

B & K Builders, Inc. and Laborers' International Union of North America, Fox/Wis River Valley Locals: 931, 539, 1359, 1407, AFL-CIO, and Bricklayers & Allied Craftsmen District Council of Wisconsin International Union of Bricklayers and Allied Craftsmen, AFL-CIO, and Greater Fox River Valley District Council of Carpenters United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 30-CA-12856, 30-CA-12866, and 30-CA-13014

April 30, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND LIEBMAN

The issues presented here arise from the judge's dismissal of certain consolidated complaint allegations based on his finding that a settlement agreement barred their litigation.¹ The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

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

On February 15, 1995,² three unions, the Charging Parties here, filed a representation election petition for a unit of carpenters, laborers, and masons employed by the Respondent. The Unions lost the April 7 election, but thereafter filed objections as well as unfair labor practice charges in Cases 30-CA-12856 and 30-CA-12866.

On July 26, the parties entered into a stipulation, agreeing to set aside the April 7 election and to conduct a second election. On July 27, the parties entered into a settlement agreement covering the unfair labor practice allegations. The Respondent complied with the notice posting and other affirmative remedial obligations in this agreement.

On August 23, 2 days prior to the rerun election, the Unions filed charges in Case 30-CA-13014. These charges alleged that, subsequent to the execution of the settlement agreement, the Respondent discriminatorily laid off employee Richard Abel in violation of Section 8(a)(3) and (1) of the Act. They also alleged that, prior

to the execution of the settlement agreement, the Respondent had violated Section 8(a)(3) and (1) by discriminatorily refusing to assign Abel to a higher paying job, and had violated Section 8(a)(1) of the Act by granting wage increases to two apprentices and by creating the impression that employees' union activities were under surveillance.

On November 29, the Regional Director set aside the settlement agreement based on the alleged postsettlement discrimination against Abel. On December 12, the General Counsel issued an order consolidating cases and consolidated complaint in Cases 30-CA-12856, 30-CA-12866, and 30-CA-13014, alleging several violations of Section 8(a)(1) and (3).

In his decision, the judge recommended dismissal of the complaint in its entirety. He found that the Respondent lawfully discharged Abel for valid business considerations. He therefore found that there was no basis for setting aside the settlement agreement to permit litigation of unfair labor practice allegations covered by that agreement. Finally, the judge found that the settlement agreement barred all allegations of presettlement unfair labor practices, including allegations first made in the charge filed in Case 30-CA-13014. In the judge's opinion, the General Counsel failed to show that the parties to the agreement had specifically reserved the right to litigate these new allegations of unlawful wage increases and surveillance.

There are no exceptions to the judge's dismissal of the complaint allegations concerning Abel's postsettlement discharge, the judge's reinstatement of the settlement agreement, or his resultant dismissal of allegations of presettlement unfair labor practices in Cases 30-CA-12856 and 30-CA-12866. The General Counsel has filed limited exceptions to the judge's finding that the "Scope of the Agreement" clause contained in the settlement agreement did not specifically reserve the right to litigate the two new allegations of 8(a)(1) violations raised by the postsettlement charge filed in Case 30-CA-13014. We find merit in the General Counsel's exceptions.

In *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978), the Board held that "a settlement, if complied with, will be held to bar subsequent litigation of all prior violations except where they were not known to the General Counsel or readily discoverable by investigation or were specifically reserved from the settlement by mutual understanding of the parties." As previously indicated, the issue here is whether the settlement agreement specifically reserved the right to litigate the new allegations of presettlement unlawful wage increases and surveillance.

The "SCOPE OF THE AGREEMENT" language of the settlement agreement states:

This Agreement settles only the allegations in the above-captioned case(s), and does not con-

¹On December 31, 1996, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed limited exceptions and a supporting brief. The Respondent filed an answering brief.

The judge's decision included discussion of Case 30-RC-5668, which had been consolidated for hearing with the above-captioned unfair labor practice cases. On March 17, 1997, the Board issued an order severing Case 30-RC-5668 from this proceeding and remanding it to the Regional Director for Region 30 for the purpose of issuing a certification of representative.

²All dates are in 1995 unless noted otherwise.

stitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

We have no trouble concluding that the above language is sufficiently specific to avoid application of the broad *Hollywood Roosevelt* rule. It expressly states that the agreement settles only the allegations in Cases 30-CA-12856 and 30-CA-12866. It clearly reserves any person's right to file new postsettlement charges of unlawful presettlement conduct, as well as the General Counsel's right to investigate and issue complaint based on these charges, regardless of whether the newly alleged conduct was already known to the General Counsel or readily discoverable. There can be no other reasonable interpretation of the meaning of this language, to which all parties to the settlement agreed.³

Indeed, the express reservation language in the settlement agreement at issue here is even more specific than in *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), where the reservation stated

This Settlement Agreement settles only the unfair labor practices alleged in the above-captioned case, and does not constitute a settlement of any other case. It does not preclude persons from filing, or the National Labor Relations Board from prosecuting, unfair labor practice charges against the Charged Party based on events which precede the date of the approval of this Settlement Agreement.

