Auciello Iron Works, Inc. *and* Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL–CIO). Case 1–CA–25969

June 27, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On November 24, 1989, Administrative Law Judge Norman Zankel issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] and the General Counsel resubmitted his brief to the judge 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, and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] On May 3, 1990, the Respondent filed a motion to file a supplementary memorandum of law on the applicability and impact of the U.S. Supreme Court's decision in *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S.Ct. 1542 (1990). The Board granted this motion on May 8, 1990, stating that all parties could file such briefs. Only the Respondent filed a supplementary memorandum of law.

[2] We agree with the judge that under established Board precedent, once the Board finds that the parties have reached a binding collective-bargaining agreement, it is unnecessary to consider the issue of a respondent's alleged good-faith doubt of the union's majority status. *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981); *North Bros. Ford*, 220 NLRB 1021, 1022 (1975). We also agree with the judge that the Board's decision in *Bickerstaff Clay Products*, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board addressed the respondent's good-faith doubt defense even though the Board found that the parties had reached a binding agreement, did not overrule the precedent followed in Belcon.

In agreeing with his colleagues that it is unnecessary to consider the issue of good-faith doubt, Member Oviatt relies on the fact that the Respondent not only failed to withdraw its offer prior to the Union's acceptance but that it did not immediately communicate to the Union its ''good-faith doubt'' that the Union had lost its majority status. He notes parenthetically that to allow a proposal to remain on the bargaining table after the Respondent has a good-faith doubt as to the Union's majority status may be tantamount to bargaining with a minority union–-and thus could leave the Respondent vulnerable to an 8(a)(2) charge.

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.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully withdraw recognition from, or refuse to bargain with, Shopmen's Local Union No. 501 a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL–CIO) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of our Hudson, Massachusetts facility, but excluding all office clerical employees, guards, and supervisors as defined in the Act (except working foremen).

WE WILL NOT fail and refuse to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

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 of the above-named Union, put in writing, sign, and put into effect, retroactively to November 27, 1988, the collective-bargaining agreement which the Union accepted that date.

WE WILL make whole, with interest, all employees to whom the November 27, 1988 collective-bargaining agreement applies, for all lost wages and other benefits they may have suffered as a result of our failure to sign an agreement containing our November 17, 1988 proposals and from our withdrawal of recognition from the Union on November 28, 1988.

AUCIELLO IRON WORKS, INC.

Avrom J. Herbster, Esq., for the General Counsel.
John D. O'Reilly III, Esq. (O'Reilly & Grosso), of Framingham, Massachusetts, for the Respondent.

Robert Thomas, General Organizer, of Smithfield, Rhode Island, for the Charging Party.

DECISION

NORMAN ZANKEL, Administrative Law Judge. This case was tried before me on June 21 and August 8 and 9, 1989, at Boston, Massachusetts, on a complaint and notice of hearing issued on January 20, 1989, by Michael F. Walsh, Esq., Acting Regional Director for Region 1 of the National Labor Relations Board (the Board).

The complaint, based on a charge and an amended charge filed on December 1, 1981[1] and January 17, 1989, respectively, alleges that since on or about November 28 the Employer refused to bargain with the Union as exclusive collective-bargaining representative of an appropriate unit of employees,[2] in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), by refusing to execute a written collective-bargaining agreement and by withdrawing recognition from the Union as bargaining agent for those unit employees.

The Employer filed a timely answer to the complaint. The answer admitted certain allegations, but denied the Employer committed the alleged unfair labor practice.

All parties were given full opportunity to produce relevant evidence through witnesses and documents; to examine and cross-examine witnesses; and to make oral arguments. Posthearing briefs were timely received from counsel for the General Counsel and counsel for the Employer.

Based on my observation of the conduct and demeanor of the witnesses, and the record as a whole, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is uncontested. The Employer, a corporation engaged in business as a metal fabricator, has had an office and place of business in Housing, Massachusetts, at all material times. During the calendar year immediately before complaint issuance, the Employer sold and shipped products, goods, and materials exceeding $50,000 in value from its Housing facility directly to points outside of Massachusetts; and, in the same period and at the Housing facility, purchased and received products, goods and materials exceeding $50, 000 in value directly from points outside of Massachusetts.

The Employer admits, the record reflects, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

All parties agree, the record reflects, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates hereafter are in 1988, unless otherwise indicated.

[2] I granted General Counsel's oral motion at the hearing to amend the complaint so the unit description would read: ''All production and maintenance employees (as defined in Section 1 of the [parties'] 1985–1988 contract) employed by the Employer at its Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act.''

All parties agree this unit is appropriate for collective-bargaining. I so find.

II. THE ISSUE

Did the September-November 1988 collective-bargaining negotiations between the Employer and Union result in an agreement to which they were bound and which precluded the Employer from lawfully withdrawing recognition from the Union based on an assertion of good-faith doubt of the Union's majority status?

I shall find a collective-bargaining agreement between the Employer and Union came into existence on November 27, 1988, and that, consequently, the Employer's admitted November 28 withdrawal of recognition from the Union was unlawful.

I find the stated question encompasses the principal, and dispositive, issue of the instant case. As noted above, the Employer admitted it withdrew recognition from the Union. But the Employer asserts that action was based on objective considerations which caused it to have a good-faith doubt of the Union's majority status. Both counsel for the General Counsel and for the Employer vigorously, and fully, litigated the sufficiency and timeliness of the withdrawal of recognition.

In view of my disposition of the principal issue, I conclude no useful purpose would be served by a discussion and analysis of the good-faith doubt issue. See *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981), where the Board left undisturbed Judge Myatt's explicit conclusion it is unnecessary to deal with that issue in situations where the facts establish a union's acceptance of collective-bargaining proposals before an employer withdraws its offer.[3]

III. THE ALLEGED UNFAIR LABOR PRACTICE[4]

A. *Background*

The Board certified the Union as the exclusive collective-bargaining representative of the employees within the appropriate unit described in footnote 2, above, in 1977. Since that time, the Union and Employer negotiated four successive collective-bargaining agreements which applied to those unit employees. The most recent of those contracts was due to, and did, expire on September 25, 1988.

Generally, the relationship between the contracting parties was uneventful through the years. The Union conducted no strikes and pursued no grievances or arbitrations until the instant dispute.

[3] I am mindful that *Bickerstaff Clay Products, Co.*, 286 NLRB 295 (1987), enf. denied 871 F.2d 980 (11th Cir. 1989), in which the Board held an acceptance which preceded offer withdrawal established a binding agreement, contains Judge Robertson's and the Board's treatment of the good-faith doubt issue. No reason for such discussion in *Bickerstaff* is apparent.

Inasmuch as the Board, in *Bickerstaff*, did not overrule well-established precedent holding irrelevant an employer's good-faith doubt of union majority status once agreement on a contract's substantive terms has been reached (*North Bros. Ford*, 220 NLRB 1021, 1022 (1975); *Utility Tree Service*, 215 NLRB 806, 807 (1974)), I consider it proper, in all the instant circumstances, to eliminate the good-faith doubt issue from my further consideration.

[4] The operative facts are substantially undisputed. Where material variations exist, they shall be resolved. My description of facts in this, section III of the decision, is a composite of undisputed testimony, documentary evidence and stipulations. Not all evidence, or argument based on it, is reported. Omitted matter is deemed irrelevant, superfluous or of no probative value to the principal issue.

B. *Scenario of the Present Dispute*

The Employer and Union began negotiations for a new collective-bargaining agreement on September 21. Robert Thomas, International Representative/General Organizer; Local Business Agent (then Local president), David Mortimer; and Steward Joseph Parenti comprised the Union's negotiating team. Attorney John D. O'Reilly III; Gerald C. Sauer, the Employer's controller; and Plant Supervisor Manlio DeGrandis were the Employer's team. The Union presented its written proposal for a new contract. Some agreements, characterized as preliminary, were reached but major substantive subjects remained unresolved.

The next bargaining session occurred on September 30. The Employer presented its written contract proposals. Extensive discussion ensued regarding wages, medical insurance premiums, and pension plan. There is disagreement among Thomas, Mortimer, and Sauer as to whether or not the negotiators reached total agreement on a new contract's terms during this session. This disagreement need not be resolved. I find it irrelevant because it is undisputed that a vote among the union membership was taken immediately following the bargaining session that day, and whatever was presented to them had been rejected.

The negotiating teams again met on October 4 or 5.[5] They reviewed their respective positions on the contract issues. At one point, Thomas met privately with Attorney O'Reilly. Thomas testified (without contradiction) he suggested that if the Employer, in effect, would adopt a union contract proposal as its own, there would be no need for the negotiating committee to submit the proposal to the union membership for a vote. O'Reilly did not accede to this suggestion.

Another negotiating session was held on October 13. The Employer modified its proposal on health insurance premiums to address the apparent reason for membership rejection on September 30, but also reduced its wage proposal. The union negotiators said they could not agree to these proposals but nonetheless would submit them to a membership vote, at a meeting already scheduled for that evening, without a recommendation for acceptance.

At that evening's union meeting, the union membership voted to reject the Employer's October 13 proposal, and voted to strike. A strike began on October 14.

On October 18, the negotiating teams met in the presence of a federal mediator. The Union made another proposal for medical insurance premiums and wages. The Employer's bargaining team made no commitment concerning those proposals. The parties met again on October 26, but no progress was made toward agreement on a new contract.

On November 17, the negotiating teams met. The mediator was present. The Employer presented numerous proposals. Oral proposals were made on medical insurance premiums, wages, and overtime. Written proposals were made which related to grievance arbitration, supervisory performance of bargaining unit work, and management rights. The written proposals contained extensive changes in provisions of the recently expired collective-bargaining agreement.

The union team requested a caucus to study the proposals. Upon examination, the team decided more time was needed. They asked for adjournment of that bargaining session. The mediator advised the Employer's team of this request. Sauer testified the union negotiators ''stormed by'' the Employer's team. Thomas and Sauer agree the Union did not expressly reject the Employer's November 17 proposals; and Sauer, during his cross-examination, acknowledged that the Employer had not removed those proposals from the bargaining table on that date.

On or about November 20, Thomas telephoned Attorney O'Reilly. Thomas asked whether there would be any advantage to sitting down and negotiating to arrive at an agreement. O'Reilly said he did not envision any change in the Employer's position. There is no evidence to show either that Thomas said the Union rejected the Employer's November 17 proposals or that O'Reilly said those proposals had been withdrawn. Sauer testified O'Reilly reported this telephone conversation to him but Sauer, even then, acknowledged no instructions were given to O'Reilly to withdraw the proposals.

After his November 20 conversation with O'Reilly, Thomas telephoned Mortimer and instructed him to contact the employees, inform them what occurred, and recommend they accept the November 17 proposals and end the strike. Mortimer complied. Mortimer testified he reached 8–10 employees.

On November 26, Mortimer reported to Thomas that the employees he polled agreed to accept the November 17 proposals and return to work.

On November 27, Thomas sent a telegram, signed with Mortimer's name, to Auciello, as follows:

> After careful consideration the proposed contract submitted by your company on November 17 1988 to Local Union 501 has(sic) unanimously ratified by our negotiating committee. The strike at your plant has concluded as of this date and employees have been advised to return to work on Monday November 28, 1988.

Auciello received the Union's telegram on November 27. The next day, O'Reilly telegraphed the Union, stating:

> Employer position in response to your notice of November 27 is as follows: 1. Employer offer of November 17 was rejected by Local 501 and is no longer open for unilateral acceptance. 2. In any event your claimed ratification [sic] limited to negotiating [sic] committee and excluding rank and file membership is insufficient. Employer now has reason to believe that Local 501 no longer represents a majority of employees in the appropriate unit and therefore disavows any obligation to carry on further negotiations.

