

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GENZ-RYAN PLUMBING AND HEATING,
INC.

Case 18-CA-18763

and

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 10

Joseph H. Bornong, Esq., for the General Counsel.
Charles E. Feuss and John F. Bowen, Esqs. (Ford & Harrison LLP),
Minneapolis, Minnesota, for the Respondent.
Nicole M. Blissenbach, Esq., (Miller, O'Brien, Cummins LLP),
Minneapolis, Minnesota), for the Charging Party.
Amanda Cefalu, Esq., (McGrann & Shea),
Minneapolis, Minnesota) for the Sheet Metal Workers Local 10 Control Board Trust Fund.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on November 18, 2008. The charge was filed May 14, 2008¹ and the complaint was issued on September 29, 2008.

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act in failing to abide by the terms of a collective bargaining agreement between the Union and a multi-employer association to which Respondent had belonged, prematurely declaring impasse in its collective bargaining negotiations with the Union and making illegal unilateral changes to the terms and conditions of employment of bargaining unit employees.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, Genz-Ryan, a corporation, is a heating, ventilation, air conditioning (HVAC) and plumbing contractor with a place of business in Burnsville, Minnesota. Genz-Ryan annually purchases and receives goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota. Respondent admits and I find that it is an

¹ All dates are in 2008 unless otherwise indicated.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Sheet Metal Workers Local 10, is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

Between May 1, 2005 and April 30, 2008, Respondent was party to a collective bargaining agreement (CBA) between the Union and the residential subdivision of the Sheet Metal, Air Conditioning, and Roofing Contractors Association of Minnesota, North Dakota and South Dakota (SMARCA).² Approximately 350 contractors belong to SMARCA, including residential, industrial and architectural contractors. The Union's agreement with SMARCA expired on April 30. This collective bargaining agreement was entered into pursuant to Section 8(f) of the Act, governing the construction industry.³

On December 17, 2007, Respondent notified both the Union and SMARCA that it was withdrawing from SMARCA and would no longer be represented by SMARCA for the purposes of collective bargaining. Genz-Ryan's letter to the Union informed it that, "any future discussions between Genz-Ryan and Sheet Metal Workers' Local 10 will be conducted directly between the parties, without any multi-employer bargaining association acting on behalf of Genz-Ryan."

On January 2, 2008, the Union informed SMARCA contractors and Respondent that it intended to reopen the existing collective bargaining agreement with SMARCA. On January 25, John Bowen, Counsel for Respondent, wrote Marty Strub, the Union's Business Manager/President. Bowen reminded Strub that Genz-Ryan had withdrawn from SMARCA and that it intended to negotiate directly with Local 10. Bowen indicated that Respondent desired to open direct negotiations with Local 10 to modify the terms and conditions set forth in the existing SMARCA contract.

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Collective Bargaining between Respondent and the Union

Collective Bargaining Chronology

March 17, 2008: The parties held a "meet and greet" meeting. No substantive discussions took place.

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² Genz-Ryan had been a member of SMARCA since 1975. Thus, I assume it was party to other contracts prior to May 1, 2005.

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Apparently there is a separate CBA between Local 10 and the commercial subdivision of SMARCA. Respondent apparently did not withdraw its authority for that subdivision to represent it and abides by the agreement between the commercial subdivision and Local 10 with regard to Genz-Ryan's one commercial employee, G.C. Exh. 4.

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³ Section 8(f) allows employers in the building and construction industry, under certain circumstances, to enter into collective bargaining agreements with certain labor organizations without regard to whether a majority of employees in an appropriate bargaining unit have selected that labor organization as their exclusive bargaining representative, as set forth in Section 9(a) of the Act.

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Respondent was also party to a collective bargaining agreement between a multi-employer association and the Plumbers' Union. It has not withdrawn from that association.

March 27, 2008: Respondent sent the Union an initial proposal for a collective bargaining agreement. Respondent proposed significant differences with the then-existing SMARCA contract. This included a decrease in total compensation, withdrawal from the Union's pension plans and employee participation in a Genz-Ryan 401(k) and profit sharing plan, and different health insurance coverage, (the Union's "Plan B," as opposed to the more expensive Union "Plan A"), G.C. Exh. 18.