Although the Board held in *Ratliff* that the above language was insufficient to permit litigation of a new charge challenging the legality of the same union-security clause that had been challenged in the settled unfair labor practice litigation,⁴ it observed that "this is

³The settled allegations involved preelection polling and interrogation, promises of wage increases, and threats to discharge the principal union activist. The new allegations are actual granting of wage increases (involving different employees from promise allegation) and the creation of the impression that its employees' union activities were under surveillance. By its express terms, the settlement agreement settled only the former allegations.

⁴The result reached in *Ratliff* was clearly a product of its special facts. Thus, in *Ratliff*, the settled case and the case the General

broad language that would permit the General Counsel to proceed in any case that can properly be defined as an 'other' case or that concerns any distinct 'event' preceding the date of the settlement. This clearly afforded the General Counsel broad latitude to proceed on other charges." A fortiori, the express reservation language in this case affords the General Counsel at least as much latitude.

Finally, we find no merit in the Respondent's claim that the reservation language of the settlement agreement is nugatory because it was preprinted boilerplate on a Board form. The Respondent was under no obligation to accept the reservation language as printed. Having entered into the settlement agreement containing such language, however, the Respondent is bound by it.

In sum, we find that the clear and specific terms of the reservation language in the settlement agreement permits litigation of the allegations of unlawful presettlement wage increases and surveillance in Case 30-CA-13014. Turning to the merits of those allegations, we note that there are no exceptions to the judge's findings that the Respondent granted unscheduled and unexpected merit wage increases to apprentice employees Brian Bushman and Ryan Leverance. The judge also found that the Respondent had failed to demonstrate a pattern or past practice of granting such wage increases. Under these circumstances, employees would reasonably conclude that the Respondent granted such wages during the representation election campaign in an effort to dissuade them from voting for the Unions. We therefore find that the Respondent violated Section 8(a)(1) of the Act by granting these wage increases.

There also are no exceptions to the judge's finding, based on uncontradicted testimony, that Supervisor Prust asked Bushman about his and Leverance's plan to cast blank ballots in the April 7 election. By this conduct, we conclude that the Respondent created the impression of surveillance by implication that it was watching the voting plans of its employees, in violation of Section 8(a)(1) of the Act.⁵

Counsel was seeking to litigate not only involved the same union-security clause and the same collective-bargaining agreement, but also the language that the General Counsel was alleging to be unlawful "even appeared in the same sentence as the language previously singled out as the fatal flaw in the clause." 310 NLRB at 1224. Under these circumstances, the Board concluded that the respondents could "reasonably believe that the settlement disposed of the legality vel non of the entire clause, at least during the term of the contract in which it was contained." *Id.*

⁵Having found unlawful impression of surveillance based on the incident involving Prust and Bushman, we find no need to pass on whether statements by Respondent's owner Kenneth Staab to former employee Harry Engle also involved unlawful impression of surveillance. An unfair labor practice finding based on the latter incident would merely be cumulative and would not affect the remedy for the Respondent's misconduct.

AMENDED CONCLUSIONS OF LAW

4. The Regional Director improperly withdrew approval of the July 27, 1995 settlement agreement, which is dispositive of all allegations in Cases 30-CA-12856 and 30-CA-12866.

5. The Respondent violated Section 8(a)(1) of the Act by unlawfully granting wage increases to employees to influence their votes in the election against the Unions and by creating the impression that its employees' voting plans were under surveillance.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, B & K Builders, Inc., Marshfield, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully granting wage increases to employees to influence their vote in the election.

(b) Creating the impression that employee voting plans were under surveillance.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its jobsite in Marshfield, Wisconsin, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees

⁶If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employed by the Respondent at any time since August 23, 1995.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleged violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT grant unscheduled and unexpected wage increases to employees to influence their votes in the election against the Union.

WE WILL NOT create the impression that our employees' voting plans are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

B & K BUILDERS, INC.

Rocky L. Coe, Esq., for the General Counsel.

Susan C. Sheeran, Esq., of Madison, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. Upon charges filed on April 7 and 24 and August 23, 1995, by the Joint Charging Parties (the Unions) against B & K Builders, Inc. (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a consolidated complaint dated December 12, 1995, alleging violations by Respondent of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act).¹ Respondent, by its answer, denied the commission of any unfair labor practices. Also on December 12, the Regional Director issued an order consolidating Case 30-RC-5668 with the unfair labor practice cases for purposes of hearing, ruling, and decision with respect to the representation case issues raised by certain challenged ballots.

Pursuant to notice, trial was held before me in Marshfield, Wisconsin, on May 1 and 2, 1996, at which the General

¹ Earlier, on November 29, the Regional Director withdrew his approval of the July 27, 1995 bilateral settlement agreement entered into by the parties amicably to resolve the matters raised in Cases 30-CA-12856 and 30-CA-12866.

