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The National Labor Relations Board has a longstanding policy of encouraging the settlement of meritorious unfair labor practice charges and honoring the formal and informal agreements which it has approved. Moreover, a case is not closed following the Regional Director's approval of the settlement and withdrawal of the charge. The Board may set aside such an agreement and reinstate the charge. This Article reviews the case law relating to the setting aside of formal and informal settlement agreements and addresses the standard that the Board should employ in determining whether a Regional Director should be permitted to go behind a non-Board settlement agreement and reinstate a withdrawn charge. The Article critically analyzes the contrary positions of this issue taken by the Courts of Appeals for the Fifth and Sixth Circuits and concludes that the Fifth Circuit's approach, which requires the Board to find that a charged party either breached the terms of the non-Board settlement agreement or committed a subsequent unfair labor practice, is superior.

INTRODUCTION

THE National Labor Relations Board (the Board) has a longstanding policy of encouraging the settlement of meritorious unfair labor practice charges[1] which has resulted in an unprecedented number of settlements.[2] John Irving, a former Board Gen-

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1. Wallace Corp. v. NLRB, 323 U.S. 248, 253–54 (1944); 3 NLRB ANN. REP. 20–22 (1938); 2 NLRB ANN. REP. 15–17 (1937); 1 NLRB ANN. REP. 30–31 (1936). In an effort to more fully implement this prosettlement policy, the General Counsel has placed at least one "settlement coordinator" in each regional office to monitor every case set for trial and to ensure that a substantial effort is made to settle the charges. Irving, *Do We Need a Labor Board?*, 30 LAB. L.J. 387 (1979).

2. In fiscal year 1979, the Board processed a record filing of 41,259 unfair labor practice charges. The Regional Directors dismissed 35.3% of these charges and the charging

eral Counsel, considers the continuation of this high settlement rate to be of paramount importance[3] to the Board's ability to effectuate the purposes of the National Labor Relations Act (the Act).[4] Although the Board encourages its Regional Directors to enter into formal, informal, oral, and non-Board settlement agreements, the formal and informal agreements are the most difficult to obtain.[5] Thus, the policy of encouraging settlement must include strong support for the disposition of meritorious charges through non-Board and oral agreements. In exploring the content of the various settlement agreements and the ability of the Board to set aside the agreements, greater insight into the prosettlement policy can be obtained.

A formal settlement is a written agreement between the Board and the charged party which requires the charged party to remedy its unfair labor practices through specific actions.[6] The agreement

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parties withdrew 30.4% of the charges before complaints were issued. Of the remaining meritorious charges, 84.5% were settled. 44 NLRB ANN. REP. 1, 2–3, 5 (Chart No. 3) (1979).

3. Memorandum 79–41 from General Counsel Irving to Regional Directors, *reprinted in* 4 LAB. L. REP. (CCH) ¶ 9164 (July 6, 1978), in which General Counsel Irving stated:

> The Regions have already demonstrated their ability to maintain a high rate of settlement, even when confronted with unusual settlement problems, and I am confident that as the Regions renew their settlement efforts in the coming months, the Agency will again achieve a high rate of settlement which is necessary for the timely remedying and adjustment of meritorious unfair labor practice cases.

Id.

In Memorandum 80–61 from Associate General Counsel to Regional Directors, the Regional Directors were informed that the General Counsel, William A. Lubbers, had written all members of the American Bar Association's Labor Law Section requesting the labor bar's help in settling pending cases before the NLRB. The Regional Directors were instructed "to follow up on the General Counsel's letter by contacting respondents with renewed settlement efforts in pending cases." Letter from Joseph E. DiSio, Associate General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers (Nov. 25, 1980).

4. 29 U.S.C. §§ 141–187 (1976). If the settlement rate were to drop below 80%, the effectiveness of the Board would be jeopardized seriously and a "crisis" in labor law enforcement would result. Irving, *supra* note 1, at 391.

5. Charged parties entered into a total of 10,401 settlements in fiscal year 1979. Only 175 of these settlements were formal and only 3,555 were informal settlement agreements. The remaining 6,671 settlements were either non-Board or oral settlements. These figures were obtained from a telephone interview with Milford Cleveland, Office of the General Counsel, Division of Operations Management, National Labor Relations Board, Washington D.C.

6. NATIONAL LABOR RELATIONS BOARD CASE HANDLING MANUAL, pt. 1, § 10164.1 (April 1975) [hereinafter cited as NLRB CASE HANDLING MANUAL] provides:

> A formal settlement is a written stipulation calling for remedial action in adjustment of unfair labor practices and providing that, upon approval by the Board, a Board order in conformity with its terms will issue. Ordinarily it will also provide for the consent entry of a court judgment enforcing the order.

must be approved by the Board members who then issue an appropriate order to conform with the terms of the agreement.[7] A consent entry of a court decision enforcing the order generally must be included in the formal settlement agreement.[8] The stringent nature of these requirements often deters the charged party from entering into a formal agreement.[9] The same result, after all, would be reached if the party litigated the allegation in the charge, lost before the Board, and, on appeal, a circuit court enforced the Board's order. A charged party will be willing to enter into a formal settlement agreement, however, if the General Counsel has a very strong case and a quick settlement would save the expense of extensive litigation. In addition, a charged party can usually obtain a better order by negotiating on the Board's order than by litigating the case before an administrative law judge.

An informal settlement agreement is also a written agreement which requires the charged party to remedy its unfair labor practices through specifications.[10] Unlike the formal settlement agreement, however, only the Regional Director, and not the entire Board, is a party to the agreement.[11] Additionally, since an informal settlement agreement does not require Board approval, there is neither a Board order issued directing the parties to conform to the terms of the agreement nor a court decision to enforce the Board's order.[12] As a result of these less stringent conditions, the Regional Director may be more flexible in negotiating the exact terms of the informal settlement agreement. Furthermore, the Director is prohibited from going to federal court to seek a contempt order if the charged party commits a subsequent unfair labor practice. Thus, a charged party is more amenable to entering into an informal agreement than a formal settlement agreement.

In contrast, the General Counsel defines a non-Board settlement as one in which the charging party and the charged party

7. *Id.*

8. *Id.*

9. *See* note 5 *supra*.

10. NLRB CASE HANDLING MANUAL, *supra* note 6, § 10146.1, provides:

> An informal settlement agreement is a simple written agreement, providing that the charged party will take certain action in remedy of the unfair labor practices. It requires the approval of the Regional Director but does not provide for a Board order or court decree.
>
> In considering whether to approve an informal settlement, the Regional Director should take into consideration whether there is a history of unfair labor practices by the same charged party.

