

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

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

and

13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION
LOCAL NO. 2, IATSE

COUNSEL FOR THE GENERAL COUNSEL'S
REPLY TO RESPONDENT'S ANSWERING BRIEF
TO THE GENERAL COUNSEL'S AND UNION'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted:

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INTRODUCTION

In its Answering Brief to the General Counsel's and the Union's Exceptions to the Decision of the Administrative Law Judge¹, Respondent JAM Productions, Ltd. and Events Productions, hereafter "Respondent" attributes straw man arguments to the General Counsel and mischaracterize his positions on the evidence. As it did before, Respondent places great emphasis on the negotiations prior to the settlement agreement in case 13-CA-160319, and claims that because no express seniority provision was included in the settlement, it is not required to offer the work to the Shaw Crew² first and restore the status quo as it was before the Respondent's illegal terminations on September 16, 2015. Respondent argues that there is nothing in the settlement agreement that obligates it to discharge the New Riviera Crew or give the Shaw Crew seniority over those employees.³ However, nothing in the Respondent's Brief demonstrates that the Shaw Crew is entitled to anything but the status quo they enjoyed before being terminated.

A. The Settlement Agreement Obligates Respondent to Restore the Status Quo for the Shaw Crew.

In its Answering Brief, Respondent claims that a court may not imply a term that was expressly rejected during the settlement negotiations and purposefully omitted from the final agreement. RAB Pg. 5. Respondent argues that when the Region dropped its demand that the language include that the Shaw Crew be reinstated with seniority and other rights and/or privileges previously enjoyed, the requirement that the status quo be reinstated simply evaporated. Respondent, like the Administrative Law Judge, completely ignores the fact that the

¹ Respondent's Answering Brief to the General Counsel's and the Union's Exceptions to the Decision of the Administrative Law Judge will hereafter be referred to as "RAB."

² The General Counsel does not seek the discharge of the New Riviera Crew as a remedy in this case.

³ Counsel for the General does agree with Respondent that the ALJ compounded the problem by ignoring the express wording and intent of the Settlement Agreement and Stipulation of Facts. However the Respondent's interpretation of the wording is simply incorrect.

settlement agreement negotiations are completely irrelevant to this discussion and therefore inadmissible as evidence. The parol evidence rule excludes extrinsic evidence offered to vary the terms of an unambiguous agreement. *Local Union No. 710*, 333 NLRB 1303, 1305 (2001). As Counsel for the General Counsel explained more fully in his Brief in Support of the Exceptions, and below, the phrase “immediate and full” is not ambiguous. Thus, any evidence offered by Respondent from the settlement negotiations to vary those terms should be excluded and not considered.

Respondent also cites several District Court and state court decisions in support for its argument that a rejected term cannot later be implied by a court into an agreement. RAB Pg. 6. *Lyncott Corp. v. Chem. Waste Mgmt., Inc.*, 690 F. Supp. 1409 (E.D. Pa. 1988)(company seeking to recover under Comprehensive Environmental Response, Compensation and Liability Act); *Rochliss v. Walt Disney Co.*, 19 Cal. App. 4th 201, 23 Cal Rptr. 2d 793 (1993)(breach of contract, fraud, defamation, and conspiracy case under California labor code); *Hutter v. Heilmann*, 252 Va. 227, 475 S.E. 2d 267 (1996)(shareholder suit against other shareholders), *Holbrook v. Lane*, 1994 WL 287430 (Tenn. Ct. App. 1994)(Court of Appeals of Tennessee case), among others. None of the cases cited by the Respondent in the first part of its argument section of the Answering Brief are interpreting the National Labor Relations Act. In fact, it’s unclear how these cases have any bearing on the instant case at all.

Respondent completely misses the point of Counsel for the General Counsel’s central argument in its Answering Brief. Counsel for the General Counsel’s position is not that the Board should imply a term that was expressly rejected. Instead, the Counsel for the General Counsel’s position is that the ALJ should have recognized a term that was already in the settlement agreement and had a well-established history in Board law. As explained in his

Exceptions to the Decision of the Administrative Law Judge and Brief in Support, the Board has utilized the phrase “immediate and full” for decades in remedying Section 8(a)(3) and (4) violations of the Act. The phrase “immediate and full participation” was agreed to by the Respondent in the settlement agreement. Counsel for the General Counsel is simply asking the Board to read and recognize an unambiguous phrase that is already contained in and was negotiated by the parties, including the Respondent, in the settlement.

