

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

**BODEGA LATINA CORPORATION  
d/b/a EL SUPER**

**and**

**Case 28-CA-170463**

**UNITED FOOD AND COMMERCIAL  
WORKERS, LOCAL 99**

**ORDER**

On April 22, 2016, the Regional Director for Region 28 issued a complaint alleging, among other things, that the Respondent violated Section 8(a)(3), (4), and (1) of the Act. The complaint alleged that the Respondent unlawfully engaged in closer supervision of Maria Neyoy and disciplined her because she joined or assisted the Union, engaged in concerted activities, gave testimony to the Board, and was a named discriminatee in Board charges and complaints against the Respondent.

Before the opening of the hearing, the Respondent proposed a consent order for approval by the judge.<sup>1</sup> The Respondent had previously rejected a formal settlement agreement proposed by the General Counsel. On June 21, 2016, Administrative Law Judge Dickie Montemayor telephonically opened the hearing and issued a ruling approving the Respondent's proposed consent order over the objections of the General Counsel and the Union. The consent order approved by the judge includes, among other things, a non-admission provision, but it lacks a default provision or a provision for a court judgment in the event of non-compliance.

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<sup>1</sup> The Board has found that the resolution of an unfair labor practice via unilateral agreement proffered by a respondent and approved by a judge is in the nature of a consent order and is not a true "settlement" between parties to the dispute. See *Local 201, Electrical Workers (General Electric Co.)*, 188 NLRB 855, 857 (1971).

On July 1, 2016, the General Counsel filed a Request for Special Permission to Appeal and Appeal from the Administrative Law Judge's Unilateral Consent Order. On July 29, 2016, the Respondent filed an opposition.<sup>2</sup> In his appeal, the General Counsel argues, among other things, that the cases relied on by the judge in approving the consent order are inapposite, because unlike this case, they involved agreements entered into by the respondents and the charging parties that satisfied the Board's traditional four-factor analysis under *Independent Stave Co.*, 287 NLRB 740 (1987). In *Independent Stave*, supra at 743, the Board stated that in evaluating settlement agreements, it would

examine all of the surrounding 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 taken by the [GC] regarding the settlement; (2) whether the settlement is reasonable in light of the nature 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 practices.

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<sup>2</sup> The Respondent subsequently filed a supplemental brief addressing the revised standard for approval of consent orders set forth in *United States Postal Service*, 364 NLRB No. 116 (2016) (*Postal Service*), in which the Board rejected the *Independent Stave* analysis in cases involving approval of settlement terms proposed by a respondent over the objections of the General Counsel and the charging party, adopting instead a "full remedy" standard in such cases. The General Counsel filed a motion to strike the Respondent's supplemental brief. We grant the General Counsel's motion because the Respondent failed to comply with *Reliant Energy*, 339 NLRB 66 (2003), which instructs that parties may bring to the Board's attention authority of which they were previously unaware only in the form of a letter of no more than 350 words. The General Counsel subsequently filed a letter bringing the Board's decision in *Postal Service* to the attention of the Board in accordance with *Reliant Energy*. We note, however, that, in *UPMC*, 365 NLRB No. 153 (2017), the Board overruled *Postal Service* and returned, with retroactive effect, to the reasonableness standard of the four-factor *Independent Stave* analysis.

The General Counsel argues that *Independent Stave* is inapplicable where, as here, the parties have not reached an agreement and instead the proposed terms are acceptable to only one party. In addition, the General Counsel contends that (1) even under *Independent Stave*, the judge erred in approving the consent order, because only the Respondent agreed to it, with the Union and the General Counsel in opposition; (2) in view of the absence of a default provision facilitating judicial enforcement, it fails to protect the rights of the alleged discriminatee or the public; (3) the terms were proposed shortly before the scheduled hearing and are unreasonable because they lack the standard default provision and the broad cease-and-desist provision urged by the General Counsel; and (4) the alleged conduct violated the cease-and-desist provisions of an informal settlement agreement and a consent order that were previously approved. Because the default provision is designed to ensure compliance, the General Counsel contends that its omission is of particular concern, asserting that without it the General Counsel will have no means of enforcing the terms of the consent order.

Applying the *Independent Stave* analysis, as previously argued by the parties and as applied in *UPMC*, we find that the terms of the consent order provide a reasonable remedy for the alleged violations.

