Local Union 290 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO *and* James R. Coleman *and* David L. Collinsworth *and* Paul Sanders *and* Kinetic Systems, Inc., Party in Interest *and* Harder Mechanical Contractors, Inc., Party in Interest.

Plumbing and Piping Industry Council, Inc. d/b/a Plumbing and Mechanical Contractors Association *and* Paul Sanders. Cases 36–CB–2456–1, 36–CB–2463–1, 36–CB–2530–1, 36–CB–2538–1, 36–CB–2553–1, and 32–CA–9572–1

October 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 25, 2005, Local Union 290 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Respondent Local 290); Plumbing and Piping Industry Council, Inc. d/b/a Plumbing and Mechanical Contractors Association (Respondent Council); James R. Coleman (Charging Party Coleman); David L. Collinsworth (Charging Party Collinsworth); Paul Sanders (Charging Party Sanders); and the General Counsel of the National Labor Relations Board entered into a formal settlement stipulation, subject to the Board's approval, providing for the entry of a consent order by the Board. The parties waived all further and other proceedings before the Board to which they may be entitled under the National Labor Relations Act, as amended, and the Board's Rules and Regulations, except compliance proceedings, and the Respondents waived their right under Section 10(e) and (f) of the Act to contest either the propriety of the Board's Order issued pursuant to the formal settlement stipulation or the findings of fact and conclusions of law underlying that Order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

After careful consideration, we find that it would not effectuate the purposes and policies of the Act to approve the stipulation.

The consolidated complaint alleges that Respondent Local 290 violated Section 8(b)(1)(A) and (2) by, among other things, operating an exclusive hiring hall in an arbitrary and discriminatory manner and imposing unlawful conditions upon the right of registrants to inspect and/or copy records relating to the operation of the hiring hall. The consolidated complaint also alleges that Respondent Council violated Section 8(a)(1) and (3) by implementing and maintaining arbitrary and discriminatory rules pertaining to the operation of the hiring hall.

The stipulation would require the Respondents to cease and desist their unlawful conduct and to jointly and severally make whole unnamed discriminatees. The stipulation would also require Respondent Local 290 to post a notice at the hiring hall involved in these proceedings and to mail a notice to all registrants currently on the out-of-work lists maintained by Respondent Local 290 as well as all employees currently working under the collective-bargaining agreement between Respondent Local 290 and Respondent Council. The stipulation would further require Respondent Council to post a notice at Respondent Local 290's hiring hall as well as at the places of business of all Respondent Council's members and those entities that have assigned their collective-bargaining rights to Respondent Council. The stipulation does not provide for the automatic entry of a consent court judgment enforcing the Board's Order, and it contains a nonadmission clause providing that the signing of the stipulation by the Respondents does not constitute an admission that they have violated the Act.

We find that the stipulation is deficient in two respects. First, the Regional Director's transmittal memo indicates that the parties have agreed that the Board "would only seek enforcement if Respondents fail to comply with the Order." However, there are no provisions in the stipulation memorializing the parties' agreement on this issue. Second, it is unclear what happens if the Respondents deny an allegation of noncompliance and maintain that a petition for enforcement should not be filed. There does not appear to be any mechanism to permit the Respondents to contest the claimed noncompliance. While it may well be that the parties have agreed to nonenforcement absent noncompliance and/or that the Respondents have agreed to accept a unilateral finding by the General Counsel of noncompliance, we would require these matters to be spelled out, in writing, in the stipulation itself.

Our dissenting colleague treats these problems as if they did not exist. She notes that the stipulation provides that it is the entire agreement, and thus the agreements discussed above have no effect. However, the Regional Office has told the parties that these agreements are a part of the stipulation. At the very least, there are issues of propriety when the Regional Office, under whose aegis the stipulation was entered into, tells the parties something that is contrary to the written agreement itself. That is, the stipulation says that it is the entire agreement, and the Regional Office says that it is not.

