United States Postal Service *and* Branch 256, National Association of Letter Carriers (NALC), AFL–CIO. Case 07–CA–142926

August 27, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

This case is before us on the General Counsel's Request for Special Permission to Appeal Administrative Law Judge Christine E. Dibble's order approving settlement terms proposed by the Respondent, over the objections of the General Counsel and the Charging Party. As the judge observed, the Board has referred to the resolution of an unfair labor practice in this manner—i.e., by dismissal of the complaint based on settlement terms proffered by a respondent and approved by a judge—as in the nature of a "consent order." See *Electronic Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855, 857 (1971).[1] For the reasons explained below, we clarify that the appropriate standard for evaluating orders approving and incorporating the settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party, is whether the order provides a full remedy for all of the violations alleged in the complaint. Accordingly, the General Counsel's request is granted, and the appeal is granted on the merits.

Background

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when an agent at its Swartz Creek facility in Michigan threatened its employees with more vigorous enforcement of work rules if they chose to be represented by a union steward or sought support and/or assistance from a union. In advance of the scheduled trial, the Respondent requested that the administrative law judge approve a "unilateral settlement agreement," to which neither the General Counsel nor the Charging Party had agreed.[2] The General Counsel and Charging Party each filed an opposition to the Respondent's request. The General Counsel asserted that the Respondent is a recidivist offender of employees' statutory rights, and he objected that the proposed agreement's scope was limited to a single facility and that it included a 6-month sunset clause limiting the General Counsel's ability to seek a default judgment if the Respondent failed to comply with the agreement. The Charging Party argued that the notice-posting provision of the agreement, which required posting only at the Swartz Creek facility, was insufficient because supervisors move throughout the postal district.

The judge evaluated the Respondent's offer to settle under the factors set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987).[3] The judge found that the Respondent's offer was reasonable in light of the "relatively minor and isolated nature" of the alleged violation, the costs and risks of litigation, and the fact that the offer provides "almost the same remedy that would be awarded if the General Counsel fully prevailed on the complaint." The judge concluded that "the Respondent's request, on balance, meets the standards set forth in *Independent Stave*," and she accepted the Respondent's offer to settle "as in the nature of a consent decree."

The History of the Board's Treatment of the Issue

The Board apparently first approved an order accepting and incorporating the settlement offer of a respondent party, without the agreement of either the General Counsel or the charging party, in 1971, in *General Electric Co.*, above, 188 NLRB at 855. In that case, the General Counsel issued a complaint alleging that the respondent violated Section 8(b)(1)(A). The respondent proposed a "Consent Board Order and Notice" to settle the complaint allegations; the General Counsel and the charging party objected. Id. The Board adopted the trial examiner's recommendation to approve the proposed order on the ground that it provided a full remedy for all of the violations alleged in the complaint, as amended. Id. The Board observed that further proceedings could not result in any changes in the proposed order and notice that would be more favorable to the General Counsel and

[1] On February 19, 2016, the Board issued a notice inviting the parties and interested *amici* to file briefs. The Respondent and four *amici* (American Postal Workers Union, AFL–CIO; National Association of Letter Carriers, AFL–CIO; National Rural Letter Carriers' Association; and Service Employees International Union) filed briefs, and the General Counsel filed a statement of position.

[2] In Board practice and terminology, the term "unilateral settlement agreement" typically has a different meaning. It refers to an agreement between the General Counsel and the charged party, to which the charging party has not agreed. See, e.g., NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (Feb. 2016) (ULP Manual), §§ 10150 (unilateral informal settlement agreements), 10164.7 (unilateral formal settlement agreements). An agreement between the charged party and the charging party to which the General Counsel has not agreed is called a "non-Board settlement agreement," see, e.g., *Independent Stave*, 287 NLRB at 740–744, or a "non-Board adjustment," see, e.g., ULP Manual §§ 10124–10142.

[3] Under *Independent Stave*, the Board considers all the circumstances surrounding a settlement agreement, including "(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." 287 NLRB at 743.

charging party. Id. The Board concluded that, in such circumstances, approval of the respondent's "Consent Board Order and Notice" would protect the public interest and effectuate the purposes and policies of the Act. Id.