11. *Id.*

12. *Id.*

reach an agreement between themselves.[13] Such an agreement, however, does not necessarily represent the final disposition of the case. Even though the charging party may have requested a withdrawal of the charge, the Regional Director can deny the request, proceed with the investigation, and potentially issue a complaint.[14] When a charging party is not represented by counsel or a union, the Regional Director reviews the terms of the agreement to determine whether "it is repugnant to the purposes of the Act" or reflects overreaching by one of the parties in the negotiations.[15]

Despite the obstacles faced in reaching a non-Board settlement, it is nevertheless the preferable agreement for charged parties. This type of settlement allows a charged party to negotiate with the charging party to obtain a less comprehensive agreement than that which the Regional Director would mandate. By entering into such an agreement, the charged party also can avoid the expense of litigation.

The non-Board agreement is also preferable for charging par-

13. *Id.* § 10142 provides:

> On occasion during the course of the investigation, Board personnel may be asked, by one or more of the parties to a case, whether they may meet directly with each other "to work out a mutually satisfactory solution." (On other occasions, they may meet without consultation with the Region.) The official attitude of the Region should be that it would not, if it could, prevent the parties from ironing out their difficulties privately. However—and this is particularly important where rights of individuals are involved—the inquiring party should be informed that any arrangement thus reached will not necessarily be recognized by the Board as disposing of the case. Investigation will continue. Should the Region be notified that a "private settlement" has been reached and that the charging party wants the case dropped (either in such language or by submitting a withdrawal request) the terms of the "settlement" should be procured if possible.
>
> The approval of the withdrawal request should then be granted or withheld in accordance with criteria laid down in [section] 10120. In those situations where individual discriminatees are not represented by counsel or a union, caution should be exercised to insure that the non-Board settlement is not repugnant to the purposes of the Act or that an individual has not been taken advantage of in the private negotiations.
>
> If approval is withheld, the parties should be so notified, and investigation should continue.
>
> If approval is granted, the case may or may not be closed as *adjusted*. The case should be closed as adjusted if the terms of the "settlement," while not constituting the full remedy which appears to be called for, provide for a substantial part of the remedy and are all consistent with the purposes of the Act. It should not be closed as adjusted if this standard is not met—it should be closed if withdrawn "because charging party does not wish to proceed."
>
> In no such case should the parties be notified that the "settlement" has the approval of the Board. They should be sent the usual withdrawal request approval letter.

14. *See* NLRB v. Sebastopol Apple Growers Union, 269 F.2d 705, 706–07 (9th Cir. 1959); Community Medical Services of Clearfield, Inc., 236 N.L.R.B. 853 (1978); Jack C. Robinson, 117 N.L.R.B. 1483 (1957).

15. NLRB CASE HANDLING MANUAL, *supra* note 6, § 10142.

ties. An unlawfully discharged individual, for example, may be willing to settle for far less back pay in exchange for immediate reinstatement rights or for a cash payment in exchange for a waiver of those reinstatement rights. Full back pay and reinstatement rights which can be obtained only after several years of litigation or settlement negotiations may be an insufficient remedy for a person who is unemployed during that period. Thus, the non-Board settlement agreement may provide the individual with the more favorable remedy of quick relief.

When the Regional Director approves a withdrawal request made pursuant to a non-Board settlement agreement, the Director makes a judgment concerning whether the case should be reported as "adjusted" or withdrawn "because the charging party does not wish to proceed."[16] The case will be closed as "adjusted" only when the settlement includes a substantial part of the remedy[17] which is required.

In contrast to the formal, informal, and non-Board settlement agreements, the General Counsel defines an oral settlement as an actual settlement in which the charged party takes remedial action at the request of the Regional Director to remedy alleged unfair labor practices but is unwilling to enter into a written settlement agreement or to acknowledge by posted notice that the remedial action was taken because of the settlement of a charge.[18] If the Regional Director finds that the remedial action provides a sub-

16. *Id.*

17. *Id.*

18. *Id.* § 10144, provides:

> A charged party may, on occasion, take remedial action as proposed by a Regional Director without, however, being willing to enter into a written settlement agreement or to acknowledge by a posted notice that the action is being taken pursuant to settlement of a charge. (Examples: Interrupted bargaining negotiations may be resumed; a dischargee may be offered reinstatement with backpay; a union may cease striking for an illegal form of union security.)
>
> Where such action is accompanied by a voluntary withdrawal request for the charging party, approval of the request should ordinarily be granted. The case may be closed as adjusted, but the parties should not be notified that the remedial action has the imprimatur of the Board. They should be sent the usual withdrawal request approval letter.
>
> Where the action is not accompanied by a withdrawal request where, in fact, the charging party is not satisfied that the action taken remedies the unfair labor practices, the Regional Director must determine whether effectuation of the purposes of the Act calls for further proceedings. Normally, if the action taken is a full or substantial remedy in fact, if there is no history of prior similar practices by the same charged party, and if there is no likelihood of recurrence, the charge should be dismissed on the ground that effectuation of the purposes of the Act does not warrant further proceedings . . . .
>
> The case, when closed, should be considered adjusted and so reported to Washington.

stantial remedy, that the charged party has no history of similar practices, and that there is no likelihood of a recurrence of the present practice, the Regional Director will approve a withdrawal request.[19] If the charging party does not make a withdrawal request, the Regional Director will dismiss the charge on the grounds that further proceedings would not effectuate the purposes of the Act.[20] This type of settlement generally involves minor violations of the Act that are remedied by informing the charged party that its actions violate the Act and by eliciting a commitment from the charged party that it will obey the law. Oral settlements have not been the subject of any significant litigation.

The Board's involvement with the case does not automatically cease when the parties enter into one of the four types of settlement agreements and the Regional Director approves the withdrawal of the charge. The Board must decide under what conditions it may set aside the settlement agreement and reinstate the charge. When a formal or informal settlement agreement is at issue, the Board polices compliance with that agreement, the charge is not withdrawn but becomes dormant, and the case remains open.[21] Furthermore, the law is settled on the proper test that the Board should use to set aside a formal settlement agreement,[22] and this test has been applied without any hesitation to the setting aside of an informal settlement agreement.[23] The law, however, is not settled on when the Board can reinstate a withdrawn charge pursuant to a non-Board settlement agreement.[24] The two circuit courts that have directly addressed the issue disagree over what

19. *Id.*

20. *Id.*

21. *Id.* § 10140.1.

22. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

23. NLRB v. International Union of Operating Eng'rs Local 925, 460 F.2d 589 (5th Cir. 1972); NLRB v. Northern Cal. Dist. Council of Hod Carriers Local 185, 389 F.2d 721 (9th Cir. 1968); NLRB v. Local 269, IBEW, 357 F.2d 51 (3d Cir. 1966).

24. The Board has taken the position that the General Counsel has unlimited discretion to proceed once a charge has been filed. This discretion includes the power to reinstate a withdrawn charge. Silver Bakery Inc., 150 N.L.R.B. 421, 424 (1964). In addition, if a charging party is dissatisfied with the terms of the non-Board settlement agreement, the party has the right to file a second charge alleging the same conduct as the charge that was withdrawn. John F. Cuneo Co., 152 N.L.R.B. 929 (1965). In either case, the Regional Director must determine whether to go behind a non-Board settlement agreement. But see note 82 *infra*, concerning the problem of the six month statute of limitations on reinstatement of the withdrawn charge by the Regional Director or on the filing of a second charge more than six months after the alleged unlawful conduct occurred.

test, if any, must be met before the Board can go behind[25] the terms of a non-Board settlement agreement and find that the charged party's conduct violated the Act.

This Article reviews the case law on setting aside formal and informal settlement agreements[26] and examines the standard the Board and the courts should use in deciding whether a Regional Director should be permitted to go behind a non-Board settlement agreement and reinstate a withdrawn charge.[27]

I. SETTING ASIDE FORMAL AND INFORMAL SETTLEMENT AGREEMENTS

The Board consistently has taken the position that it will honor a formal settlement agreement which it has approved.[28] The Board also consistently has set aside an approved formal settlement agreement and reinstated a charge when the charged party either failed to abide by the terms of the settlement agreement or committed a subsequent unfair labor practice.[29]

The Supreme Court addressed the Board's authority to disregard a previously approved settlement agreement and to reinstate a withdrawn charge in *Wallace Corp. v. NLRB*.[30] In *Wallace*, a local C.I.O. union filed a charge alleging that the company had sponsored the formation of an independent union in violation of sections 8(a)(1) and (3) of the Act.[31] As a result of this charge and subsequent investigation by the Board, all parties to the charge drafted and executed two formal settlement agreements. The Regional Director signed both agreements on behalf of the Board. One agreement provided that the C.I.O. union would withdraw its charge concerning alleged company domination of the independ-

25. Because the Regional Director is not a party to the agreement, there is no need to set aside a non-Board settlement agreement. The phrase "go behind" is used to indicate the Regional Director's disregard of the non-Board settlement agreement.

26. *See* notes 27–56 *infra* and accompanying text.

27. *See* notes 57–102 *infra* and accompanying text. The issue of going behind an oral settlement is not addressed because the use of oral settlements is not widespread and any discussion of a non-Board settlement agreement would be applicable by analogy to an oral settlement agreement.

28. Corn Products Refining Co., 22 N.L.R.B. 824, 828–29 (1940); Wickwire Bros., 16 N.L.R.B. 316, 325–26 (1939); Godchaux Sugars, Inc., 12 N.L.R.B. 568, 576–79 (1939); Shenandoah-Dives Mining Co., 11 N.L.R.B. 885, 888 (1939).

29. Locomotive Finished Material Co., 52 N.L.R.B. 922, 927 (1943); Chicago Casket Co., 21 N.L.R.B. 235, 252–56 (1940); Harry A. Halff, 16 N.L.R.B. 667, 679–82 (1939).

30. 323 U.S. 248 (1944).

31. 29 U.S.C. § 158(a)(1), (3) (1976).

ent union. The second agreement provided for a consent election to be held between the C.I.O. and independent unions.

After the independent union won the consent election and the Board certified it as the exclusive bargaining agent, the company negotiated a contract with the independent union. The union security clause provided for a "closed shop," requiring all present and future employees in the bargaining unit to join the independent union.[32] Subsequently, the independent union refused to allow some of the bargaining unit's employees, who were members of the C.I.O. union, to join the independent union. The independent union then demanded that the company discharge all employees who were not members of its union. The company, as a result, discharged forty-three employees.[33]

The C.I.O. union filed a second charge with the Board concerning the discharges of the forty-three employees. This subsequent unfair labor practice charge prompted the Regional Director to set aside the formal settlement agreement and reinstate the original charge.

The Board found that the company committed no unfair labor practices between the time it entered into the two formal settlement agreements concerning the first charge and the time of the consent election resulting from those agreements.[34] The Board further found that the company sufficiently violated the second charge, alleging unlawful discharges, to set aside the formal settlement agreements and reinstate the original charge alleging the company's domination of the independent union.[35] The Board found, as a result of the reinstatement of the second charge, that the company dominated the independent union[36] and ordered the company to "cease giving effect to any contract" between the company and the independent union.[37]

The company argued before the Court that the Board was estopped from setting aside the agreements and reinstating the union-domination charge. In rejecting this argument, the Court stated:

> With reference to the attempted settlement of disputes, as in the performance of other duties imposed upon it by the Act, the

32. 323 U.S. at 250.
33. *Id.*
34. Wallace Corp., 50 N.L.R.B. 138, 154 (1943).
35. *Id.*
36. *Id.*
37. *Id.* at 156.

> Board has power to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices. We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.[38]

The Court considered it to be the Board's duty to take "fresh steps to prevent frustration of the Act"[39] when the purpose of a settlement agreement was defeated. The Court noted that the Board had adopted a working rule that would allow the Board to set aside a settlement agreement and reinstate a charge only when either the agreement had failed to accomplish its purpose or when there had been a subsequent unfair labor practice. Thus, in *Wallace*, the Court found this rule to be "appropriate to accomplish the Act's purpose with fairness to all concerned."[40]

The Court's recognition that the Board has broad powers "to fashion its procedure to achieve the Act's purpose to protect employees from unfair labor practices"[41] demonstrates the sweeping power granted to many administrative agencies. Over the years, the courts generally have held that administrative agencies should be free to fashion their own rules of procedure to discharge their duties.[42] This freedom, however, is not unlimited and cannot exceed the statutory authority of the administrative agency's enabling legislation.[43] *Wallace* is not the only case in which a court has held that equitable estoppel does not apply to an administrative agency.[44] Similarly, courts have held that the doctrine of res judicata has no application to the action of an administrative agency.[45] Apart from the most basic pleadings which are required prior to a hearing before an administrative agency, the technical rules of evidence that are applicable to civil trials are not strictly

38. 323 U.S. at 253.

