Metro Health, Inc. d/b/a Hospital Metropolitano Rio Piedras *and* Unidad Laboral de Enfermeras(os) y Empleados de la Salud. Case 12–CA–284984

August 22, 2024

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, PROUTY, AND WILCOX

This case is before us on the General Counsel's Request for Special Permission to Appeal Administrative Law Judge Ira Sandron's order approving a "consent order," based on terms proposed by the Respondent, over the objections of the General Counsel and the Charging Party.

Under *UPMC*,[1] the Board will evaluate a proposed consent order under a "reasonableness" standard also applicable to settlement agreements between the parties. The General Counsel primarily contends that the Board should overrule *UPMC*, reinstate the standard set forth in *Postal Service*[2]—under which a consent order may not be approved unless it provides a full remedy for the alleged unfair labor practices—and reject the proposed consent order under that standard. However, the General Counsel also contends that the principles underlying Section 3(d) of the National Labor Relations Act, which grants prosecutorial authority to the General Counsel, strongly militate against the practice of issuing consent orders under any circumstances. For its part, the Respondent urges the Board to retain the *UPMC* standard and to deny the request for special permission to appeal.

After carefully considering the parties' contentions and the Board's decades of experience with the practice of accepting consent orders, we are persuaded that the Board should end this practice. The Board's Rules and Regulations do not mention the term "consent order," much less authorize the Board or an administrative law judge to accept one under any particular circumstances. To the contrary, Section 102.35(a)(7) of the Board's Rules and Regulations authorizes the Board's administrative law judges to "[h]old conferences for the settlement or simplification of the issues by consent of the parties, *but not to adjust cases*."[3] As explained below, this provision would appear to prohibit consent orders. In any case, the practice of approving consent orders over the opposition of the General Counsel and the charging party—whether under the current reasonableness standard specified in *UPMC* or the prior full-remedy standard set forth in *Postal Service*—creates administrative challenges and inefficiencies, tends to interfere with the General Counsel's statutory prosecutorial authority, and, most importantly, fails to effectuate the policies of the Act.

Accordingly, *UPMC* is overruled. In this case, and in all pending and future unfair labor practice cases, the Board will not terminate the case by accepting or approving a consent order. The General Counsel's request for special permission to appeal is therefore granted, and the appeal is granted on the merits.

I.

The Respondent operates a hospital in San Juan, Puerto Rico. The Union represents four separate units of employees employed by the Respondent at the hospital. On March 7, 2022,[4] Region 12 issued a complaint in Case 12–CA–284984, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Charging Party (the Union) with requested information regarding payroll records for operating room technicians, who were unit employees represented by the Charging Party, for two pay periods. The Respondent denied the allegation and raised various affirmative defenses, including that it had already provided the information and that the information was not relevant. On April 20, the Region consolidated Case 12–CA–284984 with Case 12–CA–279497, which alleged that the Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting unit work and laying off unit employees. The two cases involved the same parties, location, and witnesses, but involved different issues and different bargaining units.

The hearing in the consolidated case opened on June 6. Thereafter, the General Counsel and the Respondent exchanged proposals for an informal settlement of Case 12–CA–284984 but were not able to reach agreement. On June 17, the Respondent filed with the judge a motion to sever Case 12–CA–284984 from Case 12–CA–279497 and to approve a consent order that it proposed. According to the judge, the consent order "wholly comport[ed]" with the informal settlement agreement proposed by the General Counsel in Case 12–CA–284984 except that it contained a nonadmission clause and did not include a provision explicitly requiring the Respondent to distribute the notice to employees by text message. On June 30, over the objections of the General Counsel and the Charging Party, the judge severed this case from Case 12–CA–279497 and approved the proposed consent order, which

[1] *UPMC and its subsidiary, UPMC Presbyterian Shadyside*, 365 NLRB 1418 (2017) (*UPMC*).

[2] 364 NLRB 1704 (2016).

[3] 29 C.F.R. § 102.35(a)(7) (emphasis added).

[4] All dates are in 2022 unless otherwise indicated.

the judge found was acceptable under *UPMC*. On August 10, the General Counsel filed a request for special permission to appeal the judge's approval of the consent order and motion to sever.[5] The Respondent filed an opposition arguing that the request for special permission to appeal should be denied.[6]

II.

The issue presented today is best understood in its larger legal context, which includes the allocation of prosecutorial and adjudicative authority under the Act and the pro-settlement policy reflected in Federal labor law. We describe the relevant legal context next, before explaining why we have decided to end the Board's practice of accepting consent orders over the objection of the General Counsel and charging parties.

A.

Section 3(d) of the Act confers on the General Counsel final authority, on behalf of the Board, over the investigation of charges and issuance of unfair labor practice complaints and their prosecution before the Board.[7] Under Section 10, the Board, in turn, is empowered to adjudicate unfair labor practice cases subject to judicial review. Section 10(a) of the Act specifically provides that "[t]his power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ."[8] As the Supreme Court has recognized, "[t]he proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . . Section 10(a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice."[9] Accordingly, the Board is not required to accept any proposed settlement agreement, consent order, or any other disposition short of adjudication even if all the parties agree to it.[10]

Nevertheless, the Board has a longstanding practice of accepting a settlement agreement between a respondent and the General Counsel and/or a charging party in lieu of finally adjudicating an unfair labor practice case on the merits, where accepting the settlement would effectuate the policies of the Act.[11] This practice is consistent with the purposes of the Act, which (as Sec. 1 explains) are premised on "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions" on a basis of "equality of bargaining power between employers and employees."[12] As the Board has explained, "encouraging the parties' achievement of a mutually agreeable settlement without litigation" effectuates the policies of the Act by fostering "an early restoration of industrial peace, which after all is a fundamental aim of the Act."[13]

Of course, the Board will not accept any settlement that does not effectuate the policies of the Act.[14] Under the foundational 1987 *Independent Stave* decision, the Board determines whether a proposed settlement agreement effectuates the polices of the Act by considering 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.

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[5] The General Counsel stated she would retract her request for special permission to appeal the judge's severance order if the judge issued his decision in Case 12–CA–279497, which the judge did on September 8. We therefore address only the General Counsel's request for special permission to appeal the approval of the consent order. We additionally observe that the Board issued its decision in Case 12–CA–279497. See *Metrohealth, Inc. d/b/a Hospital Metropolitano Rio Piedras*, 372 NLRB No. 149 (2023).

[6] Contrary to the Respondent's argument, we find that under the circumstances of this case, the General Counsel's request for special permission to appeal, which was filed within 6 weeks after the judge's ruling, was filed "promptly" within the meaning of Sec. 102.26 of the Board's Rules and Regulations. See *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, Case 28–CA–023267 (Nov. 22, 2011) (special appeal filed within 45 days after judge's ruling was timely under Sec. 102.26 absent any showing of prejudice); cf. *Excel DPM of Arkansas, Inc*., 324 NLRB 880, 880 fn. 1 (1997) (motion for summary judgment filed 5 months after respondent's answer was filed "promptly" within the meaning of Sec. 102.24(b) of the Board's Rules and Regulations absent any showing of prejudice). As in the above cases, the Respondent has not shown prejudice here.

[7] 29 U.S.C. § 153(d).

[8] Id. § 160(a).

[9] See *National Licorice Co. v. NLRB*, 309 U.S. 350, 362, 365 (1940).

[10] See, e.g., *Independent Stave Co*., 287 NLRB 740, 741 (1987).

[11] Id.

[12] 29 U.S.C. § 151.

[13] *Independent Stave*, above at 742–743 (citing *International Harvester Co*., 138 NLRB 923, 926 (1962)).

[14] *Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958) (the Board has "refused to be bound by any settlement agreement or arbitration award where such settlement agreement or award was at odds with the Act or the Board's policies"); see also *Pottsville Bleaching & Dyeing Co*., 301 NLRB 1095, 1095 (1991) ("Settlement is not an end in and of itself . . . Of primary importance is the broad authority vested in the Board under Sec[.] 10(c) of the Act to prevent and remedy unfair labor practices.").

Independent Stave, 287 NLRB at 743.

If a case is litigated and unfair labor practices have been found by the Board, Section 10(c) of the Act provides that the Board "shall" issue an order "requiring [the respondent] to cease and desist from such unfair labor practice, and to take such affirmative action[,] including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."[15] The underlying policy of Section 10(c) "is a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal [conduct]."[16]

As the Board recognized in *Independent Stave*, however, it may effectuate the policies of the Act to approve a settlement agreement even if it does not provide the same remedy for the alleged unfair labor practices that the Board likely would have ordered if the case had been litigated to conclusion and the Board had found violations.[17] As the Board there explained, no remedy is warranted unless the alleged unfair labor practices have been litigated and established.[18] Moreover, there are risks inherent in litigation: witnesses may become unavailable, necessary documents may be lost, and, of course, the litigation may result in a finding that a respondent did not violate the Act.[19] Under these circumstances, each party to the settlement,

> 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. When 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 . . . .[20]

As the Supreme Court has stated, "settlements constitute the 'lifeblood' of the administrative process, especially in labor relations."[21] The Board's longstanding policy of accepting settlement agreements that effectuate the policies of the Act is consistent with that principle, and we reaffirm it today.

B.

In *Electrical Workers IUE Local 201 (General Electric Co.)*,[22] decided in 1971, the Board approved—apparently for the first time—a consent order proposed by a respondent to which the General Counsel and the charging party both objected. The stated basis for that action was that, in the Board's opinion, the consent order would "protect the public interest and effectuate the purposes and policies of the Act; and that further hearing herein with respect to [r]espondent's defense could not result in any changes in the proposed consent order and notice which would be more favorable to the General Counsel and [c]harging [p]arty."[23]

Subsequent decisions regarding proposed consent orders, however, did not require that a consent order provide for all the relief that the Board might order if it found the unfair labor practices as alleged. Instead of applying a full-remedy standard, those decisions (issued between 1991 and 2015) at least ostensibly applied the *Independent Stave* standard applicable to bilateral settlement agreements between opposing parties and approved consent orders that only "substantially remedied" the unfair labor practices alleged.[24] No explanation was ever provided for that apparent departure from precedent. While invoking the *Independent Stave* standard, the Board's post-*Electrical Workers* consent order cases also have been inconsistent in the weight given to the fact that the General Counsel and the charging party oppose a proposed consent order.[25]

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[15] 29 U.S.C. § 160(c).

[16] *Thryv, Inc.,* 372 NLRB No. 22, slip op. at 7 (2022) (internal quotation omitted), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024); see also *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 769 (1976) ("The task of the NLRB in applying § 10(c) is to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.") (internal quotation omitted).

[17] *Independent Stave*, 287 NLRB at 742–743.

[18] Id. at 742.

[19] Id.

[20] Id. at 743.

[21] *NLRB v. United Food & Commercial Workers Union, Local 23, AFL–CIO*, 484 U.S. 112, 128 (1987) (citation omitted) (*Food & Commercial Workers*).

