

**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

CHARGING PARTY'S RESPONSE TO RESPONDENT'S EXCEPTIONS

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INTRODUCTION

Jam has filed thirty-one numbered exceptions¹ to the ALJ's decision, many but not all of which it has grouped at page 3 of its brief into seventeen "questions involved" that it never expressly references again in the three-pronged argument section that begins at page 28 of its brief. Because it is not always clear which exceptions (or "questions") the arguments in Jam's brief are supporting, and in order not to inadvertently waive any opportunity to respond, the Union will respond to Jam's exceptions one by one.

Ultimately, the Union agrees with both Jam and the General Counsel that the ALJ erred in setting aside the settlement agreement on the basis that it reflected the parties' failure to reach a meeting of the minds. But underlying Jam's exceptions is a deeply distorted view of the facts and how to go about drawing conclusions from them. Jam has discriminated against the reinstated stagehands—not by treating them worse than their replacements, but by treating them worse than they were treated before their discharge. Jam's defense to this allegation—that everyone agrees that the settlement agreement permits this discrimination—fails. The plain language of the settlement, which is where the ALJ's analysis should have begun and ended—required Jam to give the reinstated employees full, not partial, participation in the on-call list, and *not* to use their terminations against them in any way, rather than using their terminations as a basis for giving them work only half the time. But even if one does examine the parties' bargaining history as Jam urges, that history does not tell the story that Jam wants it to tell. The parties reached an agreement containing a term the ALJ found ambiguous, and the ALJ accurately found that the parties' bargaining history does not conclusively resolve that ambiguity. But this

¹ The General Counsel has also filed exceptions. The Union finds the General Counsel's exceptions meritorious and therefore will not respond to them in this submission.

is ultimately of no moment, because the plain meaning of the phrase “full participation in the on-call list” cannot support the contrary meaning that Jam tries to assign it. The settlement agreement is not a defense to Jam’s discriminatory restriction of its reinstated stagehands’ work opportunities, and the ALJ should have, and the Board should, find that Jam’s conduct violated Sections 8(a)(3) and (4) of the Act.

RESPONSES TO JAM’S EXCEPTIONS

1. *The Union agrees that the ALJ’s finding that there was no meeting of the minds was erroneous, but strongly disagrees with Jam’s reasoning.* If one assumes *arguendo* that the phrase “full participation in the on-call list” is ambiguous at all, it is a patent ambiguity: the parties disagree over what one of the terms of their settlement agreement means, a disagreement the ALJ should have resolved as a matter of contract interpretation. 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.” *Canada Life Assurance Co. v. Guardian Life Ins. Co.*, 242 F. Supp. 2d 344, 356 (S.D.N.Y. 2003). To the extent that the parties agreed to use terms susceptible to more than one reasonable interpretation, they 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 Corp. v. Local No. 458-3M, Chicago Graphic Commc’ns Int’l Union*, 20 F.3d 750, 754 (7th Cir. 1994).

In arguing in support of this exception, Jam confuses *latent* ambiguity — an ambiguity hiding in the contract where the parties utilize a seemingly objective word or phrase that, unbeknownst to them, can actually mean more than one thing — with *patent* ambiguity — a word or phrase that is on its face subject to more than interpretation. To the extent that

the phrase “full participation in the on-call list” contains any ambiguity at all, it is of the patent variety, and the ALJ was charged with interpreting the phrase by any of the canonical means of contract interpretation, including resort to extrinsic evidence. Jam’s argument that there was a meeting of the minds because the parties’ bargaining history shows that the phrase was unambiguous gets things backwards. Either the phrase was unambiguous, in which event no recourse to bargaining history is necessary—or even permitted—or it *was* ambiguous, and one may examine bargaining history for clues as to the parties’ intent in adopting the language.

But even if one does examine bargaining history in order to determine whether the parties reached a meeting of the minds, Jam asks the Board to read far too much into that history, presumably because there is no other way to try to make the phrase “full participation in the on-call list” mean “partial” or “half participation.” The Region initially sought language that explicitly protected any seniority rights the fired employees had enjoyed in receiving work assignments. (Stip. ¶ 16.) Jam resisted this language. (Stip. ¶ 17.) In their negotiations, Jam “explained ... that Respondents objecting to discharging the New Riviera Crew,” (Stip. ¶ 17), something that there is no evidence in the record that the Region ever sought, and also noted that they “objected” to “giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew.” (Stip. ¶ 17.) But it does not follow that the Region’s agreement to remove the language referring to seniority rights reflects agreement with jam’s “objection” to giving the Shaw Crew “preferential treatment” over their replacements. On the contrary, the Region’s actions are equally consistent with a conclusion that it was not within the Board’s purview in settling a claim of discriminatory discharge to dictate what method Jam would use to assign work

to the stagehands after they were reinstated. That is, the Region may have concluded that, once they were reinstated, Jam was not necessarily bound for all time to keep using a seniority system for assigning work, so long as whatever method it did use was nondiscriminatory. But that is not the same thing as agreeing that the phrase “full participation in the on-call list” meant anything other than restoring the reinstated stagehands to their former position of being the ones whom Jam assigned—via the on-call list—to perform stagehand work. Jam tries to prove too much from the evidence of prior drafts of the final agreement.