39. *Id.* at 254.

40. *Id.* at 255.

41. *Id.* at 253.

42. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544 (1978); FCC v. Schreiber, 381 U.S. 279, 290 (1965).

43. Flotill Products, Inc. v. FTC, 358 F.2d 224, 230 (9th Cir. 1966) (en banc).

44. *See, e.g.*, NLRB v. My Store, Inc., 345 F.2d 494, 497 (7th Cir. 1965); Churchill Tabernacle v. FCC, 160 F.2d 244, 246 (D.C. Cir. 1947).

45. District 50, UMW v. NLRB, 234 F.2d 565, 568 (4th Cir. 1956); NLRB v. Baltimore Transit Co., 140 F.2d 51, 54–55 (4th Cir. 1944). *But see* United States v. Utah Constr. & Mining Co., 384 U.S. 395, 422 (1966) ("where administrative agency is acting in a judicial capacity . . . the courts have not hesitated to apply *res judicata* to enforce repose") (dictum).

observed.[46] The hearing examiner is given great latitude in all phases of the hearing, including the manner in which it is conducted.[47]

Given the courts' recognition of the broad powers of administrative agencies in general and the Supreme Court's recognition of the Board's power to fashion its own remedies in particular, it is not surprising to find that the Board and the circuit courts have applied the *Wallace* test to set aside informal settlement agreements and reinstate withdrawn charges when the parties breached the terms of the informal settlement[48] or when the charged parties committed further unfair labor practices.[49] This application of the law established in *Wallace* is proper.

Since the Board is not always required to adhere to *formal* settlement agreements, the contention that the Board should always adhere to *informal* settlement agreements because of public policy considerations is not a convincing argument. It must be noted, however, that the Regional Director is not *required* to set aside either a formal settlement agreement or an informal settlement agreement when a charged party has committed a subsequent unfair labor practice. In *Metal Processors' Union Local No. 16 v. NLRB*,[50] the court stated that the Board has discretion to decide when to set aside a settlement agreement. Even if a charged party commits a subsequent unfair labor practice in violation of the Act, the Board need only set aside a settlement agreement when the subsequent conduct violates or frustrates the terms or purposes of the settlement agreement.[51] The court concluded that it was in the Board's discretion to make such a determination.

Under the *Wallace* decision, the Court has restricted the Board to setting aside settlement agreements only when the terms

46. FTC v. Cement Institute, 333 U.S. 683, 705–06 (1948); Morton v. Dow, 525 F.2d 1302, 1307 (10th Cir. 1975); Fairbank v. Hardin, 429 F.2d 264, 267 (9th Cir. 1970).

47. Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977).

48. *See, e.g.*, NLRB v. International Union of Operating Eng'rs Local 925, 460 F.2d 589, 597 (5th Cir. 1972); NLRB v. Southeastern Stages, Inc., 423 F.2d 878, 880 (5th Cir. 1970).

49. *See, e.g.*, NLRB v. International Union of Operating Eng'rs Local 925, 460 F.2d at 597; NLRB v. Southeastern Stages, Inc., 423 F.2d at 880; NLRB v. Construction & Gen. Laborers Union Local 185, 389 F.2d 721, 724 (9th Cir. 1968); NLRB v. Local 269, IBEW, 357 F.2d 51, 56 (3d Cir. 1966); NLRB v. Dressmakers Joint Council, Int'l Ladies' Garment Workers Union, 342 F.2d 988, 989 (2d Cir. 1965); Radiator Specialty Co. v. NLRB, 336 F.2d 495, 497 (4th Cir. 1964).

50. 337 F.2d 114 (D.C. Cir. 1964).

51. *Id.* at 117 n.4.

of the agreement are breached or when the charged party commits subsequent unfair labor practices. The Court simply approved the current test adopted by the Board. Until the Board can justify that going beyond the *Wallace* test is "appropriate to accomplish the Act's purpose with fairness to all concerned,"[52] the courts should hold that a Regional Director cannot revoke approval of a settlement agreement if its terms have not been frustrated by the subsequent conduct of the charged party or if no subsequent unfair labor practice has been committed.[53]

The Board has limited the time within which the Regional Director can set aside a settlement agreement. Such an agreement can be set aside at the Regional Director's discretion only if the subsequent conduct of the charged party occurred within a reasonable time after the settlement agreement was executed.[54] The Board, for example, has found it reasonable for a Regional Director to set aside a settlement agreement that was executed fourteen months before the charged party committed a subsequent violation.[55] Currently, there is no clear standard defining a reasonable time after which a Regional Director can no longer set aside a settlement agreement. The Board, however, has indicated that it recognizes a time limit after which a settlement agreement will not be disturbed.[56]

II. Going Behind a Non-Board Settlement Agreement

If there is not a strong policy argument to support the proposition that the Board should adhere to an informal settlement agreement because the Board is not required to adhere to a formal settlement agreement, then the argument that the Board should adhere to, or at least respect the terms of, a non-Board settlement agreement is even weaker.

The United States Court of Appeals for the Sixth Circuit first

52. Wallace Corp. v. NLRB, 323 U.S. 248, 255 (1944).

53. *See* NLRB v. Bangor Plastics, Inc., 392 F.2d 772 (6th Cir. 1967), in which the court refused to set aside an informal settlement agreement after finding that the charged party did not breach the terms of the settlement agreement or commit further unfair labor practices. See also Pacific Maritime Ass'n, 192 N.L.R.B. 338 (1971), in which the Board held that a subsequent independent violation of the Act was unrelated to the matters and conduct of a settlement agreement and did not warrant the setting aside of the settlement agreement.

54. Utrad Corp., 185 N.L.R.B. 434, 441 (1970).

55. Sheet Metal Workers Local 80, 236 N.L.R.B. 41, 42 (1978).

56. *Cf.* Wolverine World Wide, Inc., 243 N.L.R.B. No. 72 (1979) (three prior violations committed during a period of six to fourteen years before the instant charge did not warrant the issuance of a broad remedial order).

addressed the issue of the propriety of the Board going behind a non-Board settlement agreement. In *NLRB v. Superior Tool & Die Co.*,[57] the company and the union entered into a strike-settlement agreement which provided that the union would withdraw a charge it had filed with the Board. The union, believing that the company had breached the terms of the strike-settlement agreement because it discharged two employees, filed a second charge against the company. The Trial Examiner found that the company had violated sections 8(a)(1) and (3) of the Act by discharging these employees. The Board then affirmed this decision.

