel apparently seeks to achieve through Board process—an exclusive hiring hall—what the General Counsel could not obtain through settlement negotiations. But there is no exclusive hiring provision in the Settlement Agreement and there is no room to imply one. The Stipulated Facts show that the General Counsel agreed that the Settlement Agreement would not require seniority for the Shaw Crew or the displacement of the New Crew. (Stip. ¶¶ 17-18.) Indeed, the Union vociferously objected to the settlement for those very reasons. (Stip. ¶ 20; JX 20.)

B. The Remedial Order Cases Cited By The Union Also Have No Bearing On The Interpretation Of A Negotiated, Pre-Trial Settlement Agreement.

The Union, like the General Counsel, argues incongruously that the Settlement Agreement must be interpreted as if it were a remedial order under the Act. But the only case the Union cites for that proposition, *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 2 (2014), does not even

⁷ In *J.E. Brown*, the CBA explicitly required the employer to use the Union’s hiring hall as the “sole and exclusive source of referral of applicants for employment.” 315 NLRB at 620. In *Island Management*, the Board granted a default judgment and found that the employer had failed to comply with a CBA requirement that the employer hire “from the Union’s *exclusive* hiring hall.” 2015 WL 4647967, at *5. In *Wise Alloys*, the Board found the evidence showed the employer had agreed to “exclusively use the union hiring hall” as part of the CBA. 343 NLRB at 466. None of these cases were based on pre-trial settlements of disputed charges, and all of them were based on explicit exclusivity terms. None of them implied seniority or exclusivity terms that had been explicitly rejected by the employer during negotiations.

involve a pre-trial settlement of disputed charges. To the contrary, in *Pressroom Cleaners*, the Board entered a remedial order *after* a trial and a finding of discrimination. The Union’s quotation from *Pressroom Cleaners* is expressly limited to remedial orders under Section 10(c). (Union Br., 11-12 (“[i] exercising its authority under 10(c), the Board is guided by the principle that remedial orders should ‘restore the situation’”).) As discussed above, Section 10(c), by its terms, limits the imposition of make whole remedial orders to cases where, after trial, the Board has found that an unlawful labor practice has occurred. Section 10(c) expressly provides that absent such a trial and finding, the Board shall not issue such a remedial order. Here, there was no trial or finding of an unfair labor practice and the pre-trial Settlement Agreement contained an express no-admission clause.⁸

Finally, the Union’s incomplete citation to the Casehandling Manual § 10124.3 (Union Br. at 11) ignores the General Counsel’s ability to approve a settlement agreement with a “lesser remedy” than what would be expected from a fully favorable Board decision. As noted, § 10124.3 provides: “Practical considerations, such as the quality of the evidence regarding certain allegations or the desires of the charging party, may, however, result in the approval of a settlement agreement with a lesser remedy if it will effectuate the policies of the Act to do so.” Here, Jam adamantly disputed the charges and would have presented evidence that the Shaw Crew was discharged for cause, and the decision-maker (who did not work at the Riviera) did not even know of any organizing activity. The General Counsel and Jam settled the case – with an explicit non-admission provision – in order to avoid the cost, burden and risk of trial.

⁸ The Union’s reliance on *May Aluminum*, 160 NLRB 575, 625 (1966), is also way off base. In *May Aluminum*, the Board affirmed and adopted the trial examiner’s finding that the employer had engaged in an unfair labor practice by refusing to bargain and recommendation that the remedial order reinstate the striking employees. *May* did not involve the interpretation of a pretrial settlement of a disputed charge and has no relevance here.

III. Jam Fully Complied with the Settlement Agreement; the Stipulated Facts Show that There Was No Discrimination; and There Is Nothing “Inherently Destructive” about Implementing the Settlement Agreement the Way it was Written and Intended.

The General Counsel argues that not offering work exclusively to the Shaw Crew was “inherently destructive” of the Shaw Crew’s Section 7 rights. (General Counsel’s Br. at 9.) But it is disingenuous for the General Counsel to settle upon terms that purposefully do not require exclusivity or seniority and then turn around and argue that the absence of such obligations are “inherently destructive” of Section 7 rights. The Settlement Agreement was a compromise. Under the settlement the Shaw Crew received full back pay and the right to participate fully in the on-call list without discrimination. (JX 5.) Jam has complied with the terms of the settlement agreement. The backpay was allocated and distributed long ago. Jam has treated both crews equally, has maintained meticulous records to prove it and, in fact, has extended more offers to work to the Shaw Crew than the New Crew. (Stip. ¶¶ 41-45, JX 19, JX 27, JX 28.)

