

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

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JAM PRODUCTIONS, LTD. and EVENT  
PRODUCTIONS, INC.

and

Case No. 13-CA-177838

THEATRICAL STAGE EMPLOYEES UNION  
LOCAL NO. 2, IATSE

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**RESPONDENTS' REPLY TO THE UNION'S RESPONSE BRIEF**

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The Union, which objected to the settlement and is not a party to the settlement, has filed a response brief that relies on a recently-adopted interpretation of the settlement that 1) does not comport with the plain meaning of the operative term “full participation in the on-call list...without discrimination”; 2) is repudiated by specific, stipulated evidence confirming the parties’ intent that the Shaw Crew would be given no seniority or preferences over the New Crew; and 3) is contradicted by the Union’s objections to and refusal to sign the settlement agreement because it did not give the Shaw Crew seniority and did not require the discharge of the New Crew.<sup>1</sup>

**1. The Union’s Interpretation Is Unreasonable and Does Not Comport with the Plain Meaning.**

The upshot of the Union’s post-settlement interpretation of the term “full participation in the on-call list...without discrimination” is that the individuals listed in the Settlement Agreement (the “Shaw Crew”) would get all of the work assignments and the New Crew would be displaced. According to the Union, the term *full* (italicized throughout the Union’s brief) exclusively limits participation in the on-call list to the Shaw Crew or gives them seniority over the New Crew. But there are blatant problems with that interpretation. As an initial matter, if the parties to the Settlement Agreement, *i.e.*, Jam and the Region (not the Union), intended that only the Shaw Crew would be allowed to participate in the on-call list or that the Shaw Crew would be given seniority over the New Crew, they would have said so in the Settlement Agreement. But, as the Union well knows, that it not what happened.

To the contrary, the Region proposed that the Shaw Crew be reinstated with seniority and other preferences over the New Crew; Jam rejected such terms; and the parties purposefully omitted any such reinstatement and seniority requirements. (Stipulation of Facts (“Stip.”) 15-18

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<sup>1</sup> All parties reject the ALJ’s finding of no meeting of the minds and agree this is a conventional case of contract interpretation.

& JX 7-15.) In the Settlement Agreement, the parties agreed only that Jam would:

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 is nothing in the Settlement Agreement that even arguably requires 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.

Moreover, the Union's central argument, that the term "full" does not mean "partial" or "half" (Union Response pp. 3, 14, 28), is fallacious because normal rules of grammar and contract construction require that the term *full* be considered in context and in light of the term *participation*. *Elkhart Lake's R. Am., Inc. v. Chicago Historic Races, Ltd.*, 158 F.3d 970, 973 (7<sup>th</sup> Cir. 1998) (defendant's interpretation "has no support in the plain language of the paragraph"). The Merriam-Webster dictionary defines participation as "*the state of being related to a larger whole.*" (<http://www.merriam-webster.com/dictionary/participation.>). The Merriam-Webster dictionary for English Language Learners 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>) (emphasis added.) (See Jam's Answering Brief, p. 8, n. 4.) Read in context, as it must be, the phrase "full participation in the on-call list" can only mean that the Shaw Crew must be allowed to *fully* take part *with others* or *fully* share in the on-call list *with others, i.e.,* the New Crew. *Full participation* in the on-call list requires only that that the Shaw Crew be allowed to *participate* in the on-call list and receive offers for work assignments in the same way and manner as the other participants in the on-call list, *i.e.,* the New Crew—which is exactly what happened.

Nor does the Union address the significance of the "without discrimination" clause in the relevant paragraph. The Settlement Agreement requires that the Shaw Crew be allowed to fully participate in the on-call list "without discrimination because of their union membership or support

for the union.” Plainly, if the Shaw Crew were the *only* stagehands allowed to participate in the on-call list, there would have been no reason to include the “without discrimination” qualification. The “without discrimination” qualification would be superfluous because, as the Union has argued, the Shaw Crew were the alleged discriminatees. Contract interpretation should give effect to all language without rendering any term useless or superfluous. *Id.* at 973; *Cole v. Milwaukee Area Tech. Coll. Dist.*, 634 F.3d 901, 905 (7<sup>th</sup> Cir. 2011). And, the additional qualification that Jam “offer them work in a non-discriminatory manner” would likewise have been superfluous. If the Shaw Crew were the *only* stagehands allowed to participate in the on-call list there would be no reason to require that the Shaw Crew be offered work in a non-discriminatory manner. Under the Union’s “interpretation,” there would be nobody else to consider for work assignments.