The Board introduced a different standard in two 1991 cases: *Copper State Rubber*, 301 NLRB 138, and *Food Lion, Inc.*, 304 NLRB 602. As in *General Electric*, the issue in both cases was whether to approve the respondents' offers to settle unfair labor practice allegations over the objections of the General Counsel and the charging parties. Instead of the "full remedy" standard that the Board had applied in *General Electric*, the Board analyzed the proposed settlements by applying the factors set forth in *Independent Stave*, supra, which had been decided just a few years earlier. Although the Board rejected the proposed settlements in both cases, it stated that it might reach a different result in the future "if [the] proffered adjustment covers all the allegations of the complaint and effectuates the remedial purposes of the Act." *Copper State Rubber*, 301 NLRB at 134 fn. 3.

Since then, administrative law judges have approved such "proffered adjustments," referring to the resulting dismissal order as "in the nature of a consent order, and not a true 'settlement' between parties to the dispute." See, e.g., *Heil Environmental*, 10–CA–114054 et al. (June 20, 2014). On review, the Board has evaluated these "consent orders" by applying the *Independent Stave* factors to assess whether they "*substantially* remedie[d] the violations alleged in the complaint." *Laborers Local 872*, 28–CB–118809 (January 12, 2015) (emphasis added) (agreeing with the judge that the proposed "unilateral settlement by consent order" met requirements of *Independent Stave*); see also *Heil Environmental*, supra (June 20, 2014) (same); *Enclosure Suppliers, LLC*, 09–CA–046169 (July 14, 2011) (setting aside "consent order" because it did not meet requirements of *Independent Stave*).

Discussion

We find, contrary to the decisions in *Copper State Rubber* and *Food Lion*, that *Independent Stave* is not the appropriate standard for evaluating a judge's order approving and incorporating the settlement terms proposed by a respondent, over the objections of the General Counsel and the charging party. The *Independent Stave* standard was explicitly formulated to evaluate non-Board settlements, that is, settlement agreements between a respondent and a charging party or parties, to which the General Counsel is not a party.[4] The *Independent Stave* Board justified permitting non-Board settlements that failed to provide a full remedy for all of the complaint allegations based on the Board's longstanding "policy of encouraging the peaceful, nonlitigious resolution of disputes," citing occasions on which "the Board ha[d] reiterated its commitment to private negotiated settlement agreements." 287 NLRB at 741.

The Board also explained that a party's decision to enter into a private settlement agreement that provides for less than a full remedy entails a judgment concerning litigation risk:

> 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.

Id. at 743. It is deference to the charging party's judgment concerning its own interests in accepting less than a full remedy, together with the well-established policy favoring private dispute resolution, that justifies compromising the Board's remedial standards in approving a non-Board settlement. As the Board observed in *Independent Stave*, "[w]hen 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." Id.

Neither of the considerations that justify approving non-Board settlements that lack the full remedy called for under Board law are present in the case of a consent order agreed to by no party other than the respondent. The charging party and the respondent have not agreed to a private resolution of their dispute. Nor has any party seeking relief from the Board (whether the charging party or the General Counsel) agreed to accept a less-than-full remedy for any reason.[5] In the absence of any of the

[4] In *Independent Stave*, the Board granted summary judgment as to the three charging parties who accepted the settlement but denied summary judgment as to the fourth charging party, who did not. 287 NLRB at 744. The *Independent Stave* Board did not evaluate the "reasonableness" of the proposed settlement as it related to the nonsettling charging party.

[5] The dissent's description of our decision as addressing "consent settlement agreements" misconceives the issue. This case involves orders approving and incorporating the settlement terms proposed by a respondent, over the *objections* of the General Counsel and the charging party. Thus, there is no "agreement" between any parties. The

policy considerations underlying *Independent Stave*, the application of the *Independent Stave* standard lacks a compelling justification.

We find that the more appropriate standard for evaluating an order approving and incorporating settlement terms proposed by a respondent, over the objections of the General Counsel and charging party, is the one originally adopted by the Board in *General Electric*, 188 NLRB at 855. In addition to the considerations discussed above, administrative economy is also served by the application of the *General Electric* standard. The Board should avoid situations in which a judge approves a proffered consent order, only to have the Board reject it as insufficient—requiring litigation to resume, after an unfortunate delay. The exacting standard reflected in *General Electric* should mean that judges will not approve consent orders in cases like this one and that the Board will rarely be required to reverse a judge's approval.