At the same time, Jam glosses over those portions of that extrinsic evidence that do not support its tortured interpretation of the agreement’s plain language. Jam objected to the Region’s proposed seniority rights language, in part on the basis of an unsupportable theory that Jam was somehow not responsible for the work assignments its crew chiefs made. Jam actually protested to the Region that “JAM maintains no seniority list and does not provide any special privileges” because it was not Jam, but rather “the crew chiefs [who] have absolute and unrestricted authority to offer stagehands work. JAM is not involved.” (Jt. Ex. 14.) Of course, this position was never tenable, and Jam has since abandoned it; the parties stipulated that the person who assigned stagehands work, Behrad Emami, is “a supervisor ... within the meaning of Section 2(11) of the Act and an agent ... within the meaning of Section 2(13).” (Stip. ¶ 7.) Jam cannot and does not contend that because the Region compromised on the settlement language, it thereby agreed to Jam’s curious view that the settlement agreement could not dictate how Jam’s crew chiefs would assign work because Jam “was not involved” in assigning its own stagehands. But if compromising on Jam’s proposed language does not signify the Region’s agreement

with *that* reason Jam offered for proposing the language, neither does it signify its agreement with Jam's claim that it objected to giving the reinstated stagehands "special privileges" over their replacements.

There is no evidence in the record that Jam ever expressed to the Region its *specific* interpretation of the settlement agreement that it now contends "everyone knew" was its meaning. Jam, as far as the record discloses, never communicated its view that the words "full participation in the on-call list," without *any* reference to the rights of the replacement employees, actually meant that Jam was entitled to split its work crews in two and offer only half of the work to the reinstated employees, and the other half to the unmentioned replacements. There is no evidence, in short, that the Region could ever have had any idea from the parties' bargaining history that Jam subscribed to this tortured interpretation of the language.²

Jam's characterization of the stipulated evidence of the parties' bargaining history is aggressively revisionist. There is no support in the record for Jam's claim that "the parties have stipulated that they deliberately excluded any seniority requirement." (Br. at 30 n.16.) There is no support in the record for Jam's claim that they "agreed to full back pay after determining that the amount sought by the Region was less than the cost of preparing for and trying the case..." (Br. at 35.) There is no support in the record for their assertion that "the Settlement Agreement was not intended to provide 'make whole' relief."

² The Board must reject Jam's argument that the Regional Director's reversal of his initial dismissal of the instant charge indicates anything about how the Region interpreted the settlement agreement, as the stipulated record contains no evidence of the basis for either decision. Jam bases its argument on new evidence of its communications with the Region during the investigation that was never presented to the ALJ, and which Jam has not sought leave to present to the Board. (Jam Br. Appx. 5.) This new evidence must be struck from Jam's brief.

(Br. at 36.) There is no evidence in the record that the Region ever indicated to Jam that it was okay and consistent with the settlement agreement to cap the reinstated employees' work opportunities. Given Jam's claim that it always wanted to be able to give at least half the work to the replacement employees, the fact that it never insisted on specific language to this effect, never proposed any language relating to the status of the replacement employees, and agreed to full back pay and make-whole relief for the reinstated employees, the Region could quite sensibly have concluded that it was Jam that had abandoned its objections and acquiesced with the Region's proposal to require "*full participation in the on-call list.*"

In short, the bargaining history that Jam so heavily relies upon does not support the extravagant claims that Jam makes for it.

But in the end Jam, by relying upon the parties' bargaining history to try to establish a counterintuitive meaning for the settlement's requirement of "*full participation,*" ultimately commits the mirror image of the error the ALJ made. In the absence of a *latent* ambiguity in the contract language, there is a meeting of the minds, and it is the ALJ's job to interpret the parties' agreement and to resolve whatever *patent* ambiguities it may contain. The error that both Jam and the ALJ make is looking to the bargaining history to establish the existence or non-existence of a *patent* ambiguity. Jam contends (erroneously) that the bargaining history proves that the language is unambiguous; the ALJ contends that the bargaining history proves that it is, and therefore that there was no meeting of the minds. Instead, the ALJ should have examined the language to see whether it could, on its face, by its plain meaning, possibly support the interpretation that Jam was urging in its defense. Only if he found that it was capable both of that interpretation and of the

interpretation the Region and Union gave it could he conclude that an ambiguity existed, and only then could he turn to the parties' bargaining history to attempt to resolve that ambiguity. The ALJ's findings that there was no meeting of the minds on the basis of his examination of extrinsic evidence was erroneous.

2. *The ALJ's finding that there was no meeting of the minds did not violate Jam's due process rights.* Jam correctly observes that the Board generally may not "find and remedy a violation of the Act" not specified in the complaint. (Jam Br. at 28.) But there is no violation that the ALJ found that was not alleged in the complaint. In fact, the ALJ found no violations of the Act at all; he has merely remanded the case to be set for a future hearing. Because the matter remains pending in its entirety, Jam has not been denied any opportunity to litigate any issue. Jam's complaint that it has been denied a day in court that has not yet occurred is not a basis for overturning the ALJ's decision.