The Union’s also contends that the boilerplate in the Backpay section of the Settlement Agreement (JX 5, p. 1) stating that Jam “will make whole the employees named in Attachment A *by payment* to each of them of the amount opposite each name” (emphasis added) somehow means that Jam agreed to a make whole reinstatement remedy. (Union Response, p. 21.) But, the only “make whole” reference is expressly limited to back pay;<sup>2</sup> other aspects of make whole relief that the General Counsel had proposed, including reinstatement, seniority and other rights and privileges, and no non-admission clause were rejected and were purposefully omitted from the final agreement. (Stip. 17-18.) In any event, it is well established that “if a specific provision appl[ies] to the subject at hand, [in this case, the full participation paragraph] the specific provision controls.” *Young v. Verizon’s Bell Atl. Cash Balance Plan*, 615 F. 3d 808, 823 (7<sup>th</sup> Cir. 2010). The Union knew the Settlement Agreement did not provide make whole relief to the Shaw Crew: that’s

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<sup>2</sup> In contrast to the extensive negotiation culminating in the final version of the full participation paragraph, there is no evidence in the record of any negotiation over the specific back pay amount or allocation of back-pay because there was none. Rather, early in the negotiation Jam furnished the Region a “not to exceed amount” and the Region calculated the amounts owed. (JX 12, point 1.)

why the Union refused to sign it. (Stip. 20, 22; JX 20.)

The Union's post-settlement interpretation of the full participation term distorts the plain language. Under the plain language, Jam "will offer" the listed individuals "full participation in the on-call list...without discrimination...and offer them work in a non-discriminatory manner." There is nothing ambiguous about this operative term and there is no basis to imply any exclusivity or seniority for the Shaw Crew. There is nothing in the Settlement Agreement that can reasonably be read to require that the Shaw Crew have exclusivity or seniority in receiving offers for work assignments from the on-call list. And the Stipulated Facts confirm that the parties purposefully omitted giving the Shaw Crew any seniority or other preferences over New Crew. (Stip. 17-18.)

**2. The Union's Interpretation Is Repudiated by Specific, Objective Extrinsic Evidence.**

The Union does not take a clear position on whether it was appropriate for the ALJ to consider extrinsic evidence. However, *if* the relevant paragraph of the Settlement Agreement is susceptible to more than one *reasonable* interpretation, then extrinsic evidence should be considered. The Stipulated Record contains "specific, objective evidence" (*Green v. UPS Health and Welfare Package for Retired Employees*, 595 F.3d 734, 739 (7<sup>th</sup> Cir. 2010)), that repudiates the Union's interpretation, including bargaining proposals, statements made in conjunction with bargaining proposals, the Union's refusal to assent to the settlement, and the manifestation of the signatories' mutual understanding.

a. As the Stipulated Facts show, Jam rejected all proposals from the Region that would restore the status quo or give the Shaw Crew priority over the New Crew. (Stip. 15-18 & JX 7-15) Initially, the Region sought language that would reinstate the Shaw Crew to their former jobs. Three times the Region transmitted proposals that Jam rejected stating that the Shaw Crew be offered "*immediate and full reinstatement to their former jobs* and restore their names to the work assignment roster in accordance with seniority, or if those jobs no longer exist, to

substantially equivalent positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.” (JX 7-9). Reinstatement, as the Union notes in its brief (p. 9), is a term of art that restores the status quo by putting the discharged employee back to where he or she was before the discharge. In this case, reinstatement of the Shaw Crew would mean that the Shaw Crew gets all work assignments as in the past. Furthermore, the Region’s “reinstatement to their former jobs” proposal did not include either the “without discrimination” term or the “offer them work in a nondiscriminatory manner” term included with the “full participation to the on-call list” phrase agreed to by the parties. This shows that the parties knew the distinction between a reinstatement remedy and a full participation remedy. Both ‘no discrimination’ terms were unnecessary if the Shaw Crew was reinstated because nobody except the Shaw Crew would be offered work assignments.

Jam rejected and the Region dropped its “reinstatement to their former jobs” proposal. Jam proposed “full participation in the on-call list” but the Region wanted “without prejudice to their seniority, rights and/or privileges previously enjoyed” (Stip. 17; JX 10, 11, 12, 13, 14). In response to the Region’s “without prejudice to their seniority, rights, and/or privileges previously enjoyed” proposal, Jam expressly told the Region’s attorneys that it would not agree to either discharge the New Crew or give the Shaw Crew any seniority or other preference over the New Crew, as the parties have stipulated:

Respondents repeatedly rejected Region 13’s proposal that the Shaw Crew be reinstated with “seniority or any other rights and/or privileges previously enjoyed.” (Joint Exhibits 10, 13, 14.) Respondents’ counsel explained to the attorneys for the Region who negotiated the Settlement Agreement *that Respondents objected to discharging the New Crew or to giving the Shaw Crew any seniority or preferential treatment over the New Riviera Crew.*

(Stip. 17.) The Region’s seniority demand was the sole remaining impediment to settlement at that point. When the Region dropped its “without prejudice to their seniority, rights, and/or privileges previously enjoyed proposal” the parties had a settlement. (JX 15, 16).