Accordingly, we hold that such a proposed order protects the public interest and effectuates the purposes and policies of the Act only if it provides a full remedy for all of the violations alleged in the complaint. In evaluating the completeness of the remedy, we will ask whether the proposed order includes all the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board. We overrule *Copper State Rubber*, 301 NLRB 138 (1991), *Food Lion, Inc.*, 304 NLRB 602 (1991), and similar cases to the extent they are inconsistent with this decision.[6]

Application to the Present Case

Applying the Board's original standard here, we find that the judge's order approving the Respondent's proffered terms over the objection of the General Counsel and Charging Party does not provide a full remedy for all of the violations alleged in the complaint. The complaint alleged that the Respondent violated Section 8(a)(1) by threatening its employees with more vigorous enforcement of work rules if they chose to be represented by a union steward or sought support and/or assistance from a union. The typical remedy for such violations is a cease-and-desist order and a notice posting. Among other things, the order in this case contains a 6-month sunset clause, limiting the availability of the enforcement procedure to the 6 months following case closure.[7] Thus, if the Respondent were to violate the order after expiration of the 6-month period, the General Counsel would have no immediate recourse.[8] Board orders providing remedies for adjudicated violations do not place such limitations on the effective duration of their terms. Indeed, the vast majority of settlements bind the respondent indefinitely. The sunset clause thus differs from the remedy that would have been ordered had the case been successfully litigated to conclusion, and its inclusion in the instant order precludes a finding that it provides a full remedy for the violations alleged in the complaint.[9]

IT IS ORDERED that the appeal is granted, that the consent order is set aside, and that this matter is remanded to the judge for further action consistent with this Order.

fundamental misconception of such orders as "settlement agreements," notwithstanding that they are involuntarily imposed on all parties other than the respondent, explains many of the dissent's erroneous conclusions. The dissent further errs in stating that under today's decision, "the respondent must agree to accept a default judgment." As any reader of the decision will confirm, the decision says no such thing. The consent order before us, which we disapprove for other reasons, provides for entry of a default judgment in the event that the respondent violates the order, but only because the respondent proposed that provision. One need look no further than *General Electric*, the original "full remedy" consent-order case, to find an approved consent order that contains no provision for a default judgment. See 188 NLRB at 855–856.

[6] The dissent's fear that our decision will stymie the early resolution of disputes is unfounded. Nothing in our decision prevents the General Counsel and the charging party from agreeing to a proffered consent order. And we certainly encourage such true settlements. Where the General Counsel and the charging party object to a proffered consent order, of course, they assume the risk that the Board ultimately will grant less relief than the respondent has consented to—or even that the Board will rule in favor of the respondent. This real possibility, it seems to us, creates a strong incentive for the General Counsel to accept reasonable settlements—and, indeed, the overwhelming majority of unfair labor practice cases are settled before they reach the Board. It is surely the rare case, and we expect will continue to be the rare case, where a respondent offers the General Counsel full or nearly full relief only to be turned down.

[7] Although the order provides for a default judgment and entry of a court judgment enforcing the Board's order in the event of noncompliance by the Respondent, it further provides that, "[n]otwithstanding the above, no default judgment will be sought by the General Counsel for conduct occurring more than six months after the closing of this case on compliance."

[8] The most that the order before us permits the General Counsel to do in the event of such a violation of its terms is to litigate from square one the complaint allegations that the consent order supposedly resolved. The dissent views this as an appropriate limitation on the General Counsel's ability to enforce a Board order. We disagree. The dissent's approach reveals its flawed conception of what it means to "resolve" a case; in keeping with this approach, the dissent appears to advocate for permitting a party that agrees to a consent order to seek judicial review of the order. We believe, as a general matter, that a case that has been resolved should stay resolved, and that Board orders should be capable of effective enforcement if they are violated.

[9] The order also includes a nonadmission clause. The inclusion of that clause does not preclude a finding that the order provides a full remedy for all the violations alleged in the complaint because the order provides for entry of a court judgment. See id. at Sec. 10164.5 ("If respondent consents to the entry of a court judgment, it is possible to include a nonadmission clause in the stipulation.").

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues decide that the Board will no longer permit the early resolution of cases—based on terms the Board would find "reasonable"—where the resolution has been agreed to by the respondent, without the agreement of the General Counsel or other parties. Such a resolution, which may be termed a consent settlement agreement,[1] will be impermissible unless two things occur: (1) the respondent must agree to provide "a full remedy"; and (2) the respondent must agree to accept a default judgment that forever waives any right to litigate the unproven allegations.