[22] 188 NLRB 855 (*Electrical Workers*). The Board has sometimes cited the case as "*Electronic Workers*."

[23] Id. at 855.

[24] See, e.g., *Laborers Local 872*, Case 28–CB–118809, 2015 WL 153954 (Jan. 12, 2015) (approving proposed "unilateral settlement by consent order" because it substantially remedied the alleged unfair labor practices, citing *Independent Stave*); *Heil Environmental*, Case 10–CA–114054 et al., 2014 WL 2812204 (June 20, 2014) (same, albeit acknowledging "grave concerns about approval of a settlement agreement over the objections of the General Counsel and [c]harging [p]arty"); see also *Sea Jet Trucking Corp*., 327 NLRB 540, 550 (1999) (applying *Independent Stave* but rejecting consent order), rev. denied mem. 221 F.3d 196 (D.C. Cir. 2000); *Iron Workers Local 27 (Morrison-Knudson),* 313 NLRB 215, 217 (1993) (same), rev. denied mem. 70 F.3d 119 (9th Cir. 1995)*; Food Lion, Inc.,* 304 NLRB 602, 602 fn. 4 (1991) (same); *Copper State Rubber*, 301 NLRB 138 (1991) (same).

[25] Compare *Copper State Rubber*, 301 NLRB at 138 ("[T]he opposition of the General Counsel and the [c]harging [p]arty is a significant factor to be considered. . . . [T]he fact that the General Counsel and the [c]harging [p]arty oppose the proffered adjustment involved here militates against acceptance of it."), with *Bodega Latina Corp. d/b/a El*

In 2016, in *Postal Service*,[26] after careful consideration that included full briefing by the parties and interested amici, the Board returned to the full-remedy consent order standard specified in *Electrical Workers*. The *Postal Service* Board distinguished between settlements, which are *agreements* between the respondent and the General Counsel and/or the charging party, and "a consent order agreed to by no party other than the respondent."[27] In the case of a settlement agreement, the Board explained, "[i]t 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 proposed settlement agreement.[28] In the case of a consent order, unlike settlement agreements, the Board found neither of those considerations is present: "[t]he 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."[29] Member Miscimarra dissented.[30]

But just over a year later, the Board abruptly changed course. In *UPMC*, a newly constituted Board majority overruled *Postal Service* and held that consent orders should be approved if they are deemed reasonable under *Independent Stave.*[31] The *UPMC* majority explained that if "a respondent offers to resolve disputed allegations based on terms that the judge *and* the Board deem reasonable under the circumstances, there is no valid reason for the Board to preclude such a resolution as a matter of law on the sole basis that the proffered terms include a less-than-full remedy."[32] According to the majority, the early resolution of Board litigation, on reasonable terms, furthers the Board's interest in encouraging voluntary dispute resolution, promoting industrial peace, conserving the Board's resources, and serving the public interest.[33] The majority also claimed that the Board's acceptance of reasonable terms may serve the interests of parties objecting to the terms, as parties may unreasonably discount the risks of litigation and turn down a reasonable offer.[34] The *UPMC* majority cited no intervening legal developments or adverse experiences under the *Postal Service* standard as support for overruling it, nor are we aware of any. Members Pearce and McFerran dissented.[35]

III.

As the parties frame the issue, the Board's choice today is to decide this case either by reaffirming *UPMC* and evaluating the Respondent's proffered consent order under *Independent Stave* or by returning to the standard set forth in *Postal Service* and analyzing whether the consent order meets the full-remedy standard specified there. We agree with the view of the *Postal Service* Board, and with the dissenting views in *UPMC*, that application of the *Independent Stave* standard to consent orders—which are not settlement agreements in any sense—is unwarranted at best and arbitrary at worst. We thus overrule *UPMC*. But, after careful consideration of the Board's decades of experience with evaluating consent orders, we conclude that instead of returning to the approach of *Postal Service*, the Board should instead entirely end the practice of approving consent orders.[36] As we will explain, that practice (even if the full-remedy standard were applied) has no clear basis in the Board's Rules and Regulations, poses administrative difficulties and inefficiencies, tends to interfere with the prosecutorial authority of the General Counsel, and fails to effectuate the policies of the Act. Below, we discuss each basis for our decision in turn.

A.

First, the Board's Rules and Regulations cast grave doubt on the propriety of accepting a consent order under any circumstances. The rules contain detailed provisions with respect to the consideration and approval of *settlement* agreements.[37] Among other things, the rules provide that a proposed settlement agreement reached after the hearing opens, but before issuance of the judge's decision, must be accepted or rejected by the judge with any aggrieved party provided the opportunity to ask for leave to

Super, Case 28–CA–170463, 2019 WL 2435789 (June 10, 2019) (deeming the General Counsel's opposition to consent order merely "inconclusive").

[26] 364 NLRB at 1704.

[27] Id. at 1704–1705 & fn. 2.

[28] Id. at 1705.

[29] Id.

[30] Id. at 1707–1710.

[31] *UPMC*, 365 NLRB at 1423.

[32] Id. at 1421 (emphasis in original).

[33] Id.

[34] Id. at 1421–1422.

[35] Id. 1428–1433 (dissent of Member Pearce), 33–39 (dissent of then-Member McFerran).

[36] Chairman McFerran was a member of the *Postal Service* majority, but after careful consideration, she agrees that the approach adopted today is superior. She notes the Supreme Court's observation that because administrative agencies properly engage in a "constant process of trial and error," the Board's earlier decisions do not freeze the development of the law but may be reconsidered. *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 265–266 (1975).

[37] See 29 C.F.R. §§ 101.7 (settlements), 101.9 (settlement after issuance of complaint), 102.16 (Regional Director's authority to extend hearing date when settlement negotiations are in progress), 102.35(a)(7) (administrative law judges' powers to hold conferences for the settlement), 102.35(b) (assignment and powers of settlement judges), 102.45(c) (alternative dispute resolution program), and 102.51 (prehearing settlement and adjustment of issues).

appeal to the Board for review.[38] The Supreme Court has upheld those provisions as rational and consistent with the Act.[39] But, as we have explained, a consent order is not a settlement agreement because it does not reflect a voluntary resolution of a dispute between adverse parties. Thus, even to the extent that the Board's Rules and Regulations encourage settlement, we do not construe them to provide any authority for the Board or an administrative law judge to approve consent orders.

Unlike settlement agreements, consent orders are mentioned nowhere in the Rules and Regulations. To the contrary, Section 102.35(a)(7) of the Board's Rules and Regulations authorizes the Board's administrative law judges to "[h]old conferences for the settlement or simplification of the issues by consent of the parties, *but not to adjust cases*" (emphasis added).[40] Accepting a consent order proffered by the respondent takes the administrative law judge beyond the role contemplated by Section 102.35(a)(7). That provision authorizes the judge to facilitate consensual settlements, while also imposing a limit on the judge's authority, in order to maintain the integrity of the adjudicative process. A consent order does not comport with this scheme. It is not a "settlement . . . by the consent of the parties," but a "proffered adjustment" with terms acceptable only to the respondent.[41] By accepting a consent order, in turn, the judge has "adjusted" the case, i.e., has resolved it short of final adjudication on the merits, on terms acceptable to the judge (but not to the General Counsel and the charging party).[42]

In sum, the Board's Rules and Regulations do not contemplate or authorize the practice of approving consent orders (in contrast to judges' explicit authority to accept or reject parties' *bilateral* settlements). Instead, the practice of approving consent orders would seem to violate the Board's Rules and Regulations insofar as they prohibit judges from "adjust[ing] cases."

B.

Second, even assuming that consent orders are not prohibited by the Board's Rules and Regulations, the full-remedy standard adopted in *Postal Service* poses administrative challenges and inefficiencies. We do not believe that the administrative benefits of retaining the consent-order practice outweigh the costs.

The Board has considerable discretion over the selection of remedies.[43] Without delving deeply into a case, it is not always simple to discern whether a proposed consent order would, in fact, provide the same remedy that the Board would order if the alleged unfair labor practices had been fully litigated and found. Although the Board has developed certain standard remedies over the years, it always retains its discretion to craft different or additional remedies based on the particular facts of the case. Indeed, it may consider the appropriateness of such remedies sua sponte.[44] Determining whether a given consent order provides a full remedy for the alleged violations, therefore, can present difficult issues that may not have a ready answer in a particular case. At the very least, determining what is necessary to fully remedy particular violations requires a complete understanding of the nature, severity, and extent of the alleged violations,[45] as well as the respondent's prior history of unfair labor practices.[46]

Resolving those remedial issues before the unfair labor practices have been litigated, as is required when ruling on a motion to approve a consent order, may represent a significant expenditure of the Board's resources. In certain circumstances, moreover, the debate over whether a

[38] Id. § 101.9(d)(1), (2).

[39] *Food & Commercial Workers*, 484 U.S. at 124-128.

[40] 29 C.F.R. § 102.35(a)(7) (emphasis added). This provision, which has appeared in the Board's Rules and Regulations since 1946, essentially tracks the language of the Administrative Procedure Act addressing the authority of agency hearing officers, except for the notable addition of the italicized prohibition against "adjust[ing] cases." See 5 U.S.C. §556(c)(6). That addition, we believe, cannot be treated as surplusage, even if the Board may have neglected it in the past.

[41] See *Copper State Rubber*, 301 NLRB at 138 (terming consent order "a proffered adjustment made by a respondent to an administrative law judge") (emphasis added).

[42] Sec. 102.35(a)(7) of the Board's Rules and Regulations, by its terms, applies to the Board's administrative law judges. The consent order in this case was accepted by the judge, and Sec. 102.35(a)(7) plainly applies to that determination. We see no valid reason, however, why the Board itself should entertain or accept a consent order—essentially an offer by the Respondent to end the case without adjudication on terms unacceptable to the General Counsel and Charging Party—when a judge may not do so.

[43] See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898 (1984) (Board has "primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act"); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board possesses broad discretion in exercising its remedial powers, subject to limited judicial review).

[44] See, e.g., *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 4 (2023) ("We have broad discretion to exercise our remedial authority under Sec[.] 10(c) of the Act even when no party has taken issue with the judge's recommended remedies or requested additional forms of relief."), enfd. 98 F.4th 896 (8th Cir. 2024); *Thryv, Inc.,* 372 NLRB No. 22, slip op. at 6 fn. 9 ("[T]he Board may issue remedies even where, as here, they are not originally sought by the [c]harging [p]arty or in the General Counsel's complaint."); *HTH Corp.,* 361 NLRB 709, 710 (2014) ("We have broad discretion to exercise our remedial authority under Sec[.] 10(c) of the Act even when no party has taken issue with the judge's recommended remedies."), enfd. in relevant part 823 F.3d 668 (D.C. Cir. 2016*); J. Picini Flooring,* 356 NLRB 11, 12 fn. 5 (2010) ("[I]t is well settled that the Board has the authority to consider remedial issues sua sponte.").