At the same time, notwithstanding Jam's claims that it was the General Counsel's burden to prove a violation of the settlement agreement, (Jam Br. at 40), the Complaint does not allege a violation of the settlement agreement. The Complaint alleges that Jam's assignment of work was discriminatory, and it was Jam that interposed the settlement agreement as a *defense* to that allegation. (Jt. Exs. 1(b) and (c).) It was Jam that insisted on presenting evidence of the parties' bargaining history, over the General Counsel's relevance objections, and Jam that continues to argue to the Board that the parties' bargaining history is why it should win. The Board must reject Jam's complaint that the ALJ actually examined the very issues of contract formation that Jam itself placed before the ALJ.

3. *The evidence supports the ALJ's finding that Shaw usually called crew members in order of seniority.* The only evidence in the record as to how Shaw *contacted* crew members in order to *offer* them work is Shaw's own affidavit. (Jt. Ex. 25.) Jam presents the hours worked by stagehands in the year before their mass termination as evidence to the contrary, (Jam Br. at 10 n.2), but this information contradicts Shaw's testimony only if we assume that everyone on Shaw's seniority list accepted work at the same rate. But this assumption is unsupported; we have no information as to how often anyone on his list accepted offers of work, or what other jobs or regular gigs or concert tours or periods of illness or injury any of those individuals had. Emami's own data from the period following execution of the settlement reveals a wide variation in acceptance rates among the reinstated employees. (Jt. Exs. 27, 28.)

Additionally, Jam's claim that it "at no time ... authorize[d] a seniority system for stagehands" is grossly misleading, seemingly premised on Jam's now-discarded view that "Jam is not involved" in stagehand work assignments, because Jam delegates those decisions to its crew chief. (Jam Br. at 10 n.2; Jt. Ex. 14.) Jam gave Shaw, its agent, complete discretion over hiring and scheduling stagehands. (Stip. at ¶ 9; Jt. Ex. 25 at 1.) Whatever system Shaw used to schedule stagehands is the one that Jam "authorized." And the only evidence in the record as to how Shaw went about *offering* work to stagehands was that he called them in seniority order.

4-6. The Union does not dispute Jam's exceptions 4-6, although it appears that none of these minor inaccuracies impacted the outcome of the case, and they are therefore immaterial.

7. *The record supports the ALJ's finding that the settlement agreement required "reinstatement."* Jam quibbles with the ALJ's characterization of the requirement that it offer its terminated employees "immediate and full participation in the on-call list" as "reinstatement," presumably because it wishes to claim that the Region agreed to remedy their mass termination by returning them with a lesser employment status than they enjoyed prior to their termination. "Reinstatement" in this context means to return a discharged employee to the same job that he or she used to occupy, rather than to some other, different job. *Panoramic Indus., Inc.*, 267 NLRB 32, 38 (1983) (finding employer did not reinstate discharged packer and shipper by assigning him to operate sanding machine); *Chase Nat'l Bank*, 65 NLRB 827 (1946) (finding employer did not comply with reinstatement order by placing discharged bank teller in position of "Assistant Manager" when teller position still existed). This is exactly what the settlement required Jam to do: before their mass termination, the discriminatees worked for Jam as stagehands at the Riviera Theatre, and this is the job that Jam was expected to, and did, return them to. (Jt. Ex. 5 at 8.)

But unlike bank tellers, packers and shippers, or most traditional "nine to five" jobs, the reinstated stagehands never had discrete, identifiable "positions" to which they could be returned; before their discharge they constituted a pool of labor to whom Stage Manager Chris "Jolly Roger" Shaw offered as it became available, using the mechanism of the on-call list. So, because no discrete, identifiable positions existed to reinstate them to, the settlement agreement instead refers to the mechanism for offering work opportunities, requiring Jam to offer the discharged employees "full participation" in that mechanism.

Jam protests because “reinstatement” implies restoration of the status quo, placing the discriminatees back into the “same jobs” —in this case, giving them the same opportunities to work at shows and events that they enjoyed before being fired en masse. The remedy of “participation,” on Jam’s view, simply means being put on the list, regardless of whether one is ever actually called and offered any work. This is a nonsensical reading of the phrase “full participation,” depriving the word “full” of any meaning whatsoever. But the ALJ plainly did not intend to decide this issue by using the word “reinstate.” On the contrary, by failing to give sufficient attention to the plain meaning of the language of the settlement agreement, instead looking directly at the agreement’s bargaining history, the ALJ read an ambiguity into the plain language that does not exist and held that he could not determine what the phrase “full participation in the on-call list” required Jam to do. While “reinstatement” in its traditional sense remains the only reasonable way to read the settlement language, it is plain that this is not what the ALJ intended by using the word, and his use of this word is immaterial.

8. *The ALJ’s framing of the primary issue in the case was accurate.* Jam excepts to the ALJ’s framing of the “primary issue” in the case as “misleading and incomplete, and as contrary to the stipulated evidence and established law.” But in its brief, Jam makes plain that its only “objection” to this formulation of the issue is just that it thinks the answer is obvious. (Jam Br. at 4.) Given that the parties have offered strenuous justifications of their respective interpretations of the settlement agreement, the ALJ’s framing of the choice between those competing interpretations as the “primary issue” in the case seems obvious. Given

that Jam does not identify what, if the ALJ has framed it wrongly, it thinks the primary issue in dispute *is*, this exception should be denied.