The Trial Examiner, citing *Wallace*, went behind the strike-settlement agreement because the post-settlement conduct of the company defeated the main object of that agreement—the reinstatement of all strikers. The Trial Examiner found that the company's presettlement conduct violated section 8(a)(1) of the Act. The Board, without adopting the Trial Examiner's view of the effect of a strike-settlement agreement, stated that going behind the agreement was appropriate and found that the company's presettlement conduct violated the Act.[58]

On appeal, the Sixth Circuit concurred with the Trial Examiner's opinion. Even though the Board's policy is not to revive old charges voluntarily settled,[59] the court concluded that when post-settlement misconduct frustrates the policy, it is proper to go behind the settlement agreement to consider events that occurred prior to the settlement.[60] Although the court cited *Wallace* as authority, it found that the company did not violate sections 8(a)(1) and (3) of the Act by discharging the two employees. By refusing to find the company in violation of the Act, the Sixth Circuit followed *Wallace* to its logical conclusion: the court will not set aside a formal or an informal settlement agreement without finding that the charged party either breached the terms of the settlement agreement or committed a subsequent unfair labor practice.[61]

Two years after *Superior Tool*, the Sixth Circuit again addressed this issue in *NLRB v. Zimnox Coal Co.*[62] In *Zimnox*, a

57. 309 F.2d 692 (6th Cir. 1962), *denying enforcement to* 132 N.L.R.B. 1373 (1961).

58. 132 N.L.R.B. at 1373 n.1.

59. *See* note 25 *supra*.

60. *See* note 27 *supra*.

61. See note 53 *supra* for additional support for this conclusion.

62. 336 F.2d 516 (6th Cir. 1964), *enforcing in pertinent part* 140 N.L.R.B. 1229 (1963).

previously filed charge[63] was withdrawn with the Regional Director's approval after the company and the union reached a non-Board settlement agreement. The settlement provided that in exchange for requesting withdrawal of the union's charge, the company would agree to a consent election. After the union won the election, it refiled the previously withdrawn charge. The company argued that the Board was estopped from proceeding on the charge because the subject matter of that charge had been settled in a non-Board settlement agreement between the company and the union. Furthermore, the second charge did not allege that the company had breached the terms of the non-Board settlement agreement or that the company had engaged in any post-election conduct that amounted to an unfair labor practice.

The Board adopted the Trial Examiner's decision in *Zimnox* without comment. The Trial Examiner denied the defense of the non-Board settlement agreement stating that the agreement was a private one, limited to the withdrawal of the pending charge so that an election could be held.[64] Moreover, the non-Board settlement agreement did not state in writing that the charge was to be withdrawn with prejudice.[65] Thus, the Trial Examiner allowed that charge to stand.

On appeal, the Sixth Circuit found that the union's refiling of the settled charge was obviously in retaliation for the company's refusal to accede to a post-election union demand. Nevertheless, the court averred that the Act did not forbid this type of action and that the "primary responsibility for preventing the revival of settled charges as a bargaining bludgeon must remain with the Regional Directors and the General Counsel."[66]

In *NLRB v. Lasko Metal Products, Inc.*,[67] the Sixth Circuit reiterated its position in *Zimnox* that the Regional Director has broad discretion to permit the refiling of a charge even though the allegations in the charge are the subject of a non-Board settlement

63. The Sixth Circuit was incorrect when it stated in its opinion that a complaint was withdrawn by the union with the Regional Director's approval. The Trial Examiner's decision established that it was a charge that was withdrawn with the approval of the Regional Director and not a complaint. Zimnox Coal Co., 140 N.L.R.B. 1229, 1233 n.12, 1237 (1963).

64. *Id.* at 1237.

65. The Trial Examiner stated that if the company believed that the withdrawal of the charge was with prejudice, then the company's attorney should have insisted that this understanding be reduced to writing. *Id.* at 1237 n.22.

66. NLRB v. Zimnox Coal Co., 336 F.2d 516, 517 (6th Cir. 1964).

67. 363 F.2d 529 (6th Cir. 1966), *enforcing* 148 N.L.R.B. 976 (1964).

agreement. In *Lasko*, the Board found that the company had committed no unfair labor practices subsequent to the time when the company entered into the non-Board settlement agreement with the union. The Board went behind the non-Board settlement agreement, however, and found that the company had violated section 8(a)(1) of the Act. The Board did not discuss the non-Board settlement agreement.[68] Rather, it adopted the findings of the Trial Examiner concerning the section 8(a)(1) violation. The Trial Examiner found that he could go behind the settlement agreement and find a violation of the Act for three reasons: (1) the settlement agreement was entered into without the participation of the Regional Director, thus, the unfair labor practice was without a remedy; (2) the withdrawal of the charge was without prejudice; and (3) the company engaged in further violations of section 8(a)(1) after it had entered into the non-Board settlement agreement.[69]

While the last of the three reasons given by the Trial Examiner was sufficient under *Wallace* to go behind the non-Board settlement agreement and find a violation of the Act, the Sixth Circuit found the first two reasons equally sufficient. The court stated that the policy against reviving charges that had been settled voluntarily[70] was not to be interpreted as prohibiting the Regional Director from reviving old charges when a voluntary agreement, to which the Board was not a party, collapsed. The court then granted enforcement of the Board's order.

In both *Zimnox* and *Lasko*, the Board and the Sixth Circuit have disregarded well established case law and concluded that the Regional Director and the General Counsel have unbridled discretion. Under these decisions, the Board can issue a complaint on a refiled charge that originally was withdrawn with the approval of the Regional Director, even though the charge was already the subject of a non-Board settlement agreement. Both the

68. The Board has discussed this issue in John F. Cuneo Co., 152 N.L.R.B. 929 (1965), where the Board, in reference to subsequent charges that were filed concerning the conduct by the employer that was settled in a non-Board settlement agreement, stated: "[A]ny agreement which the Respondent and the Union may have entered into and which resulted in the withdrawal of these prior charges was a private arrangement which does not estop the Board to proceed on any new charges alleging the same conduct as the withdrawn charges." *Id.* at 931 n.4. *See also* DeTray Plating Works, Inc., 155 N.L.R.B. 1353, 1360 (1965) (Board adopted Trial Examiner's recommendation that DeTray cease and desist from discouraging membership in Union, interrogating employees about their union activities, and interfering with employees' right to join union).

69. Lasko Metal Products, Inc., 148 N.L.R.B. 976, 991 (1964).

70. *See* note 28 *supra*.

Board and the Sixth Circuit, however, have ignored a significant public policy argument. Without subsequent conduct on the part of the charged party constituting either a violation of the terms of the agreement or unlawful conduct, the charged party has a right to expect that the other party will abide by the terms of the agreement.