Counsel and the Respondent were represented by counsel and all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in these cases, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business in Marshfield, Wisconsin, is engaged, in central Wisconsin, in the building construction industry as a general contractor. During the year preceding issuance of the consolidated complaint, Respondent, in the course and conduct of its business operations, purchased, and received, at the Marshfield, facility goods and materials valued in excess of \$50,000, which were sent directly from points located outside the State of Wisconsin. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

The Unions are, each, labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Background

B & K specializes in wood frame construction, especially, the building of multifamily housing. Owned and run by Kenneth Staab, Respondent, typically, has three to eight projects in progress at any one time which function under the direction of the project foremen, Bob Aschenbrenner, Terry Prust, Jack Smith, Mike Zvolena, and Gary Schade, statutory supervisors all. During early 1995, B & K employed some 14 construction workers (carpenters, laborers, and masons) who worked on the crews of these project foremen. Union activities among the employees began late in 1994, and early in 1995, and, on February 15, 1995, the Unions filed an election petition with the Board, seeking to represent the above-referenced employees assigned to the various construction crews.

An election was held on April 7, 1995, which was lost by the Unions by a vote of eight to three. Thereafter, they filed timely objections to conduct affecting the results of the election as well as unfair labor practice charges in Cases 30-CA-12856 and 30-CA-12866. By the charges, the Unions alleged that Respondent violated the Act by imposing a 2-day suspension on the principal union activist, employee Richard Abel, by preelection polling of the employees as to how they intended to vote, and by the intimidation and coercion of union supporters in the exercise of their Section 7 right to seek representation.

On July 26, 1995, the parties entered into a stipulation by which they agreed to have the April 7 election set aside, and to the conduct of a second election, which, subsequently, was held on August 25. On July 27, the Regional Director approved a settlement of the unfair labor practice cases by which B & K agreed to reduce Abel's discipline, from suspension to written warning, and to pay him \$177.84, to make

him whole. Under terms of the settlement, B & K further agreed not to interrogate or poll employees concerning how they intended to vote in NLRB elections; not to offer employees higher wages for work as a crane operator in order to discourage employee organizational efforts; and not to threaten to terminate employees because of their union sympathies. Finally, B & K agreed to post appropriate notices to employees concerning its undertakings. Following execution, Respondent made payment to Abel and posted notices.

Two days before the conduct of the rerun election, on August 23, the Unions filed new charges alleging that Respondent violated the Act by laying off Abel on August 4. The Unions also claimed that, months prior to execution of the settlement agreement, B & K engaged in further unlawful conduct by refusing to assign Abel to a higher paying prevailing rate job and by granting merit wage increases to two of its apprentices. After investigation of the August, charges, the Board's Regional Office concluded that Respondent had also violated the Act, presettlement agreement, by creating the impression that its employees' union activities were under surveillance.

The second election was held on August 25. On November 29, 1995, the Regional Director withdrew approval of the settlement agreement, and set it aside, based on the Abel discharge.

In the instant case, the General Counsel contends that Respondent engaged in conduct violative of Section 8(a)(3) of the Act by discharging Abel on August 7, and that this postsettlement conduct justified the setting aside of the agreement. The General Counsel further urges that Respondent violated Section 8(a)(3) of the Act by its presettlement suspension of Abel and by its refusal to assign him to a particular prevailing wage job. Further, according to the General Counsel, B & K presettlement violated the Act by interrogating employees as to how they intended to vote in the April 7 election; granting a wage increase to two of its apprentices; promising a wage increase to another employee; and creating the impression that its employees' union activities were under surveillance and by threatening to discharge a union activist. Respondent not only denies that its conduct was unlawful but, too, vigorously contests the propriety of the Regional Director's action in setting aside the earlier settlement.

B. Facts² and Conclusions

1. Alleged interrogations

Employee Raymond Bowe testified that, throughout March and April 1995, he wore a union sticker to work, on his hard hat, at the Chippewa Falls, Wisconsin jobsite. According to Bowe, in March, Project Foreman Gary Schade approached him at his work area and asked Bowe if he had made up his mind as to how he was going to vote. Bowe responded, stating that he was undecided. Schade, in his testimony, denied that he asked questions of Bowe, or any other employee, concerning voting intentions, claiming that he "stayed clear"

² The factfindings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, *infra*. In general, I have viewed with suspicion the testimony of alleged discriminatee Richard Abel who, as I watched and listened to him testify, impressed me as a less than reliable witness.

of the ongoing union activities in compliance with the "Do's and Don'ts" guidelines distributed by the owner, Staab, to the supervisors. As Bowe impressed me as an honest and believable witness, and as his testimony concerning this point was more convincing than the contrary testimony of Schade, I credit Bowe and find that, in March 1995, Schade asked the employee if he had decided how to vote.

According to employee Michael Weaver, on the Monday preceding the Friday, April 7 election, he rode to work with his supervisor, Terry Prust, who asked him if he was ready for the union vote later that week. When Weaver said that he had not given the matter much thought, Prust asked him how he was going to vote. Prust testified that he did not, in those words, ask Weaver if he was ready for the election. He acknowledged talking to the employee concerning the vote and he encouraged Weaver to be there to cast his ballot. Prust conceded that, in general conversation, he might have asked Weaver if he was "ready to be there."