The Union speculates as to why the Region dropped its reinstatement demand and its seniority demand. (Union Response, pp. 3-4, 6, 15, 17). But none of the Union's speculation explains the absurdity of its position that the bargaining history – and Jam's explicit and repeated rejection of the terms that the Union now seeks to imply – proves nothing. Under the Union's post-settlement interpretation of "full participation in the on-call list" the Shaw Crew would get all of the work – so, according to the Union, all of the back and forth negotiation and compromise over three and one half months (Stip. 15-18) changed nothing. According to the Union, the Region and Jam ended-up in the exact same place they would have been if Jam had simply accepted the Region's initial "immediate and full reinstatement to their former jobs" proposal. According to the Union, the Region and Jam ended-up in the exact same place they would have been if Jam had agreed to the Region's "without prejudice to their seniority or other rights and/or privileges previously enjoyed" proposal. According to the Union, the Region's agreement to drop these demands in the face of Jam's insistence that it would not discharge the New Crew or give the Shaw seniority or preference over the New Crew (Stip. 17) changed nothing in the agreement. With or without these terms, the Union contends that (contrary to the parties' explicit intent) the Settlement Agreement should be "interpreted" to require that the Shaw Crew would have exclusivity or seniority in receiving offers for work assignments from the on-call list. The Union's interpretation cannot be reconciled with the bargaining history—or the plain language of the Settlement Agreement, which contain no such exclusivity or seniority terms.

b. As the Stipulated Facts shows, the Union also cannot reconcile its newly-adopted interpretation with its specific objections to the settlement, a fact that the Union never coherently explains. The Union claims that its "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..." (Union Response, pp. 19-20). But that explanation

does not square with the actual objections. If as the Union claims “full participation in the on-call list” means the Shaw Crew gets all of the work, then why did the Union object to: a) the absence of language stating that the terminations would not be used against the Shaw Crew in “the assignment of work opportunities.” (Stip. 20; JX 20, objection 4); b) the failure to include language stating “without prejudice to their seniority and whatever rights and/or privileges they previously enjoyed” (Stip. 20; JX 20, objection 3); and c) the inclusion of a non-admission clause that the Union said would allow the replacements to vote (Stip. 20; JX 20, objection 1). Each of these objections showed that the Union understood that under the Settlement Agreement the New Crew would remain on the on-call list and continue to be offered work assignments in the same way and manner as the Shaw Crew, and that the Shaw Crew would have no seniority or other preference over the New Crew. The Union’s specific objections along with its refusal to sign the settlement show that the Union understood the Settlement Agreement was not intended to and did not restore the status quo.

c. The interpretation of the settlement by the signatories (Jam and the General Counsel), as exhibited by their course of conduct following the settlement, further undermines the Union’s interpretation. When considering extrinsic evidence, the parties “course of performance” is, after the parties’ bargaining history, the most important factor. *Elda Arnhold & Byzantio, LLC v. Ocean Atl, Woodland Corp.*, 284 F.3d 693, 701 (7<sup>th</sup> Cir. 2002). Jam’s interpretation is shown in the contemporaneous memo dated March 28, 2016, sent by Jam’s President, Jerry Mickelson, to Behrad Emami, notifying Emami of the settlement and giving him instructions to be fair to the Shaw Crew:

... As part of that settlement, the companies have agreed that, effective now, you, as the person who hires stagehands for the Riv (and anyone else who performs that function) will offer Jolly Roger’s [Shaw] former crew (names are listed below) “immediate and full participation in the on-call list for work of the type they performed at the Riviera Theatre from October 4, 2014 to September 21, 2015 ... without discrimination because of their union membership or support for the Union, and offer them work in a non-discriminatory manner.”

To be clear, you may hire whomever you think is best and appropriate for jobs. But union support or membership, or lack of support or membership in the union, may not play *any* role – NONE – in the hiring decisions you make. *And*, you have to give fair consideration to Jolly’s former crew. *No doubt, you have people whom you’re now using whom you know and trust. But in order to be fair to Jolly’s former crew, I want you to make sure that you give people a chance* – especially people who were most active in working Riv shows before September 21, 2015. You must make sure that you *continue* to hire stagehands in a completely non-discriminatory manner.