[45] *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 4 ("We tailor the remedies to the violations, including their nature, severity, and extent.").

[46] Id. (discussing appropriateness of additional remedies where a respondent has demonstrated a proclivity to violate the Act).

consent order provides a full remedy threatens to become an abstract exercise that provides little, if any, benefit to the goal of enforcing the Act. This case aptly illustrates that problem, as the parties here dispute whether a consent order that includes a nonadmission clause provides a full remedy.[47] Because a consent order is not a settlement agreement, there is no overriding reason why the Board should take on the administrative burden we have described, rather than permit the case to be litigated and adjudicated.[48]

C.

Third, we agree with the General Counsel that respect for her prosecutorial authority under the Act counsels against the practice of approving consent orders. As noted above, Section 3(d) provides that *the General Counsel* has final authority, on behalf of the Board, over the investigation of charges and issuance of unfair labor practice complaints and "in respect of the prosecution of such complaints before the Board."[49] As the Supreme Court has held, "Congress intended to create an officer independent of the Board to handle *prosecutions*, not merely the filing of complaints."[50] This authority includes the unreviewable discretion to issue a complaint, "to withdraw the complaint before hearing if further investigation discloses that the case is too weak to prosecute," and "final authority to dismiss a complaint in favor of an informal settlement, at least before a hearing begins."[51] Even after the hearing has opened, the complaint may not be amended without the General Counsel's consent.[52]

The decision whether to approve a consent order bears the hallmarks of a prosecutorial decision rather than an adjudication. The approval of a consent order terminates the prosecution of the case without a true settlement. Rather, in terminating the case in these circumstances, the administrative law judge or the Board effectively departs from the "normal role of an adjudicative body" and assumes a role of a "super prosecutor ready to shape a deal with a respondent."[53] Under any standard, whether *Independent Stave* or *Postal Service*, this is not an appropriate role for the Board's adjudicators. Accepting a proffered consent order therefore intrudes into the General Counsel's statutory role of exercising her prosecutorial authority under Section 3(d) of the Act. For all these reasons, the policies that underlie Section 3(d) of the Act counsel against continuing to accept consent orders.

D.

Fourth, and independent of all the above conclusions, no policy of the Act supports the approval of a consent order. As a threshold matter, Section 10(a) of the Act makes clear that the Board has the authority to adjudicate cases presented to it, notwithstanding the proffer of some other type of resolution by a party or parties. The Board's "power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise,"[54] including, in the absence of any exception to the contrary, a respondent's proffer of terms that might even amount to a full remedy for the unfair labor practices alleged. In short, the Board is not required to accept a consent order proposed by the respondent in an unfair labor practice case—a "means of adjustment" in the words of Section 10(a)—rather than to adjudicate the case and to remedy any unfair labor practices found.

Contrary to the view of the *UPMC* Board, in turn, accepting consent orders does not further the pro-settlement policy endorsed by the Board. A consent order clearly

[47] Although it is unnecessary for us to resolve whether the inclusion of a nonadmission clause in a consent order precludes a full-remedy finding in light of our disposition of this case, we observe that the inclusion of a nonadmission clause in a consent order is in considerable tension with decades of Board precedent holding that the posting of a side notice that similarly minimizes the effect of a settlement agreement is grounds for revoking the settlement agreement. See, e.g., *Outokumpu Stainless USA, LLC*, 365 NLRB 1248, 1250–1251 (2017) (letter stating respondent did not believe it had violated the Act and had not been found to have violated the Act constituted noncompliance with settlement), enfd. 773 Fed. Appx. 531 (11th Cir. 2019); *Bangor Plastics, Inc.*, 156 NLRB 1165, 1167 (1966) (side notice denying that respondent had violated the Act "create[d] in the minds of employees the impression that it does not subscribe to any of the statements expressed in the Board's notice"), enf. denied 392 F.2d 772 (6th Cir. 1967). In light of that precedent, it is hardly clear that a consent order that includes a nonadmission clause provides "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." *Postal Service*, 364 NLRB at 1706. Nor is it clear that litigation of the allegations "could not result in any changes in the proposed consent order and notice which would be more favorable to the General Counsel and Charging Party . . . . " *Electrical Workers*, 188 NLRB at 855.

[48] We note also, by contrast, that the challenge of ascertaining a full remedy is not presented when the Board approves parties' consensual settlement agreements under the standards of *Independent Stave*. In that situation, the Board evaluates only "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." 287 NLRB at 743. Because the parties to a settlement have voluntarily decided to accept a compromise outcome to the claims, it is not incumbent on the Board to ensure that the resolution of case involves a full remedy and the difficulties of determining exactly what that would be are not at issue.

[49] 29 U.S.C. § 153(d).

[50] *Food & Commercial Workers*, 484 U.S. at 127 (emphasis in original).

[51] Id. at 126. See also *United Natural Foods, Inc*., 370 NLRB No. 127 (2021) (regional director had unreviewable discretion to withdraw complaint at any time before the hearing), rev. denied 66 F.4th 536 (5th Cir. 2023).

[52] See *GPS Terminal Services*, 333 NLRB 968, 969 (2001).

[53] *UPMC*, 365 NLRB at 1439 (then-Member McFerran, dissenting).

[54] 29 U.S.C. § 160(a).

does not represent the "friendly adjustment" of an industrial dispute on a basis of an "equality of bargaining power" that the Act envisions.[55] A consent order is not the product of settlement discussions and negotiations between opposing parties to "meet[] the other party on some acceptable middle ground."[56] To the contrary, in such cases, the General Counsel and the charging party *both* object to the terms of the consent order.[57] Thus, the Board's approval of the order will not lead to the same "early restoration of industrial peace" that approval of a settlement agreement may provide.[58] If anything, terminating the litigation at the sole instigation of the respondent without actually adjudicating the merits of the case risks further inflaming the very labor dispute that led to the filing of unfair labor practice charges in the first place. Unlike the approval of a settlement agreement, moreover, the approval of a consent order cannot be justified in terms of allowing the parties to decide to avoid the risks of further litigation.[59] By opposing the consent order, the General Counsel and the charging party have demonstrated their desire to assume those risks in the hope of obtaining additional or different relief, to continue the litigation, and to have the Board adjudicate the case, as Section 10 of the Act envisions. There is no compelling reason to prohibit the General Counsel and the charging party from making this choice as litigants before the Board or to compel them to forgo the risks of litigation on terms acceptable only to the respondent.

Instead of promoting the Act's policies, the practice of approving consent orders undermines them by threatening unnecessary delay in the processing of unfair labor practice cases. When a consent order is proposed, litigation of the unfair labor practice allegations addressed by the consent order comes to a halt while the propriety of the consent order itself is litigated before the judge and, if a special appeal is filed, before the Board. Even if consent orders were otherwise permissible, we would abandon them in any event because any limited benefit they may offer does not outweigh the adverse effects of delaying the resolution of the alleged unfair labor practices while the merits of the proposed consent order are evaluated.[60] As the Supreme Court has observed, "in the labor field, as in few others, time is crucially important in obtaining relief."[61]

IV.

We respectfully disagree with the position of our dissenting colleague, who was a member of the majority in *UPMC*, a decision we overrule today.[62]

The crux of our disagreement is whether consent orders can be regarded as settlements and should be treated the same as settlements, as our dissenting colleague insists. As we have explained, a consent order does not represent an agreement between a respondent and *any* opposing party in the case. Rather, a consent order is proffered by the respondent and accepted by the administrative law judge, over the *objection* of both the General Counsel and the charging party. Our colleague cannot deny that a consent order does not reflect an agreement between opposing parties. Yet his description of this case obscures this fact, repeatedly referring to the supposed "settlement agreement" here. To be clear, it is undisputed that *neither* the General Counsel nor the Charging Party has agreed to the terms of the consent order approved by the administrative law judge and before us now.

Our rationale for categorically rejecting consent orders follows from the fact they are not settlement agreements. This is not a "a distinction without a difference," as our dissenting colleague claims. The consent of opposing parties to the resolution of a case before the Board matters. It matters for purposes of the Board's rules. It matters for purposes of the Act's pro-settlement policies. And it matters for purposes of the administration of the Act, given the different roles of the General Counsel (as prosecutor) and the Board and its judges (as adjudicators). Because

[55] 29 U.S.C. § 151.

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

[57] We note that, in this case, the General Counsel and the Respondent were unable to reach a settlement agreement because they disagreed about the inclusion of a nonadmission provision and dissemination of the notice by text message. The judge's approval of the Respondent's proposed consent order, which adopted the Respondent's positions on the disputed terms, effectively erased the lines that the General Counsel had drawn in her negotiations with the Respondent.

[58] *Independent Stave*, 287 NLRB at 742-743; see also *State County Employees AFSCME Local 47*, 274 NLRB 1434, 1435 (1985) (finding that the respondent's proposed "settlement," which was not joined by the General Counsel or the charging party, "will do little, if anything, to advance labor peace among these parties" as it lacked a quid pro quo under which each party chose to forgo its litigation rights in exchange for particular relief).

[59] *Independent Stave*, above at 743.

[60] Cf. *Food & Commercial Workers*, 484 U.S. at 131–132 (permitting litigation over prehearing settlements would impose unacceptable delays in the disposition of unfair labor practice cases).

[61] *NLRB v. C & C Plywood Corp.,* 385 U.S. 421, 430 (1967).

[62] The *UPMC* Board itself overruled *Postal Service*, without issuing a notice and invitation to file briefs. It observed that:

> Neither the Act, the Board's Rules, nor the Administrative Procedure[] Act requires the Board to invite amicus briefing before reconsidering precedent. The decision to allow such briefing is purely discretionary and is based on the circumstances of each case.

365 NLRB at 1427. We do not understand our dissenting colleague, part of the *UPMC* majority, to argue that the Board has abused its discretion here by not inviting amicus briefs. In any case, we conclude that additional amicus briefing is not necessary. The issue presented here has been examined in two prior full-Board decisions with dissenting opinions, *UPMC* and *Postal Service*, and the Board invited and received amicus briefs in *Postal Service*.

our colleague's position is premised on a false equivalence between consent orders and settlement agreements, it necessarily fails.