The SMARCA agreements required employers to contribute to a Local 10 pension fund, a Local 10 supplemental pension fund and an International Sheet Metal Workers Fund. The Local 10 pension fund and International's fund are plans with a defined employer contribution and a defined benefit. The Genz-Ryan 401(k) and profit sharing plan and the Union's supplemental fund are defined contribution plans with benefits dependent on the performance of the plans' investments.

Pursuant to Articles VII and IX of Respondent's proposed contract, Genz-Ryan would contribute \$3.50 to Genz-Ryan's 401(k) and profit sharing plan for each hour worked by a journeyman. Employees would also be able to make additional contributions to the plan.

March 31, 2008: Jon Ryan, a part owner of Respondent and its Secretary-Treasurer, made a Power Point presentation to the Union outlining Respondent's proposed contract, Exh. R-2.

April 8, 2008: Jon Ryan repeated his Power Point presentation to unit members at the Union hall. He discussed Respondent's intention to substitute the 401(k) plan for the Union's pension plans.⁴

April 10, 2008: The parties discussed employee reaction to the Power Point presentation.

April 11, 2008: The Union filed a representation petition with the NLRB.

April 18, 2008: The Union suggested working from the SMARCA contract. Respondent responded by stating that if Respondent wanted to work from the SMARCA contract, it would have remained a member of SMARCA. Genz-Ryan accused the Union of stalling the negotiations.

April 25, 2008: The Union presented Genz-Ryan with a document that was an amalgamation of the SMARCA collective bargaining agreement and Respondent's proposal, G.C. Exh. 19. This document did not contain any economic proposals different that those contained in the existing SMARCA agreement. One of the Union negotiators told Genz-Ryan that the Union was not prepared to discuss economic issues until the Union had heard from SMARCA. Respondent told the Union not to bother coming to another negotiating session without an economic proposal.

April 29, 2008: On April 25, the Union informed Respondent that it was not eligible for participation in the Union's "Plan B" health care plan. On April 29, Respondent sent the Union a revised proposal modified to reflect continued participation in the Union's "Plan A" health care

⁴ On June 5, Respondent informed the Union that it had been advised that it could not include bargaining unit members in its existing 401(k) and profit sharing plan; rather it would have to create a completely separate plan, G.C. Exh.-32.

program. The employer's contribution to the "Plan A" program was significantly higher than the contribution to "Plan B."⁵ Respondent's revised proposal decreased its contribution to the 401(k) and profit sharing plan from \$3.50 an hour to \$3.00 per hour for journeymen then employed by Genz-Ryan.

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May 2: On May 1, SMARCA agreed to a one-year extension of its collective bargaining agreement with the Union with some modifications. Most notable was a 35 cent per hour increase in the employee contribution to fringe benefit funds. On May 2, the Union asked Respondent to accept the terms agreed to by SMARCA. Respondent refused to do so.

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May 5: Respondent wrote the Union, modifying its proposal to add a 3 cent per hour per employee company contribution to the Union's National Energy Management Institute. This was based on Respondent's understanding that such contribution was required from signatory contractors under the Sheet Metal Workers International's Constitution. Genz-Ryan again complained about the pace of negotiations.

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Jon Ryan's May 5, letter states, "However, effective May 16, 2008 Genz-Ryan will discontinue following the prior contract and implement terms consistent with its bargaining proposals," G.C. Exh. 21. Ryan testified that as of May 16, Respondent stopped honoring the terms of the SMARCA contract, in that it stopped using the Union's hiring hall, allowed supervisors to do bargaining unit work, hired trainees at a lower wage rate and ceased participating in the union pensions.

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I do not credit this self-serving testimony, which I believe is an attempt to insulate changes made after May 20 from charges of illegality.⁶ There is no credible evidence that Respondent departed from the terms of the SMARCA agreement prior to May 20, when the Union won a representation election. For example, Genz-Ryan did not hire any new employees until June 13. It took no steps to assign bargaining unit work to supervisors until May 22, when it created two salaried positions discussed below.

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On May 19, Respondent paid in full its fringe benefit obligations for the month of April, albeit nine days or so late. It took no definitive steps to withdraw from the Union's pension funds prior to May 20.

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May 9: The Union informed Respondent that its members were very unhappy with Genz-Ryan's proposals to terminate its contributions to the Union's defined benefit plans. Local 10 negotiators asked Respondent to sign an agreement similar to that reached between the Plumbers Union and the multi-employer association of plumbing contractors of which Respondent was still a member. Respondent's counsel responded by telling the Union negotiators to leave its office.

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May 15: the Union submitted an information request to Respondent, G.C. Exh. 25.

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⁵ The employer contribution for a journeyman with family coverage was \$6.13 per hour under Plan A, for example, as opposed to \$4.39 for plan B. For a single journeyman the figures were \$4.63 versus \$1.69 per hour.

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⁶ On the other hand, the Union may have been counting on the Board election as a tactical weapon in collective bargaining negotiations, i.e., binding Respondent to the expired SMARCA contract while bargaining dragged on. Absent impasse, a Union election victory would have tied Respondent to the expired contract as the status quo.

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May 16: Respondent and the Union met at Respondent's office with a mediator from the Federal Conciliation and Mediation Service. No progress was made. Local 10 then struck Respondent for two days, Friday, May 16, and Monday, May 19. Union employees returned to work on May 20.

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May 20: the NLRB conducted a representation election amongst a unit of all of Respondent's full-time HVAC employees. By a margin of 24-1, the employees chose Local 10 as their bargaining representative.

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May 22: Respondent created the salaried positions of Custom HVAC Install Technician Supervisor and HVAC Tune-up Technician Supervisor. The duties of these positions include performing the work of subordinates. Thus, the duties include what had been bargaining unit work under the SMARCA agreement. Former unit employees Leonard Berens and Chad Beissel accepted these positions in late May and early June.

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May 22: the Union reiterated its information request of May 15, and also requested in writing a copy of the Genz-Ryan 401(k) and profit sharing plan, and related documents for the prior 5 years. The Union contended that it had verbally requested these documents previously, G.C. Exh. 28.

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May 27: The Board certified the Union as the exclusive collective bargaining representative of Genz-Ryan's HVAC employees pursuant to Section 9(a) of the Act.

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May 30: Respondent sent the Union a Summary Plan Description of the Genz-Ryan 401(k) and Profit Sharing Plan. In a cover letter, Respondent took issue with several statements made by the Union in its May 22 letter. Genz-Ryan contends that the Union never requested documents related to the plan during any bargaining sessions. Moreover, Respondent stated that while it would contribute a defined amount for a retirement benefit under this plan, it wrote that, "Genz-Ryan never stated that employees would be entitled to any "profit-sharing component," G.C. Exh. 29. I credit Respondent in this regard because its assertion is consistent with page 3 of R. Exh. 2, the power point presentation that it made to the Union in March and April.

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June 5: Respondent reiterated its position that it never stated that employees would be entitled to profit-sharing. It also informed the Union that the plan administrator had informed it that Respondent would have to create a completely separate plan in order to provide employees with a 401(k) retirement benefit.

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Thus, Respondent concluded that:

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At present...no documents exist that relate to the proposed 401(k) benefit.

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However, in the event we are able to reach agreement that included the proposed 401(k) benefit, Genz-Ryan will direct its provider to establish a new plan and prepare the appropriate documents. The content of that plan will be similar to the existing plan but without the "profit-sharing component." We will provide to you a copy of the Summary Plan Description for the new plan, in the event one is established.

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G.C. Exh. 32.

On June 13, Respondent hired Lamar Hubbard, Jason Johnson, Gregory Weizenegger, Lincoln Schultz at \$18 per hour. On June 23, Genz-Ryan hired Nicholas Montour at \$20 per hour.

5 The party's next meeting was scheduled on June 17. Six days before the meeting, on June 11, Respondent sent the Union a letter which stated:

10 Attached is Genz-Ryan's final proposal for your review. In light of the comments you made at our 1st meeting indicating that the Genz-Ryan employees would not agree to any wage or benefit concessions as Genz-Ryan has insisted on from the inception of our negotiations last March, we are presenting this as the last, best, and final offer.

G.C. Exh. 34.

15 On June 16, the Union submitted a counter proposal reducing its suggested wage increase by one dollar per hour for 2008, 2009 and 2010 (\$2.35 to \$1.35 for 2008; \$2.45 to \$1.45 for 2009 and 2010).

20 June 17: The parties discussed Respondent's proposal. According to Business Manager Strub, the Union, "reiterated that the loss of the pension would probably be enough to cause this thing to be rejected," Tr. 119.

25 Respondent asked the Union to put its proposal to a vote. The Union did so on June 24. Genz-Ryan's unit employees rejected Respondent's proposal and authorized the Union to call a strike, G.C. Exh. 37. On June 25, Respondent informed its employees and the Union that it was implementing its final offer on June 26, G.C. Exh. 38. Genz-Ryan reduced unit members' wage rates effective on June 26. The Union commenced a strike against Respondent on that date that was still in progress as of the November 18, 2008 hearing in this matter.

30 In July, the Union informed Respondent that it would not accept contributions to its health insurance benefit plan, if Respondent continued to refuse to contribute to its pension plans. As a result, in October, Genz-Ryan enrolled its employees in its own health insurance plan. It also discontinued payments into the Union's vacation fund during the summer of 2008.

35 August 15: The parties met again and discussed primarily the issue of what tools employees would be required to carry in their personally owned vehicles (POV) pursuant to a collective bargaining agreement.

40 October 27: The parties again discussed the issue of tools in employees' POVs, and the Union's request to be included on the Board of Trustees of Respondent's 401(k) plan. Respondent rejected this Union request. The Union offered a further reduction in wage rates and offered to give up Labor Day as a paid holiday. Genz-Ryan repeated its refusal to participate in the Union's pension plans.

45 *Issues and Analysis*

Was Respondent bound by any terms of the SMARCA collective bargaining agreement after April 30, 2008?

50 The General Counsel relies on Article XXVII the SMARCA agreement, G.C. Exh. 12, p. 38, for its contention that Respondent's obligations under that contract did not cease on April 30:

This agreement shall become effective on the 1st day of May 2005, and shall remain in force from year to year until the 30th day of April, 2008, and shall continue in force from year to year thereafter, unless written notice of reopening is given no less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect, until conferences relating thereto have been terminated by either party.

As precedent for its position, the General Counsel relies on *Evans Sheet Metal*, 337 NLRB 1200 (2002). In that case Sheet Metal Workers Local 44 also had a collective bargaining agreement with a multi-employer association. Local 44's contract with the association had a provision very similar to that in the instant case. The Board held that the Union's notice to reopen the agreement did not terminate the collective bargaining agreement because conferences relating the reopener notice had not ended.

Further, the Board found that Evans' conduct after the expiration of the collective bargaining agreement (April 30, 1993) confirmed its finding that the agreement continued in force after the reopener notice was given. Evans continued, as required by the CBA, to contribute to Union benefit funds and hired referrals from the Union hiring hall beyond 1993.

There are aspects of the instant case that are easily distinguishable from *Evans Sheet Metal*. First of all, Respondent, unlike Evans, had notified the Union and SMARCA that it was withdrawing SMARCA's authority to bargain on its behalf more than 90 days prior to the expiration date of the CBA. Secondly, negotiations between Local 10 and SMARCA ceased on May 2, when SMARCA agreed to a one-year extension of the CBA. Respondent had already made it quite clear that it did not intend to be bound by any agreement reached between SMARCA and the Union.

On the other hand, Respondent continued to contribute to Local 10's health insurance and vacation benefit funds well beyond the April 30, 2008 expiration of the SMARCA agreement.

