UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Jam Productions, Ltd. and Event Productions, Inc., a single employer, Respondent, and Theatrical Stage Employees Union, Local 2, I.A.T.S.E., Charging Party.	Case No. 13-CA-177838 Judge Rosas

CHARGING PARTY'S REPLY IN SUPPORT OF ITS EXCEPTIONS

Jam continues to stake its case entirely on one argument: that evidence of the parties' negotiations compels the conclusion that the only possible meaning of "full participation in the on-call list" is that Jam could limit the discriminatees' receipt of jobs assigned via the on-call list to about fifty percent. Jam ignores, and effectively concedes, the parties' arguments that, but for the settlement, Jam's quota system limiting the Shaw Crew to half participation in the on-call list was *per se* discriminatory and inherently destructive of their Section 7 rights. Jam also failed to respond to the Union's contention that, assuming *arguendo* that the settlement agreement must be rescinded for a failure of the meeting of the minds, that would simply eliminate Jam's defense[1] to its Section 8(a)(3) and (4) violations. But since Jam has staked its case on the argument that the settlement agreement justified its actions, that argument also constitutes the bulk of the Union's reply below.

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[1] Contrary to Jam, the Union nowhere acknowledged in its brief that "compliance with a Settlement Agreement approved by the Regional Director is a defense to a claim of violation of Section 7 rights." (Jam Resp. at 17.) The Union simply noted that Jam had *asserted* the settlement as a defense to liability. (U. Br. at 13.) Jam's tendency to read more into the parties' words than they actually say explains, perhaps, how it could have concluded that the parties agreed to "partial participation in the on-call list" for the reinstated employees and substantive rights for the replacement employees, despite that not being what the settlement says.

I. Jam continues to ignore the plain meaning of the settlement's words.

The agreement's plain meaning must be the Board's starting point; its clear and unambiguous language is the only proper indicator of the parties' intent. Yet Jam relegates its examination of the disputed phrase "full participation in the on-call list" to a footnote, where it claims that the Union has "deliberately distorted" the word "full" to mean exclusive, and that Merriam-Webster defines "participate" for "English language learners" as taking part in an activity *with others*, concluding that "full participation" "cannot even arguably mean that the on-call list would be exclusively limited to the Shaw Crew or that the Shaw Crew would be offered all of the work assignments to the exclusion of the New Crew." (Jam Resp. at 8 n.4, emphasis added.)

Jam is arguing against a straw man. The Union has no more argued that the settlement excluded the New Crew than it has agreed with Jam that it reserved space for them. "Full" means not exclusive, but "containing as much or as many as is possible or normal <a bin ~ of corn>"; "complete esp. in detail, number, or duration <a ~ report> <gone a ~ hour> <my ~ share>"; "lacking restraint, check, or qualification <~ retreat> <~ support>"; "enjoying all authorized rights and privileges <~ member>." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 505-06 (11th ed. 2004). "FULL implies the presence or inclusion of everything that is wanted or required by something or that can be held, contained, or attained by it <a *full* schedule>." *Id.* at 506. To participate is "to take part" or "to have a part or share in something." *Id.* at 903. "Full participation" in the on-call list, then, means to take part in the list completely, as much as is possible, without check or qualification; to have as complete or unqualified a part or share in the list as possible. This does not imply

that nobody else can ever have a share, but it does mean that the Shaw Crew must be given the fullest possible opportunity to access this sole source of work.

Jam does not even attempt to explain what it thinks the word "full" means, let alone how it could mean "half" or "partial." "Half" and "partial" are *antonyms* of "full," not synonyms. MERRIAM-WEBSTER'S ONLINE THESAURUS, "full," https://www.merriam-webster.com/thesaurus/full (last visited Aug. 2, 2017). It is only by ignoring its actual text that Jam could read the agreement as requiring that "the Shaw Crew participate *with the New Crew* in the on-call list and share in the work assignments being offered."[2] (Jam Br. at 8 n.4.) The Board must reject Jam's attempt to read the plain language of the agreement to mean the opposite of what it says.

II. The settlement should be interpreted consistent with the Act's purposes.

Jam's response to the Union's and General Counsel's arguments that the settlement should be interpreted consistently with the broader purposes and policies of the Act attacks more straw men. The first is Jam's claim that the Union argued that an obligation to give the Shaw Crew "preferential treatment" over the New Crew "should be implied as a matter of board policy or remedial precedent." Actually, the Union argued that, if one concluded that the agreement were ambiguous, one important determinant of the Region's intent is its statutory charge to effectuate the Act. Jam argues, from cases involving consent decrees entered into by other agencies, that a consent decree "cannot be said to have a purpose" but rather reflects "as much of [the parties'] opposing purposes as the

[2] This formulation does acknowledge that Jam recognizes that "participating in" the on-call list means more than simply having one's name placed on the list, without regard to whether one is ever offered work; it means actually receiving a share of the work assignments.