We have explained that consent orders would seem to be prohibited by Section 102.35(a)(7) of the Board's Rules and Regulations. That rule authorizes the Board's administrative law judges to "[h]old conferences for the settlement or simplification of the issues by consent of the parties, *but not to adjust cases*" (emphasis added). Thus, it is perfectly proper for a judge to approve a "settlement . . . of the issues by consent of the parties," but not to "adjust" a case in way that does *not* reflect the "consent of the parties." The rule, of course, refers to "parties" in the plural, not to a single party, the respondent. Our dissenting colleague makes no real attempt to offer a plausible, contrary interpretation of Section 102.35(a)(7).[63] Instead of explaining what the phrase "not to adjust cases" might mean, he glosses over it and insists that our reading of the rule would somehow foreclose judges from approving settlements that *do* reflect the "consent of the parties" in the language of Section 102.35(a)(7), i.e., the consent of the respondent and either the General Counsel or the charging party, if not both. There is no basis for our colleague's claim, then, as the rule itself makes plain.[64]

We also have explained that consent orders intrude on the General Counsel's prosecutorial authority under Section 3(d) of the Act, because they terminate a proceeding over her objection, in the absence of a true settlement and without adjudication of the case. Our dissenting colleague insists that a footnote in the Board's decision in *Fairmont Hotel*, 314 NLRB 534, 534 fn. 4 (1994), forecloses this conclusion. We disagree. The issue in *Fairmont Hotel* was whether the Board had authority to review the General Counsel's settlement of a case—before an unfair labor practice hearing opened—over the objection of the charging party. Applying the Supreme Court's decision in *Food & Commercial Workers,* above, which was squarely on point, the Board held that the settlement came within the General Counsel's unreviewable discretion. Id. at 534-535. In footnote 4, the Board observed:

> The General Counsel's authority not to prosecute includes settlement of a case over the Charging Party's objections where a complaint has issued but the hearing has not opened. . . . On the other hand, if the General Counsel *rejects* a proffered settlement and wishes to continue to prosecute the case, the Board will be called on to exercise its adjudicatory function. In that connection, the Board may rule on the adequacy of the proffered settlement, pursuant to a respondent motion to dismiss. See *Independent Stave Co*., 287 NLRB 740 (1987).

Id. at 534 (emphasis in original). That observation has no bearing here. First, it is not necessary to the holding of *Fairmont Hotel*, but rather is dicta. Second, the observation does not refer explicitly to consent orders, but rather—as the citation to *Independent Stave* strongly suggests—would seem to refer to settlements between the charging party and the respondent, to which the General Counsel objects. Third, in overruling *UPMC* today, we have rejected the principle that consent orders and settlements between opposing parties should be treated the same. Thus, to the extent that the footnote observation in *Fairmont Hotel* could be read as a precedential holding of the Board (a reading we reject), we overrule it insofar as it is inconsistent with our decision here.[65]

We have explained why the Board's resources are better spent actually adjudicating cases on the merits where the General Counsel and the charging party have both *rejected* a respondent's settlement offer, rather than evaluating the merits of the offer (whether under the full-remedy standard of *Postal Service* or the *Independent Stave* standard as embraced in *UPMC*). In response, our dissenting colleague asserts that we are "ced[ing] the Board's authority

[63] In a footnote, our dissenting colleague says that either "consent order" or "consent settlement agreement" can describe "the process by which administrative law judges approve unilateral offers to settle certain alleged violations of the Act before them." This statement illustrates our colleague's error. As he says, a consent order is indeed the product of the "process by which administrative law judges"—not opposing parties—"approve unilateral offers to settle certain alleged violations of the Act."

[64] Our dissenting colleague's argument that approval of consent orders is authorized by the provision in Sec. 102.35(a)(8) granting judges the power to rule on dispositive motions has no more substance. The specific prohibition in Sec. 102.35(a)(7) necessarily controls over the more general authorization of Sec. 102.35(a)(8).

We reject our colleague's suggestion that if we wish to eliminate the consent-order practice, we should (or must) do so by amending the Board's rules. As explained, the existing language of Sec. 102.35(a)(7) seems plainly to prohibit consent orders. No prior Board decision has specifically addressed this language, much less interpreted it differently. It is preserving the consent-order practice, then, that would seem to require amending the rules. For all the reasons offered here, we see no good reason to do so.

[65] We reject our dissenting colleague's assertion that in rejecting consent orders, we imperil the approval of settlements between the charging party and the respondent where the General Counsel objects, because, our colleague asserts, such settlements also intrude on the General Counsel's prosecutorial authority. In such cases, however, the Act's pro-settlement policies come into play, and thus countervailing considerations exist. Moreover, the intrusion on the General Counsel's prosecutorial authority must be understood as a matter of degree. That authority necessarily accommodates the role of the charging party, who has full party status in a Board proceeding. For example, the charging party may ensure that a case comes to the Board—even without the General Counsel's consent or participation—by filing exceptions to the administrative law judge's decision. See Sec. 102.46 of the Board's Rules and Regulations. Thus, a settlement between the respondent and the charging party alone is properly given weight, even if the General Counsel objects. This is particularly true where the charging party is a union, given the Act's goal of averting labor disputes.

to craft an appropriate (or full) remedy and giv[ing] it to the General Counsel, who now has carte blanche to continue to try a case—either because she believes she can achieve a better result through litigation, or because she sees it as a vehicle to push a broader item on her agenda." The assertion that we are ceding the Board's authority to the General Counsel is simply untrue. In rejecting consent orders, we ensure that the Board will adjudicate cases on their merits. If the Board finds that the respondent committed unfair labor practices, the Board—not the General Counsel, obviously—will craft what it deems to be the appropriate remedy under the Act and will order that remedy. Contrary to our colleague's suggestion, we have no doubt that the Board has the ability to craft and order appropriate remedies. The question, rather, is whether—when the opposing parties disagree on the appropriate remedy—the issue should be decided on the merits, as we conclude. When the Board decides a case on the merits, of course, it does so in the public interest, fulfilling its role under the Act.[66]

In turn, we reject our dissenting colleague's implication that there is something illegitimate about permitting the General Counsel "to continue to try a case." That is a decision for the General Counsel, right or wrong. Given her prosecutorial authority under the Act—which she exercises to further the public interest (not to vindicate private rights)[67] – the General Counsel is surely free to seek "a better result through litigation" and is even free to pursue litigation because she sees a case "as a vehicle to push a broader item on her agenda." It is entirely appropriate for the General Counsel, based on her conception of the public interest, to seek changes in the law by bringing cases to the Board, as virtually all General Counsels have done. This is one way that labor law develops.

Our dissenting colleague decries what he sees as a terrible waste of the agency's resources if consent orders are eliminated. His concern is exaggerated, to put it mildly. The number of consent-order cases is very small, and we highly doubt that eliminating consent orders will somehow unleash General Counsels to pursue pointless litigation, instead of using their limited resources efficiently and effectively.[68] The Board's role, of course, is not to police the General Counsel's prosecutorial decisions. Our primary statutory function is to adjudicate cases. If the General Counsel takes imprudent litigation risks instead of settling a case, the Board's adverse adjudication on the merits will serve as a corrective. To be sure, the Board should conserve its own resources, and the Board's pro-settlement policy—which we have reaffirmed—promotes that goal by permitting parties to resolve cases before the Board. Consent orders, however, are not settlements, and we see no compelling reason to treat them as if they were.

We have explained that rejecting consent orders means respecting the litigation decisions of the General Counsel and the charging party, who choose to assume the risks in rejecting the respondent's proposed resolution of the case. It is not the Board's place to make such decisions for litigants. In contrast, our dissenting colleague invokes the interest of the Charging Party here, as well as the employees it represents, in a supposedly quicker resolution of this case on the respondent's terms, through a consent order. What our colleague does not say, however, is that the Charging Party (as well as the General Counsel) rejected the Respondent's proffered settlement – and that, by definition, all consent-order cases involve this same crucial fact. In such cases, there is no settlement: the respondent's attempt to resolve the case short of full adjudication has been rejected by both the General Counsel and the charging party. We cannot accept our colleague's perplexing view that *UPMC* "respects the Board's adjudicatory duty to make the final determination as to settlement terms that are reasonable."[69] The Board has no "adjudicatory duty"

[66] E.g., *National Licorice Co. v. NLRB,* 309 U.S. at 362 (observing that the "proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights" and that the "Board acts in a public capacity to give effect to the declared public policy of the Act").

[67] E.g., *Roadway Express, Inc*., 355 NLRB 197, 201 (2010) (discussing General Counsel's authority under the Act), enfd. 427 Fed. Appx. 838 (11th Cir. 2011). We do not agree with our dissenting colleague's apparent suggestion that in permitting the General Counsel to continue to litigate a case, the Board is somehow failing to act in the public interest. Both the General Counsel and the Board act in the public interest, in their respective roles. When the General Counsel prosecutes a case, she presumably does so in the public interest, and when the Board permits the General Counsel to proceed and then adjudicates the case on the merits, it does so in the public interest as well. As we have explained, nothing in the Act compels the Board to adopt or maintain the consent-order practice, as Sec. 10(a) confirms.

[68] Our dissenting colleague points to pending consent-order cases and decries the delay in resolving them occasioned by today's decision, but we have explained why eliminating the consent-order practice will better serve administrative efficiency going forward. Of course, even if the consent-order practice were retained, those cases would have to be considered by the Board.

[69] We must point out that the presumptive beneficiaries of consent orders are respondents, assuming that all parties to a Board proceeding are rational actors. If it were in the best interest of the General Counsel (acting in the public interest, as the Act envisions by granting prosecutorial authority to her) or in the best interest of the (private) charging party to accept a respondent's proffered settlement, then presumably they would do so. In consent-order cases, however, both opposing parties have rejected the respondent's offer. When a judge or the Board approves a consent order, then, they terminate the case on terms that only the respondent desired. Our dissenting colleague apparently believes either that the General Counsel and charging parties are irrational, that the Board is a better judge of their own interests than they are, or that respondents should be rewarded for proffering settlement on terms the Board deems reasonable.

to impose a purported "settlement" when no party but the respondent has either proffered or accepted it. As explained, such a notion is contrary to Section 10(a) of the Act, which provides that the Board's remedial power to redress unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." We do not understand our colleague to argue that the Board is somehow required by the Act to establish or maintain the consent-order practice, a "means of adjustment" distinct from a genuine adjudication on the merits. If that is his position, then it is incorrect.[70]

V.

For all these reasons, we have determined to end the practice of accepting consent orders. We believe this approach is superior to the alternatives of maintaining the *UPMC* reasonableness standard or returning to the full-remedy standard of *Postal Service*, even assuming that either option could be reconciled with the Board's Rules and Regulations and the policies underlying the structure and text of the Act.

The Board's general practice is to apply new policies and standards retroactively unless doing so would cause a "manifest injustice."[71] Pursuant to the longstanding guidance of the Supreme Court, we have held that "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'"[72] To determine whether retroactive application will cause a manifest injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.[73]

We find that retroactive application of our decision abandoning the practice of approving consent orders will not cause a manifest injustice. Our decision today does not alter the standard for determining whether the Respondent has violated the Act; nor does it deprive the Respondent of an opportunity to defend against the allegations here. Although the result of our decision is that the Respondent will be required to litigate the allegations covered by the consent order (or settle them on terms agreeable to the General Counsel or the Charging Party subject to Board approval under *Independent Stave*), there is no basis for concluding that the Respondent will be prejudiced if it is required to litigate those allegations now.[74]

Eliminating the approval of consent orders only prospectively, on the other hand, would "produc[e] a result which is contrary to a statutory design or to legal and equitable principles."[75] To begin, the Board has an obligation to conform to its own rules,[76] which, upon close review (perhaps for the first time), clearly appear to prohibit the practice of approving consent orders. In any case, for the reasons fully explained above, it does not effectuate the policies of the Act to approve consent orders and, indeed, the practice actually undermines those policies. Finally, we note that the Board has retroactively applied prior decisions regarding the approval of consent orders.[77] We do so here as well.

