

St. James Mercy Hospital, Inc. and Donna Dean, Diane Davis, Sarah Patrick, and Jeanna Berry and Diane Davis. Cases 3-CA-16111 and 3-CA-16278

April 28, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

Upon charges filed by the Charging Parties on January 28 and April 25, 1991,¹ the General Counsel of the National Labor Relations Board issued a consolidated complaint on June 27 against St. James Mercy Hospital, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Copies of the charge and complaint were duly served on the parties to this proceeding.

The complaint alleges that the Respondent violated Section 8(a)(1) by soliciting grievances from an employee during a union organizing campaign, interrogating employees about their union sympathies and activities, and suspending employees Diane Davis, Donna Dean, and Sarah Patrick because they engaged in protected concerted activities. The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) by indefinitely suspending and later discharging Davis because of her support for the Union and her other protected concerted activities. On July 11, the Respondent filed an answer admitting in part and denying in part the allegations of the complaint, and raising certain affirmative defenses.

On August 21, the Respondent filed with the Board a Motion for Summary Judgment, supported by a memorandum of law and accompanying affidavits and exhibits. The Respondent contends that it entered into a settlement agreement that disposed of the allegations contained in the complaint. The Respondent argues that it did not violate the terms of the settlement agreement or engage in any subsequent unfair labor practices, and that no material issue of fact exists regarding the validity of the settlement agreement. The Respondent requests that the Board find that the Regional Director improperly withdrew his approval of the settlement agreement, and dismiss the complaint.

On August 28, the General Counsel filed an opposition to the Respondent's motion, contending that the Regional Director acted properly under Board law in setting aside the settlement agreement, and requesting that the motion be denied and that the cases proceed to a hearing.

On September 3, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The

General Counsel filed a response, and the Respondent filed a memorandum of law in further support of the Motion for Summary Judgment.

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

Ruling on Motion for Summary Judgment²

The original charge in Case 3-CA-16111 was filed on January 28, alleging that the Respondent had unlawfully suspended Dean, Davis, and Patrick about October 27, 1990. An amended charge was filed on March 11, alleging only that the Respondent had unlawfully solicited grievances and interrogated employees between mid-September and early November 1990. After the charge had been investigated by the Regional Director, the parties entered into an informal settlement agreement, under the terms of which the Respondent agreed to post a notice to employees stating that it would not interrogate employees or solicit their grievances because they had chosen to affiliate with the Union. The notice did not state that the Respondent had been found to have committed unfair labor practices. The settlement agreement contained a "non-admission clause," stating that by signing the agreement the Respondent did not admit having committed unfair labor practices, and that the Regional Director's approval of the agreement did not constitute a determination by the Board that the Respondent had violated the Act. The Acting Regional Director approved the settlement agreement on March 22, and the Respondent posted the notice.

On April 25, the charge in Case 3-CA-16278 was filed, alleging that Davis had been unlawfully suspended and terminated in early 1991. The charge was amended on June 7 to allege the unlawful suspensions of Davis, Dean, and Patrick in November 1990, as well as Davis' 1991 suspension and discharge.

By letter dated May 20, the Regional Director notified the Respondent that he was revoking the settlement agreement because the Respondent had failed to comply with the requirements of the agreement. The Regional Director based his decision on a letter, dated April 1, from the Respondent's president, Paul E. Shephard, and mailed to the employees. That letter read as follows:

Dear Employee:

We understand the New York State Nurses Association has recently sent information which stated "The National Labor Relations Board has ruled . . . St. James has interfered with RN's right

¹Unless otherwise noted, all dates are in 1991.

²The complaint alleges, the Respondent admits, and we find that the Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

to organize.” It is unfortunate this union has again found it necessary to mislead our nurses by making statements which are not true.

Several weeks ago four allegations were filed by N.Y.S.N.A. with the National Labor Relations Board on behalf of four St. James Mercy Hospital nurses. A thorough investigation was conducted by the Board which resulted in two of the allegations being withdrawn by the Union. The remaining allegations were resolved through a settlement agreement (attached). We could have attended a hearing to disprove these allegations; however, the cost of several thousand dollars did not seem a prudent or necessary step to take knowing full well St. James would not have been found guilty of either of the accusations.

This agreement, entered into by both N.Y.S.N.A. and the hospital, was approved by the National Labor Relations Board. In reviewing this document, please note it was agreed to with the mutual understanding that “the signing of this agreement does not constitute an admission of violation of the National Labor Relations Act nor does its approval constitute a determination by the National Labor Relations Board that St. James Mercy Hospital has violated the act.”³ Contrary to statements made by N.Y.S.N.A., no determination has been made by the Board that the hospital has violated anyone’s right to organize.

I encourage you to take advantage of the union’s offer to “get the facts.” Upon doing so, you might again ask yourself the question, “If this union is willing to mislead me to get my support, what would they be willing to do to me as my collective bargaining agent?”