The Regional Directors' time, therefore, is better spent addressing the meritorious charges that have not been settled than contributing to the backlog of cases by issuing complaints on charges that already have been settled by the parties. The Sixth Circuit's decision in *Superior Tool* is inconsistent with *Zimnox* and *Lasko*. In *Superior Tool*, the court refused to go behind a strike-settlement agreement because the Regional Director failed to demonstrate that the charged party either breached the terms of the agreement or committed a subsequent unfair labor practice.[71] In both *Zimnox* and *Lasko*, the court appears to have ignored its reasoning in *Superior Tool* by holding that the General Counsel and the Regional Directors have absolute discretion to disregard a non-Board settlement agreement even though the charged party neither breached the terms of the agreement nor committed a subsequent unfair labor practice.

Perhaps greater insight into the rationale of the Sixth Circuit can be obtained through a comparison with the approach the Fifth Circuit has taken on setting aside a non-Board settlement agreement. Recently, the Fifth Circuit addressed the issue of whether the Regional Director can go behind a non-Board settlement agreement and reinstate a charge that was withdrawn with approval when the charged party had neither breached the terms of the agreement nor committed a subsequent unfair labor practice. In *Gulf States Manufacturers, Inc.*,[72] the Board considered a case in which a non-Board settlement agreement between the company and the union was entered into after the union filed a charge with the Board alleging that the company violated sections 8(a)(1) and (3) of the Act. A second charge was filed within six months of the alleged violation which alleged that the company violated sections 8(a)(1) and (3) of the Act[73] but which did not contain any specific allegations that were included in the first charge other than the usual, broad "catch all" language.[74] After

71. NLRB v. Superior Tool & Die Co., 309 F.2d at 695.

72. 230 N.L.R.B. 558 (1977).

73. 29 U.S.C. § 158(a)(1), (3), (5) (1976).

74. "By these and other acts, the above-named employer has interfered with, re-

more than six months had passed from the date that the first charge allegedly occurred, the Regional Director sought to amend the complaint issued on the second charge and to reinstate the allegations contained in the first charge that were the subject of a non-Board settlement agreement. The company contended that the reinstatement of the withdrawn charge abused the Regional Director's discretion and that on the basis of public policy, this type of reinstatement would discourage voluntary settlements. The company also argued that the reinstatement was time barred under section 10(b) of the Act.[75]

The Board affirmed the Administrative Law Judge's decision without comment, holding that the "catch all" language used in the second charge was broad enough to include the allegations contained in the first charge. The judge stated that the reinstatement of a withdrawn charge by the Regional Director was not an abuse of discretion because the Regional Director was not a party to the agreement and because a private agreement does not estop the Board from proceeding on any new charges which allege the same conduct as the withdrawn charge.[76] The reinstatement of the first charge, however, was time barred under section 10(b) of the Act because the Regional Director sought to amend the second charge more than six months after the alleged violation occurred in the first charge.

The Fifth Circuit in *Gulf States Manufacturers, Inc. v. NLRB*,[77] held that reinstatement of the first charge was prohibited and that the union was estopped from making allegations in a later charge that were the subject of the non-Board settlement agreement since that agreement, entered into between the company and the union, provided for the withdrawal of the first charge with prejudice.[78] The court also held that the Board was legally and morally bound to the agreement because the Regional Director approved the withdrawal request submitted by the union.

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strained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act." 230 N.L.R.B. at 559 n.3.

75. 29 U.S.C. § 160(b) (1976) provides in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board . . . ."

76. *See* note 68 *supra*.

77. 579 F.2d 1298 (5th Cir. 1978).

78. *Compare* Gulf States Mfrs., Inc., 230 N.L.R.B. 558 (1977) *with* Zimnox Coal Co., 140 N.L.R.B. 1229 (1963). The Trial Examiner in *Zimnox* stated that if the company wanted a charge withdrawn with prejudice it should have insisted that the understanding be reduced to writing. *See* note 62 *supra* and accompanying text.

The Fifth Circuit then granted a petition for rehearing,[79] agreeing to reconsider Part I of its decision in *Gulf States*.[80] The court, sitting en banc in *Gulf States Manufacturers, Inc. v. NLRB*,[81] held that a Regional Director was authorized to reinstate a charge that previously had been withdrawn as part of a non-Board settlement agreement when a party to the agreement either breached the terms of the agreement or committed a subsequent unfair labor practice that was related to the non-Board settlement agreement. The court reversed the panel decision that the union was estopped from alleging in a subsequent charge any conduct of a charged party that was the subject of a non-Board settlement agreement. Furthermore, the court no longer posited that the Board was legally and morally bound to the non-Board settlement agreement because the Regional Director had approved the withdrawal of the charge. In applying this new test, the Fifth Circuit held that the subsequent unfair labor practice charge did not bear a "substantial relationship" to the non-Board settlement agreement. The court, therefore, denied the Board's request for the enforcement of that part of the Board's order.[82]

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79. Gulf States Mfrs., Inc. v. NLRB, 587 F.2d 808 (5th Cir. 1978).

80. 579 F.2d 1298 (5th Cir. 1978).

81. 598 F.2d 896 (5th Cir. 1979).

82. A § 10(b) issue can arise regarding a withdrawn charge in one of three different situations: (1) The charging party seeks to refile a withdrawn charge more than six months after the alleged unfair labor practice occurred; (2) The Regional Director seeks to reinstate a withdrawn charge more than six months after the alleged unfair labor practice occurred; or (3) A charging party seeks to refile or a Regional Director seeks to reinstate a charge withdrawn pursuant to a non-Board settlement agreement more than six months after the alleged unfair labor practice occurred. 29 U.S.C. § 160(b) (1976).

When a charging party seeks to refile his charge, the events complained of must have occurred within six months from the date the charge is refiled and served. Hy-Lan Furniture, Inc., 180 N.L.R.B. 308 (1969). Once a charge is filed and withdrawn, however, and the Regional Director seeks to reinstate the charge, the Board has taken the position that the General Counsel has unlimited discretion to proceed on the reinstated charge. In Silver Bakery, Inc., 150 N.L.R.B. 421 (1964), the Board stated:

> In our opinion, Section 10(b) relates only to the actual filing of charges. . . . [I]t is clear that the General Counsel acting in the public interest to effectuate the policies of the Act has virtually unlimited discretion to proceed on charges as he deems fit in the exercise of his office. And there is nothing in the Act limiting his authority to issue a complaint once a charge is filed.