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.

Dated, Washington, D.C. August 22, 2024

Lauren McFerran, Chairman

David M. Prouty, Member

Gwynne A. Wilcox, Member

[70] Our colleague is similarly incorrect when he insists that in opposing consent orders also rejected by the charging party, the "General Counsel acts in a manner that is contrary to protecting the interests of employees seeking to vindicate their rights under the Act" and so the Board must step in to protect the public interest. If the General Counsel's position in the litigation is meritless, then it will be rejected by the Board when it adjudicates the case on the merits – and the public interest will be served.

[71] *SNE Enterprises, Inc.,* 344 NLRB 673, 673 (2005) (stating that "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage'") (*quoting Deluxe Metal Furniture Co*., 121 NLRB 995, 1006-1007 (1958)).

[72] Id. (quoting *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947)).

[73] Id.

[74] The Respondent argues that it will be prejudiced because the General Counsel filed the special appeal after the judge closed the hearing on the remaining allegations in the case. However, the Respondent acknowledges that the allegations addressed by the consent order involve different issues and different bargaining units from those at issue in the allegations litigated at the hearing and, further, that the two sets of allegations are not factually intertwined. Moreover, the Respondent moved to sever the allegations already litigated as part of its motion to approve the consent order, which the judge approved. Under these circumstances, we find no prejudice to the Respondent from the fact that our decision may result in a second hearing to address the remaining allegations in the complaint.

[75] *SEC v. Chenery Corp*., above.

[76] See, e.g., *United States v. Nixon*, 418 U.S. 683, 696 (1974).

[77] See *UPMC*, 365 NLRB at 1423–1424; *Postal Service*, 364 NLRB at 1706.

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

At issue here is the judge's resolution of a case with one issue: whether the Respondent failed to provide information requested by the Union on October 14, 2021, nearly three full years ago. Approximately two years ago, Administrative Law Judge Ira Sandron issued an order severing this straightforward information-request case and approving a slightly revised draft settlement agreement that was originally proposed by the General Counsel. Under that settlement agreement, the Union, which sought the requested information for the purpose of representing bargaining-unit employees, would have received the information no later than mid-July 2022.

In deciding whether to approve the settlement agreement proffered by the Respondent,[1] the judge first found that "the parties agree that the consent order wholly comports with the informal Board settlement agreement that the General Counsel proposed to the Respondent in Case 12–CA–284984, with two exceptions set out in the General Counsel's June 24 opposition: (1) the consent order contains a nonadmission clause; and (2) it does not provide for a requirement that the respondent distribute the Notice to Employees (the notice) by text message to the latest cellphone numbers available to it." As I will discuss, the judge reasonably found that these were not compelling bases for declining to approve the revised settlement agreement; the Board has routinely approved settlements with nonadmission clauses under the "reasonableness" standard set forth in *Independent Stave*, 287 NLRB 740 (1987), and the portion of the order requiring distribution "by electronic means," is sufficient to address the General Counsel's apparent concern that employees be adequately informed of the Notice.

Again, under the terms of the settlement, the Respondent agreed to provide the Union with the exact information it had requested—payroll records for unit employees for two pay periods in fall of 2021—within 14 days of final approval of the consent order, which issued June 30, 2022.[2] In addition to the Board's aforementioned standard physical and electronic notice-posting language, the judge-approved consent order included a provision for a court judgment in the event of noncompliance and a nonadmission clause.[3]

The General Counsel requested special permission to appeal, asking the Board to set aside the consent order here and to return to the short-lived standard set forth in *Postal Service*, 364 NLRB 1704 (2016), which deviated from long-standing Board practice by requiring that consent orders provide a "full remedy" for all violations alleged. In response to the General Counsel's motion, my colleagues could have quickly resolved this matter by declining to approve the settlement agreement under the Board's absolute discretion whether to approve settlements. Indeed, nothing in *Independent Stave* requires the Board to approve settlements. Rather, *Independent Stave* lists factors that the Board will consider on a "case-by-case basis" to determine whether a specific settlement "advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest." 287 NLRB at 742. Accordingly, rather than relying on a novel, tortured interpretation of our Rules and Regulations and the Act, my colleagues could simply decline to approve judicial consent orders because, in their view, such orders fail to encourage voluntary dispute resolutions.[4] Or my colleagues could have simply granted the General Counsel's request by not approving consent orders unless they

[1] My colleagues take umbrage at the fact that I use the term "settlement agreement" with regard to the terms proffered by the Respondent and approved by the Administrative Law Judge. The Respondent's terms were set forth as revisions to the settlement agreement originally proffered by the General Counsel; a document referred to as a "settlement agreement" although it was never agreed to by the parties.

Under the circumstances, I do not think it unreasonable to refer to the Respondent's revisions to the "settlement agreement" proffered by the General Counsel as a "settlement agreement" as well.

[2] In other words, the information that the Union deemed important enough to its representation of unit employees to warrant filing a charge with the Board in October 2021, nearly three years ago.

[3] For simplicity's sake, I use the same term—"consent orders"—as the majority. I note, however, that in *UPMC* we used the term "consent settlement agreements." 365 NLRB 1418, 1418 fn. 2 (2017). In my view, either term can be used to describe the process by which administrative law judges approve unilateral offers to settle certain alleged violations of the Act before them. Contrary to my colleagues' suggestion, as I have explained above, the reference to "consent settlement agreements" simply references the fact that the judge adopts a party's proffered settlement agreement (i.e., the terms pursuant to which a party would agree to settle a matter) as a means of adjudicating a case. Although my colleagues seem to accuse me of confusing the circumstances surrounding "consent orders" and traditional "settlements," it is clear that we are all talking about the same thing.

I would be remiss if I did not note that, ironically, my colleagues seem to prefer the term "consent orders." In my mind, given their objection to "settlement agreements," "consent orders" would be equally problematic insofar as that term suggests the judge's order was the result of the parties' "consent," when it was not. If my colleagues want to come up with an entirely new term for the relevant circumstances, they are free to do so. Until such time, it is puzzling that my colleagues choose to focus on the terminology used as grounds for objecting to the reasoning in my dissent.

[4] I would have dissented, but at least it would be a disagreement of whether the consent order at issue promoted the purposes set out in *Independent Stave*.

provide a full remedy, consistent with *Postal Service*, based on the interests set forth in *Independent Stave*.[5]

Instead, without notice or inviting briefing,[6] my colleagues have chosen to hold this case for two years in order to find, for the first time in the history of the Act, that administrative law judges lack the authority to approve consent orders, which are subject to appeal to, and review by, the Board. Not only is my colleagues' rationale for making this determination deeply flawed—without any actual support in the Act, the Board's rules, longstanding Board practice, or any Board or court decision—but they apply it here to reject an entirely reasonable settlement under Board law. Indeed, they add insult to injury by remanding this case so that the parties and the Agency will now be required to expend additional resources and litigate this matter, perhaps up through the Federal courts of appeals, just because the General Counsel objected to the inclusion of a nonadmission clause and sought to include a remedy already covered by the Board's standard remedial language. Meanwhile, the Union, and the employees that it represents, are left waiting for who knows how long, possibly years, to obtain the requested information that could have been provided two years ago.[7] The result in this particular case is absurd. So are the implications for pending[8] and future ones. For the following reasons, I respectfully dissent.

A. Basic Principles

I start in the same place as my colleagues. Section 10(a) of the Act gives the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy."[9] *Borg-Warner Corp*, 121 NLRB 1492, 1495 (1958); see generally Section 10(a) of the Act (stating, in relevant part, that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise"). In exercising this power, "[t]he Board has long had a policy of encouraging the peaceful, nonlitigious resolution of disputes." *Independent Stave*, 287 NLRB at 741; see also *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 128 (1987) (observing that "settlements constitute the 'lifeblood' of the administrative process, especially in labor relations" (citation omitted)); *The Wallace Corporation v. NLRB*, 323 U.S. 248, 253–254 (1944) (stating that "[t]o prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements"). As the Board stated in *Independent Stave*, "the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned," and in exercising that discretion, the Board "will refuse to be bound by any settlement that is at odds with the Act or the Board's policies." 287 NLRB at 741 (cleaned up).

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[5] I would have dissented, for the reasons set forth in the *UPMC* decision, but at least that decision would not have been wholly without precedent.

[6] In *UPMC*, Chairman (then-Member) McFerran criticized the Board majority for overruling *Postal Service* "without even bothering to give notice or to invite briefing," calling it "a sharp break with well-established practice." 365 NLRB 1418, 1434 (Member McFerran, dissenting). Now, as part of the majority, she has done the same thing. Yet here, unlike in *UPMC*, the majority is adopting a standard that neither party has requested or briefed, nor one with any basis in Board precedent. And I reject the majority's suggestion that the amicus briefs in *Postal Service*, requested over eight years ago, and the Board's decisions and dissents in *Postal Service* and *UPMC*, neither of which included the sweeping reasoning advanced here, adequately advance the "recognized benefits of public participation in the Board's decision-making process" that Chairman (then-Member) McFerran found lacking in *UPMC*. Id., 1434 fn. 4 (Member McFerran, dissenting).

[7] Not only are my colleagues apparently unbothered by the lengthy delays that will result from their decision today, but they affirmatively attempt to downplay them, asserting that "even if the consent-order practice were retained, those cases would have to be considered by the Board." I have to assume, however, that my colleagues are not suggesting that the time that the Board would spend in reviewing a consent order is in any way comparable to the inherent delay caused by requiring administrative law judges to hold hearings, review post-hearing briefs, and issue administrative decisions where a case could, instead, be resolved through terms that clearly satisfy the *Independent Stave* test.

[8] Currently, at least 11 special appeals hinging on this issue (the oldest filed February 2023) are on hold, pending issuance of this decision. *Walmart Inc*., 10–CA–289060 (special appeal filed June 3, 2024); *Walmart Inc*., 06–CA–299058 (special appeal filed Mar. 28, 2024); *Blue Fox Heating and Cooling LLC,* 25–CA–297685 (special appeal filed Jan. 29, 2024); *Reinhold Electric, Inc.,* 14–CA–313291 (special appeal filed Dec. 21, 2023); *Harmony Cares*, 13-CA-307216 (special appeal filed Oct. 20, 2023); *Postal Service*, 07–CA–303899 (special appeal filed July 7, 2023); *Columbus Electric Cooperative, Inc*., 28–CA–275203 (special appeal filed June 7, 2023); *Apple Inc.,* 10–CA–295915 (special appeal filed June 1, 2023); *Starbucks Corp*., 14–CA–294830 et al. (special appeals filed May 26, 2023 (General Counsel) and June 16, 2023 (charging party)); *Parsons Motor Vehicle Inspection and Maintenance Corp*., 22–CA–275206 (special appeal filed May 15, 2023); *Starbucks Corp*., 16–CA—96159 et al. (special appeal filed Feb. 6, 2023). This list alone should call into question the majority's assertion that "[t]he number of consent-order cases is very small." But even if I accept arguendo my colleagues' assertion, that makes their decision today even more questionable. Why have my colleagues deemed it necessary to delay the resolution of at least 11 cases, for possibly years to come, and to undermine the Board's statutory authority to resolve unfair labor practice cases over an issue that is, as they assert, inconsequential to the Board's overall case-processing responsibilities?