I am persuaded by the argument made at pages 19-22 of Respondent's brief that it was not bound by the terms of the SMARCA agreement after April 30. The issue herein is a matter of contract interpretation. The term "conferences relating thereto" refers to conferences relating to the SMARCA contract; not conferences relating to the negotiation of a separate agreement between Local 10 and Respondent. Respondent had made it quite clear in its December 17 and January 25 letters that it was not willing to participate in any "conferences" relating to the SMARCA contract.

Moreover, there were no conferences relating to the SMARCA contract after May 2, when SMARCA agreed to extend its agreement for another year. Respondent never willingly agreed to any conferences relating to the SMARCA agreement before or after that date.⁷

⁷ I read *Sheet Metal Workers Local 162 (Dwight Lang's Enterprises)*, 314 NLRB 923 (1994) more narrowly than does the Charging Party at page 12 of its brief. The Board held that the union respondent did not violate Section 8(b)(1)(b) because the interest arbitration provision of the expired multi-employer contract *arguably* bound the employer. I do not read the case as holding that the employer, which had timely withdrawn from the multi-employer bargaining association prior to the expiration of an 8(f) contract, was bound by these provisions.

The position of the General Counsel and the Charging Party appear to turn the Board's twenty year-old application of the rule in *John Deklewa & Sons*, 282 NLRB 1375 (1987) on its head. In that case, the Board held that an employer's obligations to recognize and bargain with a labor organization under Section 8(f) terminate with the expiration of their collective bargaining agreement. Despite this, the General Counsel and Charging Party's position suggest that even had Respondent withdrawn from SMARCA in a timely fashion and then decided to operate as a non-union contractor it would have been obligated to abide by the collective bargaining agreement until those contractors who chose to remain union contractors completed their negotiations with Local 10. This is simply illogical.

Had the parties reached an impasse in bargaining thereby entitling Respondent to unilaterally implement its final bargaining proposal?

Section 8(a)(5) prohibits an employer from unilaterally instituting changes regarding wages, hours, and other terms and conditions of employment before reaching a good faith impasse in bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984). An impasse is considered to exist when the collective-bargaining process has been exhausted, *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), and "despite the parties best efforts to reach an agreement neither party is willing to move from its position." *Excavation- Construction*, 248 NLRB 649, 650 (1980); *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973). The burden of establishing the existence of an impasse is on the party asserting it as the basis for its unilateral actions. *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994); *North Star Steel*, 305 NLRB 45 (1991). The relevant factors to be considered in determining whether a bargaining impasse exists were set forth by the Board in *Taft Broadcasting Co.*, 163 NLRB 475 (1967). The Board held that, "after bargaining to impasse...an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." Determining whether a bargaining impasse exists involves a fact-intensive analysis, guided by various factors:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues on which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Id., at 163 NLRB 478.

Those who bargain collectively are normally under an obligation to continue negotiating to impasse on all mandatory issues. The law relieves them of that duty, however, when a single issue looms so large that a stalemate as to it may fairly be said to cripple the prospects of any agreement, *Calmat Co.*, 331 NLRB 1084, 1097 and n. 49 (2000), citing *NLRB v. Tomco Communications, Inc.*, 567 NLRB 871, 881 (9th Cir. 1978).

The factual determination to be made herein is whether the instant case is like *Calmat Co.*, *supra*. In that case the Board dismissed the Complaint, finding that the employer had not violated the Act in declaring impasse and implementing its last, best final offer. The Board determined that, "negotiations regarding the pension plan played a critical role in the bargaining and ...the parties' failure to agree on this issue destroyed any opportunity for reaching a successor collective bargaining agreement." *Calmat* insisted throughout negotiations that it had to eliminate a fixed contribution rate; the Union was equally adamant that the fixed contribution rate could not be eliminated. The Board concluded, "All other bargaining occurred in the shadow of this fundamental disagreement."

One striking fact in this case is how few bargaining sessions had taken place and how little time had elapsed before Respondent began to threaten to declare impasse. Moreover, only one bargaining session took place after the Union was certified as the Section 9(a) representative of Respondent's employees.