Weaver testified about this matter in clear and believable terms. On the other hand, Prust, despite his claim that he followed the "Do's and Don'ts" as best he could, was evasive in his testimony concerning this incident. I credit Weaver and find that, in the days preceding the election, Prust questioned Weaver, as detailed in the employee's testimony.

Former employee Tom Greene stated in his testimony that, while employed by Respondent, preceding the April 7 election, he was approached on the jobsite by his supervisor, Prust, who asked him "which way he was going to go, vote yes or no." Greene said that he did not know. According to Prust, he, the supervisor, never asked Greene how he would vote, but did discuss with the employee matters concerning the organizational campaign. Again, I found the testimony of the employee, in this case, Greene, clear and believable, and the contrary testimony of Prust, less clear, less likely, shifting and evasive. I find that Greene was questioned by Prust, preceding the election, as described in Greene's testimony.

Staab visited the jobsites on April 6, 1995, the day before the election. According to Weaver, he, Staab, told the employee, at his workplace, that he did not think that the Union would offer much more in the way of benefits than the employees already had. After Weaver's recollection was refreshed, he further testified that "I think he asked me how I would be voting." Staab, in his testimony, denied that, on April 6, he asked any employee how they intended to vote. In light of Staab's crisp, clear, and coherent denial, I reject the tentative and uncertain testimony of Weaver concerning this matter and I find that, on April 6, Staab did not ask Weaver how he intended to vote.

Employee Richard Abel testified that, on April 6, at the Chippewa Falls jobsite, where he worked, he was questioned by Supervisors Prust and Aschenbrenner, the latter a 5-percent owner of the Company. According to Abel, Prust asked him what he thought of the Union, and the supervisor stated his view that it would not do the employees any good. Abel responded, stating that, with a union, the employees would, at least, have some bargaining power. Later that day, Abel further testified, Aschenbrenner asked him how he was going to vote, and the employee responded, stating that he, Abel, did not have to reveal that information. According to Abel, Aschenbrenner said that Staab had told him to go around and poll the employees with regard to their voting intentions.

Prust, in his testimony, generally denied questioning employees about the Union. Aschenbrenner denied asking Abel how he was going to vote, but conceded that he asked the employee what he thought of the Union, for the purpose of starting a conversation.

As noted at footnote 2, Abel did not impress me as an accurate reporter of events. Moreover, as will appear herein-after, by April 6, Abel, for months, openly and in the presence of supervisors, had played the lead employee role in the organizational drive. Thus, it strikes me as somewhat bizarre that, on the day before the election, two of the supervisors would question him about his union views, and about how he intended to vote. Nonetheless, Abel's testimony was straightforward and sure concerning these conversations, and Prust's testimony, denying that he questioned employees about their union views, was evasive in nature and weak. Aschenbrenner conceded that he questioned Abel with respect to his union views, if not about how he was going to vote. In these circumstances, I think it more likely that not that, as Abel testified, on April 6, he was questioned by Prust regarding his union views, and by Aschenbrenner regarding his voting intentions.

With respect to the above-described events, I note that preelection interrogation and polling of employees, concerning their union sympathies and voting intentions was specifically addressed in the July 27, 1995 settlement agreement. As I have, *infra*, concluded that the agreement was improperly set aside, I further find and conclude that the settlement agreement stands as a bar to further prosecution of such allegations.

2. Wage increases

It is undisputed that, in March 1995, carpenter apprentices Brian Bushman and Ryan Leverance received unscheduled and unexpected merit wage increases shortly after Staab learned that both had gotten "A's" as school grades for the 1994-1995 first semester, a part of their apprenticeship program. Earlier, in February, their supervisor, Jack Smith, had recommended raises for them, based on their job performances. Smith had told the employees that he would make that recommendation, because of their good work. The raises were presented to the employees as a reward for superior work and grades, and without reference to the election or the organizational drive. Although Staab testified that the increases were in response to the employees' performance, at work and at school, Respondent failed to demonstrate a pattern or past practice of rewarding similarly situated apprentices for outstanding grades and work achievements.

The complaint allegations regarding the preelection wage increases granted to Bushman and Leverance were not addressed in the settlement agreement. However, the conduct complained of occurred many months prior to execution of that document, and the General Counsel has not shown that the alleged violation was "specifically reserved" from the settlement by the mutual understanding of the parties. Nor has the General Counsel established that the presettlement conduct was not known to it, and not readily discoverable by investigation. In light of my conclusion, *infra*, that the General Counsel has failed to demonstrate noncompliance with the agreement on the part of Respondent, I further find and

conclude that the settlement agreement bars litigation of this presettlement matter.³

3. Alleged promises of wage increases

Employee Bowe, a carpenter and laborer, testified that, approximately 3 weeks before the April 7, 1995 election, he received an unexpected telephone call, at home, from Staab. The owner told Bowe that he, Staab, was getting a crane and he wanted to know if the employee was interested in becoming an operator of that piece of equipment. Staab said that after crane operators were trained, they would be paid some \$10.89 per hour, which was \$1.50 per hour more than Bowe was earning. Staab also stated that he was thinking of raising the wage rate for operators of other equipment, specifically, the pettibone and the skidsteer, pieces of equipment previously operated by Bowe at his normal rate of pay.