[9] I do not disagree with my colleagues' assertion that "the Board may consider the appropriateness of [different or additional] remedies sua sponte." I simply bolster the subsequent history of two cases that they cite for this proposition: *Noah's Ark Processors, LLC d/b/a WR Reserve,* 372 NLRB No. 80, slip op. at 4 (2023), enfd. 98 F.4th (8th Cir. 2024) (finding the relevant unfair labor practices but declining to reach the merits of the extraordinary remedies ordered on procedural grounds), and *Thryv, Inc*., 372 NLRB No. 22 (2022), vacated in relevant part 102 F.4th 727, 748 (5th Cir. 2022) (vacating the extraordinary remedy promulgated by the Board in its decision without reaching its merits).

In turn, "Section 3(d) of the NLRA provides that the General Counsel has 'final authority' regarding the filing, investigation, and 'prosecution' of unfair labor practice complaints." *UFCW*, 484 U.S. at 124. Generally, "dividing the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line, is easy to discern." Id. at 125–126. But in close cases, the Board is tasked, in the first instance, with determining on which side of the line a particular action falls. Id.

Unlike my colleagues, I continue to adhere to the views espoused in *UPMC*, 365 NLRB 1418 (2017), and I believe that the Board's practice of accepting consent orders that meet the standards set forth in *Independent Stave*—like the consent order at issue here—best honors these well-settled principles.

B. The Consent Order Easily Satisfies the Board's Standard for Settlements

In this case, I would deny the General Counsel's special appeal. Examining the relevant factors, I find the consent order reasonable under *Independent Stave* and *UPMC*. In short, notwithstanding the objection of the General Counsel and the Charging Party, the consent order would have provided our standard remedy for an information-request violation and saved the parties the trouble of litigation. The General Counsel presented no evidence of fraud, coercion, or duress by any of the parties in reaching the settlement, nor claimed that the Respondent has a history of violating the Act or has breached previous settlement agreements. On balance, giving effect to the consent order would "effectuate the purposes and policies of the Act." *Independent Stave*, 287 NLRB at 741.

Further, as mentioned previously, the General Counsel and the Union have failed to assert compelling grounds for finding the consent order should be rejected because it does not provide a full remedy for the failure to provide information violation alleged. To begin, the Board regularly approves settlement agreements that include a nonadmission clause.[10] Neither the General Counsel nor the Union have proffered a compelling argument suggesting that the absence of a nonadmission clause was critical to remedying the violation at issue in this case, particularly given the provision for court enforcement in the event of noncompliance. It is also noteworthy that, under the circumstances here, the inclusion of a nonadmission clause would not have precluded approval under the "full remedy" standard promulgated in *Postal Service* and certainly would not preclude approval under the *Independent Stave/UPMC* "reasonableness" standard. As for the General Counsel's objection to the consent order's lack of explicit notice-texting language, our standard electronic notice posting language in *J. Picini Flooring*, 356 NLRB 11 (2010), includes texting if it is determined that the Respondent customarily communicates with its employees by such means.

C. Response to the Majority

My colleagues cannot dispute that, prior to their decision today, the Board would generally approve a settlement approved by a judge, so long as that settlement is found to be reasonable under *Independent Stave*, even if that settlement results in the judge dismissing the complaint over the General Counsel's objection. Indeed, my colleagues themselves have approved such a settlement as recently as April 18, 2024.[11] Nevertheless, my colleagues now assert that, because consent orders are somehow different from settlements—a distinction without a difference, so far as I can tell—judges have no authority under the Board's rules to dismiss complaint allegations based on a settlement that either satisfies *Independent Stave* or provides a full remedy, so long the General Counsel and the charging party object.[12] Each of the majority's newfound justifications for abandoning our longstanding practice is, to put it kindly, unpersuasive. Notwithstanding at least 50 years of Board precedent allowing for resolution of cases by consent order, my colleagues, it seems, have had an epiphany, now concluding that consent orders "would seem to violate the Board's Rules and Regulations"; undermine the General Counsel's prosecutorial authority under Section 3(d) of the Act; and do not further

[10] See, e.g., *Woodworkers Local 3–433 (Kimtruss Corp*.), 304 NLRB 1, 2 (1991); see also *Amazon.com Servs., LLC*, 09–CA–298870 et al., 2024 WL 1701258 (2024); *Starbucks Corp*., 12–CA–295949, 2023 WL 5953883 (2023); *Int'l Bhd. of Elec. Workers, Loc. Union #611*, 28–CA–273757, 2022 WL 2063166 (2022); *Bodega Latina Corp. d/b/a El Super*, 28–CA–170463, 2019 WL 2435789 (2019); *3rd Ave. Transit, Inc. Jofaz Transportation Inc.*, 02–CA–088984, 2014 WL 3499888 (2014).

[11] See, e.g., *Amazon.com Services*, 09–CA–298870, et al., 2024 WL 1701258 (2024).

[12] My colleagues claim that my position is premised on a "false equivalence between consent orders and settlement agreements." But, as explained, the two separate methods for resolving allegations of unfair labor practices constitute a "distinction without a difference" because that distinction (the number of parties, if any, objecting to the agreement) is explicitly accounted for by the *Independent Stave* analysis. Factor one (of the four nonexclusive factors) asks "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." 287 NLRB at 743 (emphasis added). In this way, the Board intended that the *Independent Stave* analysis gave significant weight to the views of the General Counsel, charging party, and the Respondent, but in no way did *Independent Stave* establish that two parties held the power to veto an otherwise reasonable manner of settling a dispute that serves the public interest, as the Board would determine should any party appeal. Again, it is the Board that has the authority, under the Act, to resolve disputes concerning unfair labor practice allegations to ensure that such resolutions serve the public interest. In making that determination, the Board will consider the positions of the parties, but there is no statutory basis for concluding that the Board needs to defer to them.

the Board's stated policy interest in encouraging settlement (without citing any evidence to suggest this to be true). In addition, the majority rejects the General Counsel's request to return to *Postal Service* as impractical, finding it too challenging to craft a full remedy. In its search for any possible justification for banning resolution of cases by consent order, the majority overlooks the ripple effects of its sweeping decision. In the process, my colleagues have redrawn the line separating the Agency's prosecutorial and adjudicatory functions, denigrated the Board's ability to craft remedies, and jeopardized other types of nonunanimous settlements—all to "solve" what they find to be a "very small" problem. And, of course, the ultimate result for the unit employees affected here is that the provision of requested information to their representative is now indefinitely delayed, for no good reason.

1. The Board's Rules and Regulations Do Not Prohibit Consent Orders.

At the outset, my colleagues claim that our Rules and Regulations "upon close review (*perhaps for the first time*), clearly appear to prohibit the practice of approving consent orders."[13] (Emphasis added.) But this is misleading. The Board *has* examined the interplay of Section 102.35(a)(7) and consent orders. In fact, our invitation for briefing in *Postal Service*—which then-Member McFerran joined—specifically cited to Section 102.35(a)(7) after asking whether "the Board [should] alter or discontinue the [consent order] practice as a matter of policy." Order Granting Special Permission to Appeal and Invitation to File Briefs, *United States Postal Service*, No. 07-CA-142926, 2016 WL 693122, at *1 (Feb. 19, 2016). And some responses (the General Counsel's and Amicus Curiae American Postal Workers Union, AFL-CIO's) seized on that prompt in advocating for the discontinuance of the practice. Yet in *Postal Service*, the Board (including then-Member McFerran) decided not to take that course of action, thereby implicitly rejecting the very position that she and my other colleagues now espouse. Indeed, if my colleagues are correct that Section 102.35(a)(7) "makes plain" that the rules prohibit judges from approving consent orders, not only is that a strong indictment of the Board majority who decided *Postal Service*, it makes then-Member McFerran's vote in that case even harder to reconcile with the different position she is taking here.

And for good reason. The majority's new interpretation of Section 102.35(a)(7), which allows judges to hold settlement conferences, "but not to adjust cases," is at odds with historical context. The majority declares—78 years after the Rule's enactment and without support from the Federal Register (see 11 Fed. Reg. 177-A605, 177A-609 (Sept. 11, 1946))—that the 1946 Board intended this phrase to preclude the judge from approving only one type of case adjustment: consent orders. But that cannot be. In the 1940s, the Board used "adjust" to refer to all types of settlements. See *Wallace Corp.*, 323 U.S. at 255 fn.8 (citing the Board's 1936-1943 Annual Reports). And it still does. *Postal Service* itself acknowledges contemporary use of the term "adjustment" to apply to settlements other than consent orders. 364 NLRB at 1704 fn.2 (citing Casehandling Manual (Part 1) Unfair Labor Practice Proceedings, Sections 10124-10142 (2016)); see also Sections 101.7, 101.9, 102.51 of the Board's Rules and Regulations; Adjustment, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "adjustment" as "[t]he act of settling or arranging, as a dispute or other difference").[14]

Surely the majority does not intend its new interpretation of the phrase "but not to adjust cases" to preclude judges from approving other types of adjustments—a position in conflict with other provisions in our Rules and Regulations (e.g., Section 101.9(d)(2)), decades of precedent (e.g., *Independent Stave*, 287 NLRB at 741–742 (citing historical cases)), and the majority's own stated policy interest in encouraging settlement. But my colleagues make little effort to explain why the consent order alone falls victim to their new interpretation of Section 102.35(a)(7).[15]

Moreover, my colleagues suggest that an administrative law judge's resolution of a case "short of final adjudication on the merits" is out of step with the authority granted by our Rules and Regulations. But the very next provision in Section 102.35(a) (detailing the "[d]uties and power of

[13] My colleagues make much of the fact that, although the term "settlement" appears in our Rules and Regulations, the term "consent order" does not. But it is their deliberate choice to use that term in their decision. Historically, "[t]he Board has used various terms to describe settlement terms to which the respondent has agreed but the General Counsel and charging party or parties have not, including 'consent order' and 'unilateral settlement by consent order.'" *UPMC*, 365 NLRB at 1418 fn. 2.

[14] For the reasons that I explain, I do not agree with my colleagues that Sec. 102.35(a)(7) precludes judges from approving consent orders that are subject to Board review upon appeal, nor do I believe that is a reasonable reading of that section. I note that, given my colleagues' determination to restrict Board authority by prohibiting consent orders, a more appropriate action would be to amend the rules through notice-and-comment rulemaking rather than attempt to forge policy through a misinterpretation of existing rules.

