

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

MIDWEST TERMINALS OF TOLEDO,
INTERNATIONAL, INC.

and

Case 08-CA-152192

LOCAL 1982, INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

**ORDER GRANTING MOTION TO
ACCEPT CONSENT ORDER SETTLEMENT
AND REMANDING TO REGIONAL DIRECTOR**

On February 1, 2019, the Board remanded this case to me to reconsider the issues that previously had been decided by Administrative Law Judge Eric Fine in his decision of September 19, 2016, in light of the Board's subsequent decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). After several conference calls between myself and the parties in an unsuccessful attempt to settle the matter, the Respondent filed a motion to enforce settlement agreement, dated May 15, 2019. The motion also asks that I approve its proposed settlement as a consent order under the Board's decision in *UPMC*, 365 NLRB No. 153 (2017), which permits an administrative law judge to approve such settlements over the objections of both the General Counsel and the Charging Party. The General Counsel and the Charging Party Union submitted responses to the motion.

Judge Fine found that several of Respondent's handbook policies or rules violated Section 8(a)(1) of the Act and that they had been unilaterally instituted in violation of Section 8(a)(5) and (1) of the Act. The Board's remand order makes clear that the "entire case" has been remanded.

The Respondent and the Union have had a bargaining relationship that sometimes led to disputes resulting in a series of Board cases finding violations of the Act by Respondent, which are described in Judge Fine's decision. In 362 NLRB No. 57 (2015), later reaffirmed and reported at 365 NLRB No. 157 (2017), the Board found, among other violations, threats and coercion in violation of Section 8(a)(1) of the Act. Those were remedied by a cease and desist order prohibiting such violations and any others in a like or related manner, along with a notice posting. Judge Fine also discussed two administrative law judge

decisions that were later affirmed by the Board in 365 NLRB No. 158 (2017) and 365 NLRB No. 159 (2017), in which the Board found, again among other violations, threats and coercion under Section 8(a)(1) and unilateral change violations under Section 8(a)(5) of the Act. The remedy in the latter two cases included cease and desist orders precluding those threats and coercion and changes in terms and conditions of its unit employees without first notifying the Union and giving it an opportunity to bargain over the changes, and from, in any like or related manner, violating the Act. The remedy in those cases also included the posting of appropriate notices. These Board decisions are pending review before the United States Court of Appeals for the District of Columbia Circuit. If the Board's decisions and orders are upheld by the court of appeals, there will be a court order against future violations of Section 8(a)(1) and unilateral change violations of Section 8(a)(5), in like or related manner, enforceable by the contempt powers of the court.

In addition, I am informed that there are charges pending in the General Counsel's Division of Advice alleging that Respondent has withdrawn recognition from the Union in violation of Section 8(a)(5) of the Act. Those charges will be affected by the resolution of the pending cases in the D.C. Circuit since it is clear that a lawful withdrawal of recognition cannot occur in the context of unremedied unfair labor practices. If a complaint issues on the pending charges there will be litigation on the question whether the withdrawal of recognition was lawful.

In view of the above proceedings, the alleged violations in this remand case are relatively minor impediments in the relationship of the parties. And the proposed settlement attempts to remove those impediments.

The Respondent's proposed settlement is framed in terms of a withdrawal of charges because that was the essence of what the parties were discussing early in the settlement negotiations. Respondent contends that, at that point, representatives of the Union agreed to a withdrawal of charges and the General Counsel was also on board resulting in a tentative all-party settlement, which included resolution of an additional charge that was under investigation by the region where an employee was disciplined for violating one of the alleged unlawful rules. When an attorney for the Union entered the negotiations that settlement broke down. To the extent that Respondent's motion is an attempt to enforce the tentative settlement described above, that motion is denied. I will, however, consider the motion in terms of an effort to have me approve a consent order settlement under the Board's *UPMC* decision.

The proposed settlement is essentially as follows:

1. A dismissal of allegations that 3 of the Respondent's rules are unlawful, since the General Counsel concedes that those rules are lawful.

2. Changes in the remaining 3 rules that are alleged as unlawful in respects that remove the offending language and a notification to the union and employees of the changes.
3. The dismissal of the charge in a related case where violation of one of the allegedly unlawful rules subjected an employee to discipline, together with the removal of that discipline in the employee's file.
4. A non-admissions clause asserting that Respondent does not admit that its actions in either of the two cases involved violated the Act.
5. No Board notice posting in either case.

