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# When is it better to sue?

and when is it better to

# SETTLE?

Let's look at a case involving **jazz instructors at the New School**, and a **discrimination claim at a local jazz club**

**T**HE VAST MAJORITY of legal claims that are adjudicated in this country are resolved through voluntary settlements.

This makes a great deal of sense, since litigation is a zero sum game: one party will win and one party will lose. There usually is no middle ground. But when the parties achieve a settlement, they can voluntarily structure a resolution that provides each with benefits and each with burdens. There will be no one winner or loser. Further, voluntary settlements can serve to preserve and possibly repair broken relationships. This is extremely important in labor relations where the relationship between labor and management is ongoing. Finally, if a settlement is achieved, the costs and uncertainties of a judicially-compelled resolution are avoided.

It is often said that a good settlement is one where both parties leave the table somewhat dissatisfied, yet not so dissatisfied that they choose not to settle. The decision to settle involves a subtle calculus where the probabilities of success must be factored against the likelihood that the claim will not be decided in your favor. Recently I settled two vastly different administrative claims involving Local 802 musicians using this calculus. I would like to take this opportunity to recount the dynamics of this process.

The first settlement involved the jazz instructors at the New School. The claimants are covered by a collective

bargaining agreement that provides for lesson advising services for students. This process is about assisting students in choosing which instructor they desire to take lessons with. A claim arose against the New School when it decided to change the process by which lesson advisors were selected and paid. This was in clear violation of the language in the agreement.

The union filed an unfair labor practice charge with the National Labor Relations Board protesting the unilateral modification of the unexpired agreement. The NLRB agreed that a violation of the National Labor Relations Act had occurred and issued a complaint against the New School. Several days before a trial was to occur before an administrative law judge, who would have issued a determination whether a violation of the law had occurred, the parties settled the claim.

When the NLRB is involved in the settlement process, it has specific guidelines that must be met in order for it to approve and sign off on the settlement. One of the primary components of an NLRB-sanctioned settlement is the issuance of back pay in an amount no less than 80 percent of the total amount owed. Further, the charged party must agree to publicly post a notice indicating that they admit they had violated the law and that they would not com-

mit similar infractions again. If these threshold criteria are met, the NLRB could compel a resolution even over the objection of the charging party.

Ultimately, the New School presented a settlement that met the basic NLRB requirements. Thus, the NLRB indicated that it would settle the case even without the union's approval. Fortunately, there was a general consensus amongst the six claimants that it was better to settle than not. This makes sense because the board could have compelled acceptance anyway. The agreement presents the prospect that a similar violation might occur in the future. However, there are now affirmative obligations on the New School that will make any subsequent violation much easier to remedy.

The NLRB settlement, while less than perfect, achieved a beneficial result that assisted the parties in continuing their bargaining relationship by definitively deciding this issue. No doubt lesson advising will be a topic that will be discussed during the next round of collective bargaining.

The next claim that settled involved a discrimination charge that was lodged against a Harlem jazz venue. A regular performer was instructed not to perform on a night she was scheduled to perform because she was of Asian background,

and the clientele that evening desired to hear a black performer play! When my client decided to perform against her employer's instructions, she and her ensemble were terminated. A claim was filed with the New York State Division of Human Rights. The claim was settled during an informal conference.

During the conference, the venue owner acknowledged that there had been a misunderstanding between him and the band and that the band was a great asset to his club. He agreed to provide full back pay and to negotiate a new performance schedule for the band. It was evident that the claim was settled so favorably for my client because of the strength of the claim and the bad publicity that would have been prompted by a litigated finding of liability against the club. The only down side to the settlement was that the band would not return to its regular schedule at the club. However, we intend to negotiate a contract that will prevent future misunderstandings between the band and the club owner. Once again a settlement was brokered that preserved a beneficial relationship.

Often, legal claims come first, in order to initiate a mediation and settlement process. I am happy to report that in these two situations, voluntary resolutions were successfully achieved.