I believe this is an ill-advised change for several reasons.

First, the Board's holding today is self-contradictory in a way that might be amusing if it were not for the fact that the majority is making it more difficult to achieve an early resolution of potentially serious allegations that are the subject of Board litigation. At issue here is the Board's longstanding policy of approving the early voluntary resolution of a labor dispute—possibly within days after a complaint issues—where the terms have been agreed to by the respondent, and where the Board would conclude that the terms are "reasonable." This standard is set forth in *Independent Stave Co.*,[2] a unanimous five-member Board decision dating back nearly 30 years. In today's decision, the majority overrules our reliance on the *Independent Stave* "reasonable" standard whenever the General Counsel and charging parties oppose the settlement agreement. Here is the inherent contradiction in the majority's decision: if the Board would find that the terms of a settlement agreement are "reasonable" (which is the standard under *Independent Stave*), this means the Board would find it is unreasonable not to give effect to the settlement agreement. Moreover, if the Board would find that settlement terms are "reasonable" as defined in *Independent Stave*, this means the opposition of the General Counsel and other parties is *unreasonable*. Stated differently, by holding that the Board will no longer accept settlement agreements that the Board would find "reasonable," my colleagues are imposing an irrational constraint *on themselves*.[3] In these respects, I believe what my colleagues do today does not reflect a "reasoned justification for departing from its precedent."[4] Given that Congress entrusted the Board with the responsibility to apply the Act to the "complexities of industrial life,"[5] I think the Board can and should trust itself to do what is "reasonable." On this basis alone, I dissent from my colleagues' decision.

Second, my colleagues are not merely overruling so-called "consent order" cases where settlement terms[6] were opposed by the General Counsel and the charging parties,[7] they are overruling applying *Independent Stave* itself to the evaluation of consent settlement agreements. However, the *Independent Stave* factors themselves demonstrate that the Board intended to apply them to all types of voluntary resolution of cases by settlement agreement, including those opposed by charging parties and/or the General Counsel. Thus, the first *Independent Stave* factor is "whether the charging party(ies), the re-

[1] In this opinion, the term "consent settlement agreement" refers to settlement terms to which the respondent has agreed but the General Counsel and charging party or parties have not.

[2] 287 NLRB 740 (1987). In *Independent Stave*, the Board articulated four factors it would consider when evaluating the reasonableness of settlement terms, but it made clear these factors are non-exhaustive, which means the Board would have broad discretion to decide what constitutes "reasonable" settlement terms:

> It is, of course, *impossible to anticipate each and every factor which will have relevance to our review*. . . . 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.

Id. at 743 (emphasis added).

[3] See *Independent Stave*, 287 NLRB at 741 (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) ("[T]he Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned.")) (footnote and other citations omitted).

[4] *E. I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012).

[5] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963); see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

[6] The Board uses different terms for different types of settlements—e.g., "unilateral settlement," "non-Board settlement," "private settlement," "consent order"—but my colleagues argue that the settlement terms at issue here do not represent a true "settlement" since they were not agreed to by "parties to the dispute," i.e., either the General Counsel or the charging party in addition to the respondent. Majority opinion, slip op. at 2 (quoting *Heil Environmental*, 10–CA–114054 et al. (June 20, 2014)). In my view, however, there is no good reason to apply a different standard of review to evaluate these different types of settlements. Regardless of whether or not a party other than the respondent agrees to the terms, I believe the Board should approve the early resolution of unfair labor practice cases if it determines that the settlement terms are "reasonable" under *Independent Stave*, supra.