Although the General Counsel at one point agreed to the tentative settlement insofar as it included a withdrawal of the charges, as set forth above, after the Union's lawyer came into the matter and objected to the settlement, the General Counsel decided not to go along with the settlement. After Respondent filed its motion, the General Counsel submitted a somewhat confusing response stating that it has no objection to the terms of the proposed settlement. The response also stated that the General Counsel was not party to the settlement and would not join a motion to dismiss, "but would not object to the Chief ALJ's approval of such a motion provided that the Union assented to the settlement." Significantly, for my purposes, the General Counsel does not offer any objection to the substantive terms of the proposed settlement.

In its response, the Union stated its opposition to the proposed settlement. Its main objections are twofold—that the proposed settlement does not provide for a notice posting; and it contains no remedy for the alleged Section 8(a)(5) unilateral change allegation.

Respondent asserts that its settlement proposal meets the elements set forth in *Independent Stave*, 287 NLRB 740 (1987) for approval of consent order settlements under *UPMC*, cited above, if they comport with what the Board called the "reasonableness standard" of *Independent Stave*. *Independent Stave* provides that the Board will accept even a non-Board settlement, that is, a settlement without a Board notice, even if it does not provide a full remedy; rather it would (Id. at 743):

examine all the circumstances, including, but not limited to (1) whether the charging party(ies), the respondent(s) and any of the individual discriminatee(s) have agreed to be bound, and the position of the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

There is no impediment to the settlement based on fraud or coercion because those are not present here. Nor is there any allegation of discrimination or monetary liability in this case. Moreover, the Respondent has agreed to be bound in the same way as the respondent in the *UPMC* case. Although Respondent has been found to have violated the Act in other cases, it has not been found to have breached previous settlement agreements. Like *Independent Stave*, this case involves a settlement without a Board notice. But this case is even a stronger case for approval of a settlement on that score because previous Board cases against this same Respondent provided a Board notice. Moreover, the previous Board cases provided a cease and desist order that prohibited not only subsequent violations of Section 8(a)(1) found in those cases, but also of the unilateral changes in violation of Section 8(a)(5), as well as like or related violations. These remedies are essentially the same as those that would apply in this case.

The main *Independent Stave* factor to be considered here is whether the settlement is reasonable in light of the allegations and the risk and stage of the litigation. Clearly, here, those factors support approval of the settlement. Although this case is a remand, in the absence of a settlement, a trial to assess the legality of the rules under the *Boeing* case and also the legality of the alleged unilateral implementation of those rules is likely. The proposed settlement comes prior to the remand hearing, thus saving all parties the time and expense of further litigation. Significantly, Respondent has agreed to rescind the alleged unlawfully broad rules and to notify the Union and the employees of the rescission and the new rules. It has also agreed to rescind the punishment of the only known employee who violated one of those rules. The latter rescission resolves a separate case involving that punishment. Finally, as indicated, previous cease and desist orders and notice postings essentially preclude any future violations of the kind involved in this case. There is thus no need for another cease and desist order or notice in this case. And, in the circumstances, it is also reasonable to include a non-admissions clause as part of the settlement.

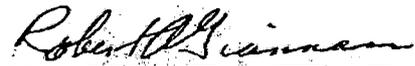
I also consider it significant that the General Counsel does not have any objection to the substantive terms of the proposed settlement. In that respect, the settlement is less like a consent order settlement under *UPMC* and more like a two-party settlement with a charging party objection.

In all the circumstances, I find that the Respondent's proposed settlement meets the reasonableness standard set forth in *Independent Stave* and warrants approval pursuant to my authority under the *UPMC* case. However, I cannot order the Union to withdraw its charges. Instead, I am modifying the proposed settlement to delete the references to the withdrawal of charges, but retaining the substance of the proposed settlement. Accordingly, the Respondent's motion is GRANTED, the proposed settlement, as modified, is APPROVED, and the case is REMANDED to the Regional Director, who is directed to dismiss the complaint

as well as the related pending charge upon full compliance with the modified consent order settlement, which is attached as an appendix to this order.

It is so ORDERED.

Dated, Washington, D.C.
May 29, 2019



Robert A. Giannasi
Chief Administrative Law Judge

APPENDIX

SETTLEMENT AGREEMENT

WHEREAS, the Union filed an unfair labor practice charge (8-CA-152192) against the Company which resulted in an Administrative Law Judge issuing the decision and order in *Midwest Terminals of Toledo International Inc.*, JD-89-16 (September 19, 2016) (“ALJ Decision”).

WHEREAS, on or about October 31, 2016, the Company filed an appeal of the ALJ Decision with the National Labor Relations Board.

WHEREAS, on or about October 10, 2018 the Board issued a Notice to Show Cause as to why the case should not be remanded to an Administrative Law Judge for further proceedings consistent with the Board’s adoption and implementation of a different standard to determine the lawfulness of Handbook Policies/Rules as set forth in *The Boeing Co.*, 365 NLRB No. 154, slip op. (2017) (“Boeing”).

WHEREAS, on or about January 25, 2019, the Board issued an Order remanding the case back to the ALJ for further proceedings.

WHEREAS, on or about February 1, 2019, the Board issued an Order remanding the case back to the ALJ for further proceedings.

WHEREAS, on or about September 22, 2017, the Company issued discipline to Prentis Hubbard for violating Policy #3100 – Camera, Cell, Digital Device Policy and CBA work rule # 12.

WHEREAS, on or about October 4, 2017 the Union filed an unfair labor practice charge (8-CA-207426) against the Company alleging the discipline was unlawful based upon §8(a)(3) and (1) and 8(a)(5) and (1) of the Act.

WHEREAS, Region 8 has not yet made a determination regarding 8-CA-207426.

TERMS AND CONDITIONS

1. The General Counsel concedes that three of the Company’s policies at issue in this litigation are lawful per the Board’s criterion set forth in *Boeing*. Those policies are as follows: Policy #2500 – Non-Disclosure/Confidentiality Policy referring to photography and recording; Policy #3100– Camera, Cell, Digital Device Policy; and Policy #1600 – Incident Reporting Policy. These policies remain in full force in effect. See, Complaint ¶¶ 6(A)(iii) and 7(A)(i-vi), attached hereto as Exhibit A.

2. The Company will rescind any purported unlawful language in the following policies: Policy #2500 Non-Disclosure/Confidentiality Policy; Policy #2550 Confidentiality Agreement Policy; and Policy #4500 Safe Workplace Environment.
3. Per paragraph 2 of this Agreement, ***Policy #2500 Non-Disclosure/Confidentiality Policy*** now reads as follows:

The protection of confidential business information and trade secrets is vital to the interests and success of MWTTI and MWTT. Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose trade secrets or confidential business information, ~~to include information regarding labor relations,~~ will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information. Marketing documents specific to a customer (~~including all contact information and all accounting data~~) ~~all personnel information, and union related business~~ are considered confidential business information and should be guarded as such. Password--protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Employees who violate this policy will be subject to disciplinary action, up to and including employment termination.

Employees are required to sign in acknowledgement that they have read and understand this policy and the potential disciplinary consequences of violating it.

This policy will be reviewed periodically, and enforced at all times.

4. Per paragraph 2 of this Agreement, ***Policy #2550 Confidentiality Agreement Policy*** now reads as follows:

Use of Confidential Information by Employees

I, _____, as an Employee of Midwest Terminals of Toledo International, Inc. (MWTTI) or Midwest Terminals of Toledo, Inc. (MWTT) I do hereby acknowledge that I must comply with a number

of State and Federal Laws that regulate the handling of confidential and personal information regarding both customers/clients of this company and its other employees. These laws may include but not be limited to FACTA, HIPAA, GINA, The Economic Espionage Act, The Privacy Act, Gramm/Leach/Bliley ID Theft Laws (where applicable), Trade Secrets Protections, and Implied Contract Breach.

I understand that I must maintain the confidentiality of ALL documents, customer/client credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, any personal information or the expectation of privacy of said customers/clients and/or employees; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

I further agree to follow the rules and regulations this company has in place as regards to the handling of confidential information so as to protect the privacy of all involved.