9. *The Union agrees that the quoted language does not accurately reflect the language of the Region's initial settlement proposal.*

10. *The Union objects to this exception as vague and unsupported by any citations to the record or the ALJ's opinion.*

11. *This exception raises the same issues as no. 7. The discriminatees were "reinstated" and "recalled" in the sense that, both before their termination and after the implementation of the settlement agreement, they formed Jam's labor pool (or part of it, after reinstatement) from which it made assignments to work as stagehands on individual shows and events at the Riviera. The ALJ's use of the word in this sense is perfectly conventional and obviously did not indicate any conclusion on his part as to whether Jam violated the Act by limiting the reinstated employees' work assignments.*

12. *The record establishes Emami's belief that, under the settlement agreement, he was to split work equally between the reinstated and replacement employees. Joint exhibits 18 (the settlement agreement) and 19 (Jam's memo to Emami), relied upon by Jam, are irrelevant; Emami's affidavit is the only evidence of his belief as to how he should proceed. And in that affidavit he states,*

I was told that following a Board settlement, I was to adapt my crew call process. I was informed that ... I was to give them full participation in the on call list. ... I understood that I should be fair, and that I should allow them to be equally involved. I would generally work toward hiring the current crew and the Chris

Shaw crew in equal shares of work. ... I was not given specific guidance other than to make an effort to use those listed as the “most active.”

...

In implementing Michelson’s instruction, I would basically split the crews in half and then tried to give work to both groups.

(Jt. Ex. 24 at 4-5.) The ALJ’s conclusions about Emami’s belief as to what he was required to do under the settlement were wholly supported by the only source of evidence on that issue—Emami’s own affidavit.

13. *The evidence supports the ALJ’s conclusion that the “Shaw Crew” received fewer offers to work under Emami than they had before their mass termination.* The facts cited by the ALJ are accurate: Emami’s scheduling approach resulted in a reduction both in work opportunities and in actual work for the reinstated Riviera crew, as the timesheets and call logs reveal. Emami called Kramer, the highest seniority bargaining-unit employee, for 74% of shows, while he had previously *worked* 97% of shows and would have been called for every show given his place atop the seniority list. (Jt. Exs. 26, 28; U. Br. to ALJ Appx. A, B.) Emami called Justin Huffman—identified by the parties as the Union’s point person in the organizing campaign—only half of the time, and he had previously worked 80% of shows and also would have been called for nearly every show given his high placement on the seniority list. (*Id.*) Emami called Paul Wright 32% of the time; even this is at least a fifty percent drop. (U. Br. to ALJ Appx. A, B.) Similarly, Emami called Adam Ross 24% of the time, at least a ten percent drop. (U. Br. to ALJ Appx. A, B.) These numbers—and those of almost all of the employees who worked in the twelve months before Jam fired them—demonstrate that these employees are not in the same position they occupied

prior to being fired. They receive dramatically fewer work opportunities and work only a fraction of the hours they worked before being fired.

These reductions necessarily occurred, given that before September 2015 the fired employees constituted Jam's entire stage crew and by definition received every work offer and made up 100% of every crew, but after reinstatement received only 55% of work offers and constituted only 41% of the crews—and the employees who had worked the most before being fired got only 43% of work offers and made up just 36% of the crews. (U. Br. to ALJ Appx. D.) Emami's stated intent was to "balance" his crews so that they were half reinstated employees and half replacement employees, and the data show that he was effective. Because half of the available work is reserved for replacement employees, the reinstated employees necessarily have fewer chances to work than they did before they were fired. The evidence fully supports the ALJ's findings.

14. *The Union agrees that the unfair labor practice allegations—which contend that Jam limited the work opportunities of the reinstated employees because of their protected, concerted activity and participation in the settlement agreement—may be resolved without reference to the parties' settlement agreement.* The Complaint alleges not that Jam violated the settlement agreement, but that its assignment of work was discriminatory; it was Jam that interposed the settlement agreement as a *defense* to that allegation. As the Union argued at length in its opening brief, the best evidence of the parties' intent is the plain meaning of the actual words they chose in their settlement agreement; recourse to extrinsic evidence of their intent is only necessary when those words are ambiguous. In the present case, there is no plausible reading of the words "full participation in the on-call list" that support Jam's

proffered defense; those words cannot sensibly be read to mean “partial” or “half participation in the on-call list, shared with the replacement employees we hired after firing all of the employees whose claims are being resolved by this agreement.”

15. *The ALJ’s finding that “the Union specifically objected to the inclusion of a non-admissions clause and the omission of a provision assuring the reinstated Shaw Crew employees of seniority in the on-call list” is accurate.* In the very document that Jam cites in support of its exception, the Union writes, “We object to the non-admissions clause,” and insisted that the settlement agreement be revised to provide for participation in the on-call list “without prejudice to their seniority and whatever rights and/or privileges they previously enjoyed.” (Jt. Ex. 20.) If Jam believes that some nuance of the ALJ’s characterization of this language is not fully accurate, they do not explain how, let alone how this mischaracterization had any impact whatsoever on the ALJ’s ultimate decision in the case. This exception should be overruled.