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The same is true with regard to the actual implementation of Respondent's last, best, final offer. Depending on whether you count the March 17, "meet and greet" meeting, 5 or 6 sessions had taken place over a 6 week to two month period, when Genz-Ryan began to talk about impasse and only 8 or 9 sessions over the course of 2 ½ to 3 months had taken place when Respondent implemented its final offer. "While it is true that the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse." *PRC Recording Co.*, 280 NLRB 615, 635 (1986); *Day Automotive Group*, 348 NLRB 1257, 1264 (2006).

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On the other hand, it is not unprecedented for the Board to find that an impasse has occurred after only a few negotiating session. *Betlem Service Corp.*, 268 NLRB 354 (1983), cited by Genz-Ryan, is probably the best example of such a holding. In that case the Board stated:

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Generally, the Board will not find that an impasse has occurred unless the negotiations between the parties have been exhaustive. Here, the parties had engaged in only two formal bargaining sessions with subsequent contact through two telephone conversations. We agree, with the judge, however, that the Union's refusal to consider any agreement other than the new local agreement caused impasse early in the negotiations.

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In the instant case, the Union never waived in its refusal to consider Respondent's determination to substitute a 401(k) plan for a defined pension plan.⁸ It did however, offer wage concessions at the June 17 meeting. The fact that Respondent did not have plan documents for the plan it was proposing also complicates the issue of whether a valid impasse existed on June 25, 2008.⁹ On balance, I conclude that it did. The Union was adamant up to that point that it would not accept an agreement that allowed Respondent to withdraw from its pension plans. I conclude that the fact that Respondent had failed to provide the Union with plan documents had a negligible impact, if any, on the parties' negotiations. Prior to June 25, the Union had made it clear that it would not accept any 401(k) plan in lieu of its pension plans.

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Unilateral Changes

An employer's obligation to bargain before making changes commences not on the date of certification, but on the date of the election, *Mike O'Connor Chevrolet*, 209 NLRB 701, 704 (1973); *Ramada Plaza Hotel*, 341 NLRB 310, 315-316 (2004). Thus, even if it had no obligations under the SMARCA agreement, Respondent was obliged to maintain the status quo as of May 20, 2008, unless a valid impasse existed.

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⁸ I would note the adverse consequences of making employees dependent on a 401(k) did not seem as momentous in March-June 2008, as they do at the present time.

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⁹ There is no complaint allegation that Respondent violated the Act in failing to provide relevant information about the 401(k) plan, or in failing to respond to any other Union information request, see General Counsel's brief at page 22.

5 The law is clear that “a lawful impasse cannot be reached in the presence of unremedied
unfair labor practices.” *White Oak Coal Co.*, 295 NLRB 567, 568 (1989). In the absence of a
lawful, good-faith impasse, an employer may not unilaterally implement its final offer, *Id.* Indeed,
an employer that has committed unfair labor practices cannot “parlay an impasse resulting from
10 its own misconduct into a license to make unilateral changes.” *Wayne’s Dairy*, 223 NLRB 260,
265 (1976). However, not all unremedied unfair labor practices committed during negotiations
will give rise to the conclusion that impasse was declared improperly, thus precluding unilateral
changes. *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), *enfd.* 192 F.3d 133 (D.C. Cir. 1999). Only
“serious unremedied unfair labor practices that effect [sic] the negotiations” will taint the
15 asserted impasse, *Id.*, quoting *Noel Corp.*, 315 NLRB 905, 911 (1994). Thus, the central
question is whether any unlawful conduct on the part of Respondent detrimentally affected the
negotiations over a new collective bargaining agreement and contributed to the deadlock.

15 After May 20, and prior to declaring impasse on June 26, Respondent made unilateral
changes in creating salaried positions which entailed the performance of bargaining unit work. I
conclude that these changes had a negligible impact, if any, on collective bargaining
negotiations, and thus do not invalidate Respondent’s claims of impasse.