[15] Indeed, the majority does not sound fully convinced itself—hedging that our Rules and Regulations "*would appear* to prohibit consent orders" (emphasis added); consent orders "*would seem* to violate the Board's Rules and Regulations" (emphasis added); our Rules and Regulations "clearly *appear to*" prohibit consent orders (emphasis added); "consent orders *would seem* to be prohibited by Sec[.] 102.35(a)(7)" (emphasis added); and the Rule "*seems* plainly to prohibit consent orders" (emphasis added). Neither their language, nor their explanation, is persuasive.

Administrative Law Judges") explicitly confers authority on judges to rule on all types of dispositive motions. Section 102.35(a)(8) (authorizing judges to "[d]ispose of procedural requests, motions, or similar matters, including motions referred to the Administrative Law Judge by the Regional Director and motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and, upon motion, to order proceedings consolidated or severed prior to issuance of Administrative Law Judge decisions"). The ability to accept or reject a proffered consent order fits well within the scope of our administrative law judges' authority and expertise to dispose of cases under our Rules and Regulations.[16]

2. Section 3(d) Of The Act Does Not Prohibit Consent Orders.

After unnecessarily hamstringing our administrative law judges, the majority also unnecessarily hamstrings the Board itself, claiming that consent orders usurp the General Counsel's prosecutorial authority under Section 3(d) of the Act. Our precedent says otherwise.

Per *UFCW*, above, the *Board* is tasked, in the first instance, with determining on which side of the prosecutorial/adjudicatory line an action falls. And the Board has already deemed approval of a settlement over the General Counsel's objection an adjudicatory function.[17] *Fairmont Hotel*, 314 NLRB 534, 534 fn. 4 (1994); cf. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981, 981 (1992) (stating that "General Counsel has unreviewable discretion—i.e., discretion is not subject to either Board or court review—to withdraw a complaint after the hearing on it has opened but before any evidence has been introduced, *at least so long as there is no contention that a legal issue is ripe for adjudication on the parties' pleadings alone*" (emphasis added)). The Board decision in *Fairmont Hotel*, a portion of which the majority now rejects and/or overrules, correctly drew the line between the Agency's prosecutorial and adjudicatory roles in the settlement context. Once the hearing has opened, the General Counsel exercises her prosecutorial authority by advocating for rejection or acceptance of a settlement before the judge and, on appeal, before the Board. The judges and the Board then exercise their adjudicative authority by considering the General Counsel's claims and weighing if a settlement—whether offered by one party, two parties, or unanimously—effectuates the purposes and policies of the Act.

My colleagues now arbitrarily depart from the *Fairmont Hotel* position, but apparently only for consent orders. By redrawing the prosecutorial/adjudicatory line, they imperil more than just consent orders. For under their expanded view of Section 3(d), a judge's or the Board's acceptance of a settlement between a respondent and charging party, over the General Counsel's objection, equally infringes on the General Counsel's prosecutorial authority to try her case.[18]

This position, especially when coupled with the majority's rejection of the *Postal Service* full-remedy standard (discussed next), is nothing short of radical. The majority cedes the Board's authority to craft an appropriate (or full) remedy and gives it to the General Counsel, who now has carte blanche to continue to try a case—either because she

[16] My colleagues dismiss this argument, observing that the "specific prohibition in Sec. 102.35(a)(7) necessarily controls over the more general authorization of Sec. 102.35(a)(8)." What my colleagues miss, however, is that these actions—whether they be approving adjustments such as settlements and consent orders or ruling on dispositive motions—are all adjudicatory functions that are clearly within the special competence of the Board's administrative law judges and the Board itself.

[17] By contrast, the Supreme Court has recognized that "until the hearing begins, settlement or dismissal determinations are prosecutorial." *UFCW*, 484 U.S. at 125–126 (emphasis added).

[18] The majority illogically asserts that a settlement between a respondent and a charging party does not infringe on the General Counsel's Sec. 3(d) prosecutorial authority as acutely as a consent order because the charging party—especially if it is a union—has "full party status" in Board proceedings. But the charging party's opinion has no bearing on the General Counsel's Sec. 3(d) authority to decide whether to prosecute a case. Indeed, Sec. 3(d) of the Act makes no mention of the General Counsel's accommodating charging parties' interests. It provides the General Counsel alone with "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board." See, e.g., *GTE Automatic Elec., Inc*., 196 NLRB 902 (1972) (finding that trial examiner cannot grant charging party's motion to amend complaint absent consent of General Counsel); see also Sec. 102.9 of the Board's Rules and Regulations (stating that charging party cannot withdraw charge absent consent of Regional Director, administrative law judge, or Board depending on status of the hearing); Sec. 102.19 of the Board's Rules and Regulations (stating that charging party can appeal Regional Director's refusal to issue complaint only to the General Counsel).

As an example of the permissible degree of "intrusion" on the General Counsel's Sec. 3(d) authority, my colleagues observe that, under Sec. 102.46 of the Board's Rules and Regulations, a charging party can "ensure that a case comes to the Board—even without the General Counsel's consent or participation—by filing exceptions to the administrative law judge's decision." But of course, at that point, the case is no longer simply a prosecutorial matter left "for the General Counsel, right or wrong," it is a matter under adjudication that only the Board's administrative law judges and, ultimately, the Board itself can resolve. And in resolving these matters, the Board must act in the public interest, not simply at the behest of the General Counsel or the charging party. See *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (holding that the Board acts in the public interest to enforce public, not private, rights). The Board does so by evaluating the merits of a consent order, i.e., adjudicating whether to "permit" the General Counsel to proceed (as the majority puts it) notwithstanding a unilateral offer to settle the case. Of course, this is not to say that I view the General Counsel's and the charging party's opinions on a settlement as irrelevant; rather, I believe they are given due consideration by the Board under *Independent Stave* factor one.

believes she can achieve a better result through litigation, or because she sees it as a vehicle to push a broader item on her agenda.[19]

3. The Board Has A Long History Of Determining What Constitutes a "Full Remedy."

Yielding our authority to approve a reasonable consent order is bad enough. But the majority goes even further to make the preposterous assertion that, notwithstanding our broad discretion to craft appropriate remedies under Section 10(a) and (c) of the Act, it is simply too hard for us to figure out a full remedy on the pleadings alone. Although I do not support a return to *Postal Service*, the majority has not adequately grappled with its rejection of that full-remedy standard, one Chairman (then-Member) McFerran not-so-long ago deemed "a fully rationalized approach" to the issue of consent orders.[20] Nor has the majority provided any evidence to support its speculative assertion that determining a full remedy "may represent a significant expenditure of the Board's resources."[21]

Paradoxically, the majority, in deciding not to adopt a full-remedy standard, claims that applying the current standard (*Independent Stave*) is easier than crafting a full remedy.[22] Perhaps, then, we should keep that standard. In any event, I maintain that the Board—which Congress entrusted with this role—is fully capable of evaluating and crafting remedies based on the parties' pleadings. We do so in several analogous contexts: default judgments, summary judgments, non-Board settlements, unilateral settlements, and formal settlements. As we said in *UPMC*, "the Board should trust itself to do what is reasonable. It does not effectuate the purposes of the Act to craft unacceptable restraints on the Board's ability to make that final judgment." 365 NLRB at 1422.[23] Here too, I fear the majority has perilously ignored the broader implications of calling into question our remedial authority.[24]

4. My Colleagues' Position Will Require an Indefensible Misuse of Agency Resources.

It cannot be questioned that, when judges approve consent orders, the agency is no longer required to commit significant resources such as trying the case at a hearing before an administrative law judge, including possible travel-related expenses; filing posthearing briefs; filing briefs before the Board; and filing briefs and arguing cases before the United States Courts of Appeals. As the Board has long recognized, the Board deems it necessary—consistent with its duty under the Act—for the agency to expend such resources in cases where a respondent is not willing to enter into a settlement agreement that satisfies the standards of *Independent Stave*. But my colleagues would require the allocation of scare agency resources—with the resulting diminishment of resources to pursue other agency business—not only when the standards of *Independent Stave* are satisfied, but even when the respondent has agreed to a *full remedy*. This is at odds with the acknowledgement of Chairman (then-Member) McFerran, in *UPMC*, that "[i]f the remedy were complete, then adjudicating the case would truly be a waste of time and resources." *UPMC*, 365 at 1439 (McFerran, dissenting).

My colleagues' failure to provide an adequate justification for this seemingly wasteful use of agency resources is also at odds with the Chairman's statements concerning the limitations of the Board's budget. For example, in the FY2023 NLRB Performance and Accountability Report, the Chairman observed that the Board "simply did not have the capacity to keep pace with a significant increase in case intake" and contended that "[a]dditional budgetary support . . . remains necessary to enable the Agency and its workforce to continue effectively serving the workers, employers, and unions that count on us to resolve their workplace issues." Id. at 5, available at https://www.nlrb.gov/reports/agency-performance/performance-and-accountability. It is damaging to the

[19] To be clear, I do not take the position, as my colleagues suggest, that the "Board is somehow required by the Act to establish or maintain the consent-order practice." Rather, I merely point out here that my colleagues' radical position that the Act prohibits this practice is incorrect.

[20] *UPMC*, 365 NLRB at 1437 (Member McFerran, dissenting). The Board's adjudications are subject to review under the Administrative Procedure Act, which prohibits "arbitrary" agency action. 5 U.S.C. Section 706(2)(A); see *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359, 364. (1998).

[21] The majority has little evidence on which to base this assertion. Aside from *Postal Service* itself, the Board examined just one consent order under the full-remedy standard. *Operating Engineers Local 181 (Marathon Petroleum Co.)*, 09–CB–155016 et al., 2017 WL 1374032 (April 14, 2017).

[22] Despite finding it too hard to determine a full remedy, the majority goes on to find that inclusion of a nonadmission clause is inconsistent with a full remedy. Confusingly, the majority cites *Postal Service* as support for this proposition, but *Postal Service* explicitly found the opposite, stating that "[t]he inclusion of that [nonadmission] 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." 364 NLRB at 1706 fn. 9. Beyond its failure to explain its departure from *Postal Service*, the majority's sweeping reasoning—comparing nonadmission clauses to side notice postings—again implicates, without considering, settlement agreements beyond just consent orders.

[23] Similarly, the Board recognized in *UPMC* that "it is the Board's adjudicatory duty, not that of the prosecuting General Counsel and certainly not of the charging party, to make the final determination" whether "settlement terms are reasonable." Id. at 1422.

[24] I note that I am not aware of any case in which a court has questioned the Board's authority to approve consent orders, nor am I aware of any case finding that the Board erred in rejecting a settlement agreement or consent order.