[7] See, e.g., *Copper State Rubber*, 301 NLRB 138 (1991); *Food Lion, Inc.*, 304 NLRB 602 (1991).

spondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement."[8] Consistent with the intent of the Board in *Independent Stave*, succeeding Boards have applied that decision to evaluate the reasonableness of consent settlement agreements for the past 25 years.[9] Moreover, contrary to my colleagues, they do not return today to the standard "originally adopted by the Board" in *Local 201, Electronic Workers (General Electric)*, 188 NLRB 855 (1971), because the Board in *General Electric* did not, in my colleagues' words, "adopt[] the trial examiner's recommendation to approve the proposed order *on the ground that* it provided a full remedy for all of the violations alleged in the complaint."[10] In *General Electric*, the trial examiner recommended approving a consent settlement agreement that provided "a full remedy," and the Board adopted the trial examiner's recommendation. Id. at 855. The Board did not say that it was adopting the recommendation "on the ground that" it provided a full remedy. The Board did not say it would *only* approve consent settlement agreements that provide "a full remedy." Nor can a "full remedy" standard be inferred from the *General Electric* decision. Merely because the Board in *General Electric* approved a consent settlement agreement that provided a full remedy, it does not follow that it would *reject* a consent settlement agreement that provided somewhat less than a full remedy. A high jumper that clears the bar by a foot would also clear it if he had jumped 6 inches lower. In short, my colleagues do not return to "the Board's original standard" for consent settlement agreements. They announce a "full remedy" standard *for the first time in the Board's history*.

Third, I respectfully disagree with my colleagues' suggestion that the Board in *Independent Stave* favored the voluntary resolution of cases only in "deference to the charging party's judgment."[11] Again, the *Independent Stave* factors themselves contemplate that charging parties might *oppose* the proffered settlement terms.[12] It is true that, in reference to the three charging parties who accepted the settlement, the Board in *Independent Stave* mentioned that it was "honoring the parties' agreements" and that the settlements eliminated risks that the parties "have decided to avoid."[13] However, the Board characterized the Act's purposes more broadly as "encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest."[14] These purposes are advanced by the Board's acceptance of *all* settlements that the Board deems "reasonable," regardless of opposition by the General Counsel or certain parties. The Board in *Independent Stave* also renounced any requirement of "a full remedy" for reasons that apply regardless of whether the General Counsel or other parties might insist on such relief. The Board stated:

> 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 [full] 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 settlement must mirror a full remedy, we would be *ignoring the realities of litigation.*[15]

I agree with the *Independent Stave* Board that rejecting a

[8] *Independent Stave*, 287 NLRB at 743.

[9] See, e.g., *Local 872*, 28–CB–118809, 2015 WL 153954 (Jan. 12, 2015) (agreeing with the judge that the proposed "unilateral settlement by consent order" met requirements of *Independent Stave*); *Heil Environmental*, 10–CA–114054 et al., 2014 WL 2812204 (June 20, 2014) (same); *Postal Service*, 20–CA–31171 (May 27, 2004) (approving under *Independent Stave* a unilateral settlement offer opposed by the General Counsel and the charging party); *Leprino Foods Co.*, 07–CB–43599 (Jan. 24, 2003) (same); *Caterpillar, Inc.*, 33–CA–10164 (May 13, 1996) (same); *Propoco, Inc., d/b/a Professional Services*, 2–CA–27013 (June 26, 1995) (same). See also *Lin Television Corp.*, 362 NLRB 1818 (2015) (setting aside "consent order" as it did not meet requirements of *Independent Stave*); *Enclosure Suppliers, LLC*, 09–CA–046169, 2011 WL 2837659 (July 14, 2011) (same); *Sea Jet Trucking Corp.*, 327 NLRB 540, 550 (1999) (setting aside unilateral settlement proposed by the respondent over the General Counsel's and charging party's objection as it did not satisfy *Independent Stave* requirements); *Iron Workers Local 27 (Morrison-Knudson)*, 313 NLRB 215, 217 (1993) (same); *Food Lion, Inc.*, 304 NLRB 602, 602 fn. 4 (1991) (same).

[10] Majority opinion, slip op. at 1.

[11] Majority opinion, slip op. at 2.

[12] 287 NLRB at 743.

[13] Id. As my colleagues observe, the *Independent Stave* Board did not evaluate the reasonableness of the proposed settlement as to the fourth charging party (employee Raley), who did not accept the settlement. But the respondent in *Independent Stave* did not ask the Board to approve the settlement as to Raley despite Raley's objection. Rather, the respondent asked the Board to find that Raley, by rejecting its settlement offer, waived any right to claim employment based on the complaint allegation that it unlawfully refused to hire him. Id. at 740. The Board's denial of summary judgment as to Raley, therefore, does not mean the Board held that the *Independent Stave* standard was inapplicable to consent settlement agreements.

[14] Id.