16. *The ALJ was correct that the parties disagree as to what the phrase “immediate and full participation in the on-call list” means.* But he was incorrect that Jam’s interpretation of that phrase as meaning “partial participation in the on-call list,” an interpretation those words cannot support on their face, was reasonable, and was incorrect, given the plain meaning of the words “full participation,” that the agreement was ambiguous.

17. *The evidence fully supports the ALJ’s contention that the extrinsic stipulated evidence of the parties’ intent is ambiguous.* Respondents do rely, as the ALJ found, on the fact that the General Counsel had proposed in earlier drafts to require Jam to restore the reinstated

employees' names to the "work assignment roster in accordance with seniority" as the basis for their argument that the final agreement excluding that language permits Jam to assign work to the replacement employees at the reinstated employees' expense. *See, e.g.*, Respondents' brief in support of their exceptions at 44-45, where Jam once again recites the back-and-forth of negotiations over the settlement and insists that this bargaining history itself demonstrates that the "agreement did not confer the Shaw Crew any preferences over the New Crew." (*Id.* at 45.)

Jam's exception that the ALJ inaccurately characterized its argument, then, is ill-founded. But so is the argument itself. Jam argues that the *only* conclusion one can draw from that fact that the Region initially insisted on language requiring that employees be reinstated to the referral roster with their seniority intact is that the Region gave up on securing that relief and instead resolved that the agreement would "not confer the Shaw Crew any preferences over the New Crew." But, as argued above in response to exception 2, equally consistent with the Region's course of conduct is the conclusion that, while it may have preferred the precise prose it proposed, it was willing, in order to get the settlement done, to agree to less precise language that it viewed as ultimately having the same effect. Jam will respond that during the negotiations it "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.) But nothing in the record—not a stipulation of fact or a single piece of correspondence from the Region—indicates that the Region ever acquiesced in Jam's contention that it did not wish to "confer the Shaw Crew any preferences over the New Crew." For all the evidence reveals, the Region could well have concluded that, *despite* its objections to "conferring the Shaw Crew any preferences over the

New Crew,” it was Jam that ultimately acceded to the Region’s demand by signing language that meant the same thing. More likely, the parties deliberately agreed to language that they both recognized a reviewing body could interpret in more than one way, thereby accepting the risk of a negative interpretation. *Colfax Envelope*, 20 F.3d at 754.

At the same time, the ALJ was correct to point out that “the General Counsel, in responding to the Union’s objection, expressed his opinion that the final version of the settlement agreement preserved the Shaw Crew’s seniority rights notwithstanding the omission of specific language to that effect,” (ALJ Dec. at 7), as this is precisely what the General Counsel did express:

the Region’s position is that the settlement fully remedies the alleged unfair labor practices, and therefore the Union’s proposed changes are unnecessary. Specifically, the language proposed on Objection 3 [to specifically make reinstatement without prejudice to seniority rights] is already implicitly addressed by that clause in which the Employer agrees to offer the alleged discriminatees work in a non-discriminatory manner.

(Jt. Ex. 21 at 1.) The ALJ’s finding that this was the General Counsel’s view of the settlement agreement is completely supported by the record evidence.

Not supported by the evidence is Jam’s claim that it was unaware of the Region’s view. Jam’s claim in its brief that “the Region never communicated that understanding to Jam,” (Jam Br. at 31), and that “the General Counsel did not contradict Jam or state ‘It’s our position that notwithstanding the fact that the Region dropped the seniority requirement from its settlement demand that Jam is nonetheless required to use seniority in assigning work,’” (Jam Br. at 32), are neither stipulated to nor supported by any evidence in the stipulated record. And its contention that “the parties have stipulated that they deliberately excluded any seniority requirement” is false; there is no such stipulation.

(Jam Br. at 30 n.16.) The record is silent as to any position communicated by the Region to Jam about how it interpreted the parties' agreement to revise the wording of its initial proposal. Jam acknowledges as much by stating that "the General Counsel simply sent Jam an email accepting Jam's final offer and expressing full agreement with Jam's changes to the language of the agreement." (Jam Br. at 32.) The Region agreed to Jam's changes to the *language*; it made no comment as to Jam's purported objections to "special treatment" for the reinstated employees.

The Region presumably did not view the agreement as giving the reinstated employees "special" treatment; it gave them full participation in the on-call list in settlement of the claim that their discharge had been unlawful. This is not "special treatment" any more than standard Board language reinstating regular, full-time employees to their former jobs is "special treatment," even though it may strike the employees hired to replace them that way. The Region, quite reasonably, viewed the agreement as providing exactly what it said it was providing: full participation in the on-call list. The view that the parties would have chosen the words "*full participation in the on-call list ... without discrimination,*" without making any reference whatsoever to the replacement employees, in order to communicate the idea that Jam was to offer the reinstated employees participation in the on-call list about half the time, along with the unnamed replacement employees, lacks sense. It is Jam's reading of this language that is "idiosyncratic," and the Region was fully justified in concluding that this reading was not viable and approving the settlement agreement, despite Jam's continuing to "object" to giving the reinstated employees any "seniority or special treatment over the" replacements. (Stip. ¶ 17.)