Staab testified that, prior to 1995, the Company had not owned or operated a crane. On February 15 of that year, he signed a contract and made a down payment to purchase same, which was delivered, as scheduled, on or about April 1. Staab explained that he offered increased wage rates to employees Bowe and Eugene Hutter, Respondent's most experienced machine operators, based on anticipated ability to operate the crane, and only while so engaged.

The foregoing matter was specifically addressed in the settlement agreement. Since, *infra*, I have concluded that the agreement was not breached by Respondent, justifying its abrogation, I conclude that the settlement agreement bars litigation of this allegation.

4. Alleged threats to discharge an employee

Employee Bowe testified that, following Abel's 2-day suspension of March 13 and 14, Supervisor Mike Zvolena, while riding to work with Bowe, told him that Abel had been suspended for failing to show up for work on the previous Friday, March 10. Zvolena further told Bowe that Staab had said, at a Friday March 10 foreman's meeting, that "possibly this was a way they could get rid of Dick." Later that day, Bowe spoke to Supervisor Schade who told the employee that Staab was trying to use Abel's absence from work to get rid of him.

Schade, in his testimony, denied telling Bowe, in March or April 1995, that Staab was trying to use the absence as a way to get rid of Abel. Schade could not recall any discussion, at any of the foreman's meetings held in those months, concerning Abel's absences. Zvolena testified that he was uncertain if he made the remark attributed to him by Bowe. The supervisor confirmed that Staab talked, at a foreman's meeting, of getting rid of Abel, but explained that, in doing so, Staab made reference to the employee's absences, not his union activities.

I have, previously, found Bowe a credible witness, and I rely on his testimony here. I find that Supervisors Zvolena and Schade told Bowe, after Abel's March 10 absence, and the March 13-14 suspension, that Staab had said that this was, possibly, a way to get rid of Abel. I also credit Zvolena, who was very sure and certain on this point, that Staab, in making such a remark, referred to Abel's absences, not his union activities.

³ *Quality Hotel Tacoma Dome*, 314 NLRB 538 (1994).

Abel testified that, a few days after the suspension, he was told, in separate conversations with Supervisors Zvolena and Schade, that those supervisors had refused to honor Staab's request that they sign a statement accusing Abel of poor quality work. According to Abel, the supervisors told him that Staab had said that, if the Company rid itself of Abel, a union organizer, the rest of the guys would fall in line regarding the Union. Zvolena and Schade, in their respective testimony, denied having had such conversations with Abel. The supervisors were clear and convincing in their respective testimony concerning this matter and I accept that testimony, and reject the less likely narration offered by Abel.

In any event, the above-described matters were addressed by the settlement agreement. That agreement was not properly set aside, *infra*, and, accordingly, the agreement bars litigation of those matters.

5. Creating the impression of surveillance

Employees Bushman and Leverance agreed between themselves to cast blank ballots at the April 7 election. As the election date approached, Prust spoke to Bushman at his worksite. According to the employee's uncontradicted testimony, Prust asked Bushman about such a plan, and said that it would not do anybody any good to drop a blank ballot.

Former employee Harry Engle testified that he visited Respondent's offices on April 6, 1995, and he asked Staab "what was going on with the union vote." According to Engle, Staab replied, stating that he thought only two or three people were going to vote for representation. Staab, in his testimony, stated that he could not recall what transpired during the subject conversation.

Abel testified that, following his April 6 conversation with Supervisor Aschenbrenner, described above, he, Abel, approached Supervisor Smith and asked him if Smith, as a foreman, was supposed to ask Abel how he would vote. According to Abel, Smith "kind of chuckled" and said all of the foremen were supposed to ask the employees how they intended to vote. Smith, in his testimony, denied telling Abel this and, further, denied that he ever asked any employee to reveal his voting intentions.

The testimony of Bushman and Engle, concerning the complaint's surveillance allegations, stands uncontested and is credited. Accepting Abel's testimony at face value, his interaction with Smith, which Abel initiated, resulted in Smith's answering Abel's question in a fashion which Smith intended, and the employee understood, as jocular.

As in the case of the alleged unlawful wage increases, the complaint allegations regarding surveillance were not addressed in the settlement agreement. Nonetheless, as the conduct complained of occurred long before that document was signed, indeed, before the April 7 election, itself, and was not "specifically reserved," and, moreover, was readily discoverable, it, too, is barred from litigation as a presettlement matter.

