

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

MICHELS CORPORATION

AND

Case 30-CA-081206

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 139, AFL-CIO**

**OPPOSITION TO REQUEST FOR SPECIAL PERMISSION TO APPEAL AND APPEAL FROM THE
ADMINISTRATIVE LAW JUDGE'S APPROVAL OF NON-BOARD SETTLEMENT AGREEMENT AND
DISMISSAL OF COMPLAINT, MOTION FOR APPROVAL OF NON-BOARD SETTLEMENT AGREEMENT, AND
MOTION FOR PROTECTIVE ORDER**

NOW COMES Michels Corporation ("Michels" or the "Company"), by its attorneys, Littler Mendelson, P.C., and for its Opposition to Counsel for the Acting General Counsel's Request for Special Permission to Appeal and Appeal from the Administrative Law Judge's Approval of Non-Board Settlement Agreement and Dismissal of Complaint ("Request"), Motion for Approval of Non-Board Settlement Agreement, and Motion for Protective Order, pursuant to the Board's Rules and Regulations, states as follows.

This case involves a charge filed by International Union of Operating Engineers, Local 139 ("Union"). The hearing on the Complaint opened on October 9, 2012. The formal papers, which were admitted into evidence at the hearing, are attached to the Request as Exhibit B. Prior to the opening of the hearing, the Union, Michels, and the alleged discriminatee reached a non-Board settlement agreement ("Agreement), a copy of which is attached to the Request as

Exhibit A. The terms of the Agreement were discussed on the record and Counsel for the Acting General Counsel objected to the Agreement. The Administrative Law Judge (“ALJ”) heard argument from Counsel for the Acting General Counsel, took testimony from the alleged discriminatee, and invited the parties to create other record evidence prior to evaluating the Agreement under *Independent Stave Co.*, 287 NLRB 740, 741 (1987). Counsel for the Acting General Counsel declined to question the alleged discriminatee or introduce any other evidence in support of its objections. Based on the record evidence, the ALJ approved the Agreement, granted the Union’s request to withdraw its charge, and dismissed the Complaint.

On June 19, 2012, Michels was served by e-mail with Counsel for the Acting General Counsel’s Request for Special Permission to Appeal and Appeal from the Administrative Law Judge’s Approval of Non-Board Settlement Agreement and Dismissal of Complaint (“Request”) in the above matter. Michels hereby opposes the Request, moves that the Agreement be accepted, and moves for a Protective Order sealing and protecting the Agreement against any further public disclosure.

The Board has long had a policy of encouraging the peaceful, non-litigious resolution of unfair labor practice charges including approving non-Board settlements over the objection of General Counsel. The leading case in this area is *Independent Stave*. In *Independent Stave*, in determining whether to give effect to a non-Board settlement, the Board stated that it will consider all of the surrounding circumstances including, but not limited to: (1) whether the charging party, respondent, and the alleged discriminatee 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 charges. Notably, the Board's articulation of the "reasonableness" test was a change from prior Board law requiring that a settlement "substantially remedy" the violation alleged.

Counsel for the Acting General Counsel concedes, as she must, that factors one, three and four of the *Independent Stave* analysis weigh in favor of approving the Agreement reached. Thus, Charging Party Union, Michels, and the alleged discriminatee have all agreed to the terms of the Agreement. There is no evidence that there was any fraud or coercion in reaching the Agreement. As the transcript of the hearing shows, the ALJ went to great lengths to ensure that the alleged discriminatee understood the Agreement including what he was receiving and what he was giving up. As Counsel for the Acting General Counsel acknowledges, the alleged discriminatee confirmed for the ALJ that he understood the Agreement and was not coerced in any way. In addition, Michels does not have a history of violations of the Act or breaching prior agreements. To the contrary, Michels has an exemplary record of compliance with the Act and has already fulfilled its obligations to the alleged discriminatee under the Agreement. These factors weigh heavily in favor of approval of the Agreement.

That leaves the second *Independent Stave* factor. As discussed below, it is clear that the Agreement is reasonable in light of the violations alleged, the risks inherent in litigation and the stage of litigation.