Nothing in the record or in the complaint allegations supports Jam’s conclusion that the Region believes that Jam is required to use seniority in assigning work, (Jam Br. at 32), or that Jam was required to “terminate the New Crew.” (Jam Br. at 30.) The Region asserts that the reinstated employees are to have full participation in the on-call list—that is, that work must be offered to the reinstated employees *as a group* to the fullest extent practicable, and only then offered to others—but the Region asserts no view as to how work must be offered *within* that group. The General Counsel’s view is equally consistent with offering work to the reinstated employees in *any* non-discriminatory manner (including, if it chose, by seniority), so long as it is actually offering the work to the reinstated employees, and not instead limiting their work opportunities. And nothing in the record suggests that the Region *ever* sought termination of the replacement employees—indeed, nothing in any settlement draft or proposal by either the Region or Jam makes any mention of the replacement employees. Nothing in the Region’s view of the settlement agreement prevents Jam from offering work to the replacements that the reinstated employees are unavailable to do.

Also unsupported by the stipulated record is Jam’s retort that the Union “did not believe that the Region’s alleged ‘opinion’ [that the settlement agreement ‘implicitly included seniority and other rights and privileges for the Shaw Crew’] was a reasonable reading of the plain language in the agreement and refused to sign the agreement because it did not provide for seniority and other rights.” (Jam Br. at 32.) The record establishes merely that “the Union did not agree to the Settlement Agreement and Notice,” (Stip. ¶ 22; Jt. Exs. 18, 31), remaining silent as to *why* the Union did not sign off. The Union’s objections express not an opinion about the meaning of the final settlement language, but

rather a preference for including the clarifying language protecting whatever rights and privileges—including but not limited to seniority rights—Jam’s employees enjoyed before being fired, without specifying what those rights were. (Jt. Ex. 20 at 2.) Nothing in this preference for precision indicates a belief that the final language authorized limiting the replacement employees to only half of the available work.

In short, Jam makes a much stronger claim for what it believes the parties “clearly understood” than the evidence supports. The parties negotiated language requiring full participation in the on-call list for the alleged discriminatees. To the extent that this language can actually be viewed as ambiguous, the parties plainly attached different meanings to it—a situation the Seventh Circuit notes rightly describes as “common,” “just a gamble on a favorable interpretation by the authorized tribunal should a dispute arise.” *Colfax Envelope*, 20 F.3d at 754. Jam’s disparagement of the Region’s reasonable interpretation of the settlement language as an “idiosyncratic opinion” is unsupported by any evidence. The *Robbins* case relied upon by Jam holds not that a party’s interpretation of a term within a contract cannot prevail if it is not communicated in advance to the other side—see *Colfax Envelope*—but rather that a party’s execution of what is on its face a binding contract defeats any claim of a private intent not to be bound by the document. *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988). In this case, the parties plainly intended to form a binding settlement agreement; the only question is what they understood one of its terms to mean.

Ultimately, the ALJ’s error is not that “private intent counts only if it is conveyed to the other party and shared.” (Jam Br. at 30.) Rather, it is that extrinsic evidence of intent counts only if the language is ambiguous. *Rexam Beverage Can Co. v Bolger*, 620 F.3d 718,

726 (7th Cir. 2010) (“we only apply rules of construction when a genuine ambiguity exists in the language, not merely when the parties disagree as to how the language should be interpreted”); *Green v. UPS Health & Welfare Package for Retired Emps.*, 595 F.3d 734, 738 (7th Cir. 2010) (“the fact that parties to a contract disagree about its meaning does not show that it is ambiguous”). In the present case, “full participation in the on-call list” unambiguously requires that the reinstated employees be permitted to participate in the mechanism by which they receive all of their work at the Riviera—the on-call list—to the fullest extent.

18. *The ALJ’s finding that the agreement’s make-whole relief during the back pay period and its failure to mention the replacement employees support the ambiguity of the phrase “full participation in the on-call list” is partly correct.* The ALJ did *not*, as Jam alleges, find that “Jam’s agreement to one element of make whole relief—full back pay—creates an ambiguity as to whether it agreed to provide complete make whole relief on every element, including the discharge of the New Crew.”³ (Jam Br. at 35.) Rather, the ALJ was adhering to the established maxim that “[t]he meaning of a contract cannot be derived from words and phrases considered in isolation. To the contrary, the intention of the parties is ascertained from a consideration of all of an agreement’s provisions.” *First Bank & Tr. v. Firststar Info. Servs. Corp.*, 276 F.3d 317, 324 (7th Cir. 2001). *See also, e.g., Taracorp v. NL Indus.*, 73 F.3d 738, 745 (7th Cir. 1996) (“the meaning of separate contract provisions should be considered in light of one another and the context of the entire agreement”). To the extent that one concludes that there is any ambiguity as to the meaning of “full participation in the

³ As noted above, nothing in the settlement or the parties’ interpretations of it requires the discharge of the replacement employees.

on-call list,” looking to the structure of the agreement as a whole is a standard method of trying to resolve that ambiguity.

Applying this method, the fact that the agreement requires Jam not simply to pay the employees a certain sum, but to “*make whole* the employees named by Attachment A by payment to each of them” is significant in this context. Jam admits that the amounts it paid represented “full back pay.”⁴ (Jam Br. at 35.) If making the discharged employees whole required full back pay, that implies those employees’ entitlement to all of the stagehand work. If they were entitled to only half the work, making them whole would have required only fifty percent back pay. Reading the agreement to treat employees as though their terminations had never occurred, but only up until their actual reinstatement, whereupon their entitlement to perform stagehand work is cut in half, creates a curious incongruity, and it is a reasonable act of contract interpretation to find that Jam’s position creates internal inconsistencies that the General Counsel’s and Union’s position does not.

