

**Romal Iron Works Corp., DeGraw Iron Works Corp., and Empire Erector Corp. and Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. Case 29-CA-14334**

April 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

On January 22, 1991, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Romal Iron Works Corp., DeGraw Iron Works Corp., and Empire Erector Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

“(b) On execution of the aforesaid agreement, give retroactive effect to the provisions thereof and make whole the employees, with interest, for any losses they may have suffered by reason of Respondent's failure to sign and effectuate all the terms of the agreement. Backpay shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup>The judge included a visitatorial provision in his recommended Order. Under the circumstances of this case, we find it unnecessary to include that provision. Accordingly, we have modified the judge's recommended Order.

We amend the judge's recommended Order to provide that interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall issue a new notice to correct the date from which the agreement should be given retroactive effect. We find that the correct date is April 7, 1989, the date the Union requested execution of the agreement reached on April 3, 1989.

2. Substitute the following for paragraph 2(e).

“(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.”

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT refuse to bargain in good faith with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, by refusing to execute and honor any collective-bargaining agreement reached with it.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of their rights under the National Labor Relations Act.

WE WILL forthwith execute the collective-bargaining agreement we reached with the above-named labor organization on April 3, 1989.

WE WILL give full effect to the agreement, retroactively to April 7, 1989, and make all employees whole, with interest, for any losses suffered by reason of our failure to honor the terms of that agreement.

ROMAL IRON WORKS CORP., DEGRRAW  
IRON WORKS CORP., AND EMPIRE EREC-  
TOR CORP.

*James P. Kearns, Esq.*, for the General Counsel.  
*Robert M. Ziskin, Esq.*, of Commack, New York, for Romal  
Iron Works Corp., et al.  
*Mr. Elmer H. Beberfall*, Representative for Shopmen's Local  
Union No. 455.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that Romal Iron Works Corp., DeGraw Iron Works Corp., and Empire Erector Corp., a single business enterprise (Respondent) has engaged in an unfair labor practice as defined in Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by having refused to sign a collective-bargaining agreement it had reached on April 7, 1989, with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (the Union). Respondent denies that agreement had been reached.

I heard this case in Brooklyn, New York, on April 25, 1990. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION AND LABOR ORGANIZATION

Respondent manufactures and installs metal structures in commercial buildings under construction or being renovated. In its operations annually, it meets the Board's nonretail jurisdictional standard.

The Union is a labor organization as defined in Section 2(5) of the Act.

##### II. THE ALLEGED UNFAIR LABOR PRACTICE

###### A. *Bargaining History*

On September 25, 1987, the Board issued a Decision and Order (285 NLRB No. 148) (not reported in Board volume) which ordered Respondent to recognize the Union as the exclusive representative of its production and maintenance employees, including shop and field employees and to bargain collectively with it. In addition, the Board ordered Respondent to offer reinstatement to 10 employees whom Respondent unlawfully discharged.

On October 6, 1987, the Union's president, William Colavito, wrote to Respondent's president, Salvatore Ruggiero, to request a meeting to negotiate a collective-bargaining agreement. Respondent's counsel, Robert Ziskin, responded by letter of October 26, 1987, to ask Colavito to call him to set up a mutually convenient date to meet. The meeting was not held, however, until February 1, 1988. Present then were Colavito, Ruggiero, and Ziskin. (Colavito testified that the first meeting did not take place "until the Board itself got involved." There is nothing further in the record which clarifies that comment.)

Colavito attended all the negotiating sessions on behalf of the Union. The Union's counsel was present at one session. Ziskin and Ruggiero represented Respondent in the negotiations.

The developments from the first session in February 1988 to the one held in September 1989—all preceding the alleged unfair labor practice in this case—are discussed next, based essentially on Colavito's testimony and documentary material in evidence. The basis for using Colavito's account as to these background meetings is evident from my later findings, *infra*.

At the first negotiating session, held on February 1, 1988, Colavito and Ziskin reviewed a draft contract which Colavito had presented. They also discussed Respondent's obligation to reinstate the 10 discriminatees. Colavito, Ziskin, and Ruggiero met again on February 10 when they continued discussing the contract proposals. Respondent talked about taking back two or four of the discriminatees but said it would put the lock on its door before it would take the others back. The next meeting, on February 19, covered the same areas and, in addition, Respondent informed Colavito that its foreman was leaving. At the next meeting, on February 25, Respondent asked Colavito for a replacement for the foreman; Ruggiero stated that, unless he got a foreman, he would not

take back any of the discriminatees. Colavito asked that Respondent furnish him with a written statement, containing the names of its employees, their rates of pay, benefits, and other data, some of which was given him orally. During the discussion, Respondent stated that it could not afford the Union's demands.

