

**Isratex, Inc. and Isratex, Inc., Debtor-in-Possession  
and United Production Workers Union, Local  
17-18. Case 29-CA-17847**

January 26, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On November 9, 1994, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order as modified.<sup>3</sup>

**AMENDED CONCLUSION OF LAW**

"3. At all material times until about October 28, 1993, the Union was the collective-bargaining representative of the Respondent's employees in the following appropriate unit within the meaning of Section 9(b) of the Act:

"All employees employed by Respondent, excluding guards, professional employees and supervisors as defined in the Act."

<sup>1</sup>In its exceptions, the Respondent contends that, because of the automatic stay provision of the Bankruptcy Act (11 U.S.C. § 362(a)), the judge erred in affirmatively ordering it to remit the contributions it owes to the Union's welfare fund for September and October 1993. There is no merit to that contention. As the judge found, it is well settled that Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its police or regulatory powers, 11 U.S.C. § 362(b)(4). (That provision was not affected by the 1994 amendments to the Bankruptcy Act, P.L. 103-394.) See *R. T. Jones Lumber Co.*, 313 NLRB 726, 727-728 (1994); *NLRB v. 15th Avenue Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832-834 (9th Cir. 1991). Moreover, the Board has the authority under Sec. 362(b)(4) to process an unfair labor practice case to final disposition, including the determination of amounts owing as a result of the unlawful actions, even though collection of those sums requires a separate application to the bankruptcy court. *R. T. Jones*, supra at 728; *15th Avenue Iron Works*, supra at 1337; *Continental Hagen*, supra at 834-835.

<sup>2</sup>We shall amend the judge's third conclusion of law to state that the Union was the bargaining representative of the unit employees only through about October 28, 1993, as alleged in the complaint.

<sup>3</sup>We shall modify the judge's recommended remedy and Order to provide that the employees be made whole with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and modify his recommended remedy to provide that interest, if any, due the welfare fund be computed as set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Isratex, Inc. and Isratex, Inc., Debtor-in-Possession, 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(c).

"(c) Reimburse any employee, with interest, for losses or extra expenses the employee incurred due to the Respondent's failure to make these payments to the Welfare Fund."

2. 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 with United Production Workers Union, Local 17-18 (the Union) by failing and refusing to make the welfare fund contributions and the monthly remittance reports as required by our contract with the Union.

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

WE WILL remit to the Union's welfare fund the contributions that we should have made for the months of September and October 1993, together with the remittance reports, as set forth in our contract with the Union.

WE WILL reimburse any of our employees, with interest, who suffered any losses or incurred extra expenses due to our failure to make the welfare fund payments in September and October 1993.

**ISRATEX, INC. AND ISRATEX, INC.,  
DEBTOR-IN-POSSESSION**

*Diane Lee, Esq.*, for the General Counsel.

*Steven B. Horowitz, Esq. (Horowitz & Pollack, P.C.)*, for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Brooklyn, New York, on October 6, 1994. The complaint, which issued on January 12, 1994, and

was based upon an unfair labor practice charge filed on November 22, 1993,<sup>1</sup> by United Production Workers Union, Local 17-18 (the Union) alleges that Isratex, Inc. and Isratex, Inc., Debtor-in-Possession (Respondent) violated Section 8(a)(1) and (5) of the Act by unilaterally failing and refusing to remit monthly contributions and make monthly remittance reports to the United Production Workers Union, Local 17-18 Welfare Fund (the Welfare Fund) on behalf of its unit employees for the months of September and October, despite the fact that its contract with the Union provides for these payments and reports.