Respondent’s implied term argument and citation to irrelevant District Court cases fails to address the Board’s history of consistently using the unambiguous phrase “immediate and full.” See *Security Plating, Co., Inc.*, 147 NLRB 877 (1964); *United Electric Co.*, 194 NLRB 665, 672 (1971)(ordering immediate and full reinstatement for two 8(a)(3) discharges); *South Shore Hospital*, 229 NLRB 363 (1977)(immediate and full reinstatement for two 8(a)(3) discharges)(reversing one discharge in *NLRB v. South Shore Hospital*, 571 F. 2d 677 (1978)); *Louis Ronca d/b/a Ronca’s Exxon Service*, 268 NLRB 1157 1984)(8(a)(4) allegations); *Residential Management, Inc.*, 311 NLRB 1174 (1993); *Park ‘N Go of Minnesota, LP*, 344 NLRB No. 152 (2005).

B. Respondent’s Argument Regarding a Remedial Order and a Settlement Agreement is a Distinction Without Significance.

Respondent argues that the General Counsel and Union have made an error in assuming that settlement agreements are created to restore the status quo. Respondent claims because there has been no trial, no finding of an unfair labor practice, and no remedial order issued by the Board, the settlement agreement cannot obligate it to restore the status quo. Respondent claims that the General Counsel’s and Union’s arguments are contrary to Section 10(c) of the National Labor Relations Act and undermine the strong policy in favor of voluntary settlement of unfair labor practice cases. RAB Pg. 9.

Respondent reliance on Section 10(c) is misleading and does not support its contentions. Section 10(c) presents the authority of the Board to issue its findings of fact and orders requiring that any person cease and desist from unfair labor practices. Respondent argues from this that absent a trial and the finding of an unfair labor practice, there can be no remedial order under 10(c). Respondent cites additionally to *United States v. Armour & Co.*, 402 U.S. 673 (1971), claiming that the General Counsel waived any factual and legal arguments that he might have otherwise made at trial, and gave up demands that were made and rejected earlier in the negotiations. RAB Pg. 10.

While Section 10(c) does provide for remedial orders, pre-trial settlement agreements clearly provide for remedies to unfair labor practices as well. Nothing about Section 10(c) negates this fact. Logically if settlement agreements did not provide remedies for unfair labor practices of employer, there would be no point in the agreements to begin with. Respondent's reliance on *Armour, id.*, is also misplaced. Again, *Armour* has nothing to do with the National Labor Relations Act. In that case, the Supreme Court examined whether the Meat Packers Consent Decree of 1920, which prohibits Armour & Co. from dealing either directly or indirectly in certain specified commodities, prevents a corporation which deals in certain of those commodities, from acquiring a controlling interest in Armour & Co. *Id* at 673. It is difficult to see what connection, if any, this case has with the National Labor Relations Act and the facts of this case. *Armour* was not even a labor law case.

Respondent then argues if settlements were to restore the status quo ante, this would discourage settlements. Relying on the Board's well-established practice of encouraging settlements of unfair labor practices, Respondent apparently believes that restoring the status quo ante can only be accomplished by a remedial order after a trial. According to Respondent, the

purposes of settlement are defeated if the General Counsel is allowed to “modify” a pre-trial settlement agreement to include status quo provisions. However, as explained more fully above, Counsel for the General Counsel is not requesting the Board to modify or interpret an existing provision in the settlement agreement. The General Counsel seeks to hold Respondent responsible to a well-established and unambiguous term that is on the face of the agreement.

C. The Cases Cited by the General Counsel are Relevant to the Unambiguous Terms of the Settlement Agreement.

Respondent criticizes the cases cited by Counsel for the General Counsel in his Exceptions and Brief in Support. Respondent argues that because the cases cited did not involve pre-trial settlement agreements and instead were remedial orders after a finding of an unfair labor practice, they have no bearing on the instant case. Respondent places some emphasis on the fact that the cited cases used the language “immediate and full reinstatement” instead of “immediate and full participation in the on-call list” as in the settlement agreement. Similarly, Respondent claims that Counsel for the General Counsel’s analogy to cases involving exclusive hiring hall provisions are not applicable to the case.