The Union parts ways with the ALJ, however, in concluding that this potential inconsistency is evidence of the existence of an ambiguity, rather than a resource for resolving language that is ambiguous on its face. Jam also gets this backward—after correctly citing cases for the proposition that rules of construction apply only when there is a genuine ambiguity in the contract language, Jam accuses the ALJ of erring by “finding ambiguities where none exist if he had considered the parties [*sic*] bargaining history and the final terms of the agreement.” (Jam Br. at 34.) One does not turn to the bargaining history in order to determine whether or not an ambiguity exists—that was precisely the

⁴ The Board must not consider Jam’s proffered explanation in its brief about why it agreed to full back pay, (Jam Br. at 35), as there is no evidence in the record supporting this assertion.

ALJ's mistake. One turns to bargaining history if one cannot resolve a patent ambiguity in the language by reference to the four corners of the contract. In the present case, the plain meaning of the phrase "*full participation*," in conjunction with the structure of the agreement discussed above, supports the Union's interpretation of the agreement, without any resort to extrinsic evidence.

19. *The Union agrees that the ALJ's finding that there was no meeting of the minds was erroneous, but Jam's due process rights have not been violated. These points are addressed above in response to Jam's exceptions 1 and 2.*

20. *The Union agrees that, because the finding that there was no meeting of the minds was erroneous, it was also erroneous to set aside the settlement.*

21. *The Union does not dispute this exception.*

22. *As explained in response to exception 7 above, the ALJ's use of the word "reinstatement" was correct.*

23. *The Union agrees that Jam did not offer work **exactly** equally to the reinstated and replacement employees beginning in April 2016. After being reinstated, the fired employees received 55% of work offers and constituted 41% of the crews—and the employees who had worked the most before being fired got only 43% of work offers and made up just 36% of the crews. (U. Br. to ALJ at Appx. D.) Limiting the reinstated employees to exactly half the work was Jam's goal, however. (Jt. Ex. 24 at 5.) But the difference between "offering work equally" and "offering work approximately equally," is immaterial to the outcome of the case.*

24-26. *The Union also has excepted to the ALJ's conclusion that the settlement agreement was patently ambiguous, establishes that there was no meeting of the minds, and is unenforceable, and the relief that he ordered in light of those findings.*

27. *The ALJ correctly declined to find and conclude that Jam complied with the settlement agreement and the National Labor Relations Act.* For the reasons discussed at length above, limiting the reinstated employees to half participation in the on-call list because of the fact of their terminations violated the settlement agreement's requirements of offering full participation and not giving their terminations any effect, and as discussed below, taking that action solely because of the reinstated employees' status as the "Shaw Crew" who were named in the settlement agreement violated sections 8(a)(3) and (4) of the Act.

28. *None of the exceptions contained within this single numbered paragraph has merit.*

a. Jam is incorrect that "under the settlement agreement there would be a larger combined crew consisting of the New Crew and the Shaw Crew." There is no way to read the settlement agreement as providing for this. The words—or even the concepts—of a "larger crew" or "combined crew" do not appear anywhere in the agreement, nor does the agreement make any reference whatsoever to the replacement employees.

b. The data from the timesheets show that the average crew size before the discriminatees' mass termination was 16.5, and that the average crew size after they were reinstated was 10.5. (Jt. Exs. 26, 28; U. Br. Appx. D.)

c. The Union agrees that the settlement agreement does not dictate in what manner the reinstated employees are assigned for work and does not require *any* employee's discharge, as explained above in response to exception 17.

d. Respondents did not comply with the provision of the settlement agreement that they offer “immediate and full participation in the on-call list,” as explained above in response to exception 1.

e. Respondents did, after implementation of the settlement, offer more work to the reinstated employees than to the replacement employees. But this is a red herring. Jam argues that it cannot have discriminated against the reinstated employees, because it treated them “the same” as the replacement employees. This is like a child stealing his sister’s cookie, and, instead of making him give it back, the kids’ parent makes the kids split the cookie between them on the ground that this is equal treatment. The logic (and equity) of this is likely to escape the sister. But Jam contends that its equal sharing of the work assignments was not merely fair and balanced, but actually magnanimous, because all that the settlement agreement required it to do was add all of the discriminatees’ names to the list, but not to ever actually give any of them work, given that Emami didn’t know them and was more “comfortable” with the people he had hired after the mass termination. (Jam Br. at 41.) This view that the reinstated and replacement employees have equal claims to Jam’s work finds no support in the settlement agreement, which confers no rights whatsoever on the replacement employees while guaranteeing the reinstated employees full participation in the on-call list. If Jam offers its employees less than the fullest possible access to work assignments via the on-call list, then Jam has breached the terms of the settlement agreement.