Colavito wrote Ziskin on March 10, requesting that Respondent make its books available for an audit and also asking that another bargaining session be scheduled. Ziskin wrote back to state that Ruggiero would make Respondent's books available to the Union and that he will send to Colavito under separate cover Respondent's counterproposals. Colavito never received any such written counterproposals.

In April 1988 Colavito met with Ruggiero and Ziskin in the latter's office. Ziskin left the meeting early; Colavito and Ruggiero continued the negotiations. In the discussion that day, the Union dropped various demands including those for a pension clause and for payments to a vacation fund. Colavito and Ruggiero agreed to a mechanic's classification not contained in any contract that the Union has with other employers. Colavito reduced the Union's demands for contributions to an annuity fund to 6 percent for the first year and an additional 6 percent in the second year of a proposed 2-year contract. Colavito testified further that, at the conclusion of that meeting, an accord was reached as to all contract terms and that Ruggiero then asked for Colavito's notes in order that Ziskin could have the contract typed up.

Colavito heard nothing thereafter until he "forced" a meeting in June. At that meeting, he was given a copy of a contract that Ziskin drafted. Ziskin stated to Colavito that he had also given a copy of that draft to Ruggiero's daughter and that she had stated that she wanted to read the draft to her father.

Colavito read the draft given him by Ziskin and pointed out that the annuity clause was drafted improperly in that it provided for a 6-percent contribution for the length of the contract instead of 6 percent the first year and an additional 6 percent in the second year.

Subsequent to that meeting, Ziskin called Colavito and said that Ruggiero wants a 3-year contract. Colavito replied that he would agree to a third year, provided Respondent adds "another six percent for the annuity (fund)" and would also include the increases "in the industry agreement, wages and trust funds." Ziskin replied that that was acceptable.

Colavito later received a revised draft from Ziskin, made some notations on it and met with Ziskin on June 30, 1988, to review the draft "paragraph by paragraph." According to Colavito, Ziskin had no problem with Colavito's annotated version. Ziskin agreed to retype the contract and send it to Ruggiero.

On July 7, 1988, Ziskin sent Colavito a copy of a cover letter he had sent that day to Ruggiero, enclosing the revised draft. On July 21, Ziskin sent Colavito a copy of a letter he mailed that day to Ruggiero. That letter stated that, as a result of negotiations in the "industry" the union rate would increase 5 percent effective July 1, 1988. The letter further stated that Ziskin had informed Colavito that Respondent had agreed to "a flat 6% payment" to the annuity fund, rather than pay a 6-percent contribution in the first year, 12 percent the second, and 18 percent in the third. Colavito testified that he telephoned Ziskin to call his attention to that error and

that Ziskin replied that he did not remember what the agreement was in the discussion he had previously with Colavito.

In a telephone conversation on August 19, 1988, Ziskin told Colavito that issues exist as to annuity fund contributions and that he also would like to continue discussing the subject of welfare fund contributions. Colavito then became angry over what he perceived to be Respondent's evasive tactics and he abruptly hung up on Ziskin.

Ziskin, on September 8, 1988, wrote Colavito to state that he would appreciate hearing from Colavito "as to the outstanding issues." Colavito responded on September 16 that, while his view was that a complete agreement had been reached, he nevertheless would meet with Ziskin. Ziskin, by letter dated September 20, expressed surprise at that statement and wrote that he was "quite clear that (Respondent and the Union) do not have an agreement on all terms of a contract."

A meeting, held on September 28, was attended by Colavito, Ruggiero, and Ziskin. Colavito testified that he offered and they accepted his proposal for a 1-year contract with a reopener and arbitration thereafter. Ziskin, according to Colavito, said he would type up the agreement. On September 29, Ziskin sent Colavito a copy of a letter he sent to Ruggiero which related that a copy of the draft agreement was enclosed. There was no enclosure with the copy of that letter which Colavito received. Colavito, in fact, did not get a copy of that draft until the beginning of 1989 and then only after he had made a number of telephone calls to Ziskin's office.

When Colavito did get the draft in early 1989, he saw that portions needed clarification, according to his testimony. He tried without success to reach Ziskin. On March 7, 1989, the Union's attorney wrote Ziskin to state that the record of delay by (Respondent) beats all others and that, unless the Union hears from him within the next few days, the Union "will file again with the Board." On March 22, Ziskin wrote Colavito to state that Respondent would meet with him. Ziskin also asked Colavito to state which issues are unresolved, "in addition to the most obvious one involving that of Annuity Fund Contributions." Colavito testified that that statement was inaccurate, as there were no unresolved issues.

A meeting was scheduled for April 3, 1989. The General Counsel's contention is that, at that meeting, the parties reached the agreement which Respondent has unlawfully refused to sign.

#### *B. The April 3, 1989 Session and Subsequent Developments*

##### *1. Colavito's account*

The meeting was attended by Colavito and the Union's attorney, Belle Harper, and by Ziskin and Ruggiero. Only Colavito and Ruggiero testified as to what transpired.