Our dissenting colleague also notes that, in general, the Board can seek enforcement of its order even without an

agreement. Although that may be so, the Regional Office told the parties that it would not do so unless there was noncompliance. Again, there would seem to be questions of propriety if the Office promised one thing and did another.

Finally, our colleague relies upon *Independent Stave*, 287 NLRB 740 (1987). However, that case simply spells out the factors that the Board will consider in deciding whether to accept or reject a settlement agreement. The problem in the instant case is the threshold issue of ascertaining what the stipulation entails, and spelling that out in the stipulation itself.

We are also concerned that the stipulation's notice provisions may be inadequate. Notwithstanding that some of the alleged violations date back to 2002, there is no provision for notification to registrants who were on the out-of-work lists maintained by Respondent Local 290 at the time of the alleged violations, but who are not currently on the list or currently working under the collective-bargaining agreement between Respondent Local 290 and Respondent Council. In our view, the parties should at least consider inclusion of this group in the notice provisions.[1]

Accordingly, we reject the instant stipulation and remand the proceeding to the Regional Director for further processing without prejudice to further settlement negotiations consistent with this Order.

MEMBER LIEBMAN, dissenting.

Today, the Board takes the unusual step of rejecting a formal settlement stipulation all parties have signed and submitted to the Board for approval. Because the stipulation plainly effectuates the policies of the Act, I must dissent from the majority's refusal to approve it.

I.

The facts are set forth in the majority opinion. In brief, the Respondent Union and the Respondent Council were parties to a collective-bargaining agreement providing for an exclusive hiring hall. In December 2004, the Regional Director issued a complaint alleging that the Respondents violated the Act in numerous respects, including by maintaining certain hiring hall rules. The complaint also alleges that the Respondent Union violated the Act by operating the hiring hall in a discriminatory and arbitrary manner, and by refusing to provide dispatch records to a registrant.

In May 2005, the two Respondents, the three individual Charging Parties, and the General Counsel entered into a formal settlement stipulation. The formal settlement stipulation requires the Respondents to cease and desist from the conduct alleged to be unlawful, to jointly and severally make discriminatees whole, and to post and mail notices to employees. In agreeing to the stipulation, the Respondents waived "their right under Section 10(e) and (f) . . . to contest either the propriety of the Board Order that will issue pursuant to the Formal Settlement Stipulation or the Findings of Fact and Conclusions of Law underlying that Order."

II.

The leading case on whether to approve a settlement agreement is *Independent Stave Co.*, 287 NLRB 740, 743 (1987).[1] The *Independent Stave* criteria clearly militate in favor of approving the formal settlement stipulation. First, all the parties have agreed to be bound. Second, the stipulation appears to remedy all the unfair labor practices alleged in the complaint. Third, there is no evidence of fraud, coercion, or duress. Finally, there is no contention that the Respondents have a history of violating the Act.[2] Under these circumstances, "honoring the parties' agreement advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." Id.

The majority does not seriously contend that the formal settlement stipulation is deficient under *Independent Stave*. The majority expresses "concern" over the adequacy of the stipulation's notice provisions, but does not reject the stipulation on that ground.

The majority cites two other reasons for disapproving the stipulation. First, the majority states that there is no provision in the formal settlement stipulation memorializing the "parties' agreement" that the Board would only seek court enforcement if the Respondents failed to comply with the Order. This part of the majority opinion is based on the following two sentences in the Regional Director's May 26, 2005 memorandum transmitting the formal settlement stipulation to the Board for its approval:

> Procedurally, the proposed Order differs slightly from a standard Order in that the Board would not automatically seek court enforcement of the Order, but rather

[1] We do not suggest, however, that broader notification is necessarily a sine qua non for acceptance of any future settlement if reasons for the more limited notice are provided.