With regard to the first *Independent Stave* factor, as the General Counsel asserts, only the Respondent agrees to the consent order, with the General Counsel and the Union opposing it. Under the same circumstances in *UPMC*, the Board found this factor inconclusive, reasoning that the General Counsel's objection to the agreement is important, but not dispositive. Therefore, we also find the first factor

inconclusive here. Furthermore, as in *UPMC*, no party asserts that the Respondent has engaged in any fraud, coercion, or duress concerning the consent order, and we accordingly find that the third factor favors approval.

With regard to the fourth factor, concerning the Respondent's history of violations or settlement breaches, the General Counsel argues that the Respondent has been the subject of several unfair labor practice charges and three complaints, each of which was settled with a non-admissions clause. Board precedent instructs that settlement agreements including such clauses may not be relied on as evidence of a respondent's proclivity to violate the Act. *Brotherhood of Teamsters Local 70*, 191 NLRB 11, 11 (1971). As the Respondent here has not admitted, and the Board has not found, that the Respondent has previously violated the Act as alleged in the earlier settled charges and complaints, we find that the fourth factor favors approval of the consent order.

The second factor, as noted above, considers the reasonableness of the settlement "in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation."<sup>3</sup> The consent order here provides for the posting of a notice that includes cease-and-desist language referring to the complaint allegations involving interrogations, threats, and the creation of the impression of surveillance. The notice also includes cease-and-desist and affirmative remedies for the closer supervision and discipline of Neyoy, which, in the absence of any loss of pay or benefits, constitutes the traditional Board remedy for those allegations.<sup>4</sup>

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<sup>3</sup> *Independent Stave*, supra at 743.

<sup>4</sup> The cease-and-desist provisions concerning Neyoy specifically address the Sec. 8(a)(4) and (1) allegations that the Respondent more closely supervised her and disciplined her "because [she] filed charges or gave testimony to the National Labor Relations Board" and "because [she] engaged in protected concerted activities for

This factor also requires consideration of the argument, made by the General Counsel and our dissenting colleague, that the consent order is deficient because it fails to include a provision for enforcement through default proceedings. As discussed above, the General Counsel contends that a default provision is necessary to ensure compliance and to deter the repetition of the alleged unlawful conduct. Although a default provision affords a measure of assurance that a respondent will comply with the terms of a consent order or settlement agreement, we disagree with the General Counsel's argument that it constitutes the *only* means of enforcement in the event of noncompliance. Contrary to the General Counsel, we find that an alternative means is available, in which the General Counsel could issue a new complaint based on the unremedied allegations. The dissent argues that this option — if it becomes necessary — would “further delay the remedies owed to the victims” and “waste additional Agency resources.” But the approval of reasonable consent orders reduces the often-substantial delays associated with litigation before the Board and conserves the Board's limited resources. See *UPMC*, supra, slip op. at 4. Accordingly, we find that the second factor favors approval.

In sum, the first factor of the *Independent Stave* analysis is inconclusive and the remaining three factors favor approval of the consent order. Accordingly, we conclude that the judge did not abuse his discretion in approving the consent order here, and we deny the General Counsel's appeal.

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purposes of mutual aid and protection.” Although complaint also alleges that the same conduct violated Sec. 8(a)(3), we find that the judge did not abuse his discretion by approving the consent order with this omission, because it would not affect the remedy.

IT IS ORDERED that this proceeding be remanded to the administrative law judge for further proceedings consistent with this order.

Dated, Washington, D.C., June 10, 2019.

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER McFERRAN, dissenting in part.

In *UPMC Presbyterian Hospital*, 365 NLRB No. 153 (2017), over my dissent, a divided Board overruled recent precedent in *Postal Service*, 364 NLRB No. 116 (2016), which had held that the Board generally would not accept *unilateral* consent orders ending Board litigation over the objections of the General Counsel and the charging party.<sup>5</sup> Here, the majority's decision to accept the Respondent's unilateral settlement offer highlights one flaw in *UPMC*: that it permits a respondent to obtain a resolution that cannot effectively be enforced by the General Counsel if the respondent fails to honor it. That is exactly what the Respondent's unilateral resolution would do here, a particularly troubling outcome given the gravity of the Respondent's alleged misconduct and its history before the Board.

I.

