Independent Stave Company, Inc. *and* James A. Holt *and* Charles William Moore *and* James O. Railey, Jr. *and* James Edward Turner. Cases 9-CA-19619-1, 9-CA-19619-2, 9-CA-19619-3, and 9-CA-19619-4

16 December 1987

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JOHANSEN, BABSON, STEPHENS, AND CRACRAFT

Upon charges filed on 4 and 5 May 1983,[1] the General Counsel of the National Labor Relations Board issued a complaint on 14 June against the Respondent alleging that it has violated Section 8(a)(3) and (1) of the National Labor Relations Act.

The complaint alleges that on specified dates in February the Respondent refused to hire the Charging Parties because, for several years prior to December 1982, the individuals held offices with the Coopers International Union of North America, Local Union No. 48, AFL-CIO (the Union). On 20 June the Respondent filed an answer admitting and denying in part the allegations of the complaint and requesting that the consolidated complaint be dismissed.

On 18 July the Respondent filed a Motion for Summary Judgment, with a supporting brief and exhibits. On 22 July the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the Respondent's Motion for Summary Judgment should not be granted. On 4 August the General Counsel filed a brief in opposition to the Respondent's Motion for Summary Judgment.

Ruling on the Motion for Summary Judgment

In its Motion for Summary Judgment, the Respondent contends that there are no genuine issues concerning material facts and that all the matters raised in the complaint have been fully resolved. In support of its contentions, the Respondent offers copies of agreements signed on 28 June by the Charging Parties James A. Holt, Charles W. Moore, and James Edward Turner, settling all claims the individuals may have against the Respondent.[2] Pursuant to the agreements, each individual was given employment with retroactive seniority and $350, for which each agreed to release the Respondent from "any and all claims of whatsoever nature relating to pending NLRB charges" and to request withdrawal of the unfair labor practice charges. The agreements were approved by the Union's president and secretary-treasurer with a statement that the agreement was "fair" and that the Union would not oppose it but rather "encourages it being approved and carried out." Regarding James O. Raley Jr., who did not execute a non-Board settlement agreement, the Respondent asserts that Raley has waived any right to claim employment by rejecting the Respondent's unconditional offer of employment and that, by virtue of his full employment elsewhere, he would not be entitled to backpay. Based on the foregoing, the Respondent requests that its motion be granted and that the complaint be dismissed as a matter of law.

The General Counsel, in opposition to the Respondent's motion, argues that the Regional Director properly refused to approve the Charging Parties' withdrawal requests of the underlying unfair labor practice charges because the private, non-Board settlement agreements do not fully remedy the alleged unfair labor practices. The General Counsel contends that the settlement agreements are deficient because they provide only 10 percent of the net backpay to which each employee would be entitled were the prosecution of the complaint successful and fail to provide for the posting of a notice by the Respondent to its employees. Therefore, the General Counsel argues that the Regional Director's refusal to allow withdrawal of charges and to dismiss the complaint effectuated the policies of the Act, as the Regional Director must consider the public interests and not only the parties' private rights.[3] With respect to the purported unconditional employment offer made to Raley, the General Counsel states that because Raley was required to respond to the Respondent's offer the same day, he was not given a reasonable amount of time to respond and the offer is therefore inadequate. The General Counsel also argues that although backpay may not be owing at the present time, Raley may be entitled to backpay if and when the General Counsel prevails. The General Counsel also states that the Respondent offers no evidence that Raley acknowledged the substance of the telephone conversation or adopted the transcript purportedly made of the telephone conversation by the Respondent's counsel.

For the reasons stated below, we agree with the Respondent that, in light of the execution of the private settlement agreements with Holt, Turner, and Moore, there are no genuine issues of material fact which warrant a hearing on the allegations regarding those three individuals. Therefore, we

[1] All dates are in 1983 unless otherwise indicated

[2] Copies of the agreements are attached to this decision as Appendices A (Holt), B (Moore), and C (Turner)

[3] *Clear Haven Nursing Home*, 236 NLRB 853 (1978)

grant the Motion for Summary Judgment in this regard and dismiss those complaint allegations. However, as also explained below, we deny the Motion for Summary Judgment concerning Raley.

The Respondent manufactures wooden barrels. In late 1982 the Respondent purchased Bourbon Cooperage Company, which also manufactured wooden barrels. In February 1983, the Respondent solicited applications for work at the plant and by mid-February began production. By early June, the Respondent had a work force of approximately 122 employees, 101 of whom were former employees of Bourbon Cooperage.

During the period from December 1980 until 31 December 1982, the four Charging Parties held offices with the Union.[4] Each of them timely submitted an application for employment with the Respondent. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) by refusing to hire them in early February 1983.

On 14 June Holt, Turner, and Moore were offered employment by the Respondent.[5] On 28 June the three individuals entered into settlement agreements with the Respondent, accepting employment, retroactive seniority, and $350 in return for requesting the withdrawal of the unfair labor practice charges. The settlement agreements were then approved by the union officers, even though there is no indication that the matter resolved by these agreements was the subject of a pending grievance. As noted, the Regional Director refused to approve the withdrawal requests.

The Board has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes. "The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them."[6] On a number of occasions, the Board has reiterated its commitment to private negotiated settlement agreements and its policy of "encouraging parties to resolve disputes without resort to Board processes." *Combustion Engineering*, 272 NLRB 215 (1984). Accord: *Coca-Cola Bottling Co.*, 243 NLRB 501, 502 (1979); *Texaco, Inc.*, 273 NLRB 1335, 1336–1337 (1985). See also *NLRB v. Food & Commercial Workers Local 23* (No. 86–594, slip op. at 14, 1987) ("Congress was aware that settlements constitute the 'life blood' of the administrative process, especially in labor relations.")

Notwithstanding this strong commitment to settlements, the Board is not required, however, to give effect to all settlements reached by the parties to a dispute with or without the General Counsel's approval. For it is well settled that "the Board's power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights" and "the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned."[7] Finally, the Board has also stated that, in exercising its discretion, it will refuse to be bound by any settlement that is at odds with the Act or the Board's policies. See, e.g., *Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958).

Accordingly, upon a motion of one or both of the parties to defer to a settlement agreement in lieu of further proceedings upon a complaint, the Board, after considering any objection raised by the General Counsel, will determine in its own discretion, "whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices."[8]

In deciding whether it will effectuate the purposes and policies of the Act to give effect to a settlement, the Board has considered such factors as the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions, and the conservation of the Board's resources.[9] In addition, the Board has considered whether the parties to the dispute and the employees affected by the dispute have agreed to the settlement,[10] whether the settlement was the product of a grievance-arbitration mechanism,[11] and whether the agreement was entered into voluntarily by the parties, without fraud or coercion.[12]

One additional factor has been stressed by the Board. In *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957), the Board stated that it would give effect to a settlement agreement only where the

[4] The offices held were James A Holt, president, Charles W Moore, vice president, James E Turner, recording secretary, James O Raley Jr, financial secretary

[5] The three individuals were placed in layoff status until 29 June while the plant was temporarily closed from 13–27 June

[6] *Wallace Corp*, 323 U S 248, 253–254 (1944)

[7] *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (fn omitted) Accord *NLRB v Federal Engineering Co*, 153 F 2d 233, 234 (6th Cir 1946), *NLRB v Ann Arbor Press*, 117 F 2d 786, 792 (6th Cir 1941)

[8] *National Biscuit Co*, 83 NLRB 79, 80 (1949) Accord *Kelly-Springfield Tire Co*, 6 NLRB 325, 347–348 (1938), *Ingram Mfg Co*, 5 NLRB 908, 911 (1938)

[9] *Roselle Shoe Corp*, 135 NLRB 472, 475 (1962), *Farmers Co-Operative Gin Assn*, 168 NLRB 367 (1967) In both of these cases, the Board also evaluated the legal and factual merits disclosed by the General Counsel's administrative investigation to determine "whether, in view of the normal uncertainties of litigation, it was reasonable to anticipate that the violations alleged in the complaint could so clearly be established by a preponderance of the evidence that no adjustment, less than the fullest relief indicated, would be warranted" *Roselle Shoe*, 135 NLRB at 475

[10] See, e g, *House of Adler*, 206 NLRB 228 fn 1 (1973), *APD Transport Corp*, 253 NLRB 468 (1980)

[11] See, e g, *Central Cartage Co*, supra at 338 (1973), *Coca-Cola Bottling Co*, supra at 502 (1979)

[12] See, e g, *Kelly-Springfield Tire Co*, 6 NLRB 325, 346–350 (1938)

unfair labor practices are "substantially remedied" by the agreement. The determination of what constitutes a "substantial" remedy caused sharp disagreement among the Board members in *Clear Haven Nursing Home*, 236 NLRB 853 (1978). In that case, the complaint alleged that the respondent violated Section 8(a)(5) by unilaterally terminating, without notice or bargaining, the existing employee health plan and substituting a health plan that provided diminished benefits, by insisting to impasse on changes in the scope of the recognized bargaining unit, and by refusing to furnish the union with relevant information requested by the union during negotiations. In addition, the complaint alleged that the respondent violated Section 8(a)(3) by its refusal to reinstate a large number of unfair labor practice strikers after their unconditional offer to return to work and violated Section 8(a)(1) by unlawfully threatening, warning, and interrogating employees.

The non-Board settlement agreement reached by the parties, but opposed by the General Counsel, provided for the execution of a collective-bargaining agreement, the reinstatement of 14 strikers who had not yet been reinstated at the time of the hearing, and the full reinstatement of 3 strikers who had been returned to work but not to their former or substantially equivalent positions. The agreement provided no backpay for the strikers who had been discriminatorily denied reinstatement.

The majority of the Board rejected the settlement agreement "as a wholly inadequate vehicle for effectuating the purpose and policies of the Act." *Clear Haven*, supra at 854. As basis for rejecting the agreement, the majority cited the absence of any effective notice to employees concerning the Respondent's alleged unfair labor practices and the absence of any backpay.[13] The majority emphasized that "for the limited purpose of passing on the acceptability of a proposed settlement, of necessity we begin with the assumption that the case is meritorious and the General Counsel is prepared to carry his burden of proof." *Clear Haven*, supra at 855–856.

The dissenters, characterizing the majority's decision as "exhibit[ing] an attitude toward administration of the Act which we find to be repugnant to its basic purposes and policies," would have given effect to the settlement agreement. *Clear Haven*, supra at 856. The dissenters reached a different result even though they agreed with the majority that "[t]he only sensible yardstick against which to measure the settlement is the remedy to which the Union would be entitiled if it won the entire case on the merits." *Clear Haven*, supra at 857. The dissenters stressed that the agreement provided for the execution of a collective-bargaining agreement, containing a wage rate negotiated with the backpay expectations of the employees in mind, and the reinstatement of the strikers—more than the union would have gained by Board order after litigation. The dissenters also stressed that the employees voted in favor of the settlement by a vote of 60 to 14, and that the majority's upsetting of the agreement meant that the employees would immediately lose the higher wage rates and other benefits of the collective-bargaining agreement, which would have to be renegotiated by the parties. Thus, according to the dissenters, the settlement agreement "attain[s] the ends we desire without the need for going to hearing" and, given the limited staff and resources of the Board, "serves the public interest as well as that of the private parties." *Clear Haven*, supra at 858.

We find, in agreement with the dissenters, that the majority's approach to the settlement agreement in *Clear Haven* reflected too narrow a focus. The presumption of the majority in *Clear Haven* that the General Counsel would prevail on *every* violation alleged in the complaint coupled with their requirement that the settlement agreement must substantially remedy *every* violation alleged went beyond using the remedy for the alleged violations as a benchmark by which to evaluate the reasonableness of the settlement. The majority was inescapably led to the wrong conclusion that any settlement providing a less than full remedy of the violations alleged was not in accord with "the public interest in the vindication of statutory rights." *Clear Haven*, supra at 854. Such an assumption, however, ignores the equally important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation.

At this stage of the litigation we are confronted only with *alleged* violations of the Act. Even though the allegations in the complaint issued after the Region's investigation and determination that reasonable cause exists to believe the allegations occurred, a charging party's right to a remedy can be enforced, upon the authority of the Government, only after an adjudication. In addition, there are risks inherent in litigation. For example, witnesses may be unavailable or uncooperative; procedural delays may occur; the issues may be complex or novel; supporting documentation may have been destroyed or lost; and credibility resolutions may have to be made by the administrative law judge. By operating on a rigid requirement that the settle-

[13] The General Counsel contended that the amount of backpay would exceed $60,000

ment must mirror a full remedy, we would be ignoring the realties of litigation.[14]

Each of the parties to a non-Board settlement recognizes that the outcome of the litigation is uncertain and that he may ultimately lose; thus, the party in deciding to settle his claim without litigation compromises in part, voluntarily foregoing the opportunity to have his claim adjudicated on the merits in return for meeting the other party on some acceptable middle ground. The parties decide to accept a compromise rather than risk receiving nothing or being required to provide a greater remedy. When we reject the parties' non-Board settlement simply because it does not mirror a full remedy, we are consequently compelling the parties to take the very risks that they have decided to avoid, as well as depriving them of the opportunity to reach an early restoration of industrial peace, which after all is a fundamental aim of the Act. See *International Harvester Co.*, 138 NLRB 923, 926 (1962).

Accordingly, we reject the limited approach to settlement agreements set forth in *Clear Haven* in favor of an expanded approach which will evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement. As outlined above, such a case-by-case approach was utilized by the Board prior to *Clear Haven*. Consequently, to the extent that *Clear Haven* is inconsistent with today's decision, it and other inconsistent cases are overruled.

It is, of course, impossible to anticipate each and every factor which will have relevance to our review of non-Board settlement agreements. At this juncture, we find it unnecessary to provide an exhaustive list of all the factors which may become relevant in individual cases. Generally, however, in evaluating such settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the Board will examine all 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 General Counsel 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 practice disputes.

We have examined this case in light of these factors and conclude that the requests of Holt, Moore, and Turner to withdraw their charges pursuant to the settlement agreements with the Respondent should be approved.[15] Holt, Moore, and Turner, the Charging Parties and the only discriminatees involved herein, and the Respondent voluntarily agreed to be bound to these settlements. The officers of the employees' union also found each settlement "fair" and "encourage[d] it being approved and carried out." There is no contention that the Union's interests were not aligned with the discriminatees, who were former union officers. The General Counsel, following the dictates of *Clear Haven*, opposed these settlements. This case was settled 10 days after issuance of the complaint, which had alleged that the Respondent violated Section 8(a)(3) and (1) by refusing to hire Holt, Moore, and Turner because they were union officers. The parties have not identified any unusual litigation risks. We, therefore, take note of the customary risks inherent in any litigation. When the settlements are viewed against these risks and in light of the early stage of the proceedings and the nature of the allegations, we find the settlements providing for immediate employment,[16] retroactive seniority, and $350 to be reasonable.[17] This early resolution of the dispute after the Board processes have been invoked and the provision for reinstatement demonstrate to other employees a recognition of their statutory rights involved. In addition, there is no evidence of fraud, coercion, or duress. It does not appear that the Respondent has engaged in a history of violations of the Act nor is there evidence of breach of any prior settlement agreements. Therefore, we believe that honoring the parties' agreements advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest.

Accordingly, we grant the Respondent's Motion for Summary Judgment with respect to Holt, Turner, and Moore and dismiss the complaint alle-

[14] *Hotel Holiday Inn v NLRB*, 723 F 2d 169, 172–173 (1st Cir 1983) All of the uncertainties of an adversary hearing, i e, the competence of counsel, the thoroughness of preparation, the memories of witnesses, the attitudes of the hearing officer, and the availability of witnesses, stood between [the employees] and [a full remedy].

[15] Raley, who did not execute a settlement agreement, will be discussed below

[16] Moreover, the Respondent's 14 June offer of employment to Holt, Moore, and Turner came less than 5 months after the Respondent's alleged unlawful refusal to hire them in early February

[17] If fully successful, the Charging Parties would have also been entitled to more backpay and the posting of a Board notice to employees

gations regarding Cases 9-CA-19619-1, 9-CA-19619-2, and 9-CA-19619-4.

Regarding Raley, who did not execute a non-Board settlement agreement, there remains material issues of fact and law which would best be resolved at a hearing. Accordingly, the Respondent's Motion for Summary Judgment with respect to Raley is denied.