6. Alleged discriminatory treatment of Richard Abel

a. *The setting*

Richard Abel was employed by Respondent as a carpenter from August 1989 through August 4, 1995. Beginning on Monday, August 7, 1995, he refused to report to work, or

even to call in to say that he would be absent. At the end of that week, on Friday, August 11, he was discharged.

In the course of Abel's employment, he was frequently reprimanded by Staab, orally and in writing, for failure to report to work on Fridays, and for failure to honor Respondent's rules regarding requesting time off in advance, and calling in absences. Another area of contention was Abel's rate of pay on jobs covered by the State of Wisconsin's "prevailing rate," so-called white sheet jobs.

In the spring of 1994, carpenters Abel and Bowe worked under Supervisor Prust at the Black River Falls, Wisconsin library project, a white sheet job. Both employees voiced dissatisfactions concerning pay. In June, Prust directed them to meet with Staab about the matter in his office and Prust also attended the meeting. When, at this conference, Abel felt that he was not being allowed adequately to voice his views, he got up and walked out.

Abel testified that, in the fall of 1994, while still working at Black River Falls, he became "irritated" with Prust, and he, Abel, walked off the job, for an entire week, without informing anyone. At the end of the week, on Saturday, Supervisor Schade set up a meeting between Abel and Staab, in the latter's office, to, in Abel's words, "try and work out our differences." Schade testified that he acted after receiving a telephone call from Abel, on the preceding Friday night, during which the employee stated that he had not gone to work all week because of conflicts with Prust. In any event, at the meeting, Abel told Staab that Prust was bossy, and he picked on him. According to Abel, he and Staab reached an agreement that, after the Black River Falls project, Abel would not, again, be assigned to work under Prust and, on that basis, Abel returned to work. According to Staab, while it was agreed, ultimately, that Abel could return to work, there were no additional understandings concerning supervisory assignments. It is undisputed that, in the course of the meeting, Staab talked to Abel, extensively, about Respondent's leave policy. Staab told Abel that this was hardly the first time that Abel had failed to report to work, without notice, and that he, Staab, had talked to Abel before about the need to call in and report absences. Staab told Abel that he was warning him that failure to report to work, or call in, was a serious violation of the Company's rules, as contained in the handbook distributed to the employees, and that future infractions would be met with increasingly harsher discipline.

Following the meeting, Abel told other employees and supervisors that he had an understanding with Staab that, after Black River Falls, he, Abel, would not, again, be assigned to work under Prust. While still at Black River Falls, on November 19, 1994, Abel received a speed letter from Staab, warning him against carrying out his expressed plan not to show up for work on the Friday following Thanksgiving. The letter also referred to Abel's having quit the jobsite, the week before, without informing a supervisor, and warns of consequences for any such future violations of company rules.

In December, Abel told Prust that he was going to get his wage rate straightened out by seeking the assistance of the Carpenters Union. Later in the month, the employee made contact with union representatives and, at their suggestion, he agreed to talk to his fellow employees about representation and to encourage them to attend a meeting, which was thereafter set for January 20, 1995. Abel spoke to the employees at the various jobsites, in the presence of Supervisors Schade

and Zvolena and other management officials. Following the union meeting, at which employees signed cards designating the Unions as their collective-bargaining representative, the representation petition was filed, on February 15.

It is undisputed that, throughout 1995, Abel was an active, open, and avowed union supporter, and Respondent knew it. At the April 7 election, he served as the union observer.

b. Abel's mid-March 2-day suspension

Despite Abel's claim of an agreement with Staab that he, Abel, would not work under Prust after the Black River Falls job, the employee was sent, early in 1995, to the Chippewa Falls jobsite, a large project to which a number of the foremen and many of the employees were assigned, under the overall supervision of Prust. There is evidence that, for most of his time there, Abel, essentially, worked alone, with general direction from Prust. By April, Supervisor Smith arrived at the Chippewa Falls locale and, starting at that time, he supervised Abel.

While working at Chippewa Falls, Abel and employee Bowe rode to and from work with Supervisor Zvolena. It is undisputed that, on Thursday evening, March 9, on the way home from work, Abel told Zvolena not to pick him up for work on the next day, Friday, March 10, as he, Abel, was going to take off from work and "fake being sick." Abel did not report for work on Friday, March 10, and he did not call in to report that he would be absent. When, on March 10, Prust saw that Abel was absent, he asked Zvolena, the masonry foreman, where he was, as Prust knew that Abel, normally, rode to work with Zvolena. Zvolena told Prust that Abel had told him, the night before, not to pick him up for work on the next day. As Abel had not requested the day off, Prust reported the absence to Staab's office. By speed letter dated March 15, 1995, Staab suspended Abel from work for 2 days for "being a repeat violator of company policy" in taking another Friday off without notice and without calling in. The letter notes, *inter alia*, that had Abel "been in the union, at some point you would have been fined."

There is record evidence that, historically, not every employee violation of the company leave and call-in rules has resulted in discipline. There is also ample evidence that, through the years, the Company has imposed discipline to and including discharge for repeat violations of attendance rules, especially, "no calls, no shows."