First, while Counsel for the Acting General Counsel claims that she would have been able to prove its case; Michels was prepared to take the case to trial and was equally strong in its conviction that the Complaint had no merit and would have been dismissed. Counsel for the Acting General Counsel conveniently failed to mention in her Request that the alleged

discriminatee had been employed by Michels for less than two (2) months at the time of his layoff, was the junior employee, and had received two warnings for serious safety issues during his short tenure. These facts were never in dispute. Counsel for the Acting General Counsel also failed to mention that Michels denied the allegations in the Complaint and that her success or failure in the case turns entirely on the credibility of witnesses and also requires a finding that the individual alleged to be responsible for most of the alleged threats – a foreman – was actually a Section 2(11) supervisor. There was a material risk that Charging Party Union and alleged discriminatee would walk-away with nothing if the case was litigated.

However, who would have won or lost the case is mere speculation and besides the point. Winning is often hollow when the risk, cost, and delays associated with litigation, appeals, potential compliance proceedings, and more appeals is considered. The critical fact under *Independent Stave* is that Michels, the Charging Party Union, and the alleged discriminatee carefully weighed their respective risks and arrived at an Agreement that they considered fair and reasonable under the circumstances. See e.g., *Gourmet Toast Corporation*, Case No. 29-CA-30404, 2011 NLRB LEXIS 299 (Fish, June 16, 2011)(settling charges that employer violated the Act by reducing the hours of and laying off an employee without notice to or bargaining with the Union).

Second, the Agreement, in total or otherwise, is not at odds with the Act or the Board's policies. For example, Counsel for the Acting General Counsel objects to the mutual non-disparagement clause in Paragraph 12 of the Agreement and claims that such language has been found in other contexts to chill the exercise of Section 7 rights. However, all of the cases Counsel for the Acting General Counsel relies involve overbroad work rules unilaterally imposed on employees by their employer.

This case involves a mutual agreement that was freely and fairly negotiated at arms-length by Michels, the Charging Party Union, and the alleged discriminatee. Each opted for peace and gave up the legal right they had to disparage the other in exchange for valid consideration. Non-disparagement provisions are a common feature of and often essential to the settlement of labor disputes. On information and belief, non-Board settlement agreements including such provisions have previously approved by the Regional Director for Region 30. In addition, a company and a union (with or on behalf of its members) are free under Board law to negotiate labor contract provisions that include such waivers and the waiver of other rights each has under the Act.

Counsel for the Acting General Counsel's claim that the ALJ failed to properly consider and apply the factors set forth in *Independent Stave* is baseless and, indeed, contrary to the only record evidence in the case. In advance of signing the Agreement, the parties engaged in lengthy discussions that included an evaluation of each of Counsel for the Acting General Counsel's objections and assessed the merits of their cases. The parties concluded in a very careful and reasoned way that Counsel for the Acting General Counsel's objections should not be an impediment to an Agreement they deemed to be in their collective and mutual best interests. The ALJ agreed. The parties concluded that the settlement was reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation. The ALJ agreed. While the settlement was reached the day of the hearing, Counsel for the Acting General Counsel was aware that settlement negotiations were taking place during the prior two weeks and was aware of the terms being discussed. It is routine for cases to settle at or on the eve of a Board trial. In fact, as here, ALJ's often invite and attempt to assist the parties in settling their disputes before officially opening the record. Had Counsel for

the Acting General Counsel taken a proactive role in attempting to settle the case prior to hearing, instead of insisting that the parties accept a formal Board settlement, all concerned could have saved the resources they invested preparing for trial. Under *Independent Stave*, the fact that an Agreement was reached prior to the commencement of the hearing weighs in favor of approval.

Counsel for the Acting General Counsel also objects because the Agreement does not provide the alleged discriminatee with the amount of backpay Counsel for the Acting General Counsel was seeking and does not include a remedy for each violation alleged in the Complaint (specifically the alleged threats), a notice to employees, and includes a confidentiality clause. If that was the test under *Independent Stave*, non-Board settlements would cease to be a common and viable approach to the peaceful resolution of charges.