The complaint in this case presents allegations of serious wrongdoing. It alleges that the Respondent violated Sections 8(a)(3), (4) and (1) of the Act, including by

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<sup>5</sup> Dissenting in *UPMC*, I raised the danger of respondents effectively seeking to negotiate resolutions directly with the Board, thereby significantly compromising the General Counsel's prosecutorial discretion under Sec. 3(d) of the Act. I also pointed out that routinely accepting unilateral settlements would too often result in resolutions that fell short of a sufficient remedy. *UPMC*, supra, 365 NLRB No. 153, slip op. at 22.

retaliating against an employee for testifying and participating in the Board's processes. The Board has long held that "[t]he prohibition expressed in Section 8(a)(4) against discharging or otherwise discriminating against an employee because he has filed charges or given testimony under the Act is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes." *Filmation Assocs., Inc.*, 227 NLRB 1721, 1721 (1977). Thus, the "duty to preserve the Board's processes from abuse is a function of th[e] Board and may not be delegated to the parties or to an arbitrator." *Id.*

Here it is especially important that the General Counsel be able to ensure that the Respondent's alleged misconduct is fully and timely remedied. But the Respondent's proposed resolution frustrates that interest. The proposal seeks to end the prosecution of the serious unfair labor practice allegations against the Respondent with no admission of wrongdoing and with no provision for immediate judicial enforcement in case of default. Without a default provision, the General Counsel will have no choice but to restart the prosecution of this case from square one if the Respondent does not comply. This is troubling in and of itself, but even more so because the Respondent is a de facto repeat offender with a history of finding ways to avoid making that status official.

The Respondent has a history of alleged violations before the Board, along with various settlement agreements that ended those cases without the Respondent having to admit wrongdoing. In 2015, the Union filed charges against the Respondent alleging violations of Sections 8(a)(1), (3), and (4) in connection with the Union's ongoing

organizing campaign. The Regional Director issued a Second Consolidated Complaint in that case in June 2015 and secured a Section 10(j) injunction based on the likelihood that those violations took place.<sup>6</sup> However, the allegations were resolved through an informal Board settlement in July 2015.

A second charge came only a few months later in September 2015, alleging more Section 8(a)(1) violations along with an 8(a)(3) and (1) allegation concerning a change in an employee's schedule. A complaint issued, but in February 2016 that case, too, was resolved, this time by a "consent" order over the objections of both the General Counsel and the Union. Notably, the February 2016 order also included a non-admissions clause and omitted any provision specifying what enforcement action could be taken if the Respondent did not comply.

This case is now the third against the Respondent since 2015. Once again, the Respondent -- as a result of today's decision -- will evade being labeled a "recidivist" by way of a non-admissions clause and avoids any provision for immediate enforcement in the event it defaults. Notably, moreover, this case arises from events that took place in February 2016, at the same time as the second case was being resolved by the February 2016 unilateral "consent" order, and it concerns the same employee as in the first 2015 case. In a very real way, then, the Respondent is repeating its alleged misconduct, yet again evading any real consequences.

## II.

It is hardly a stretch to suggest that the Respondent's strategy here is to stymie the General Counsel. Given the similarities between the allegations in this case and

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<sup>6</sup> Cases 28-CA-143974 et al.

those in the second 2015 case, the General Counsel moved to have the February 2016 “consent” order revoked. The judge denied the General Counsel’s motion, however, and because the February 2016 order contained no default provision, the General Counsel had no way to hold the Respondent accountable in that case, other than to start from scratch and relitigate the entire series of events.

Now, the Respondent has again succeeded in making it harder for the General Counsel to prosecute the serious allegations against it, by unilaterally setting the terms for resolving those allegations. And, once again, the Respondent has done so in a way that leaves the General Counsel no option to hold the Respondent immediately accountable for any noncompliance. This outcome simply is not an appropriate disposition of the case, if the National Labor Relations Act is to be effectively enforced.

My colleagues claim that the absence of a default provision is acceptable because there is another enforcement option: issuance of a new complaint based on the unremedied allegations. The majority suggests that the obvious inefficiencies in that option would be outweighed by the savings achieved from consent agreements generally. But with respect to effective enforcement of the Act – our primary statutory mandate – the restart option is deeply flawed. It would leave the General Counsel in a continual loop not of his own choosing in attempting to secure compliance with the Act, would further delay the remedies owed to the victims of the Respondent’s alleged wrongdoing, would waste additional Agency resources, and would compromise the General Counsel’s ability to build a record of the Respondent’s potential recidivism.

For these reasons, and for those stated in my dissent in *UPMC*, I would reject the Respondent's unilaterally proposed order.

Dated, Washington, D.C., June 10, 2019.

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD