

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

A.W. FARRELL & SON, INC.

CASE NO. 28-CA-22599

AND

SHEET METAL WORKERS INT' L
ASSOCIATION, AFL-CIO, LOCAL UNION
NO. 88

JOINT MOTION TO REMAND TO REGIONAL DIRECTOR
FOR PURPOSES OF EFFECTUATING INFORMAL SETTLEMENT AGREEMENT

This matter is currently pending before the National Labor Relations Board. On November 18, 2010, Administrative Law Judge Lana Parke issued a Decision and Recommended Order. Prior to filing exceptions with the Board, the parties agreed to enter into the National Labor Relations Board's voluntary Alternative Dispute Resolution (ADR) program. Through the ADR process, the parties have reached a non-Board settlement satisfactory to all parties. Therefore, Counsel for the Acting General Counsel, Counsel for Respondent, A.W. Farrell & Son, Inc., and Counsel for Charging Party, SMWIA Local 88, hereby jointly file this Motion requesting that the Board remand this case to the Regional Director for further disposition consistent with the terms of the parties' settlement agreement.

In support of this Motion, the parties advise the Board as follows:

1. The parties met on February 8, 2011 and participated in settlement negotiations on this matter with the assistance of Administrative Law Judge Clifford Anderson. Telephonic and electronic negotiations continued and the parties have now reached full agreement on the terms of a non-Board settlement.
2. The Respondent and Charging Party do not currently have a collective bargaining agreement. Respondent is a party to bargaining agreements with other SMWIA local unions.

3. In addition to the pending NLRB charge, A.W. Farrell and SMWIA Local 88 are parties to other legal proceedings addressing the relationship between the Respondent and SMWIA Local 88.

4. The Respondent and SMWIA Local 88 have reached an agreement that will resolve all issues between Respondent and SMWIA Local 88 and establish the terms of the mutually-beneficial future relationship between Respondent and Charging Party and will end not only this litigation but also other litigation involving the parties to allow them to move forward and promote harmonious labor relations.

5. The terms of the agreement are set forth in the attached non-Board settlement. Essentially, A.W. Farrell will recognize SMWIA Local 88 as the exclusive bargaining representative for its employees in Las Vegas, Nevada for both sheet metal roofing and traditional roofing and enter into collective bargaining agreements regarding the same. A.W. Farrell will also pay \$25,000 to the SMWIA Local 88's Joint Partnership and Training Fund to be used for improving training facilities for built-up roofing. SMWIA will withdraw and dismiss with prejudice the ULP charge pending before the Board and a grievance pending before the National Joint Adjustment Board.

6. Because this is a universal settlement, it also involves parties that are not party to the ULP proceedings before the Board.

7. Counsel for the Acting General Counsel and the Regional Director have no objections to the settlement.

The parties and the Acting General Counsel affirm that the non-Board settlement agreement meets the Board criteria under *Independent Stave*, 287 NLRB 740 (1987). Specifically, (1) all parties have agreed to be bound by the settlement; (2) the settlement is

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is made by and between A. W. Farrell & Son, Inc. (“Farrell”), Progressive Services, Inc. (“Progressive”), Roof USA, LLC (“Roof USA”), Sheet Metal Workers International Association (“SMWIA”) and Sheet Metal Workers International Association Local 88 (“Local 88”). Collectively, these entities are referred to as the “Parties.” In this Agreement, “Farrell” refers to A.W. Farrell & Son, Inc., and Jameson Roofing, Inc. and their past, present and future parents, divisions, subsidiaries, officers, shareholders, employees, agents, servants, attorneys and representatives. “SMWIA” refers to the Sheet Metal Workers International Association and its constituent local unions.

1. Farrell has entered into a collective bargaining agreement with several local unions affiliated with SMWIA, including Sheet Metal Workers International Association Local 112 (“Local 112”). These agreements are all generally in the form of the Standard Form of Union Agreement (“SFUA”) negotiated by the SMWIA and the Sheet Metal and Air Conditioning Contractors of North America. All these agreements, including the agreement between Farrell and Local 112, contain “out of area” provisions that are numbered Article VIII, Sections 5 and 6 in the SFUA (the “out of area provisions”). Farrell has not previously entered into any contractual relationship with either SMWIA or Local 88. Progressive and Roof USA have not entered into any contractual relationship with SMWIA, any local union affiliated with SMWIA or any other labor organization.