Agency's credibility to, on the one hand, plead for additional resources from the American people while, on the other, change Board policies to divert those resources to be spent on needlessly litigating cases where the Respondent offered to provide either an eminently reasonable settlement or, even, a full remedy. Worse, the misallocation of resources that is the unavoidable result of my colleagues' decision today needlessly reduces the amount of available resources for the Board to use actually protecting American workers.[25]

5. The Policies Underlying The Act Do Not Support The Majority's Views.

Finally, the majority declares that "no policy of the Act supports the approval of a consent order." But it neglects to persuasively explain how the Board in *UPMC* apparently erred in reaching the exact opposite conclusion. And while it claims to rely on its "decades of experience with the practice of accepting consent orders," it fails to cite a single nonspeculative problem arising from that experience. These bare assertions fall far short of the requisite "reasoned justification for departing from [our] precedent." *E. I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012).

In *UPMC*, we explained that our practice of accepting consent orders that meet the *Independent Stave* standard "encourag[es] voluntary dispute resolution, promot[es]industrial peace, conserv[es] the resources of the Board, and serv[es] the public interest." 365 NLRB at 1421 (citation omitted). It "may well be in the best interest of parties who object to a consent settlement agreement, especially where those parties are unreasonably discounting the risks associated with litigation." Id. at 1421–1422. It respects the Board's adjudicatory duty to make the final determination as to settlement terms that are reasonable. And it "will often leave parties in a better position than would result from a Board adjudication." Id. at 1422. In *Postal Service*, the Board also found that consent orders (albeit ones that provide a full remedy) "protect[] the public interest and effectuate[] the purposes and policies of the Act." 364 NLRB at 1706. Now, my colleagues reject those views and declare that the Board's interest in settlement only includes "friendly adjustment[s]," that the practice of accepting reasonable consent orders may inflame labor disputes, and that consent orders "threaten[] unnecessary delay."

The misguided nature of my colleagues' decision may be epitomized by their assertion that "it is not the Board's place to make [litigation] decisions for litigants." But, by approving a consent order, the Board is not making any litigation decisions whatsoever. Rather, the Board is exercising its statutory mandate to enforce the Act with the best interests of the *public* in mind.[26] My colleagues cannot dispute that the Board serves as a forum for litigating public, not private rights. And, contrary to the majority's assertions, I do not adhere to the cynical view that the "General Counsel and charging parties are irrational, that the Board is a better judge of their own interests than they are, or that respondents should be rewarded for proffering settlement on terms the Board deems reasonable." Rather, I believe that retaining a mechanism by which the Board can approve (not "impose") *reasonable* settlements proffered by a respondent as a means of resolving a pending matter, even over objection, best preserves agency resources, advances the Board's pro-settlement policies, and thereby serves the *public*'s interest.[27] Nowhere does the Act suggest that protecting the litigation strategy of the General Counsel, or any party, was contemplated by Congress, let alone considered to be an interest that outweighed the Board's statutory duty to protect the public interest. I believe that my colleagues commit serious error in suggesting that it does.

Further, my colleagues' claims have no grounding in reality. Of the consent orders approved by the Board (under either the *Independent Stave*/*UPMC* "reasonableness"

[25] Indeed, it is not only the Board that will be required to expend unnecessary resources in such cases. In fact, I question whether requiring a respondent to continue to litigate a case in which it has offered a full remedy could be viewed as punitive and therefore beyond the authority of the Board. Cf. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805-806 (discussing cases, including several Supreme Court cases, proscribing Board remedies "that are not directly related to the effectuation of the purposes of the Act or are punitive").

[26] My colleagues reject this position, suggesting that the Board must defer to the General Counsel's subjective judgment regarding how the agency can best serve the public's interests. I do not believe, however, that there is anything in the Act suggesting that Congress wanted the Board to defer to the General Counsel's subjective view of the public interest. Nor would I constrain the Board's ability to exercise our own judgment regarding how best to comply with the agency's Congressional mandate, including the mandate to use taxpayer dollars judiciously, just because the General Counsel might disagree.

My colleagues also take the position that, so long as a charging party union rejects a settlement agreement, the interests of employees who would otherwise receive offers of reinstatement and a full make-whole remedy are being protected. I will simply say that I question whether most, let alone all, employees who are required to wait additional years to receive the offers of reinstatement and full make-whole remedies that they would have received via a proposed consent order would agree that the charging party union had truly protected their interests in opposing that order.

[27] I note that my colleagues' assertion that the Board's retention of the ability to approve consent orders where the resolution supports the public interest is somehow anti-settlement, and that their view is somehow "pro-settlement," defies logic. It seems obvious that parties' knowledge that an administrative law judge has the authority, subject to Board review, to approve a consent order over two parties' objection would motivate parties to reach an agreement before the case ever reaches the judge.

standard or the *Postal Service* "full remedy" standard) during our "decades of experience," I have not found any instances of those settlements being breached and the complaint being reissued.[28] In other words, consent orders *are* doing their job—resolving grievances short of a full hearing on the merits, and all the attendant proceedings. And the Board is doing its job too—having no trouble setting aside (under various standards) consent orders that it deems inconsistent with the purposes and policies of the Act.[29]

The majority also provides no support for its assertion that settling a case by consent order "threaten[s] unnecessary delay," a complete about face from our finding in *UPMC* that such settlements generally conserve time and Board resources, 365 NLRB at 1422 & fn. 7, and in *Postal Service* that full-remedy consent orders promote "administrative economy," 364 NLRB at 1706. Further, my colleagues ignore the fact that, if the consent order directly remedies the violation alleged, the rights of the employees involved will be vindicated far earlier than they would be if the case continued to a hearing, and thereafter faced possible appeals at the Board and court level. Although, of course, there is a chance that a minor delay in opening the hearing could result should the Board reject the consent order, assuming that the Board promptly acts on any special appeals, but that is not substantively different from the chance of delay that could arise should the Board reject any type of settlement that it reviews.

CONCLUSION

The majority stresses that abolishing consent orders is necessary because "in the labor field, as in few others, time is crucially important in obtaining relief." But my colleagues could have quickly decided this case, with the same result, by simply deciding that approving the consent order did not further the purposes of the Act. Instead, the Union has been denied access to information it deemed relevant to the representation of the bargaining-unit employees for over two years, for the sole purpose of allowing my colleagues to formulate a sweeping precedent that neither party requested nor briefed. To make matters worse, my colleagues have put in limbo at least 11 other consent order special appeals similarly delaying resolution of issues, whether or not such delay was in the best interest of the affected employees (see infra fn. 8).[30] I have a hard time believing that the unit employees here would not have been better off had the Board timely denied the General Counsel's special appeal and approved the consent order, thereby ensuring that the Union would finally have the information it sought so long ago.

The majority is apparently unbothered by these delays, as it asserts that it is entirely appropriate for General Counsels to use cases to push their agenda items, whether "right or wrong." My colleagues could not be more wrong. The Board's responsibility is for enforcing the Act in the best interests of the public, and especially those employees whose rights have been violated. When the General Counsel acts in a manner that is contrary to protecting the interests of employees seeking to vindicate their rights

[28] See, e.g., *Bodega Latina Corp. d/b/a El Super*, 28–CA–170463, 2019 WL 2435789 (June 10, 2019) (using *Independent Stave* analysis, as applied in *UPMC*, to find that terms of consent order provide reasonable remedy for alleged violations); *UPMC*, 365 NLRB 1418 (2017) (finding respondent's proposed remedial guarantee, over General Counsel's and charging party's objection, reasonable under *Independent Stave); Operating Engineers Local 181 (Marathon Petroleum Co.),* 2017 WL 1374032 (finding, under *Postal Service* standard, that "judge's order approving the Respondent's proffered terms over the objections of the General Counsel and Charging Parties provides a full remedy for the violations alleged in the complaint"); *Laborers' Local 872*, 28–CB–118809, 2015 WL 153954 (Jan. 12, 2015) (agreeing with judge that 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). In addition, the following cases predate the Board's current docketing system, but I found no indication of subsequent breach in Board volumes nor publicly available legal databases: *Spurlino Materials, LLC*, 25–CA–029866 et al. (Aug. 29, 2008) (two-member Board); *Postal Service*, 20–CA–031171 (May 27, 2004); *Leprino Foods Co*., 07–CB–043599 et al. (Jan. 24, 2003); *Caterpillar, Inc.,* 33–CA–010164 (May 13, 1996); *Propoco, Inc., d/b/a Professional Services*, 02–CA–027013 (June 26, 1995); *Electrical Workers IUE Local 201 (General Electric Co.)*, 188 NLRB 855 (1971) (adopting Trial Examiner's recommended consent order that provided for a full remedy).

[29] See, e.g., *Starbucks Corp.,* 01–CA–299987 et al. 2023 WL 5953804 (2023) (setting aside consent order because it did not meet requirements of *Independent Stave*); *Postal Service*, 364 NLRB 1704 (2016) (setting aside consent order because it did not provide for a "full remedy"); *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); *Printpack, Inc*., 30–CA–016980 et al. (May 14, 2008) (same) (two-member Board); *Community Medical Center,* 04–CA–034888 et al. (Sept. 28, 2007) (same); *Food Lion, Inc*., 304 NLRB 602, 602 fn. 4 (1991) (same); *Iron Workers Pacific Northwest Council (Hoffman Const.*), 292 NLRB 562, 563 fn. 7 (1989) (agreeing, on exceptions, with judge's rejection of respondent's post-hearing offer to settle over General Counsel and charging party's objections); *State County Employees AFSCME Local 47*, 274 NLRB 1434 (1985) (rejecting judge's acceptance of respondent's unilateral settlement); *Lion Uniform, Janesville Apparel Division*, 247 NLRB 992 (1980) (same).

[30] For example, in *Parsons Motor Vehicle Inspection and Maintenance Corp.*, 22–CA–275206 (special appeal filed May 15, 2023), the only issue in the case is the allegedly unlawful suspension and discharge of an employee in late March 2021. The consent order settling the case, issued April 10, 2023, contains an acknowledgement that the Respondent was offered an unconditional reinstatement on October 27, 2022, which he accepted the next day. The consent order also provided full backpay for the employee. More than three years after his discharge, and more than one year after the consent order, that employee is still waiting to be made whole.

under the Act, simply to pursue her own agenda, the Board not only has the authority but it has the *duty* to use its authority to protect the rights of the public over the interests of the General Counsel. Put simply, I do not believe that my colleagues have acted in the best interests of the public by allowing the significant delay in either the case at issue or the other cases that have been "held" pending this decision. Nor do I believe that my colleagues have acted in the public interest by rejecting the consent order in the instant case. I have a hard time believing that there are elements of the settlement that are truly contrary to the purposes set forth in *Independent Stave*; certainly my colleagues have failed to explain why the resolution of this case upon the revised settlement terms fails to promote the purposes of the Act. Finally, I have a hard time believing that, by removing judges' ability to resolve cases through consent orders, subject to Board review, my colleagues have given sufficient weight to either the best interests of employees affected by violations of the Act or the best use of scarce agency resources. Accordingly, I must dissent.

Dated, Washington, D.C. August 22, 2024

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Marvin E. Kaplan, Member

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