Id. at 424–25. The Board in *Silver Bakery* then stated that it would dismiss the reinstated charge only if the equities in the case compelled a dismissal because of the time that elapsed between the withdrawal of the charge and the reinstatement by the Regional Director. *See* California Pac. Signs, Inc., 233 N.L.R.B. 450 (1970); Public Servs. Planning & Analysis Corp., 243 N.L.R.B. No. 183 (1979).

When a charge is withdrawn pursuant to a non-Board settlement agreement, the Board has taken the position that a Regional Director cannot reinstate a charge to circumvent the § 10(b) time period. *See, e.g.*, Glacier Lincoln-Mercury, Inc., 189 N.L.R.B. 640, 643 (1971);

The Fifth Circuit adopted the *Wallace*[83] test as its guideline for setting aside a non-Board settlement agreement, thereby establishing a middle ground between its earlier panel decision and the Sixth Circuit's decisions. The panel decision, albeit a concurring opinion, did not permit withdrawn charges to be reinstated because the parties to the agreement and the Regional Director were legally and morally bound to the non-Board settlement agreement. In contrast, the decisions of the Board and the Sixth Circuit allowed the Regional Director unreviewable discretion to go behind a non-Board settlement agreement and reinstate charges that were settled previously and withdrawn pursuant to that agreement. For public policy reasons, however, the Fifth Circuit chose to apply the *Wallace* test to non-Board settlement agreements. The Fifth Circuit thought that the *Wallace* test balanced the national public policy of settling labor disputes by voluntary agreement with the need to assure that non-Board settlement agreements are not used to impede the Board's implementation of the Act.

The dissent in *Gulf States*[84] asserted that the test in *Wallace* should not apply to a non-Board settlement agreement. The dissent noted that the Regional Director approves only the withdrawal of the charge and that neither the Board nor the Regional Director is a party to the non-Board settlement agreement.[85] Second, the NLRB Case Handling Manual considers a withdrawal of a charge to be without prejudice.[86] Third, the dissent regarded the majority opinion as conflicting with section 10(a) of the Act[87] since the parties, by contractual agreement, had divested the "Board's function to operate in the public interest."[88] Finally, the dissent cited the Sixth Circuit's decision in *Zimnox* and the Sev-

Koppers Co., 163 N.L.R.B. 517, 517 (1967). The Board has not specifically stated, however, that the equities will bar a reinstatement of a charge that was voluntarily withdrawn pursuant to a non-Board settlement agreement after the § 10(b) time period has elapsed.

The Fifth Circuit and the Sixth Circuit do not accept the Board's interpretation of the sweeping power of the General Counsel to reinstate a charge more than six months from the date that the alleged unfair labor practice occurred. NLRB v. Silver Bakery, Inc., 351 F.2d 37 (5th Cir. 1965); NLRB v. Electric Furnace Co., 327 F.2d 373 (6th Cir. 1964).

83. Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

84. 598 F.2d at 906–11.

85. *Id.* at 907.

86. NLRB CASE HANDLING MANUAL, *supra* note 6, § 10120.5.

87. 29 U.S.C. § 160(a) (1976).

88. 598 F.2d at 909 (quoting Boire v. International Bhd. of Teamsters, 479 F.2d 778, 803 (5th Cir. 1973)).

enth Circuit's decisions in *NLRB v. My Store, Inc.*[89] and *NLRB v. Rose*[90] to support the position that the Board has the discretion to go behind any non-Board settlement agreement. The dissent further objected to the majority's interpretation of *Wallace* which requires that any subsequent unfair labor practice committed by the charged party must be related to the non-Board settlement agreement before the Board can go behind the non-Board settlement agreement and reinstate the charge.

For numerous reasons, the Fifth Circuit's majority opinion outlines the proper standard for going behind a non-Board settlement agreement.[91] Public policy dictates that the parties should be able to assure themselves that a settlement of the dispute, coupled with a withdrawal of the charge, will finally resolve the issues presented in the charge if the terms of the non-Board settlement agreement are not breached and there is no subsequent unfair labor practice committed by the charged party.[92] It is untenable that a charged party could be placed in the same position as the charged party in *Zimnox*. The Sixth Circuit in *Zimnox* acknowledged that the company had neither breached the terms of the non-Board settlement agreement nor committed any subsequent unfair labor practices. Despite the absence of such factors, the court allowed the union to refile the settled charge and use it as a bludgeon to force the company to agree to certain demands at the bargaining table. This weapon, however, could be described more aptly as a double-edged sword. A company could just as easily refile a charge against a union to obtain concessions at the bargaining table. Neither case, however, promotes harmony between labor and management—the basic public policy of the Act. In contrast, the *Wallace* test represents a well-reasoned middle ground which gives the parties assurance that the terms of their agreement will be respected. This test also gives the Regional Di-

89. 345 F.2d 494 (7th Cir.), *cert. denied*, 382 U.S. 927 (1965).

90. 347 F.2d 498 (7th Cir. 1965).

91. For a thorough discussion of the proper procedure that the Board should follow compare Bioff, *"Capitulate or Litigate"—The Labor Board's Settlement Policy and the Objectives of the National Labor Relations Act*, 47 U. MO. KAN. CITY L. REV. 289 (1979) with Whipple, *"Capitulate or Litigate"—The Labor Board's Settlement Policy and the Objectives of the National Labor Relations Act—A Reply*, 47 U. MO. KAN. CITY L. REV. 309 (1979).

92. While an argument can be made that § 10(b) of the Act will cut off the Regional Director's right to reinstate the charge after six months from the date of the unfair labor practice, the Board has not accepted this position; thus, the parties to a non-Board settlement agreement remain unsure whether the agreement would, at some point in time, finally resolve the issues. *See* note 82 *supra*.

rectors and the General Counsel the power to effectuate the purposes and policies of the Act by reinstating the withdrawn charge if the charged party breaches the terms of the agreement or commits a subsequent unfair labor practice.