Abel's suspension was specifically addressed in the settlement agreement, by the terms of which he was made whole for the loss of 2 days' pay, and the suspension was reduced to a written warning. As the agreement was not properly set aside, *infra*, it bars litigation of this issue.

c. The refusal to assign Abel to a white sheet job in May

Abel testified that, following the April 7 election, at a meeting of the employees and foremen, Staab asked the foremen to choose leadpersons, for permanent assignment as such, and that Supervisor Schade chose Abel. Thereafter, according to Abel, in mid-April, while he continued to work at Chippewa Falls, Schade told him that, in a few weeks, he, Schade, would be going to a white sheet job in Eau Claire, Wisconsin, and Abel would go with him. However, early in May 1995, Abel testified that Schade told him that he, Abel,

would not accompany Schade to Eau Claire, as Staab had said that Abel and Bowe were trouble on all white sheet jobs.

In May 1995, Staab assigned Schade, apprentice Ryan Leverance and, as a preapprentice, newly hired Jeff Forrester, who was from Eau Claire, to the Eau Claire project. Staab testified that, while the permanent assignment of leadpersons to foremen was discussed, the concept was not implemented, except in the case of employee Tom Greene, who was so assigned to Supervisor Prust. Schade, in his testimony, claimed that, at the April 1995 meeting concerning, in part, leadpersons, he, Schade, did not state a preference and, in any event, he did not have a leadperson assigned to him. Schade further testified that he did not, at any time, tell Abel that he could not go with him to Eau Claire because Staab had said that Abel was trouble on white sheet jobs.

The record evidence demonstrates that Abel was not, in fact, assigned as leadperson to Supervisor Schade. In addition, I found convincing Schade's testimony that he neither selected Abel nor expressed a desire that Abel be assigned to him, and did not tell the employee that he was not going with him to Eau Claire because Staab regarded him as trouble on such jobs. Abel's contrary testimony is discredited.

The complaint allegation regarding the May 1995 refusal to assign Abel to Eau Claire was not addressed in the settlement agreement. However, the conduct complained of occurred months before the agreement was signed, was not "specifically reserved," and was readily discoverable. It is barred from litigation as a presettlement matter.

d. *The Abel discharge*

Abel testified that, in mid-July, at a time when the Chippewa Falls project was near completion, Supervisor Jack Smith told him that, shortly, he would be assigned to work at the La Chance apartment project, a 10-unit apartment building in Phillips, Wisconsin. Abel told Smith that he did not have to go to Phillips, because that project was under the direction of Supervisor Prust, and he, Abel, and Staab, had an agreement that Abel did not have to work with Prust. According to Abel, Smith said that he did not know anything about such an agreement. Smith testified that, when Abel referred to the claimed agreement, he, Smith, told Abel that he had better contact Staab and talk matters out.

On Thursday, August 3, 3 weeks before the second election, Abel further testified, Supervisor Zvolena told him to report to the Phillips project, on the following Monday. Abel reminded Zvolena that he had earlier told him of the claimed agreement with Staab, under which Abel did not have to work for Prust. According to Zvolena, he told the employee that any such agreement was between Abel and Staab.

At the time that Abel was assigned to Phillips, he was one of only four individuals, and the only carpenter, employed by B & K still at the Chippewa Falls jobsite. Also, there was a painter, a mason, and Masonry Foreman Zvolena, who was performing "punch list" work. The carpentry work was 99-percent completed and the remainder was, thereafter, finished by Zvolena.

Staab credibly testified that he decided to assign Abel to the Phillips project, because of Abel's previous experience working on almost identical La Chance apartment buildings. Also, that project was behind schedule because of rain and crew shortages occasioned by employee resignations. As

noted, Staab denied that he had promised Abel, after Abel's August 1994 week of "no calls, no shows," that the employee would not, again, be assigned to work under Prust.

Abel did not report to work on Monday, August 7, and there followed another week of "no calls, no shows." At no time during the course of that week did Abel contact Staab, voice his objections to the new assignment, or request an alternative assignment. At the end of the week, by letter dated August 11, 1995, Staab told Abel that, in light of his "failure to report to work and your failure to call and report your absences," for an entire week, the Company "considers you to have voluntarily quit your employment effective August 7, 1996." Abel replied by letter dated August 17, denying that he had quit and pointing to the alleged agreement concerning assignment to Prust. By subsequent letter, Staab informed Abel:

My letter of (August 11, 1995) stands. I never told you that you would not have to work with Terry. When Jack Smith and Mike Zvolena told you and the other employees who had been working on the Chippewa Shoe Factory job to report to the LaChance job on Monday August 7, 1995, you did not object. We had work available for you, but you failed to report to work and failed to call in or send notice August 7 through, 11, 1995 as you were required to do.

Your employment with B & K Builders, Inc. is therefore, terminated effective August 7, 1995.

Thereafter, following an October 4, 1995 hearing, Abel was denied unemployment compensation, for having quit his job without good cause.