20 I conclude that the creation of salaried positions which encompassed bargaining unit
work was a unilateral change that violates Section 8(a)(1) and (5). I do not find that Respondent
violated the Act in enrolling its employees in a 401(k) plan because this was consistent with its
pre-May 20 bargaining proposals. Similarly, I do not find that the implementation of different
health coverage violated the Act in view of the Union’s failure to directly answer Respondent’s
25 inquiry as to whether the Union would accept contributions to the Union’s health insurance plan
without contributions to the Union’s pension funds.

Respondent did not unlawfully discontinue contributions to the Union’s Health Insurance Plan

30 Respondent’s final offer of June 11, 2008, included continued contributions to the
Union’s Health Insurance Plan.¹⁰ On August 1, Genz-Ryan unilaterally enrolled its employees
in Respondent’s Blue Cross/Blue Shield health insurance plan. The General Counsel and
Charging Party contend this is a violation of Section 8(a)(5) and (1) because Respondent never
proposed replacing the Union plan with the company plan prior to declaring impasse. I
conclude, however, that Respondent was confronted with the kind of exigency that excuses its
35 unilateral change, *RBE Electronics, of S.D.*, 320 NLRB 80 (1995).

40 On July 11, Respondent’s counsel wrote to Union Business Manager Strub stating that
Richard Leitschuh, financial secretary/treasurer of Local 10 and a member of the Union
negotiating team, informed Respondent’s Human Resources Manager that the Union would not
accept contributions to the Union’s health insurance plan without contributions to the pension
plans. Counsel asked Strub to confirm in writing whether these statements were correct. He
further stated in that in light of the statements attributed to Leitschuh, Respondent may have no
choice but to put its employees in a different health insurance plan, G.C. Exh. 43.

45 Strub responded on July 14, G.C. Exh. 44:

50 ¹⁰ Although the June 11, proposal references the Union’s Plan B proposal, the premium
amounts in that proposal are consistent with enrollment in the more expensive Plan A health
insurance, Exh. G.C.-34; Exh. R- 5.

5 It is not now and never has been the Union's position that the Benefit Office will not accept any medical benefits from Genz-Ryan on behalf of any Genz-Ryan employee. Quite the opposite. It is our position that Genz-Ryan is legally obligated to continue to make medical benefit contributions under the terms of the expired contract, as well as all other fringe benefit contributions required by the contract...

Mr. Leitschuh did not say that the Benefit Office will only accept contributions on behalf of union members, and that is not the case...

10 Your position remains confusing to me. I do not understand how you believe you can legally continue to make medical contributions while refusing to make the other fringe benefit contributions. As you know, section 302 of the Labor Management Relations Act requires that you have a written agreement in order to make benefits contributions... Under your view of the facts, your contributions for medical insurance are illegal...

15 Thus, we demand that you immediately resume making all fringe benefit contributions required by the former agreement and the status quo obligations of the employer, including medical, pension, and supplemental retirement.

20 On July 18, Respondent told the Union that unless it received confirmation that all of its bargaining unit employees would continue to be covered under the Union's health plan, it may place all unit members under a different health insurance plan, G.C. Exh. 45. The Union's response of July 22, G.C. Exh. 46, did not state that Respondent's employees would continue to be covered by the Union's health insurance plan if Respondent did not also contribute to other
25 Union benefit funds.

On July 25, the Union's Benefits Fund office sent letters to Respondent's unit employees suggesting that they might not be covered by the Local 10 health insurance plan after September 30, R. Exh. 1.

30 It light of the ambiguity left by the Union's response to Respondent's inquiries regarding whether or not Genz-Ryan unit members would continue to be covered by the Union's health insurance plan, I conclude that Respondent was confronted by the type of "exigency" that allowed it to cease its contributions to the Union's health insurance plan and enroll its
35 employees in a different plan. Thus, I find that Respondent did not violate the Act in doing so.

Respondent violated Section 8(a)(5) and (1) to the extent that the benefits to unit employees under the 401(k) plan that it implemented differed from the 401(k) and profit sharing plan it originally proposed.