2. SMWIA and Local 88 contend that the out of area provisions of the SFUA mean that a contractor such as Farrell may travel into the jurisdictions of local unions other than the ones with which it has signed agreements and (a) may take up to two employees from the jurisdiction of the local union with which it is signed to the SFUA to perform work covered by

the SFUA in the other local union's jurisdiction, (b) will hire any remaining employees needed to perform such work through the local union into whose jurisdiction the contractor has traveled and (c) will abide by the terms and conditions of employment in the local union's jurisdiction where the work is performed. SMWIA and Local 88 further interpret the SFUA to mean that the local union into whose jurisdiction the contractor has traveled has the right to enforce the out of area provisions through Article X of the SFUA, which provides a grievance procedure. Farrell, Progressive and Roof USA dispute these interpretations of the SFUA.

3. SMWIA and Local 88 claim that metal roofs and metal siding on non-residential projects is work covered by the SFUA.

4. Progressive contracted with public entities in Clark County, Nevada to perform work that included metal siding and metal roofs. Progressive subcontracted this work to Farrell. Farrell performed the work without using employees obtained through Local 88 and without adhering to the terms and conditions of employment for sheet metal workers established under the SFUA as negotiated by Local 88 with SMACNA contractors in southern Nevada. Farrell contends that because it had a signed collective bargaining agreement with Roofers Local 162, which asserted jurisdiction over metal roofs, and since Farrell had roofing employees who were capable of installing metal roofing and since Farrell had no agreement with Local 88, Farrell believed it was in compliance utilizing Local 162 members to install metal roofing in Nevada. Metal siding work was contracted to a company which was signatory to an agreement with Local 88.

5. Local 88 filed a grievance against Farrell under Article X of the SFUA, alleging that Farrell's performance of this work violated Article VIII, Sections 5 and 6 of the SFUA (the "Grievance"). Farrell denied the Grievance, denied that Local 88 had any standing to file the

Grievance and asserted that the Grievance was not substantively arbitrable. A Local Joint Adjustment Board (“LJAB”) hearing was held on the Grievance in Las Vegas, Nevada on September 23, 2009. On October 26, 2009 the LJAB ruled against Farrell and awarded damages in the sum of \$514,933.46 (“the LJAB award”). Farrell has preserved its position that Local 88 did not have standing to file the Grievance, that the LJAB did not have jurisdiction to rule on it, that the Grievance is not substantively arbitrable. Farrell has appealed the LJAB award to the National Joint Adjustment Board (“NJAB”).

6. On June 4, 2009, Local 88 also submitted an information request to Farrell asking for information about the relationship between Farrell, Progressive and Roof USA. Farrell refused to comply with the request, asserting that it was under no legal duty to do so. Local 88 filed an unfair labor practice charge against Farrell for refusing to comply with the request, and the charge was assigned the number 28-CA-22599 (the “Unfair Labor Practice Charge”). Region 28 of the National Labor Relations Board issued a complaint against Farrell on the Unfair Labor Practice Charge. The first day of hearing on the complaint was held on April 8, 2010.

7. Farrell desires to settle the Grievance and the Unfair Labor Practice Charge in order to avoid further expense and management time and to establish a mutually-beneficial and cost-effective relationship with Local 88, SMWIA and SMWIA local unions. Local 88 and SMWIA also desire to avoid further litigation expense and to establish a mutually-beneficial relationship with Farrell. Farrell, Local 88 and SMWIA further recognize the risks and uncertainties inherent in litigation and prefer to settle on agreed terms.

8. In consideration for the promises and covenants made herein by SMWIA and Local 88, Farrell agrees:

(a) Nevada—(i) it is bound by Local 88’s Standard Form of Union Agreement and will sign the same upon request by Local 88, (ii) all metal roofing and siding work on prevailing wage rate jobs shall be assigned exclusively to sheet metal workers covered by Local 88’s SFUA, (iii) it is bound by the SMWIA National Building Enclosure Agreement, which is hereby incorporated by reference, and will sign the same upon request by SMWIA, (iv) it will assign all metal roofing and siding work on non-prevailing wage rate jobs exclusively to sheet metal workers covered by the National Building Enclosure Agreement, (v) Farrell and Local 88 agree to meet and bargain to an agreement by no later than April 1, 2011 over the terms of a Specialty Agreement for built-up roofing that will go into effect on May 1, 2011, including an “escape clause,” so that any such agreement may be terminated by Farrell if SMWIA is unable to provide trained workers who can efficiently and economically perform this work, (vi) on or after May 1, 2011, it will assign all built-up roofing work to employees covered by the Specialty Agreement; however, for any construction contracts that have been bid by or awarded to Farrell prior to the effective date of this Agreement, the wages and benefits set out in those bids/awards will apply to the extent that they differ from the terms of any applicable SMWIA SFUA, the NBEA or the Specialty Agreement; and (vii) pursuant to paragraph 11(a) of this Agreement it will pay \$25,000 to Local 88’s Joint Partnership and Training Fund in two equal, annual installments on April 1, 2011 and April 1, 2012, provided that these contributions will be used only to fund improvement in the training facilities for roofing work.

(b) California —(i) it will assign all metal roofing and siding work on prevailing wage rate jobs exclusively to sheet metal workers covered by the SFUA of the SMWIA local union in whose jurisdiction the work is to be performed, and (ii) it will assign all metal roofing and siding work on non-prevailing wage rate jobs exclusively to sheet metal workers covered by

the National Building Enclosure Agreement provided that SMWIA agrees to give Farrell an “escape clause,” so that any such agreement may be terminated by Farrell if SMWIA is unable to provide trained workers who can efficiently and economically perform this work. However, for any construction contracts that have been bid by or awarded to Farrell prior to the date of this Agreement, the wages and benefits set out in those bids/awards will apply to the extent that they differ from the terms of the applicable SMWIA SFUA, the NBEA or the Specialty Agreement.

Note: the parties acknowledge that Farrell is not currently licensed to perform work in California, but it is currently taking reasonable steps to obtain such approvals and will diligently attempt to obtain required California license as soon as practicable.

9. In consideration for the promises and covenants made herein by SMWIA and Local 88, Progressive agrees:

(a) Nevada—to subcontract to Farrell all metal roofing and siding work for which Progressive contracts, however, this section does not apply to any construction contracts that have been bid by or awarded to Progressive prior to the date of this Agreement; and

(b) California —to subcontract to Farrell or another SMWIA signatory contractor all metal roofing and siding work on prevailing wage rate jobs for which Progressive contracts, however, this section does not apply to any construction contracts that have been bid by or awarded to Progressive prior to the date of this Agreement.

10. In consideration for the promises and covenants made herein by SMWIA and Local 88, Roof USA agrees that if Roof USA performs non-residential metal roofing and siding work in Nevada during the term of this Agreement that it will subcontract to Farrell all non-residential metal roofing and siding work for which Roof USA contracts in Nevada.

11. In consideration for the promises and covenants made herein by Farrell, Progressive and Roof USA, SMWIA and Local 88 agree:

(a) Upon Farrell's performance of the promises in paragraph 8(a)(i),(iii) and (v), Local 88 shall withdraw the Grievance with prejudice , provided that the LJAB award shall be reduced to \$25,000 to be paid to the Local 88 Joint Apprenticeship and Training Fund in two equal, annual installments on April 1, 2011 and April 1, 2012, exclusively for the purposes of improving training facilities for roofing work, and the remainder of the LJAB award shall be held in abeyance during the term of this Agreement and shall be exonerated completely at the end of that term if Farrell, Progressive and Roof USA have been in compliance with this Agreement;

(b) Upon Farrell's performance of the promises in paragraph 8(a)(i),(iii) and (v), Local 88 shall request withdrawal of the Unfair Labor Practice Charge and will withdraw the underlying request for information and shall not make such a request again or refile such an Unfair Labor Practice Charge during the term of this Agreement;

(c) To enter into certain agreements with Farrell as specified above in paragraph 8;

(d) Not to assert in any forum during the term of this Agreement that any combination of Farrell, Progressive and/or Roof USA are alter-egos or constitute a single employer and acknowledge that this Agreement, and any steps taken by the parties to effectuate it will not be introduced or relied upon to support such an assertion at any time;

(e) To allow any Farrell employees who desire to join SMWIA Local 88 to join within thirty (30) days after the parties sign a Specialty Agreement pursuant to Section 8(a)(v);
and

(f) To assist and to help Farrell in any legal or labor dispute involving Roofers Local 162 or any Roofers local in other jurisdictions. Such assistance shall include but is not limited to: conducting legal research and assisting with the preparation of legal briefs; reviewing factual and legal documents; developing legal strategies and theories, providing and preparing witnesses, and publicly supporting Farrell in any dispute with Roofers Local 162 or any Roofers local in other jurisdictions. SMWIA will intervene to protect and directly assert all of its legal rights under this Agreement and any SFUA signed by Farrell.

12. As used in this Agreement, “metal roofs” means the following:

- (a) All forms of metal roofs, including metal tiles, metal panels, metal shingles and corrugated metal sheets (including laminated panels with elements such as glass, insulation, or photovoltaic);
- (b) Metal clips and subgirts and other attachment devices for metal roofs;
- (c) Metal fascia gutters and downspouts for metal roofs; and
- (d) Underlayment, including insulation, for metal roofs, provided that the parties acknowledge and agree that jurisdiction over underlayment for metal roofing in any given area, other than in Nevada and Southern California, will depend upon the local past practice in that location and the ability of the SMWIA local union in that location to provide trained and experienced workers for that type of work.

13. Progressive and Roof USA are parties to this Agreement only for the purposes of ensuring performance of paragraphs 9 and 10 and for no other purpose, and that by becoming parties hereto, Progressive and Roof USA do not enter into any collective bargaining relationship or agreement with Local 88 or SMWIA or owe any obligations to Local 88, Local 112 or SMWIA beyond what is expressly set out in this Agreement.

14. The Parties acknowledge that Farrell must be competitive and profitable in every project that it undertakes, such that the cost of labor is an important issue. SMWIA also agrees to work with Farrell towards these goals. SMWIA also agrees to improve Farrell's access to qualified workers. This will include making more effective and economical use of available SMWIA training facilities and allowing for greater mobility of properly trained SMWIA members between the jurisdictions of its constituent locals.

15. The Parties agree and acknowledge that this Agreement is not to be construed as an admission by any party of any violation of any federal, state or local statute, ordinance or regulation, common law or contractual duty or obligation under any collective bargaining agreement. Each party specifically denies that it or any of its officers, representatives or employees engaged in any wrongdoing of any kind concerning any other party.

16. Farrell agrees that during the term of this Agreement Farrell will not sign a stipulation to be bound by the Plan for Settlement of Jurisdictional Disputes in the Construction Industry, local or regional jurisdictional dispute boards, nor to be bound by their decisions with regard to any work within the scope of this Agreement. It is further understood that Farrell, SMWIA, and Local 88 shall not submit any dispute with regard to work covered by this Agreement to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry or local or regional jurisdictional dispute boards.

17. The parties agree that any dispute between SMWIA, Local 88, and Farrell over the terms of this Agreement will be resolved as provided in Article X of the Standard Form of Union Agreement. The parties agree that any dispute over the terms of this Agreement that involve Progressive or Roof USA will be resolved through final and binding arbitration before an arbitrator who is a member of the National Academy of Arbitrators and appointed pursuant to the

rules and procedures of the American Arbitration Association. In interpreting this Agreement, the arbitrator shall have no authority to add to, subtract from or modify the provisions of this Agreement. The parties will equally share the arbitrator's costs, and otherwise each side will bear its own expenses.

18. All provisions hereof and all rights, obligations and liabilities arising hereunder shall be construed in accordance with federal law. Any action to enforce the terms of this Agreement shall be filed in the federal or state courts of the State of Nevada only.

19. In the event that any provision of this Agreement shall be held invalid or unenforceable for any reason, such invalidity or unenforceability shall attach only to such provision and shall not affect or render invalid any other provision of this Agreement.

20. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns. This Agreement contains all of the promises and understandings of the parties, there are no other agreements or understandings except as set forth herein, and this Agreement may be amended only by a written agreement signed by the parties.

21. This Agreement shall be effective upon its execution by all parties and shall have a term of two (2) years from the date of execution. Except as otherwise provided herein, all actions required to be taken by any of the parties shall be initiated not less than 15 days from the Effective Date. The parties agree to cooperate and assist each other in the signing of all documents and the making of all necessary representations to public and private authorities necessary to effectuate the promises and covenants in this Agreement.

(Signatures on following page)

Sheet Metal Workers International Association

By: _____
(Print Name)

Its: _____
(Print Title)

Signature: _____

Date: _____

Sheet Metal Workers International Association
Local 88

By: _____
(Print Name)

Its: _____
(Print Title)

Signature: _____

Date: _____

A. W. Farrell & Son, Inc.

By: _____
(Print Name)

Its: _____
(Print Title)

Signature: _____

Date: _____

Progressive Services, Inc.

By: _____
(Print Name)

Its: _____
(Print Title)

Signature: _____

Date: _____

Roof USA, LLC

By: _____
(Print Name)

Its: _____
(Print Title)

Signature: _____

Date: _____