respective parties have the bargaining power and skill to achieve."[3] *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971) (cited in Jam Br. at 3-4). But where a court "cannot resolve [an] ambiguity on the basis of the decree's language alone, we 'look at the evil which the decree was designed to rectify.'" *Goluba v. Sch. Dist.*, 45 F.3d 1035, 1038 (7th Cir. 1995) (quoting *Armour,* 402 U.S. at 686). This is not because an agency's mission is automatically ensconced in every settlement it signs; rather, the "evil which the decree was designed to rectify" provides context in interpreting an ambiguous term. *Id.* In the present case, the "evil which the decree was designed to rectify" was the mass termination of an entire unit of employees seeking representation. Given the General Counsel's statutory mission to protect employees' Section 7 rights, it is reasonable to view the requirement that Jam offer those fired employees "immediate and full participation in the on-call list" to be intended to have actually put them back in their old jobs, rather than just to have put their names on a list from which Jam may or may not call them.

The next straw man is Jam's assertion that the Union and General Counsel argued that the settlement agreement is a "remedial order under 10(c)." (Jam Br. at 10.) Nobody has argued that it is somehow impossible for the Region to settle for anything short of a full make-whole remedy. The Union's point is that the settlement *in this case*, by its terms, restored the discriminatees to the position they occupied previously: that of full participation in the on-call list, the sole mechanism by which they ever received work.

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[3] This observation does not change the fact that, when the language of a consent decree is "clear on its face, it is neither necessary nor appropriate to consider the defendants' extrinsic evidence, including affidavits from the settling defendants' lawyer about what he really meant in approving the language." *Rumpke of Ind. v. Cummins Engine Co.*, 107 F.3d 1235, 1243 (7th Cir. 1997).

Finally, Jam asserts that both it and the General Counsel settled the case "in order to avoid the cost, burden and risk of trial," and therefore the General Counsel must have meant to settle for less than it sought at trial. (Jam Resp. at 15.) Jam is speculating. The stipulated record contains no evidence as to any party's motivations. For all the record reveals, Jam may have capitulated because it knew it had a terrible case and was wasting money fighting a losing battle.[4] There is no place for such speculation in interpreting the agreement; "full participation in the on-call list" on its face means that Jam was required to offer work to the reinstated stagehands to the greatest extent possible. It has undisputedly failed to do so, and Jam's defense that it was just following the settlement does not insulate it from liability for violating Sections 8(a)(3) and (4) of the Act.

III. The stipulated record does not support the extravagant conclusions Jam draws from the parties' bargaining history.

Jam continues to flog the argument that the parties' bargaining history conclusively proves that the settlement cannot mean what it says. But it relies on a number of faulty premises: (1) the Region made "repeated demands" that the settlement require "participation in the on-call list … without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any," (Jam Resp. at 6); (2) Jam "expressly rejected those demands and made clear it would not settle if the Shaw Crew was reinstated with seniority or any special rights," (*Id.*); (3) the parties "purposefully omitted these terms from the Settlement Agreement," (*Id.*); and (4) the Union "vociferously objected to the settlement" because "the General Counsel agreed that the Settlement Agreement would not

[4] The Board must reject as wholly unsupported in the stipulated record Jam's baseless speculation that it "would have presented evidence that the Shaw Crew was discharged for cause, and the decision-maker … did not even know of any organizing activity." (Jam Resp. at 15.)

require seniority for the Shaw Crew or the displacement of the New Crew," (Jam Resp. at 14); therefore the agreement contains no "seniority or special privileges" for the "Shaw Crew." Each of these premises is wrong, or at best misleading, as discussed in turn below.

(1) *The Region made "repeated demands" that the agreement provide for "participation in the on-call list … without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any."* This language was in the Region's initial proposal, (Stip. ¶ 16), and remained there until the Region ultimately agreed to omit it. (Stip. ¶ 18.) To say that the Region was "demanding" this language, in the sense of strongly and insistently calling for it, is unsupported by the record, which contains no evidence as to what importance the Region attached to it or even what the Region thought it meant. The record does not support the conclusion that the Region abandoned the requirement that Jam give the fired stagehands their old jobs back when it dropped these words from the agreement.

(2) *Jam "expressly rejected those demands and made clear it would not settle if the Shaw Crew was reinstated with seniority or any special rights."* Actually, there is no evidence in the record that Jam even suggested, let alone "made clear," that it "would not settle if the Shaw Crew was reinstated with seniority or any special rights." The parties stipulated merely that "Respondents' counsel explained to the attorneys for the Region who negotiated the Settlement Agreement that Respondents 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), without stating when in the process Jam raised this "objection," what the Region's response was, or what ultimatums Jam issued over this "objection"—or, for that matter, what concessions or disclaimers it made. No evidence supports Jam's claim that the "General Counsel and the Union knew before the settlement

was executed that Jam would continue to employ the New Crew and would not provide seniority or other preferences to the Shaw Crew." (Jam Resp. at 17.) Jam cannot establish that the final language represented the Region's acquiescence in its "objection."