40 Following impasse, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within its preimpasse proposals, *Taft Broadcasting Co., supra*. In the instant case, Respondent proposed a 401(k) benefit, but failed to provide the Union with any details as to what this benefit encompassed until July 28, G.C. Exh. 48. I find
45 that under these circumstances Respondent violated the Act insofar as the benefits in the plan that it implemented differs from those that unit members would have received in the 401(k) and profit sharing plan Respondent initially proposed to the Union (absent the profit sharing component). To the extent those benefits are less than those originally proposed, I find that Respondent should be required to compensate unit employees for the difference in the two
50 plans.

Conclusions of Law

1. Respondent was not bound by the terms of the SMARCA contract with the Union after April 30, 2008 and thus did not violate the Act in departing from its terms.

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2. Respondent did not violate the Act by declaring impasse on June 25, 2008, and implementing terms and conditions of employment reasonably comprehended within its preimpasse proposals.

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3. Respondent violated Section 8(a)(5) and (1) by transferring bargaining unit work to non unit employees, i.e., the Custom HVAC Install Technician Supervisor and the HVAC Tune-up Technician Supervisor.

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4. Respondent violated Section 8(a)(5) and (1) to the extent that it implemented a 401(k) plan whose benefits differed from those contained in the 401(k) and profit-sharing plan originally proposed to the Union (absent the profit-sharing component).

Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

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The Respondent, Genz-Ryan Plumbing and Heating, Inc., Burnsville, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Making unilateral changes in the terms and conditions of employment of bargaining unit employees that are not reasonably comprehended within its preimpasse proposals to the Union;

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

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

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(a) Restore to bargaining unit members all bargaining unit work assigned to non-unit employees or supervisors since May 22, 2008, including, but not limited to, unit work assigned to the Custom HVAC Install Technician Supervisor and the HVAC Tune-up Technician Supervisor.

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¹¹ 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.

(b) Make unit employees whole for any loss of wages or other benefits that resulted from the unlawful assignment of bargaining unit work to non unit employees or supervisors.

5 (c) Restore to bargaining employees any benefits they would have received under the Genz-Ryan 401(k) and profit sharing plan (absent the profit sharing component) that they have not received under the Genz-Ryan 401(k) plan.

10 (d) Make bargaining unit members whole for any loss of wages or other benefits that resulted from the implementation of the Genz-Ryan 401(k) plan instead of the Genz-Ryan 401(k) and profit sharing plan that was submitted to the Union prior to May 20, 2008 (absent the profit sharing component).

15 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (f) Within 14 days after service by the Region, post at its Burnsville, Minnesota, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

30 (g) Within 14 days after service by the Region, mail copies of the attached notice marked Appendix, at its own expense, to all employees in the Local 10 bargaining unit who were employed by the Respondent at its Burnsville, Minnesota since May 22, 2008. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

35 (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

40 (i) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., February 11, 2009.

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Arthur J. Amchan
Administrative Law Judge

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¹² 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."

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT implement any changes in the terms and conditions of your employment that were not reasonably comprehended within our preimpassé proposals to the Union during collective bargaining negotiations.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit represented by Sheet Metal Workers International Association, Local No. 10.

WE WILL restore to bargaining unit members all bargaining unit work assigned to non-unit employees or supervisors since May 22, 2008, including, but not limited to, unit work assigned to the Custom HVAC Install Technician Supervisor and the HVAC Tune-up Technician Supervisor.

WE WILL make unit employees whole for any loss of wages or other benefits that resulted from the unlawful assignment of bargaining unit work to non unit employees or supervisors.

WE WILL restore to bargaining unit employees any benefits they would have received under the Genz-Ryan 401(k) and profit sharing plan (apart from the profit-sharing component) that they have not received under the Genz-Ryan 401(k) plan.

WE WILL make bargaining unit members whole for any loss of wages or other benefits that resulted from the implementation of the Genz-Ryan 401(k) plan instead of the Genz-Ryan

401(k) and profit sharing plan that was submitted to the Union prior to May 20, 2008 (absent the profit sharing component).

GENZ-RYAN PLUMBING AND HEATING, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

330 South Second Avenue, Towle Building, Suite 790

Minneapolis, Minnesota 55401-2221

Hours: 8 a.m. to 4:30 p.m.

612-348-1757.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 612-348-1770.