Respondent’s arguments regarding the cases cited by the Counsel for the General Counsel again miss the point of the arguments advanced by the General Counsel. Notwithstanding that few Board cases deal with unusual pre-trial settlement agreements like the one in case 13-CA-160319, the phrase “immediate and full” has decades of Board jurisprudence interpreting its meaning. The substitution of “participation” for “reinstatement” is an insignificant distinction. As the case cited by Counsel for the General Counsel demonstrate, there is no reason to interpret “immediate and full” in any way other than it has been used by the Board in the past. Respondent seeks to compound the errors made by the ALJ in this case and read the language in a vacuum. Additionally, Counsel for the General Counsel analogizes to

exclusive hiring hall cases because like the facts in those cases, the employer here had a history of using certain employees, i.e. the Shaw Crew, exclusively. For example, in *Wise Alloys, LLC*, 343 NLRB 463 (2004), the Board ordered the employer to “restore its past practice of *exclusively* using the Union hiring hall to select employees....” *Id.* The Board recognized that had it not been for the employer’s unlawful conduct, the employees would have been hired. Here, had Respondent not unlawfully terminated the Shaw Crew, it would have continued to call them first for work. Counsel for the General Counsel is obviously not suggesting a literal exclusive hiring hall remedy in this case and is instead asking that Respondent be required to restore its work assignment practice that it had before terminated the Shaw Crew.

D. Respondent’s Method of Offering Work to the Shaw Crew Was Inherently Destructive of their Section 7 Rights.

Respondent argues that it is disingenuous for the General Counsel to settle upon terms that purposefully do not require exclusivity or seniority and then argue that the absence of such obligations are “inherently destructive” of Section 7 rights. RAB Pg. 16. Respondent mischaracterizes the General Counsel’s arguments. Respondent signed the settlement agreement on March 28, 2016. On that same day, Respondent’s agent, Behrad Emami began offering and assigning work to the Shaw Crew. The unfair labor practice charge in 13-CA-177838 was filed by the union on June 7, 2016. Stipulation of Facts, Pg. 6. Emami gave a description of the way he contacted and offered work to the Shaw Crew in his affidavit dated September 28, 2016. Thus, Counsel for the General Counsel is not arguing that the absence of exclusivity or seniority language in the settlement agreement is inherently destructive. Emami’s method of offering work, which the Region learned of and investigated later, is inherently destructive. Emami could have chosen a method which was not inherently destructive, such as, calling the Shaw Crew first, but instead chose a discriminatory method.

Respondent claims that its compliance with the settlement agreement is a defense to any claim of a violation of Section 7 rights and relies primarily on *United States Gypsum*, 284 NLRB 4, 10 (1987). RAB Pg. 17. In *United States Gypsum* the Board adopted the judge's reinstatement of a settlement agreement for several unfair labor practice cases after the General Counsel acted improperly in revoking the settlement and abused his discretion. *Id.* at 4. Respondent in the instant case claims that like the General Counsel in *United States Gypsum*, the General Counsel now is attempting to abrogate the settlement agreement and "wrongfully compel[ed] Respondent[s] to pursue protracted and expensive litigation that, by entering the settlement, it sought to avoid." RAB Pg. 4.

The facts of the instant case are nothing like those in *United States Gypsum*. First and foremost, the Regional Director has not revoked the settlement agreement in 13-CA-160319 and does not seek to do so. Secondly, as the administrative law judge noted in his decision, "it is well-established that an unfair labor practice will not be found based on presettlement conduct unless there has been a failure to comply with the settlement agreement, or subsequent unfair labor practices have been committed." *Id.* at 12 (citing *Interstate Paper Supply Co.*, 251 NLRB 1423 fn. 8 (1980)) In the instant case, Respondent has failed to comply with the settlement agreement and subsequent unfair labor practices were committed by Behrad Emami when he began calling the Shaw Crew and offering them work. Emami's inherently destructive method of offering work to the Shaw Crew continued up to the present day. Thus, the facts in *United States Gypsum* are completely distinguishable.

CONCLUSION

For the reasons stated above, the Board should overrule the ALJ's rulings, findings and conclusions, based on the Exceptions and Brief in Support filed by the Counsel for the General

Counsel. Counsel for the General Counsel also requests the Board decide the merits of Case 13-CA-177838 based on the Joint Stipulation of Facts and Exhibits and legal arguments presented by the parties.

DATED this 3rd day of August, 2017.

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CERTIFICATE OF SERVICE
13-CA-177838

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Reply to Respondent's Answering Brief to the General Counsel's and Union's Exceptions to the Decision of the Administrative Law Judge have been e-filed with the Office of the Executive Secretary of the National Labor Relations Board and served this 3rd day of August, 2017, in the manner indicated, upon the following parties of record.

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