Sincerely,
Paul E. Shephard
President

The Regional Director also relied on “similar comments” by the Respondent’s director of human resources, Dennis Canty, which were printed in a local newspaper on March 28. The Regional Director found that the Respondent’s statements—unequivocally declaring its innocence, emphasizing the nonadmission clause in the settlement agreement, and asserting that the Respondent had settled the case only to avoid litigation expenses—vitiated the effectiveness of the settlement agreement and warranted its revocation.

The Respondent argues that Shephard sent the letter, along with a copy of the settlement agreement, to employees in order to set the record straight regarding the disposal of the charges in Case 3-CA-16111. The Re-

spondent alleges that about March 28 it received a copy of a printed bulletin that the Union was distributing to the Respondent’s registered nurses. The bulletin, a copy of which is included among the Respondent’s exhibits, states, in relevant part: “You won! The National Labor Relations Board Has Ruled . . . St. James has interfered with RNs’ right to organize.” The Respondent contends that it did no more than inform the employees that the Union had misrepresented the facts regarding the settlement of the outstanding charge, and set forth the Respondent’s perspective on the settlement. The Respondent further notes that it did not post the letter with the notice, but instead mailed it to the nurses.

In these circumstances, the Respondent argues, the Regional Director should not have voided the settlement agreement. According to the Respondent, it had the right, under both the first amendment and Section 8(c) of the Act, to speak the truth and communicate its opinions to the employees. This is especially so, the Respondent continues, because it did not post the letter beside the notice, but mailed copies to employees in response to the Union’s mischaracterization of the settlement. The Respondent further notes that the statements in the letter are not alleged to have been unlawful, and that it has not been accused of engaging in any postsettlement unfair labor practices.

Finally, the Respondent urges that, because the settlement agreement should not have been revoked, the complaint should be dismissed under the rule of *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), because all the allegedly unlawful conduct took place, if at all, before the settlement, was either known to or readily discoverable by the General Counsel at the time of the settlement, and was not reserved from the settlement by the parties.

In opposition, the General Counsel argues that the revocation of the settlement agreement did not violate the Respondent’s rights under the first amendment or Section 8(c), and that the Regional Director acted properly in revoking the agreement because the Respondent’s statements vitiated the agreement’s effectiveness.⁴ The General Counsel contends that the Respondent advised employees, in effect, that it had done nothing wrong and that it had entered into the settlement agreement in order to save money, and that in so doing it defeated the purpose of the Board’s notice, which was to assure employees that their Section 7 rights would be respected.⁵ The General Counsel further argues that the mailing of the Respondent’s letter directly to the employees individually increased the

³The material within quotation marks is not a verbatim reproduction of the language of the agreement; the differences, however, are not material.

⁴The General Counsel does not contend that the Respondent’s statements violated the Act, or that the Respondent committed any postsettlement unfair labor practices.

⁵See *Bingham-Williamette Co.*, 199 NLRB 1280 (1972), enfd. mem. 491 F.2d 1406 (5th Cir. 1974).

tendency of the statements in the letter to undermine the settlement agreement.⁶ In regard to the Respondent's protest that it was only replying to misinformation contained in the Union's literature, the General Counsel notes that the Respondent could have accomplished its purpose without making the assertions that were found to have undermined the settlement agreement. Under all the circumstances, therefore, the General Counsel argues that the Regional Director properly revoked the settlement agreement and issued the consolidated complaint. In the alternative, the General Counsel urges that the case is not appropriate for summary judgment because the newspaper article containing remarks attributed to Canty was not submitted with the Respondent's motion, briefs, affidavits, and exhibits, and, accordingly, there are material facts that are in dispute.⁷

We agree with the Respondent. In sending its letter to the employees explaining that it had not admitted having engaged in unlawful conduct, and that no unfair labor practices had been found by the Board, the Respondent was replying truthfully to the Union's material misrepresentation of the nature of the settlement agreement. The Union's literature announced that "The . . . Board Has Ruled . . . St. James has interfered with RNs' right to organize." That statement simply is not true. The Board had not ruled any such thing in this case, and the settlement agreement explicitly provides that the Respondent does not admit to having violated the Act, and that the Regional Director's approval of the agreement does not constitute a determination by the Board that the Respondent acted unlawfully. The Union having placed the terms of the settlement agreement in issue by means of an *inaccurate* characterization, the Respondent can hardly be denied the right to furnish employees with an *accurate* portrayal of the agreement by way of reply.⁸

⁶Cf. *Pottsville Bleaching Co.*, 301 NLRB 1095 (1991), in which the Board refused to approve a settlement agreement providing that a nonadmission clause (which was part of the agreement) would also be included in the notice to employees. The Board reasoned that the inclusion of such a provision in the notice could be confusing to employees and could undermine its effectiveness.

⁷The Respondent states, in reply, that it does not contend that Canty did not make the comments attributed to him or that those comments were not similar to those contained in Shephard's letter (as the Regional Director found). The Respondent thus argues that there is no dispute concerning the material facts surrounding the Regional Director's revocation of the settlement agreement.