But it has also thereby discriminated in violation of Sections 8(a)(3) and (4), because Jam admits it offered the reinstated employees not *full* participation in the on-call list, but slightly-better-than-half participation, because they were the reinstated employees, and

for no other reason—not because Emami was unfamiliar with them, or because Emami for some reason did not trust the credentials or experience of these long-tenured Riviera stagehands, or even because he was making work assignments at random. Jam, through Emami, deliberately sought to limit the reinstated employees’ participation in the on-call list to fifty percent. Prior to their discharge, the discriminatees received *all* work assignments at the Riviera. After reinstatement, they received about half of them. The only reason they receive fewer than they used to is that Emami was deliberately limiting their participation in the on-call list because of their status as members of the former “Shaw Crew” who had participated in the organizing drive, the Union’s unfair labor practice charge, and the settlement agreement.

Jam claims that it had hired new employees, making the pool of available employees larger, and that the fifty percent quota guaranteed minimum work opportunities among the larger pool rather than acting as a limit. But saying that Jam hired more employees and diluted the pool is just another way of saying that Jam limited the Shaw Crew’s work opportunities.⁵ The discriminatory treatment that the reinstated employees have suffered since their reinstatement is not that they are getting less work than someone else; it is that they are getting less work than they used to. Reduction of work opportunities is an adverse employment action within the meaning of Section 8(a)(3) and (4). *See, e.g., Station Casinos, LLC*, 358 NLRB 1556, 1558 (2012) (sending employee home early and denying her

⁵ The appearance of the replacement employees on the property is intimately intertwined with Jam’s entire course of conduct. The replacement employees work at Jam because Jam fired its entire crew when they sought representation. The General Counsel’s attempt to remedy that allegedly unlawful action through a settlement agreement cannot reasonably be read as creating employment rights for the replacement employees.

work opportunities for her union activity). The Union does not claim that the settlement guarantees the reinstated employees a certain amount of work—not only because it does not say this, but also because Jam schedules the number of concerts it is able to schedule and uses the number of stagehands it determines it needs to stage those concerts, and there are no guarantees that there will be any particular amount of work. But when there is work—and therefore when Jam is using its designated mechanism for assigning that work, the on-call list—the reinstated employees as a group should get that work—and therefore they should participate *fully* in the mechanism for assigning that work. The reinstated stagehands used to participate fully in this mechanism before being fired; now they do not. And the reason they do not is that Jam has deliberately segregated them into a group it identifies as the “Shaw Crew” and determined that they are, by virtue of their membership in that group, entitled to only half the work. By making the case about the replacement employees, and whether Jam is treating the replacements and the reinstated employees the same, Jam obscures the real issue, which is that it has unlawfully reduced the discriminatees’ work opportunities. With or without regard to the requirements of the settlement agreement, this conduct violates Sections 8(a)(3) and (4) of the Act.

29. *The General Counsel did carry his burden of proving discrimination, as set forth in response to exception 28 above.* The General Counsel was under no obligation to prove that the Shaw Crew was more qualified than the New Crew; such a requirement would buy into Jam’s erroneous theory that the case is about whether it has treated the reinstated stagehands fairly *as compared with the replacement employees*, instead of whether Jam had a discriminatory reason for reducing their work opportunities. Emami made plain that he

divided the crew into two groups—the so-called “Shaw Crew” and “New Crew”—and made work assignments based on their membership in one group or the other. If the Employer had devised a quota system, hiring 55% union members and 45% non-members, would plainly be violating Section 8(a)(3). Substituting “settlement agreement participants” or “employees engaging in protected activity” for “union members” does not change the analysis.

30-31. *As exception 30 does not specify which findings, conclusions, analyses, rationales, or recommendations of the ALJ Jam excepts to, the Union cannot respond. And the paragraph numbered 31 does not state an exception.*

CONCLUSION

While some of Jam’s exceptions have merit and others do not, Jam’s fundamental understanding of the case is wrong. Jam has indisputably reduced the work opportunities of the reinstated employees for no reason other than their being part of the “Shaw Crew,” which is defined as the group named as discriminatees in the settlement of case 13-CA-160319. Jam’s defense—that the settlement agreement permits this discrimination—fails, because the settlement agreement on its face requires what Jam by its discriminatory conduct failed to provide: full participation in the on-call list, and not using the employees’ terminations against them in any way. Because these requirements are clear, resort to the parties’ bargaining history is improper. But even if one does examine that history, it offers Jam no consolation. The parties’ negotiations reveal that they settled on compromise language, and each party thereby accepted the risk that, in the event of a dispute such as the present one, an interpreting body would take a contrary view of its

meaning. Nothing in the parties' negotiations suggests that they agreed that "full" should mean "partial" or that the agreement should confer unmentioned rights upon unnamed persons. On the contrary, the agreement's plain language and structure and the course of the parties' negotiations support the Region's view that, while the compromise language regarding the on-call list may not be as clear as what it first proposed, and while the Region may have backed off any intention to dictate *how* Jam gave out the work to the reinstated employees, the language nevertheless required that those employees get the work, *fully* participating in the on-call list without their terminations being used against them in any way. Jam breached the settlement agreement, and the agreement therefore affords Jam no defense to its unlawful discrimination. The Board should find that Jam violated the settlement agreement and that it unlawfully denied the reinstated employees in the "Shaw Crew" work opportunities in violation of Sections 8(a)(3) and (4) of the Act.

Respectfully submitted,

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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 Division of Judges via the Board's e-filing system, on July 24, 2017:

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