[15] Id. at 742–743 (emphasis added).

settlement agreement on the basis that it does not furnish a "full remedy"—when settlement terms would be deemed "reasonable" in light of the factors set forth in *Independent Stave*—improperly fails to recognize that it is never certain that the General Counsel and charging parties will prevail in Board litigation.[16]

Fourth, I believe the Board should acknowledge that, in many or most cases, less-than-complete but "reasonable" settlement terms agreed to by the respondent at an early stage[17] will leave the parties in a better position than would result from a Board adjudication, considering the substantial burdens and time involved in Board proceedings. Unfortunately, the nature of Board litigation entails substantial delay in getting unfair labor practices resolved. Our procedures require the filing of a charge that is investigated by one of the Board's Regional Offices, which decides whether to issue a complaint, which is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions with the Board, which typically are supported by another round of briefs, and the Board renders a decision, which can be followed by court appeals. When the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's Regional Offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and, too often, causes unacceptable delays before *any* Board-ordered relief becomes available to the parties.[18]

Fifth, even if one applies the "full remedy" standard adopted by my colleagues, I believe the settlement terms at issue here must be deemed acceptable by the Board. The single unfair labor practice alleged in this case is that the Respondent threatened employees with more vigorous enforcement of work rules if they chose to be represented by a union steward or sought support and/or assistance from a union. The remedy that would be ordered by the Board in this case after a full adjudication would be an order to cease and desist and to post a remedial notice. Under the terms of the consent settlement agreement, the Respondent agrees to post a remedial notice stating, among other things: "WE WILL NOT threaten you with more vigorous enforcement of rules if you choose to be represented by a union steward or seek support and/or assistance from a union," and "WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights under Section 7 of the Act." This is what the remedial notice would say if the Board ordered the posting of a notice after a full adjudication. Moreover, the Respondent has agreed to post the remedial notice for 60 days, which is the standard notice-posting period ordered by the Board in adjudicated unfair labor practice cases. Moreover, going *beyond* "the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board"—the standard the majority will now apply in evaluating consent settlement agreements—the Respondent has agreed that under certain circumstances set forth in the agreement's default language, it waives the right to oppose entry of a judgment against itself by a United States court of appeals.

My colleagues cite only one ground for concluding that the consent settlement agreement fails to afford a "full remedy" in this case: the settlement agreement provides for a default judgment in the event that the respondent breaches the settlement agreement, but the default judgment provision is subject to a 6-month limitation, which my colleagues call "a 6-month sunset clause."[19] For three reasons, the presence of a "6-month sunset clause" in the settlement agreement does not make

[16] See id. at 742 ("[T]here are risks inherent in litigation."); id. at 743 ("[T]he outcome of the litigation is uncertain" and parties "may ultimately lose.").

[17] In *Independent Stave*, for example, the settlements regarding three of the charging parties were agreed to by the employer *10 days* after the issuance of the complaint. Id. at 743. In the instant case, the complaint was issued on March 31, 2015, and the employer sought approval of the settlement terms on May 20, 2015, roughly 2 weeks before the scheduled hearing commencement date of June 4, 2015.

[18] Many cases involve years of Board litigation, and often dozens or even hundreds of employee-claimants. For example, the dispute in *CNN America, Inc.*, 361 NLRB 439 (2014)—involving approximately 300 employee-claimants—required 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal. Another example, in the early stages of Board litigation, involves consolidated claims being pursued against McDonald's USA, LLC, and 31 other employer parties, based on 61 unfair labor practice charges filed in six NLRB regions alleging 181 unfair labor practices involving employees at 30 restaurant locations. See, e.g., *McDonald's USA, LLC*, 363 NLRB 847 (2016).

[19] The consent settlement agreement's default judgment language provided that, in the event of a breach of the agreement's terms, the respondent agreed to the entry of a default judgment, which waives the respondent's right to litigate the unproven allegations that gave rise to the settlement, except the respondent may litigate the question of whether it violated the agreement. The default language in the consent settlement agreement provides that "no default judgment will be sought by the General Counsel for conduct occurring more than six months after the closing of this case on compliance." My colleagues deny that a respondent must agree to accept a default judgment for a proposed settlement to pass muster under their decision today, but, as noted, the 6-month limitation on default judgments is the sole basis upon which they reject the settlement at issue in this case.

the agreement provide less than a "full remedy."