5. Per paragraph 2 of this Agreement, *Policy #4500 Safe Workplace Environment* now reads as follows:

Teamwork, safe work behaviors and cooperation from all employees will help provide a safe and efficient work environment. Any employee who refuses or fails to follow the standards set forth herein will be subject to disciplinary action up to and including discharge. In cases not specifically mentioned, employees are expected to use good judgment and refer any questions to a supervisor.

Employees found participating in any of the following activities on any jobsite will be subject to immediate discharge (firing).

- Fighting or attempting a willful act to cause bodily injury upon another person which constitutes Violence in the Workplace.
- Insubordination, threatening, or intimidating a supervisor, another employee or other site personnel – which constitutes Violence in the Workplace.
- Possession and/or use at any time of a prohibited weapon on Company property, in any facility maintained by the Company, and/or in Company-supplied vehicles or in personal vehicles while on Company property. Exceptions to this policy must have prior approval from the Company President.
 - Prohibited weapons include any form of weapon and any form of explosive restricted under local, state, or federal regulation. This includes all firearms, or other weapons covered by the law, regardless

of whether the person is licensed to possess and/or use a weapon or not.

- Refusing to submit to a search when requested by management in accordance with this policy.
 - o Upon reasonable suspicion, the Company reserves the right to conduct searches of any person, vehicle, or object on Company property at any time. Pursuant to this provision, the Company or its agent, is authorized to search lockers, desks, purses, briefcases, baggage, toolboxes, lunch sacks, clothing, vehicles parked on Company property, and any other personal effect or item in which a weapon may be hidden.
- ~~Violating others' expectation of privacy.~~
- Failing or refusing to cooperate with any investigation relating to a possible violation of this Safe Workplace Environment Policy

Employees found participating in any of the activities listed below are subject to disciplinary actions up to and including discharge:

- Violations of safety rules or OSHA standards;
- Harassment (of any form), horseplay, pranks, malicious mischief, or immoral conduct or other conduct affecting the right of others, or which violates the common decency of fellow associates;
- Failure to comply with TWIC/gate admittance procedures;
- Loitering or presence on the jobsite without authorization before or after assigned shift is completed. ~~The jobsite is defined as the areas of Facility 1 inside the gates.~~
- Failing or refusing to report a known violation of this Safe Workplace Environment Policy.

This Safe Workplace Environment Policy does not constitute a contractual undertaking by the Company and the Company does not through this Policy, assume or offer to assume any obligations beyond that which may be imposed by applicable law. The Company reserves the right to alter, amend, or discontinue any Policy or program included in the Safe Workplace Environment Policy without notice at its sole discretion. The failure of the Company to exercise any function in any particular way shall not be considered a waiver of the Company's right to exercise such function or preclude the Company from exercising that prerogative in some other way.

The Safe Workplace Environment Policy establishes clear guidelines that address prohibiting weapons, fighting, harassment and violence in the workplace to ensure a safe work environment.

I do hereby certify and acknowledge that I have received and read the Safe Workplace Environment Policy. I understand that engaging in prohibited behavior under the policy may result in discipline, up to and including removal from

Midwest Terminals of Toledo International, Inc. (MWTTI) and/or Midwest Terminals of Toledo, Inc. (MWTT) premises, termination and legal action. I agree to uphold the Safe Workplace Environment Policy.

I release and agree to hold harmless MWTTI and MWTT, and its directors and associates for any action taken by the Company in compliance with the provisions of this policy.

A photocopy/facsimile of this authorization and release shall have the same force and effect as the original.

6. Within 14 days of the approval of this settlement, the Respondent will notify the Union and the employees, in writing, of the changes in our policies mentioned above.
7. Within 14 days of the approval of this settlement, the Respondent will expunge from Prentis Hubbard's personnel file the September 22, 2017 discipline for violating Policy #3100 – Camera, Cell, Digital Device Policy and CBA work rule # 12 and notify both the union and Prentis Hubbard of said action.
8. Cases 8-CA-152192 and 8-CA-207426 will be dismissed once compliance with paragraphs 6 and 7 have been accomplished.
9. The Respondent does not admit that it violated the Act in any of these matters.
10. Respondent is not required to post a Board notice in any of these matters.
11. Case 8-CA-152192 is remanded to the Regional Director for Region 8 for further actions consistent with this order, including actions with respect to Case 8-CA-207426.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ORDER was sent via email to the following on this 29th day of May, 2019:

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5/29/19
Date


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