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent, a New York corporation with its principal office in Brooklyn, New York, has been engaged in the manufacture and nonretail distribution of military uniforms and other garments. Since on about May 10, 1994, Respondent Debtor-in-Possession has been the debtor-in-possession of Respondent's operation. During the past year Respondent sold and shipped from its Brooklyn facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of New York. During the same period, Respondent sold and distributed military uniforms and other garments valued in excess of \$50,000 to the United States Government. Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. FACTS AND ANALYSIS

Respondent has been party to a number of contracts with the Union through the Williamsburgh Trade Association (the Association) of which Respondent was a member during the relevant periods. The most recent contract was effective for the period April 1, 1991, through March 31, 1994. This contract provides, inter alia, that Respondent shall contribute to the Welfare Fund the amount of \$6 a week for each unit employee who worked any time during the week. It further provides: "Every employer shall prepare and submit to the Fund, together with its contributions, a remittance report setting forth the names and social security numbers of those employees for whom it is making contributions." These payments are due to be received by the Welfare Fund on the 10th day of the month following the month for which the contributions are paid. Douglas Isaacson, president of the Union and chairman and trustee of the Welfare Fund, testified that the Respondent did not submit remittance reports or any contributions for the months of September or October. By letter dated November 12, Isaacson wrote to Respondent advising it that it was in arrears for the Welfare Fund contributions for September and October, but received no response. Counsel for Respondent stated that he does not dispute the fact that Respondent failed to make the payments

<sup>1</sup> Unless indicated otherwise, all dates referred to relate to the year 1993.

for these months. His defense is that since Respondent has filed for bankruptcy, there is an automatic stay pursuant to the bankruptcy code and therefore "it is inappropriate for this tribunal to move forward." In this regard, he argues that the Board does not have exclusive jurisdiction in this type of matter; the Welfare Fund could have gone to arbitration or the courts to collect the amount due, but these actions would have been barred by the stay of the bankruptcy filing. Why, he argues, should it be different if the Welfare Fund goes to the Board to collect?

Financial inability to pay contractually required payments is not a defense to an 8(a)(1) and (5) violation. *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989); *DFV Electric Corp.*, 306 NLRB 24 (1992). As regards Respondent's defense herein, in *Phoenix Co.*, 274 NLRB 995 (1984), the complaint alleged that the employer violated Section 8(a)(1) and (5) of the Act by ceasing to transmit to the union dues that it had deducted from its employees' paychecks, by reducing the employees' pay below the rate provided in the contract, and by refusing to provide relevant information to the union. The employer admitted these allegations, but defended that because it had filed bankruptcy, the Board proceeding had to be stayed by the provisions of the bankruptcy code. The Board disagreed: "It is well settled that the institution of bankruptcy proceedings does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. Board proceedings fall within the exception to the automatic stay provision for proceedings by a governmental unit to enforce its policy or regulatory powers." (Citations omitted.) I therefore find that the Board is not stayed from proceeding with this matter because the Respondent filed for bankruptcy on about May 10, 1994.

Respondent was a party to the contract with the Union through its membership in the Association. The contract required Respondent to make monthly contributions to the Welfare Fund together with a monthly remittance report by the 10th day of the following month. Respondent failed to make the contributions for September and October and failed to provide the Union with remittance reports for these months as well. By unilaterally failing to observe the terms of its contract, Respondent violated Section 8(a)(1) and (5) of the Act.

In her brief, counsel for General Counsel requests that, in addition to finding a violation herein, I make a finding of the amount due to the Union, thereby obviating any need for a supplemental hearing. At the hearing, counsel for General Counsel moved into evidence monthly union dues deduction reports for the months of September and October. These reports name the employees who were employed by Respondent during these months, together with dues deducted for each. Isaacson testified that, based on these reports, he could calculate the amount that Respondent owed the Welfare Fund for the months of September and October.<sup>2</sup> After the receipt of these documents, I told counsel for General Counsel that these documents would be more appropriate for a supplemental hearing, and asked her whether she was asking me to make a finding on the amount due to the Welfare Fund, in addition to whether there was a violation of the Act. She responded: "That's not part of the hearing." A moment

<sup>2</sup> Actually, the breakdown in these monthly dues reports is by month, not week.

later, I again asked counsel for General Counsel: "Do you wish me to also make a finding as to the amount owed?" She answered no. Another moment later I asked: "you are not asking me to come up with an amount certain that is owed, is that correct?" She responded: "That's correct." Then a moment later, she said: "Counsel for the General Counsel is not objecting to your making findings on the exact amount owed. If that is the case then we can—we don't have to have another trial." Counsel for Respondent did object to my making any finding on the amount owed to the Welfare Fund.