The following is Colavito's account. Ruggiero's is set out separately below.

All four participants reviewed the draft that Ziskin had sent to Colavito several months previously and on which Colavito had made some notations, which he termed "corrections." After discussing the draft, they reached agreement on all items. Ziskin agreed to type it and to send it to Harper to be signed. On April 4, Ziskin sent the agreement to Harper, along with a letter which stated in part, "As you know,

there are still two outstanding issues, one of which is the Union's ability to supply [Respondent] with a lay out man, and the second issue deals with the effective date of the [Agreement]." Ziskin also stated, in that letter, that he was submitting a copy of the agreement to Ruggiero for his review and that he will advise Harper as to Ruggiero's comments, noting further in a capitalized postscript that the draft is subject to Ruggiero's approval. Colavito's testimony is clear that, on April 3, there were no such conditions agreed on before the contract was to become effective.

The draft that Harper received from Ziskin with the April 7 letter recited, in relevant part, that the contract "would run from the execution date through and including the period of three years," and that, on execution, Respondent "shall employ two to three employees through the Union and shall also hire a lay out man or foreman through the Union hiring hall."

Colavito signed the agreement for the Union and, on April 7, 1989, Harper forwarded the agreement to Ziskin with an accompanying letter, asking him to arrange for Respondent to execute it. She also observed in her letter to Ziskin that she construed his April 4 letter to her as an intention on his part to have Ruggiero review the draft as to form only, not substance, and she further stated that the Union will make every effort to supply Respondent with a layout man.<sup>1</sup>

The Union has not received from Respondent an executed agreement. Colavito testified that he telephoned Ziskin repeatedly but has been unsuccessful in his efforts to get an executed document. On September 14, 1989, the Union filed the unfair labor practice charge in this case. On October 30, 1989, Ziskin wrote to the Board's Regional Office as to that charge. He stated that the draft he sent to Harper's office clearly stated that it was subject to Ruggiero's approval and that Ruggiero never did approve it. Ziskin further stated in this letter that any agreement "would be subject to [the Union's] being able to provide . . . a lay out man and other employees concerned" and that the Union has, in essence, not provided Respondent with those employees.

##### *2. Ruggiero's account as to the negotiations*

Ruggiero's testimony essentially is that he had agreed to nothing with the Union. Respecting the subject of contributions to the annuity fund, he related that he agreed to contribute 2 percent the first year of the contract, 2 percent the second year, and 2 percent more in the third year—for a total of 6 percent. The drafts prepared by Ziskin do not support that testimony. In one draft, Ziskin recited that the "contribution rate for the first year shall be the sum of six (6%) of the gross payroll of all bargaining unit employees."

Ruggiero also testified that he made it clear that there would be no agreement with the Union until it furnished him with a qualified layout man. The agreement Ziskin prepared after the April 3, 1989 recites, as noted above, that Respondent agrees to hire a layout man through the Union on execution of the contract.

<sup>1</sup>In April 1988 and in several ensuing months, the Union had referred to Respondent three individuals who were experienced layout men. Two declined Ruggiero's offers and the third worked only briefly for Respondent.

### 3. Credibility resolution and analysis

Ruggiero's account is not corroborated by the draft itself. Further, his account was too conclusory. I am more impressed with Colavito's candor and his detailed account which stood up well in cross-examination. I credit Colavito's testimony.

The credited evidence establishes that Respondent and the Union reached agreement on April 3, 1989, on the terms of a 3-year collective-bargaining agreement, that the Union asked Respondent on April 7, 1989, to execute it and that Respondent has failed and refused to do so. In these circumstances, its refusal constitutes a refusal to bargain collectively. See *Medical Towers Limited*, 285 NLRB 1011 (1987).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to execute and honor a written agreement embodying terms and conditions of employment agreed to with the Union on April 3, 1989, Respondent violated Section 8(a)(1) and (5) of the Act.

4. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Romal Iron Works Corp., DeGraw Iron Works Corp., and Empire Erector Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to bargain in good faith and to execute and honor collective-bargaining agreements concluded by it with Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers AFL-CIO, or any other labor organization.

(b) In any like or related manner coercing, restraining, and interfering with the rights accorded employees by Section 7 of the Act.

<sup>2</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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

(a) Forthwith execute the collective-bargaining agreement consummated by Respondent and the Union on April 3, 1989.

(b) On execution of the aforesaid agreement, give retroactive effect to the provisions thereof and make whole the employees, with interest, for any losses they may have suffered by reason of Respondent's failure to sign and effectuate all terms of the agreement. Backpay should be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed therein.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps have been taken to comply. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from Respondent, its officers, agents, successors, or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States court of appeals enforcing this Order and may be had on any matter reasonably related to compliance with this Order, as enforced by the court.

<sup>3</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."