At the same time, Jam raised other objections it has since dropped, explaining to the Region that referring to seniority "creates rights that do not exist" because Jam's "crew chiefs have absolute and unrestricted authority to offer stagehands work. *JAM is not involved.*" (Jt. Ex. 14 at 1, emphasis added.) Given that the Region never acquiesced in, and Jam has now dropped, *this* objection to the "seniority" language, one cannot connect the dots from a party having voiced an objection during the course of their back-and-forth over settlement and the parties' mutual intent in reaching the final compromise language.

(3) *The parties "purposefully omitted these terms from the Settlement Agreement."* To be sure, omitting the words "without prejudice to their seniority or any other rights and/or privileges previously enjoyed, if any" from the final settlement agreement was presumably "deliberate" in that it was not a mistake or an accident. But the record is silent as to *why* the Region agreed to this language. Jam claims the Region must have agreed that it could continue using the replacement employees; but it is equally plausible that it concluded that, because Jam's "objections" were baseless, the Region could agree to compromise language that meant the same thing as its initial proposal, even if doing so also gave Jam room to make interpretive arguments the Region believed it could win. That is precisely the gamble that parties routinely make when negotiating contracts, and the bargaining history is perfectly consistent with the Region having made just such a gamble. *Colfax Envelope Corp. v. Local No. 458-3M Chicago Graphic Commc'ns Int'l Union*, AFL-CIO, 20 F.3d 750, 753 (7th Cir. 1994). The bargaining history, in short, does not support Jam's

interpretation of the language, and it does not serve to resolve any ambiguity in the words "full participation in the on-call list."

But again, it is with these words—"full participation in the on-call list"—that the Board must begin, which is why Jam's turn to bargaining history in the first place is improper. Jam cites to cases for the proposition that a term explicitly rejected and purposely omitted from a settlement cannot later be deemed an implied term of the agreement. (Jam Resp. at 6-7.) But in these cases a party was attempting to *imply* a rejected term, such as an indemnity clause, that the final agreement plainly did not contain. In the present case the Union's position is not that the agreement contains an "implied seniority requirement"; the agreement does not mention seniority. The reinstated employees must displace their replacements not because they are more senior, but because Jam agreed to give them full participation in the only mechanism by which it assigns work, without using their prior terminations against them in any way. This language cannot reasonably be read to permit Jam's limiting those employees to half the available work.

Finally, the Region proposed participation "without prejudice to [the employees'] seniority or any other rights and/or privileges *previously enjoyed*, if any." (Stip. ¶ 16, emphasis added.) The seniority or other rights "previously enjoyed" were, by definition, not the right to receive work ahead of other employees, because there were no other employees. Whatever their seniority rights were *before their termination*, the language referring to those rights necessarily was not aimed at giving them priority over anyone else. Shaw had contacted employees for work in seniority order; this was arguably the right the Region initially sought to protect. The Region's dropping of that language, then, is nothing more than the Region declining to take a position as to whether Jam's new stage manager

had to continue to call the *reinstated employees* in seniority order. But the Agreement, both before and after the revisions that resulted in the final document, remains consistently silent about the replacement employees—because it is not intended to safeguard their rights. By eliminating the "seniority rights … previously enjoyed" language, the Region never agreed that "full participation in the on-call list" and not using the employees' terminations "against them in any way" mean anything less than what they say.

(4) *The Union "vociferously objected to the settlement" because "the General Counsel agreed that the Settlement Agreement would not require seniority for the Shaw Crew or the displacement of the New Crew."* Jam's statement that the Union's objections to the settlement were "vociferous" and its claim to know why the Union made them lack support in the record. All the Union said about the deleted language was that it "believe[d] that something like the language in the prior draft should be reinserted," expressing the view that whatever rights and privileges the employees enjoyed prior to their termination should be maintained. (Jt. Ex. 20.) This expresses no fear that the Region and Jam had agreed that the Shaw and New Crews should share equally in work assignments. Believing that the language could be improved to more clearly protect the reinstated employees is very different from acknowledging that the Region was actively agreeing not to protect them.

In short, Jam reads far more into the parties' bargaining history than the stipulated record supports. The record shows that the Region's initial draft contained language preserving existing seniority and other rights; the final agreement does not. But nothing in the record directly ties the disappearance of that language to anything other than Jam's ludicrous theory that it had no responsibility for assigning stagehands. The record does not prove that the parties agreed the settlement would mean the opposite of what it says.

CONCLUSION

Despite the parties' agreement that the ALJ erred by finding that there was no meeting of the minds and by setting aside the settlement agreement on that basis, neither the law nor the evidence supports Jam's analysis of the meaning of that agreement. Because the plain meaning of the language is the best evidence of the parties' intent, and because the settlement agreement plainly requires the reinstated employees' *full* participation in the on-call list and bars using their terminations against them in any way, the settlement required offering those employees all the available work before calling anyone else and therefore posed no impediment to finding that Jam's quota system based on employees' participation in the Board's processes violated the Act. Jam's analysis of the language is incomplete and unconvincing, and its analysis of the parties' bargaining history is not only improper, given the language's unambiguity, but also incorrect: Jam draws numerous sweeping inferences about the parties' intent that the thin stipulated record simply does not support. 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 Office of the Executive Secretary via the Board's e-filing system, on August 7, 2017:

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