[1] Although *Independent Stave* involved a non-Board settlement, in subsequent cases the Board has applied its criteria in determining whether to approve a Board settlement. E.g., *K & W Electric*, 327 NLRB 70 (1998).

[2] Although the Respondents violated an informal settlement they entered into in July 2004, this factor should be given little weight in determining whether to approve the May 2005 formal settlement stipulation. Unlike the informal settlement, the formal settlement stipulation is subject to court enforcement. If enforced by a court of appeals, any violation of the formal settlement stipulation would subject the Respondents to contempt proceedings.

would only seek enforcement if Respondents fail to comply with the Order. In exchange for the Board not automatically seeking court enforcement, Respondents agree to waive all rights to court review of the underlying merits of the Complaints.[3]

The answer to the majority's first objection is found in the formal settlement stipulation itself, which contains an "Entire Agreement" clause stating as follows: "This stipulation constitutes the entire agreement between the parties *and there is no agreement of any kind, verbal or otherwise, that alters or adds to it*." (Emphasis added.) As set forth above, the formal settlement stipulation expressly incorporates the Respondents' agreement to "waive their right . . . to contest either the propriety of the Board Order that will issue pursuant to the Formal Settlement Stipulation or the Findings of Fact and Conclusions of Law underlying that Order." However, there is no mention whatsoever in the formal settlement stipulation of any "agreement" to seek court enforcement only if the Respondents fail to comply with the Order. Because there is no reference to the latter "agreement" in the formal settlement stipulation and because the "Entire Agreement" clause prohibits "add[ing]" it, the conclusion is inescapable that the "agreement" relied on by the majority is not part of the formal settlement stipulation. If the Respondents believed that the "agreement" in question was a necessary part of the stipulation, they could have reduced it to writing. Obviously, they did not do so. It is not the Board's role to second guess their judgment and insist now that it be included in the formal settlement stipulation.

In any event, the Region's oral representation to the parties that court enforcement would be sought in the event of noncompliance is hardly a novel proposition that needed to be memorialized in writing. Section 10164.5 of the Casehandling Manual (Part One) states that in cases like this one, in which the formal settlement does not provide for an automatic court judgment, "entry of such a judgment may be sought in appropriate circumstances." Certainly, the failure to comply with the stipulated Order would be an "appropriate circumstance" for seeking court enforcement. The Region's commitment to follow Agency practice hardly seems an appropriate basis for rejecting an all-party formal settlement stipulation.

The majority's second reason for rejecting the formal settlement stipulation fares no better. The majority states that "it is unclear what happens if the Respondents deny an allegation of noncompliance and maintain that a petition for enforcement should not be filed. There does not appear to be any mechanism to permit the Respondents to contest the claimed noncompliance."

However, compliance is not relevant to an enforcement proceeding. As the Seventh Circuit has explained, "'[B]ecause the Board's orders impose a continuing obligation and because compliance today may evaporate tomorrow, compliance is not a defense to an enforcement action, nor does compliance moot enforcement proceedings. [Citation omitted.] Therefore, even if a respondent voluntarily complied with a Board order after a formal finding that it was not complying, the Board could still institute proceedings to insure future compliance." *NLRB v. Howard Immel, Inc*., 102 F.3d 948, 952 (7th Cir. 1996). In short, the majority has directed the parties to pursue an inquiry that serves no useful purpose.

III.

In conclusion, in issuing today's decision, the Board has lost sight of its mission. The Board's role is not to reject a formal settlement stipulation based on an "agreement" the parties chose not to include or on the absence of a "mechanism" to resolve an irrelevant issue. Rather, the Board's goal is to promote the peaceful resolution of labor controversies. Believing that this all-party settlement plainly accomplishes that end, I must dissent from the majority's refusal to approve it.

[3] At first blush, the Regional Director's memorandum would appear to be an improper ex parte communication. However, Sec. 102.130(d) of the Board's Rules specifically exempts "written communications proposing settlement or an agreement for disposition of any or all issues in the proceeding."