First, an agreement's default judgment language (with or without a 6-month sunset clause) has nothing to do with whether employees receive a "full remedy." The completeness of the remedy relates to the agreement's substantive terms (which, depending on the type of case, may involve backpay, reinstatement, a cease-and-desist order, and a remedial posting requirement). An agreement's default judgment language, and any 6-month limitation on any default judgment, only relates to the process by which the Board would enforce the settlement in the event of a breach. Whether the settlement affords a "full remedy" is determined by the substantive commitments set forth in the agreement, which are different from what occurs if the Respondent fails to abide by those commitments. And as explained above, those substantive commitments represent a full remedy.[20]

Second, my colleagues define a "full remedy" as "all the relief that the aggrieved party would receive under the Board's established remedial practices were the case successfully litigated by the General Counsel to conclusion before the Board." As explained above, that "full remedy" is provided in the consent settlement agreement my colleagues reject in the instant case. As I have shown, if this case were "successfully litigated by the General Counsel to conclusion before the Board," the Respondent would be ordered to take the same remedial steps that it agreed to take as outlined in the consent settlement agreement. In fact, the consent settlement agreement imposes more onerous requirements on the Respondent than what would result from successful litigation "before the Board." Under Section 10(f) of the Act, a respondent who loses before the Board has the right to file a petition for review in a United States court of appeals seeking to have the Board's order modified or set aside. Under the terms of the consent settlement agreement, the Respondent *waives* this right.

Third, even if the "6-month sunset clause" might be deemed relevant to the completeness of the remedy, it is expressly permitted in informal settlements where, like here, chances of default are low. See GC Memorandum 13-04, at 12 (March 19, 2013); OM Memorandum 14-48, at 3 (April 10, 2014). As the judge observed, there is no indication in this case of "a significant danger that the Respondent will violate the Act in the future at that facility." Moreover, not only has the Division of Operations-Management within the Office of the General Counsel decided that a 6-month "sunset clause" in the default provisions of a settlement agreement is permissible when chances of default are low, it has further decided that "the six-month period may run from approval of the settlement agreement rather than closure of the case." OM Memorandum 14-48, at 3 fn. 2. Six months from approval of the agreement is a shorter period of time than 6 months from closure of the case on compliance. Here, the 6-month period runs from closure of the case on compliance. In these circumstances, it appears that the settlement terms encompass all of the voluntary remedial actions that could be required of a respondent who allegedly committed an isolated instance of an unfair labor practice.[21]

For these reasons, I disagree with my colleagues' decision to overrule *Copper State Rubber*, 301 NLRB 138 (1991), *Food Lion, Inc.*, 304 NLRB 602 (1991), and similar cases; I disagree with the decision to overrule the application of *Independent Stave* to consent settlement agreements, i.e., settlements opposed by the General Counsel and charging parties; and I disagree with my colleagues' failure to affirm the judge's approval of the settlement terms agreed to by the Respondent. Again, the practical effect of today's decision will be to prevent the Board from having any opportunity to secure voluntary early settlements—even when the Board itself would find that the settlement terms are reasonable under *Independent Stave*—merely because the settlement terms are unreasonably opposed by the General Counsel and the charging parties. Accordingly, I respectfully dissent.

[20] Significantly, the Charging Party did not object to the inclusion of either the non-admissions clause or the 6-month sunset clause in the consent order. Its sole objection was that the consent order did not provide *more than* the standard Board remedy—specifically, district-wide notice posting. In support of their conclusion that the settlement agreement fails to provide a full remedy, my colleagues (rightly) do not cite the absence of district-wide notice posting. In these circumstances, the majority's insistence on what they deem a full remedy in "deference to the charging party's judgment concerning its own interests in accepting less than a full remedy" rings a bit hollow.

[21] Because the proposed 6-month "sunset clause" runs from the closure of the case on compliance, it would have no effect on the enforceability, through default judgment, of any failure to comply with the notice-posting provision. The clause does limit the period during which the consent settlement agreement can be enforced through a default judgment if the Respondent thereafter were to fail to comply with its other provisions, but by the terms of the agreement the General Counsel retains the ability—even after the 6-month period—to revoke the agreement and litigate the settled allegation. A Board order in a litigated case, or a settlement agreement without a default judgment provision, similarly require further litigation before a court order requiring compliance can be secured.