As indicated, there is uncontradicted record evidence that, in the past, Respondent has disciplined employees to and including termination for repeated lateness and repeated failure to report for work or call in. The General Counsel urges, however, that there have been instances where employees were deemed to have quit, or failed to report to work for lengthy periods, and later were permitted to return to their employment positions. Thus, employee Raymond Bowe, a union activist known to Staab as such, quit his employment on August 17, 1995, and, on his request, in mid-September 1995, was rehired. However, prior to his August resignation, Bowe gave Respondent advance oral and written notice of his intentions. Also, Staab testified, during the course of his employment Bowe, generally, complied with company policies. As to employee Steven Taskay, his "quit" occurred after he requested, in February 1995, to leave work early one day in order to take an examination at the technical college he was attending. The request for time off was denied by Staab, because of a conflict with employer scheduled mandatory safety training, and Staab told Taskay that if he did not report, he would no longer be employed. Taskay took the time off, anyway, and appeared for his college test. On consideration of all the circumstances, Staab later decided to reduce Taskay's punishment to a 1-day suspension, and to require him to make up the safety training.

The General Counsel also points to the long-term absences and reemployment of Bret Schaefer and Mike Doescher in an effort to show disparate treatment of Abel. Schaefer was injured on the job and, for a period of months, was away from work and received workers' compensation. During that time,

Staab received conflicting medical reports concerning the employee's ability to return to work. Also, Schaefer threatened to file a discrimination lawsuit if Staab did not rehire him. After informing Schaefer that he, Staab, considered Schaefer "to have quit," Staab, by letter dated April 28, 1995, offered to reemploy him. Staab testified that this offer of reemployment was made in consideration of the medical matters, and the threat of suit. As to Doescher, he, in 1994, was off work for weeks, without notice, due to a series of back problems. He received a written warning, but was not terminated as Staab regarded his physical problems as mitigating circumstances.

Richard Abel was the lead employee union activist and, on the state of this record, it is beyond legitimate dispute that Respondent knew it. He was discharged just 2 weeks before the scheduled second election. At least during the period preceding the first election, and execution of the settlement agreement, Respondent opposed unionization of its employees and, as shown, supra, engaged in actions proscribed by the Act in furtherance thereof. Accordingly, the General Counsel has established, prima facie, that the Abel discharge, on August 11, 1995, was violative of the Act.

Nonetheless, I conclude that Respondent did not violate the statute by discharging Abel and, thus, that the settlement agreement was improperly set aside, as Respondent has shown that it would have discharged Abel, and refused to reemploy him, even absent his protected conduct. Abel was discharged after failing to show up for work for a week, and failing to call in to report his absences, in violation of established company rules. Over a lengthy period of time, he compiled a record of many "no calls, no shows," and he received warnings and progressively severe discipline. Particularly, a year earlier, in the fall of 1994, preceding the advent of organizational activities, he also failed to report to work for a week, or call in, and, while he was able to convince Staab to allow him to return to work, Staab warned Abel concerning the seriousness of his conduct and threatened harsh discipline for future infractions.

Few employers, indeed, would countenance "no calls, no shows," for periods of as long as a full week at a time, engaged in repeatedly. After so many warnings, and progressively harsher discipline, Abel stayed home, and did not even contact his employer, in protest of his assignment to the Phillips project, under Supervisor Prust, despite the demonstrably legitimate business reasons for which he was so assigned, to a job for which he was particularly qualified. He was discharged for his repeat violations of basic company policies.

There is no showing, on the state of this record, of disparate treatment of Abel. Others, who were retained or rehired, as pointed to by the General Counsel, engaged in entirely different type actions (Bowe and Taskay), breached attendance policies for the first time (Schaefer and Doescher), and/or committed infractions amidst mitigating circumstances (Taskay, Schaefer, and Doescher).

In light of the entire record, I am persuaded that the Abel discharge was a result of lawful business considerations and not in retaliation for protected conduct. I conclude that the firing was not unlawful under the Act and, thus, that the fact of the termination did not give rise to justification for setting aside the settlement agreement.

C. *The Representation Case*

The tally of ballots following the rerun election conducted on August 25, 1995, showed that five votes were cast for the Unions, and two votes were cast against representation. There were three challenged ballots which were sufficient in number to affect the election results.

At trial, the Petitioners withdrew their challenges to the ballots of Jeff Forster and Marvin Doescher and agreed that their ballots may be opened and counted. In light of my earlier finding that the preelection discharge of Richard Abel was not in violation of the Act, the Employer's challenge to his ballot must be sustained. This will make it unnecessary to open and count the Forster and Doescher ballots, as they are, now, too few in number to affect the results. A majority of the valid ballots were cast in favor of representation by the Joint Petitioners.

CONCLUSIONS OF LAW

1. B & K Builders, Inc. is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Joint Charging Parties are, each, labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent did not violate the Act by discharging its employee Richard Abel.

4. The Regional Director improperly withdrew approval of the July 27, 1995 settlement agreement, which is dispositive of all other allegations contained in the consolidated complaint.

[Recommended Order for dismissal omitted from publication.]