The strike ended as stated in the Union's November 27 telegram, but the Employer has remained steadfast in its refusal to sign a collective-bargaining agreement containing the terms of the Employer's November 17 proposals and in its withdrawal of recognition from the Union.

C. *Analysis*

(1) The ratification issue

The Employer, in part, contends that ratification of negotiated contract terms by the applicable bargaining unit employees was a precondition to the formation of a collective-

[5] Thomas testified the meeting was on October 4. Sauer claimed it was on the following day. There is no need to resolve this difference.

bargaining agreement with the Union. The General Counsel argues that the instant circumstances show ratification was not a requirement for an enforceable agreement to come into existence.[6]

The evidence regarding past practice of ratification, and what was said and done in that connection during the 1988 negotiations is critical to resolution of this case. Thomas and Mortimer testified with respect to ratification practices with the Employer. Ralph Auciello, Employer's vice president for production, and Sauer, testified as to the Employer's perspective of ratification. I credit the testimony of each of these witnesses, especially respecting ratification. Each of them was direct, forthright, and candid. The relevant evidence regarding ratification follows.

It is undisputed that neither the Ironworkers' International constitution nor the bylaws of the Local Union contains any provision regarding ratification of collective-bargaining agreements. Mortimer acknowledged the terms agreed-to at the bargaining table in each of the three previously-negotiated contracts were submitted by the Union's negotiating committee to the membership for a vote. He said the agreements were ratified ''as a matter of course.''

Thomas explicitly denied the union negotiators ever told their Employer counterparts that membership ratification was needed ''before there would be a final contract'' during the 1988 negotiations (Tr. 26). He was unchallenged in that connection.

Auciello initially testified, in general terms, that the ''Union committee always stated that they must have a ratification of the men'' (Tr. 162). During cross-examination, however, Auciello explained that he had not personally participated in the negotiations, but relied on Sauer for reports. Then, Auciello conceded that Sauer did not inform him that the union negotiators said that ratification was needed before the parties had an agreement. Instead, Auciello testified he had been advised the union committee was going to make recommendations to the membership for a vote, and that was consistent with past practice.

Sauer, referring to the negotiations conducted in years before 1988, was asked and answered questions as follows, during his direct examination:

> Q. Did they [the Union] reach agreement with your committee across the table and then express a need to have that agreement ratified?
>
> A. That is correct.
>
> Q. And did they, in fact, go through the ratification process in each of these negotiations?
>
> A. Yes, they had . . . .
>
> Q. And did they, subsequent to the ratification process, report back to management the results of the ratification vote?
>
> A. That is true. (Tr. 392).

Regarding the 1988 negotiations, Sauer (during his direct examination) testified that ''after we reached an agreement with the Union . . . Mr. Thomas said that they had to go back and have the agreements that we have made across the table ratified by the rank and file'' (Tr. 393). However, during Sauer's cross-examination, he conceded that Thomas ''did not say if there wasn't ratification there would be no contract'' (Tr. 420).

In sum, I find the ratification evidence shows:

a. No written mandate existed which required proposed collective-bargaining agreements to be submitted to union membership votes before those agreements could become binding;

b. No explicit discussions occurred between the Employer and Union during the 1988 negotiations by which the Union told the Employer that membership ratification was needed to establish a contract;[7]

c. The evidence that the Union submitted contract terms to membership votes in negotiations before 1988, and during the 1988 negotiations, is insufficient basis to conclude that the bargaining history shows ratification was a precondition to reaching a binding agreement in the totality of circumstances in this case.

Some of that evidence was presented by Auciello as pure hearsay and in generalized terms. Hence, I find it unpersuasive.