⁸This case thus is distinguishable from *Bingham-Williamette Co.*, supra; *Bangor Plastics*, 156 NLRB 1165, enf. denied 392 F.2d 772 (6th Cir. 1967); and other decisions in which employers gratuitously brought up the fact that they had not admitted any wrongdoing by entering into settlement agreements, and undermined the effectiveness of posted notices by implying that the posting was a mere formality. The employers in those cases were not responding to misleading statements by the unions concerning the terms of the settlement agreements.

We note that the Respondent's letter erroneously stated that the Union had filed the charge in Case 3-CA-16111, withdrawn two of

The General Counsel contends that even if the Respondent was attempting to address the misinformation contained in the Union's literature it could (and, implicitly, should) have done so without asserting its innocence, emphasizing the nonadmission clause in the settlement agreement, or stating that it had settled the case only to save money. Under the circumstances of this case, we cannot agree that the Respondent should have had to limit its defense in the manner suggested by the General Counsel. Although the Board in other decisions has relied on similar statements by employers in setting aside settlement agreements,⁹ we find the situation before us distinguishable in that the Respondent's statements were made only in response to the Union's misrepresentations. Given the implications of those misrepresentations, the Respondent was entitled to dispel any false notions concerning the Board's action and the meaning of the settlement that the misrepresentations might have engendered in the minds of its employees. Thus, by stating the circumstances under which it entered into the settlement agreement and explaining the nature of that agreement, and not committing any unfair labor practices in the process,¹⁰ the Respondent did no more than mount a vigorous, truthful defense of its position. That being the case, we find that the Respondent remained within the bounds of permissible discourse and, contrary to the conclusion of the Regional Director, did not fail to comply with the requirements of the settlement agreement.

We also reject the General Counsel's contention that the Respondent's mailing copies of the letter and settlement agreement to employees had a greater tendency to undermine the agreement than did the notice containing the nonadmission clause in *Pottsville Bleaching*, supra. The Board has consistently criticized employers for posting messages such as the Respondent's letter next to the notices mandated by settlement agreements, because such postings tend to undermine the effectiveness of the notice.¹¹ The Respondent did not post its letter next to the notice, and there is no contention that it included copies of the notice with the

allegations, and been a party to the settlement agreement. Although those misstatements arguably portrayed the Union in an unfavorable light, they are at best peripheral to the issues before us. Perhaps for that reason they have gone unremarked on by both the Regional Director and the General Counsel, neither of whom evidently considers them grounds for invalidating the settlement agreement. In these circumstances, we find that the Respondent's erroneous statements do not preclude our granting summary judgment.

⁹See, e.g., *Bingham-Williamette Co.*, supra; *Bangor Plastics*, supra.

¹⁰This case is distinguishable from *Paymaster Corp.*, 162 NLRB 123, 126-128 (1966), in which the employer responded to the union's characterizations of the settlement agreement as an admission of guilt with statements that the Board found to have independently violated Sec. 8(a)(1).

¹¹See *Bingham-Williamette Co.*, supra, 199 NLRB at 1281 and fn. 2, and cases cited.

letter to employees. Indeed, the letter did not even mention the notice. In these circumstances, contrary to the General Counsel, the deleterious effect on the notice is much attenuated.

We turn now to the General Counsel's argument that without evidence of the content of the newspaper article purportedly containing statements by Canty concerning the settlement agreement an issue of material fact exists that precludes summary judgment. We are not persuaded by that argument. Although the article itself is nowhere to be found in the papers submitted by either party, the Respondent does not deny that Canty made the statements that were referred to in the article. No one disputes the Regional Director's characterization of the statements in the article as similar to those in Shephard's letter, which we have found not to warrant revocation of the agreement. The General Counsel does not contend that the statements in the article would warrant revocation of the settlement agreement even if Shephard's statements did not.

Accordingly, we find that there is no material issue of fact that must be decided at a hearing, and we shall grant the Respondent's Motion for Summary Judgment.

We therefore find that the Regional Director improperly revoked the settlement agreement in this case, and we shall order that it be reinstated. Further, both the Respondent and the General Counsel agree that a viable settlement agreement disposes of all issues in-

volving presettlement conduct except for previous violations of the Act that were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by mutual understanding of the parties.¹² All the violations alleged relate to conduct that is said to have occurred before the approval of the settlement agreement.¹³ There is no contention, or evidence, that any of the alleged violations were unknown at the time of the settlement, not readily discoverable, or specifically reserved from the settlement by agreement of the parties. The General Counsel contends only that the *Hollywood Roosevelt* rule should not apply because the settlement agreement was properly revoked—a proposition we have rejected. It follows that all the issues in the complaint were disposed of by the settlement agreement. Therefore, we shall dismiss the complaint.

ORDER

It is ordered that the Respondent's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED that the settlement agreement is reinstated and the complaint is dismissed.

¹² *Hollywood Roosevelt Hotel*, supra.

¹³ The interrogations, solicitation of grievances, and suspensions of Davis, Dean, and Patrick are alleged to have taken place in the fall of 1990. Davis is alleged to have been suspended indefinitely in January 1991, and to have been discharged on February 27, 1991. The settlement agreement was approved on March 22, 1991.