The final settlement language states that the Shaw Crew is entitled to ‘full participation in the on-call list without discrimination,’ *i.e.*, the opportunity to take part in or share in offers of work assignments without discrimination. (*See* p.8, n.4, *supra.*) Jam’s well-documented efforts to make-up crews consisting of half Shaw Crew members and half New Crew members was a good faith effort to comply with the full participation requirement and ensure even-handed treatment of the Shaw Crew, and the Regional Director explicitly found that Jam had satisfied its obligation to offer the Shaw Crew “full participation in the on call list for work assignments, as required by the settlement agreement.” (Stip. ¶ 39; JX 29 (emphasis added).) There is absolutely no evidence of discrimination.⁹

⁹ Respondents’ Initial Brief outlines in detail the stipulated evidence showing that Jam offered the Shaw Crew “immediate and full participation in the on-call list ... without

Compliance with a Settlement Agreement approved by the Regional Director is a defense to a claim of violation of Section 7 rights, as the Union acknowledges. (Union Br. 13.) The Settlement Agreement disposed of the underlying charges *and* the *status quo ante* remedy sought by the General Counsel in the underlying complaint. *United States Gypsum*, 284 NLRB at 10; *see also Armour*, 402 U.S. at 681–83 (“the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation”). The General Counsel and the Union knew before the settlement was executed that Jam would continue to employ the New Crew and would not provide seniority or other preferences to the Shaw Crew. (Stip. ¶¶ 17-18.) Those proposed provisions were purposefully omitted from the Settlement Agreement (JX 5), and the omission of those provisions was the reason the Union refused to sign the agreement. (Stip. ¶ 20; JX 20.)

Notwithstanding the stipulated evidence that Jam explicitly and repeatedly refused to give seniority or preferences to the Shaw Crew and that those terms were deliberately excluded from the Settlement Agreement, the General Counsel and Union have concocted a theory that the Shaw Crew was nonetheless entitled to *all* the work to the exclusion of the New Crew. If that were the case, the Union would not have objected to the settlement. (Stip. ¶ 20; JX 20.) If the Settlement Agreement “impliedly” required seniority for the Shaw Crew or the discharge of the New Crew (as the General Counsel and the Union now assert) there would have been no reason for the Union to not join in the settlement. And there would have been no reason for the Union to specifically object that under the settlement the New Crew would be eligible to vote (objection no. 1) and the Shaw Crew would not have seniority (objection no. 3). (Stip. ¶ 20; JX 20.) That the Union and the

discrimination,” as required by the Settlement Agreement, and that the Shaw Crew was in fact offered more work opportunities than the New Crew. (*See Respondents’ Initial Brief* pp. 17-23.)

General Counsel now advocate for the same interpretation of the Settlement Agreement simply cannot be reconciled with the fact that the Union objected to the Settlement Agreement. By now joining together and claiming that the Shaw Crew must get *all* the work, the General Counsel has reneged and the Union has done an about face.

The General Counsel’s position here—that a seniority requirement should be implied—also cannot be reconciled with the Regional Director’s previous rejection of the unfair labor practice charge filed by the Union in this case. In his letter rejecting the charge, the Regional Director stated:

We have carefully investigated and considered your charge [and] [f]rom the investigation, the evidence is insufficient to show that the Employer has failed and refused to offer the employees named as discriminatees in Case 13-CA-160319 full participation in the on call list for work assignments, *as required by the settlement agreement that was reached in that case*, because of their engagement in protected concerted or union activity, or because they were named as discriminatees in the Complaint or Settlement Agreement. Further, *the evidence is insufficient to show that the Employer is in violation of the express terms of the settlement agreement reached in Case 13-CA-160319.*

(Stip. ¶ 39; JX 29 (emphasis added).) When the Regional Director made this determination he knew from Jam’s position statement and the attached logs and time sheets that Jam had not discharged the New Crew and that both crews were being offered work assignments. (*See, e.g.*, Stip. ¶¶ 41-45, JX 19, JX 27, JX 28.) He knew this meant the Shaw Crew was not being given any seniority or other preference over the New Crew. Yet he nonetheless confirmed that Jam was not in violation of the Settlement Agreement. (*Id.*) Thus, after a careful investigation (which included a review of the logs and the time sheets showing work being offered to both the Shaw Crew and the New Crew), the Regional Director found that Jam had offered the Shaw Crew “full participation in the on-call list for work assignments” without discrimination, “as required by the settlement agreement.” (Stip. ¶ 39; JX 29.) The only way the Regional Director could have reached

this conclusion is if he (correctly) understood the Settlement Agreement not to require that the Shaw Crew be afforded seniority or other preferences over the New Crew, but only to require that the Shaw Crew not be discriminated against in being offered work assignments.

There is nothing in the Settlement Agreement or the Stipulated Facts that can reasonably be interpreted as requiring Jam to offer work exclusively to the Shaw Crew. The General Counsel and the Union have no good faith basis to argue otherwise, and there is nothing in the record to support the ALJ's *sua sponte* determination that there was no valid settlement agreement.

CONCLUSION

For the reasons stated above, the Board should overrule the ALJ's rulings, findings, and conclusions, dismiss the charge and complaint, and hold that Jam complied with the settlement agreement.

Respectfully submitted,

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

JAM PRODUCTIONS, LTD. and EVENT
PRODUCTIONS, INC.

and

Case No. 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION
LOCAL NO. 2, IATSE

CERTIFICATE OF SERVICE

I, the undersigned attorney, being duly sworn, state that on July 24, 2017, I had served the **Respondents' Answering Brief to The General Counsel's And The Union's Exceptions To The Decision Of The Administrative Law Judge** upon the following

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