Sauer's testimony that union representatives said they would submit contract terms to membership ratification in years before 1988 is the strongest evidence supporting the Employer's contention. This is especially true when viewed in the light of the fact (as has been shown) that at least two membership votes were taken in 1988. Nonetheless, I conclude the mere submission to membership votes falls short of making ratification a requirement of the formation of a binding agreement.

The Board has consistently held that where there was no evidence of an explicit agreement between the negotiating parties about union ratification, the formality of such a vote by the union membership is not required as the foundation of a binding collective-bargaining agreement. *Newtown Corp.*, 280 NLRB 350 (1986); *Consumat Systems*, 273 NLRB 410, 413 (1984); *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1978); *C & W Lektra Bat Co.*, 209 NLRB 1038, 1039 (1974), enfd. 513 F.2d 200 (6th Cir. 1975).

In *Childers Products Co.*, 276 NLRB 709 (1985), more compelling circumstances existed for finding ratification a requirement of contract formation than in the case before me. The parties, in Childers, signed a memorandum of agreement containing the terms agreed-to by the negotiators. That memorandum ended with the line ''THIS AGREEMENT SUBJECT TO RATIFICATION,'' although no one discussed the meaning of the quoted sentence and there was no discussion of ratification during the negotiations. No ratification vote was taken by the union membership.

The Board left undisturbed Judge Nations' observation that ''The condition precedent of 'ratification' means ratification as defined by the Union in its internal procedures. There was no understanding established by the parties during negotiations concerning what the Union meant by ratification'' (276 NLRB at 711). The Board affirmed the conclusion that those circumstances supported a finding that the method of ratification was within the union's exclusive control and sustained

[6] The Employer also urges that, even if ratification were not needed to establish a contract, the offer which the Union purportedly accepted had been withdrawn prior to acceptance. This argument will be addressed further below.

[7] Indeed, I conclude Thomas' October 4 or 5 solicitation of an Employer proposal which would not be subject to union membership vote tends to support the view that the Employer had been told implicitly that ratification was not a condition precedent to a binding agreement.

the finding that a vote of the union's executive committee satisfied the ratification issue in *Childers*.[8]

I find the instant case analogous to *Childers*. In both cases, the parties had no explicit discussion concerning the ratification process; no ratification procedure was mandated by the union constitution or bylaws;[9] no formal ratification vote was taken by the members on the offer which the union accepted;[10] and the agreement was accepted by a vote of some body of the union (here, the Union's negotiating committee; in *Childers*, the executive committee). I conclude application of the decisional precedent cited above militates in favor of finding the instant facts show ratification by the union members was not required to form a binding collective-bargaining agreement in the instant case.

Finally, I conclude the Employer's reliance on the Union's submission of contract terms to membership votes in negotiating years before 1988, and even during the 1988 negotiations, as establishing such ratification votes a precondition to contract formation, is misplaced. Even union negotiator's remarks regarding intention to submit contract terms to a vote by which employer's negotiators ''felt'' or ''understood'' ratification was a precondition to a binding agreement, were insufficient to make it so (*Seneca Environmental Products*, 243 NLRB 624, 627 (1979).

Based upon all the above, I find that the evidence in the instant case, when assessed in light of the applicable precedent,[11] does not show that ratification by the Union's membership was a prerequisite to the formation of a collective-bargaining agreement between the Employer and Union. I therefore find, in the circumstances of the instant case, a unanimous vote of the Union's negotiating committee could effectively accept a pending offer for a collective-bargaining agreement.

These findings, however, do not end the inquiry. It is equally important to determine whether or not the Employer's November 17 proposals remained in existence as a contract offer when the Union signified its unanimous ''ratification.''

(2) Withdrawal of recognition

There is no dispute that the Employer's extensive oral and written proposals of November 17 effectively comprised a complete contract. However, the Employer, contrary to the General Counsel and Union, argues its proposals were rejected when the Union team ''stormed'' out from the November 17 negotiations,[12] and there was no offer pending that the Union could have accepted[13] by the Union on November 27.