It is tempting to make a finding of the amount due from Respondent to the Welfare Fund for the months of September and October to save the parties and the Board the time and expense of litigating this matter at a supplemental hearing. It is clear, however, that I cannot make such a finding at this time. Respondent did not consent to my making such a finding, and the issue was not fully litigated. After the receipt of the monthly dues deduction reports for September and October, and after General Counsel informed me that she did not want me to make a finding on the amount owed, I asked her for the relevance of this report. She responded that it was relevant to establish that there were employees employed by Respondent during this period, and I said that I would receive it for that purpose, not for the number of employees. Even if I had received the report for all purposes, I would not be able to determine the amount owed to the Welfare Fund because the report lists dues paying employees by month, and Welfare Fund contributions are computed at a weekly rate. It may be that some employees worked some, but not all weeks during this period.

Counsel for General Counsel alleges in her brief that the Board's Rules and Regulations permit consolidation of compliance and unfair labor practice proceedings where the issues are relatively simple and consolidation would not confuse, impede, or unduly prolong the hearing. Section 102.54(b) of the Board's Rules and Regulations states:

Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and notice of hearing issued pursuant to Section 102.15 a compliance specification based on that complaint. After the opening of the hearing, consolidation shall be subject to the approval of the Board or the administrative law judge, as appropriate.

The Regional Director did not consolidate these matters prior to the opening of the hearing. Although it may have been relatively simple to litigate the amount due herein, that also was not done. It is therefore inappropriate for me to make a finding as to the amount due to the Welfare Fund.

#### CONCLUSIONS OF LAW

1. The Respondent, Isratex, Inc. and Isratex, Inc., Debtor-in-Possession, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. Since on or about 1991, the Union has been the collective-bargaining representative of Respondent's employees in

the following appropriate unit within the meaning of Section 9(b) of the Act:

All employees employed by Respondent, excluding guards, professional employees and supervisors as defined in the Act.

4. By failing to pay to the Welfare Fund the amounts due for the months of September and October 1993, and by failing to submit remittance reports for these months, Respondent violated Section 8(a)(1) and (5) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the Act. In this regard, I shall recommend that Respondent be ordered to reimburse the Welfare Fund for the amounts that it failed to pay for the months of September and October 1993, and to submit remittance reports for these months as well. I shall also recommend that Respondent be ordered to make whole any employee for any losses or expenses they incurred due to Respondent's unilateral cessation of payments to the Welfare Fund. *Stone Boat Yard*, 264 NLRB 981 (1982). Counsel for General Counsel, in her brief, also asks that Respondent be ordered to mail executed copies of the notice to employees to all bargaining unit employees employed by the Respondent since October 1993 to their home addresses and to provide these home addresses to the Regional Director, citing *GHR Energy Corp.*, 294 NLRB 1011 (1989). That case involved numerous 8(a)(1), (3), and (5) violations while the instant matter involves the failure to pay 2 months' contributions to the Welfare Fund, apparently not due to union animus, but rather, the lack of money. Although I agree with counsel for General Counsel that it is important for Respondent's employees to be aware of this determination, especially if they had extra expenses due to Respondent's violations, I do not believe that this remedy is appropriate herein. Rather, the Union has the names and addresses of its members, and it can notify them of this situation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, Isratex, Inc. and Isratex, Inc., Debtor-in-Possession, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union by unilaterally failing to make the welfare fund payments to the Union for September and October 1993, and to submit accompanying remittance reports, as provided in its contract.

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

<sup>3</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) Pay to the Welfare Fund the payments that were due for the months of September and October 1993, together with the remittance reports, as set forth in its contract with the Union, an amount to be determined in a supplemental hearing, absent agreement by the parties.

(b) Preserve and, on request, make available to the Board or its agents for examination or copying all records and documents necessary to analyze and determine the amount owed to the Welfare Fund for the months of September and October 1993.

(c) Reimburse any employee for losses or extra expenses the employee incurred due to Respondent's failure to make these payments to the Welfare Fund.

(d) Post at its office in Brooklyn, New York, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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 Respondent has taken to comply.

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<sup>4</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."