ORDER

The National Labor Relations Board grants the Respondent's Motion for Summary Judgment with respect to Charging Parties Holt, Moore, and Turner and orders that the complaint allegations regarding Case 9-CA-19619-1, Case 9-CA-19619-2, and Case 9-CA-19619-4 be dismissed. The National Labor Relations Board denies the Respondent's Motion for Summary Judgment with respect to Raley and orders that the complaint allegations regarding Case 9-CA-19619-3 be remanded to the Regional Director for Region 9 for appropriate proceedings consistent with this decision.

Exhibit F

APPENDIX A

General Release

The undersigned, in consideration of the company's promise to pay me $350.00 as contract labor hereby agrees to release the company from any and all claims of whatsoever nature relating to pending NLRB charges and to request withdrawal of all pending claims or charges and not to refile those or similar claims or charges I further agree that my seniority date and job classification shall be as follows:

Seniority date 2-4-83, job classification—maintenance.

Pay rate to be $6.85 effective June 29, 1983.

I understand that the payment from the company in the above amount shall not be classified as wages or back pay, and that I am entitled to no wages or back pay, and that the payment shall be treated as, and is, for contract labor and to serve as other good and valuable consideration for the mutual promises and agreements reached this date as spelled out herein.

I fully understand the contents hereof, and agree that I will indemnify and save and hold the company harmless from any and all damages by reason of any violation of the promise herein contained. The company is not required to give the payment above provided until the NLRB charges relating to my claims are withdrawn and dismissed and until the company has been notified of that fact.

Dated June 28, 1983.

James A. Holt

As union representative of the petitioner for a maintenance and cleanup unit, we agree that the above agreement is fair and that the Union will not take any action to seek to oppose the carrying out of this agreement, but encourages it being approved and carried out.

Ernest D. Higdon
Tommy Thompson

Exhibit G

APPENDIX B

General Release

The undersigned, in consideration of the company's promise to pay me $350.00 as contract labor hereby agrees to release the company from any and all claims of whatsoever nature relating to pending NLRB charges and to request withdrawal of all pending claims or charges and not to to refile those or similar claims or charges. I further agree that my seniority date and job classification shall be as follows.

Seniority Date 2-1-83, job classification—stove grader.

Pay rate to be $7.40 effective June 29, 1983.

I understand that the payment from the company in the above amount shall not be classified as wages or back pay, and that I am entitled to no wages or back pay, and that the payment shall be treated as, and is, for contract labor and to serve as other good and valuable consideration for the mutual promises and agreements reached this date as spelled out herein.

I fully understand the contents hereof, and agree that I will indemnify and save and hold the company harmless from any and all damages by reason of any violation of the promises herein contained. The company is not required to give the payment above provided until the NLRB charges relating to my claims are withdrawn and dismissed and until the company has been notified of that fact.

Dated June 28, 1983

Charles W. Moore

As union representative of the production unit, we agree that the above agreement is fair and that the Union will not take any action to seek to oppose the carry out of this agreement, but encourages it being approved and carried out.

Ernest D. Higdon
Tommy Thompson

Exhibit H

APPENDIX C

General Release

The undersigned, in consideration of the company's promise to pay me $350.00 as contract labor hereby agrees to release the company from any and all claims of whatsoever nature relating to pending NLRB charges and to request withdrawal of all pending claims or charges and not to refile those or similar claims or

charges. I further agree that my seniority date and job classification shall be as follows:

Seniority date 3-30-83, Job classification—yard labor (outside).

Pay rate to be $7.13 effective June 29, 1983.

I understand that the payment from the company in the above amount shall not be classified as wages or back pay, and that I am entitled to no wages or back pay, and that the payment shall be treated as, and is, for contract labor and to serve as other good and valuable consideration for the mutual promises and agreements reached this date as spelled out herein.

I fully understand the contents hereof, and agree that I will indemify and save and hold the company harmless from any and all damages by reason of any violation of the promises herein contained. The company is not required to give the payment above provided until the NLRB charges relating to my claims are withdrawn and dismissed and until the company has been notified of that fact.

Dated June 28, 1983.

/s/James Lumor

As union representative of the production unit, we agree that the above agreement is fair and that the Union will not take any action to seek to oppose the carrying out of this agreement, but encourages it being approved and carried out

/s/Ernest D. Higdon
/s/Tommy Thompson