Fortunately, that is not the test. In *Independent Stave*, the Board held that a non-Board settlement is not required to "fully remedy" all charged violations. Indeed, the Board recognized that the very nature of most private settlements involves compromise and the finding of a middle ground acceptable to the parties. In fact, in *Independent Stave*, the Board accepted a non-Board settlement over the opposition of the General Counsel even though it provided for only 10% of the back pay allegedly owed because the charging party union and alleged discriminatee believed the settlement was fair and there was no evidence that the union's interests were not aligned with those of the alleged discriminatee.

Likewise, in *American Pacific Pipe Co.*, 290 NLRB 623, 624 (1988), the alleged discriminatee was paid 50 percent of the backpay amount calculated by the General Counsel. Considering all the circumstances of the case, the Board determined that honoring the parties' agreement advanced the purposes of the Act. As in this case, the settlement in *American*

Pacific Pipe was executed by the alleged discriminate and the charging party union after carefully weighing the risks of litigation.

Finally, in *Monogahela Power Company*, Case 6-CA-23785, 1992 NLRB LEXIS 539 (Giannasi, 1992), the ALJ approved a non-Board settlement that was reached after the close of hearing but before briefs were filed. Judge Giannasi, in rejecting many of the arguments made by Counsel for the Acting General here, noted that: (1) the Board has accepted private settlements of the sort executed here without a notice posting or a cease-and-desist order and over the objections of the General Counsel; (2) all parties, except the General Counsel, but particularly the alleged discriminatee and the union that filed the charge on his behalf, agreed to the settlement without fraud or coercion agreements; and (3) the settlement payment was reasonable even though it was less than full backpay:

Obviously, General Counsel's objections and the lack of a full remedy with a notice posting and a cease-and-desist order are not considerations which, in and of themselves, defeat a non-Board settlement. If this were so there would be no Independent Stave on the books. One must then examine the need for a full remedy in light of a compromise that calls for less. Here, the General Counsel has offered no persuasive reason why less than a full remedy should not be accepted. There is a real dispute here; causation and credibility are at issue in the Cutlip allegations and the Respondent asserts that the statement alleged to constitute a Section 8(a)(1) violation was not made, at least in the way the General Counsel asserts. The risks of litigation justify the compromise."

Like the alleged discriminatee in *Monogahela Power Company*, this is a case where the alleged discriminatee and the Charging Party Union cannot be faulted for not wanting. The alleged discriminatee "gets his money now and avoids the risk that the General Counsel might fail to prove the violation . . ."

See also, *Service Merchandise Co.*, 299 NLRB 1132, 1134 (1990) (alleged discriminatees waived reinstatement and accepted 50% of backpay); *Insulation Sales Inc.*, 1998 WL 1985159, 1998 NLRB LEXIS 639 (NLRB Division of Judges 1998) (judge approved settlement between

employer and charging party/discriminatee, providing for backpay of approximately one-third of what would have been due and waiver of reinstatement; General Counsel, although objecting to approval of withdrawal request, did not appeal judge's decision); *Ribbon Sumyoo Corp.*, 1992 WL 1465636, 1992 NLRB LEXIS 1411 (NLRB Division of Judges 1992) (judge approves non-Board settlement providing for approximately 45% of backpay, plus waiver of reinstatement, over objection of General Counsel; again, no appeal filed by General Counsel to judge's approval of agreement and granting motion to withdraw charges); *BP Amoco Chemical*, 351 NLRB 614, 615-616 (2007)(majority of Board applied Independent State standards to termination agreements signed by 37 alleged discriminatees, providing for enhanced severance benefits but no backpay and dismissed complaint allegations concerning these discriminatees, even over the objection of both General Counsel and charging party).

Based upon the above cited cases, General Counsel's objections to the settlement should be rejected. Here, the parties also carefully weighed the allegations in the Complaint, their respective burdens of proof, and decided that a fair settlement should not include a remedy for the alleged threats, should not include a posting of any kind, and should include a confidentiality clause. The ALJ agreed.