(Stip. 19; JX 19.) Thus, in addition to the “people whom you’re now using,” *i.e.*, the New Crew, Jam directed Emami to offer the Shaw Crew “immediate and full participation in the on-call list...without discrimination...and offer them work in a nondiscriminatory manner.” He was instructed to “give fair consideration” to the Shaw Crew, “to make sure you gave people a chance” (especially the “most active” members of Shaw’s Crew who were listed by name), and to “make sure you continue to hire stagehands in a nondiscriminatory manner.” To carry out these instructions, Emami’s affidavit, logs, and time sheets show he tried to assign work evenly among the two crews (though he actually made more offers of work to the Shaw Crew). (Stip. 41-45, JX 19, 24, 27, 28.)

On June 7, 2016, the Union challenged Jam’s interpretation by filing an unfair labor practice charge alleging that “since at least the approval of the settlement agreement...the above-named employer has been failing and refusing to offer the employees named as discriminatees in the complaint and settlement agreement in that case full participation in the on-call list for work assignments...because of their engagement in protected activity...[and] in violation of the terms of the settlement agreement.” (Stip. 38). The Region’s interpretation of the agreement is manifested by its dismissal of the Union’s unfair labor practice charge. The Region determined that Jam’s implementation of the settlement was not discriminatory or a violation of the agreement. On July 13, 2016, the Region notified the Union that it had “carefully investigated and considered your charge” and was dismissing it:

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, 27, 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.*)

The Union does not address the significance of the dismissal. This interpretation by the Regional Director, which is closest in time to the making of the agreement by the Regional Director, is entitled to significant weight. That the Regional Director later reversed course based upon the Union's appeal (JX 30) does not change the fact that the Regional Director necessarily interpreted the Settlement Agreement the same way that Jam did (and the way it was implemented) at the time that was closest to the making of the agreement. Thus, the Union's claim that there is no evidence "the Region could ever have had any idea ... that Jam subscribed to [its] tortured interpretation of the language" (Union Response, p. 5) is contradicted by the Regional Director's determination that the evidence was "insufficient" to show Jam violated the Settlement Agreement by failing to offer the Shaw Crew "full participation in the on-call list for work assignments."

The Union's repeated speculation about how the Region "presumably" viewed the agreement is irrelevant. The "primary objective in construing a contract is to give effect to the intention of the parties." 284 F.3d at 701 *quoting Arrow Master Inc. v. Unique Forming Ltd.*, 12 F.3d 709, 715 (7<sup>th</sup> Cir. 1993). The Union is not a party to the agreement, and the General Counsel

did not file an answer brief disputing Jam’s exceptions brief and its facts showing that the General Counsel gave up claims to certain relief in order to get a settlement.

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Jam and the Region voluntarily settled a disputed claim. The settlement was a compromise. Jam honored the settlement by paying the required back pay and offering the Shaw Crew “full participation in the on-call list...without discrimination.” Both the plain language of the Settlement Agreement and the specific, objective extrinsic evidence show that the Region was not successful in obtaining preferential treatment for the Shaw Crew – indeed, the Region dropped its reinstatement, and its seniority and rights and/or privileges demands, to obtain a settlement. And the Union showed its real understanding of the settlement a long time ago. The Union objected to the Settlement Agreement because it understood the New Crew would continue to work and the Shaw Crew would not be conferred seniority and other rights and/or privileges previously enjoyed. The only reason this case was brought is because the Regional Director apparently now regrets settling without giving the Shaw Crew reinstatement rights or seniority and other rights and/or privileges that would give them preference over the New Crew in the assignment of work.

To prove discrimination, the Union must show the Shaw Crew was treated less favorably than the New Crew. *See Carson and Paulsin v. Lake County, Indiana*, F.3d, 2017 WL 3160702 \* 7 (7<sup>th</sup> Cir. 2017) (to establish a prima facie case “Plaintiffs must show they were treated less favorably than similarly situated employees outside their protected class”). The Union has not done so. The parties do not dispute that Emami has been even-handed in offering work assignments, and there is no evidence Emami has discriminated against or used the termination of the Shaw Crew members against them in any way – the records show that Emami has actually made more offers to work to the Shaw Crew than the New Crew. This case should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, being duly sworn, state that on August 3, 2017, I had served the **Respondents' Reply to the Union's Response Brief** upon the following:

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