Notably, the assumption in the NLRB Case Handling Manual that a withdrawn charge is to be withdrawn without prejudice is not relevant to a factual setting in which the withdrawal request is made pursuant to a non-Board settlement agreement that stipulates that the charge is withdrawn with prejudice. The dissent in *Gulf States* did not recognize this crucial factual distinction. Furthermore, the Board's Trial Examiner in *Zimnox*, in referring to counsel's failure to insert the words "with prejudice" in a non-Board settlement agreement, stated that "[i]f such were in fact the understanding reached, it is a little difficult to understand why Respondent's counsel, who was present and participated in the discussions, did not insist that such understanding be incorporated in the consent-election agreement, *or otherwise reduced to writing*."[93]

Although there is no question that the Board operates in the public interest to enforce public, and not private, rights,[94] the majority opinion in *Gulf States* does not conflict with section 10(a) of the Act. The parties to a non-Board settlement agreement do not contractually agree to divest the Board of its function to operate in the public interest. The Regional Director's authority and control over a case is not usurped when the charging party and the charged party enter into a non-Board settlement agreement because that Director is not required to agree to the withdrawal of the charge pursuant to the terms of the agreement. If the Regional Director determines that the agreement is not in the public's interest, the Director can refuse to allow the charge to be withdrawn and proceed with the case. The public interest is thereby fully protected. It is only after the Regional Director agrees that the charge can be withdrawn that the *Wallace* restrictions apply to the power to go behind a non-Board settlement agreement. Under *Wallace*, however, the Regional Director is still empowered to go behind a non-Board settlement agreement if the agreement is found to be an obvious frustration of the Act's purposes.[95] There is no limitation, therefore, on the Board's power under section

93. 140 N.L.R.B. 1229, 1237 n.22 (emphasis added).

94. Amalagamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

95. Wallace Corp. v. NLRB, 323 U.S. at 253.

10(a) of the Act to remedy unfair labor practices in the public interest.

The dissent in *Gulf States* relied on decisions of the Sixth and Seventh Circuits. The dissent cited the Sixth Circuit decision in *Zimnox* to support its position.[96] As authority for its holding in *Zimnox*, however, the Sixth Circuit cited *Wallace*, which denied the Regional Director's absolute discretion to set aside formal settlement agreements.[97] Prior to *Zimnox*, the Sixth Circuit in *Superior Tool*[98] had refused to go behind a strike-settlement agreement to find a violation of the Act when there was no finding that the charged party had committed a subsequent unfair labor practice. Thus, in relying on the Sixth Circuit to support its opinion, the dissent in *Gulf States* relied on a circuit court with inconsistent rulings. The dissent[99] also relied on dicta in the Seventh Circuit's decision in *NLRB v. My Store, Inc.*,[100] which, like the Sixth Circuit opinion, cited *Wallace* as authority. The dissent also cited the Seventh Circuit decision in *NLRB v. Rose*[101] in which the Regional Director did not approve a withdrawal request and proceeded in the public interest to a hearing on the merits of the charge. The decision in *Rose* was proper, but the case bore no relation to the facts in *Gulf States*.

Finally, the dissent in *Gulf States* objected to the Fifth Circuit's contention that a subsequent unfair labor practice must be related to a non-Board settlement agreement before the court will allow the Regional Director to go behind that agreement to find a violation of the Act on the earlier charge. The Board, however, took the position of the majority. In *Pacific Maritime Association*,[102] the Board held that a subsequent independent violation of the Act unrelated to the matters and conduct of an informal settlement agreement, did not warrant the setting aside of the informal settlement agreement. It is reasonable to apply this rule, and not that of the dissent in *Gulf States*, uniformly to all settlements.

III. CONCLUSION

The Sixth Circuit's position is that the General Counsel or the

96. 598 F.2d at 908.
97. 323 U.S. 248 (1944).
98. 309 F.2d 692 (6th Cir. 1962).
99. 598 F.2d at 908.
100. 345 F.2d 494 (7th Cir. 1965).
101. 347 F.2d 498 (7th Cir. 1965).
102. 192 N.L.R.B. 338 (1971).

Regional Director always can go behind a non-Board settlement agreement to reinstate a withdrawn charge. The rationale of the court is that the Board, as protector of the public interest, is not a party to the agreement and, therefore, is not restricted by the prerequisites outlined in *Wallace* governing the revival of charges withdrawn pursuant to a non-Board settlement agreement.

The Fifth Circuit, however, has adopted the *Wallace* test which requires the Board to find that a charged party either breached the terms of the non-Board settlement agreement or committed a subsequent unfair labor practice before the Board can revive a charge that was withdrawn pursuant to such an agreement. The court's rationale is that the *Wallace* decision properly balances the need to assure that non-Board settlement agreements are not used to impede the Board's implementation of the Act with the national public policy of settling labor disputes by voluntary agreement.

The Fifth Circuit's decision in *Gulf States* furthers this national public policy by encouraging charged parties to reach final, non-Board settlement agreements. If the charged parties reach these agreements expeditiously, they often can obtain the charging parties' agreement to settle for less than that which the Regional Directors might have demanded. The charged parties also can save themselves the costs of negotiations, settlement, and repeated litigation with the Regional Directors. Thus, the non-Board settlement represents a very attractive alternative to charged parties in the Fifth Circuit.

The charging parties also benefit from the Fifth Circuit's decision in *Gulf States* because they can obtain quick settlements. Not only do these swift settlements effectuate the purposes and policies of the Act, but they obviate the unemployed discriminatees' need for the lengthy negotiation and litigation necessary to obtain reinstatement with back pay. The charging parties find that relinquishing the right to refile their charges if they are dissatisfied with the terms of their agreements is a fair trade-off for such a settlement. Although the charging parties might be able to obtain a more favorable settlement through negotiations with the Regional Directors, the possibility of unsuccessful negotiations or losing at the hearing makes a settlement more attractive.

The Fifth Circuit's decision in *Gulf States* also prevents litigation over non-Board settlement agreements unless the charged parties commit subsequent unfair labor practices that are substantially related to those agreements. This decision, therefore, gives

finality to the non-Board settlement agreements that comprise a large portion of the cases settled each year. Thus, the Fifth Circuit helps the Board achieve its goal of effectuating the purposes and policies of the Act and avoiding the possibility of a crisis which could result from a significant decrease in the settlement rate.

The Fifth Circuit also gives the Board freedom to prevent frustration of the Act by allowing the reinstatement of withdrawn charges under limited circumstances. In this grant of freedom, the Fifth Circuit evinces its agreement with the policy argument that without subsequent conduct by a charged party constituting either a violation of the terms of the agreement or unlawful conduct, the charged party has some right to expect that the other party will abide by the terms of the agreement.

In light of the merits of the Fifth Circuit's approach to non-Board settlement agreements, the Sixth Circuit's approach is not convincing. In fact, the Sixth Circuit could not have reached its current position, as articulated in *Zimnox* and *Lasko*, without ignoring its earlier decision in *Superior Tool*. The Sixth Circuit, therefore, should squarely address the issues and adopt the position of the Fifth Circuit.