Non-Board settlement agreements generally do not provide for a posting of the kind desired by Counsel for the Acting General Counsel, yet are routinely approved by the Regional Director for Region 30. Non-Board settlement agreements often contain confidentiality clauses and on information and belief, such agreements have been approved by the Regional Director for Region 30. At hearing, the ALJ offered Counsel for the Acting General Counsel the opportunity to create record evidence in support of her objections to the Agreement. Since Counsel for the Acting General Counsel declined that opportunity, her claims about what other

employees did or did not know about the allegations in the Complaint is the worst kind of empty speculation and not a basis for setting aside the Agreement.

Shockingly, Counsel for the Acting General Counsel implies that the Union somehow sold the alleged discriminatee out because of some selfish desire to maintain a good relationship with a large employer of its members. Again, at hearing, the ALJ offered Counsel for the Acting General Counsel the opportunity to create record evidence in support of such allegations. Counsel for the Acting General Counsel could have asked the alleged discriminatee or Charging Party Union what actual or perceived pressure, if any, they felt. Since Counsel for the Acting General Counsel declined that opportunity, the alleged discriminatee's testimony stands unrebutted and Counsel for the Acting General Counsel's claims about what the alleged discriminatee may have secretly felt is simply more empty speculation and not a basis for setting aside the Agreement.

Litigation entails risks and uncertainties that must be considered in evaluating the appropriateness of accepting a settlement agreement in lieu of pursuing further litigation. Michels, the Charging Party Union, and the alleged discriminatee (all with the advice of counsel) reached an Agreement that they believe is fair, reasonable, and in the interests of all concerned including the Union's other members. The Board has never found that it would effectuate the purposes and policies of the Act to set aside a non-Board settlement under these circumstances.

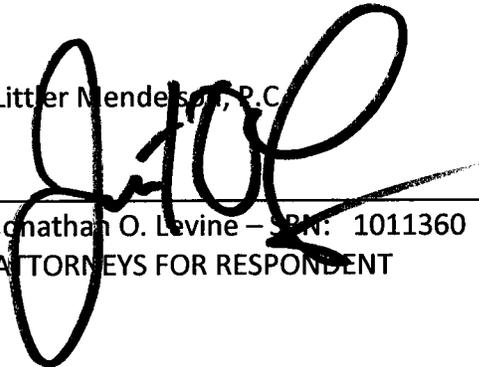
By filing the Request, Counsel for the Acting General Counsel has, has done an end-run around the confidentiality provision of the Agreement. Perhaps this was unintentional. However, in addition to approving the Agreement, Michels motion for a protective order should also be granted so the parties' desire for privacy is also honored.

For all of these reasons, it is clear that the ALJ properly exercised her authority in approving the Agreement, the Request should be denied, and a protective order should be entered as requested by Michels.

WHEREFORE, Michels respectfully requests that Counsel for the Acting General Counsel's Request be denied, Michels motions herein be granted, and Michels be awarded its reasonable attorneys fees incurred in responding to the Request.

Dated this 23rd day of October, 2012.

Littler Mendelson, P.C.



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INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139, AFL-CIO

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2012 caused copies of the Michels Corporation's Opposition to Request for Special Permission to Appeal and Appeal from the Administrative Law Judge's Approval of Non-Board Settlement Agreement and Dismissal of Complaint ("Request"), Motion for Approval of Non-Board Settlement Agreement, and Motion for Protective Order to be served on the following:

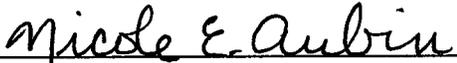
CHIEF ADMINISTRATIVE LAW JUDGE ROBERT A. GIANNASI ATTN: ADMINISTRATIVE LAW JUDGE CHRISTINE DIBBLE NATIONAL LABOR RELATIONS BOARD 1099 14TH STREET, NW, ROOM 5400 EAST WASHINGTON, DC 20570	EMAIL AND REGULAR
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PASQUALE A. FIORETTO, ATTORNEY BAUM, SIGMAN, AUERBACH & NEUMAN LTD 200 WEST ADAMS STREET STE 2200 CHICAGO, IL 60606	EMAIL AND REGULAR
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LESTER A. HELTZER EXECUTIVE SECRETARY NATIONAL LABOR RELATIONS BOARD 1099 14TH STREET WASHINGTON, DC 20570-0001	E-FILED
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October 23, 2012


Nicole E. Aubin
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