Under Board law, the formation of collective-bargaining agreements is not necessarily controlled by technical rules of contract law. *Ben Franklin National Bank*, 278 NLRB 986 fn. 2 (1986). The Board's policy regarding offer and acceptance of collective-bargaining agreement terms was summarized by Judge Harmatz in *Pepsi Cola Bottling Co.*, 251 NLRB 187, 189 (1980), enfd. 659 F.2d 87, 90 (8th Cir. 1981), as follows:

> [A] complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance in toto must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was ex- pressly made contingent at a time prior to acceptance.

The Eighth Circuit's enforcement decision approved this policy (see fn. 4, the Court's decision), and restated it this way:

> Under this policy (of the National Labor Relations Board), an offer, once made, will remain on the table unless explicitly withdrawn by the offeror or unless circumstances arise which would lead the parties to reasonably believe that the offer had been withdrawn.

Clearly, there is neither evidence nor contention that the instant Employer expressly withdrew its November 17 contract proposals any time before the Union's November 27 acceptance telegram. Thus, the focus turns to an examination of whether or not the evidence supports a conclusion that some event occurred which ''defeased'' the proposals, or from which the parties could ''reasonably believe'' they had been withdrawn. I conclude the record does not contain sufficient evidence from which it can be found that the November 17 proposals were no longer open for acceptance on November 27.

As noted above, the Employer theorizes there was no offer open for acceptance. The only evidence to support such a theory shows the union team ''stormed'' away from the November 17 bargaining session. However, there is no evidence that any member of the union team made any contemporaneous remarks, during the team's angry exit from that session, which could be interpreted as a rejection of the Employer's proposals.

Moreover, I find the contents of Attorney O'Reilly's conversation with Thomas on or about November 20 illuminating, and contrary to the Employer's position. No evidence was presented to show either that there was an express withdrawal of the November 17 proposals during that phone discussion or that anything was said which indicates either of the parties believed the Union's November 17 actions constituted circumstances which formed a foundation of a reasonably based conclusion the proposals had been withdrawn.

[8] The principle of union self-determination of sufficiency of ratification is well-established. See *Zayre Department Stores*, 289 NLRB 1183 (1988); *M & M Oldsmobile*, 156 NLRB 903, 905 (1966); *North Country Motors*, 146 NLRB 671 (1964).

[9] This observation is unaffected by the fact that the *Childers* union constitution contained language regarding ratification, while no ratification language whatsoever appears in the instant case. The *Childers* language clearly is discretionary.

[10] Arguably, Mortimer's polling of members during the week before acceptance can comprise a ratification vote. If so, the instant Employer is divested of its argument that the membership did not vote to ratify a contract.

[11] Apparently believing in the efficacy of its position, the Employer has cited no authority to support its contentions regarding ratification. In addition to studying the cases I have cited above, I have examined cases which might support the Employer's position contained in an exhaustive analysis of this subject by Board Chairman Stephens' concurring opinion in *Sacramento Union*, 296 NLRB 477 (1989).

[12] I recognize the Employer seeks to justify its withdrawal of recognition by asserting its good-faith doubt-of-majority argument. For reasons discussed above, I find it unnecessary to deal with this argument in this analysis.

[13] That the language of the Union's November 27 telegram constitutes an acceptance is unchallenged.

If the Employer believed its proposals had been rejected, I find it reasonable to expect something to that effect would have been said during the Thomas-O'Reilly phone conversation.

Viewing the evidence in a light most favorable to the Employer, it is arguable that the Union's November 17 actions reasonably give rise to a conclusion the Employer's proposals had been rejected. Such conclusion, however, would not compel adoption of the Employer's position.

There is nothing in the Board's or court's *Pepsi Cola* decision which licenses or contemplates the kind of unilateral judgment the Employer espouses in this case. As I understand the *Pepsi Cola* language, the special circumstances which might permit a determination that contract offers have been withdrawn are those from which *both parties* to negotiations could reasonably draw the same conclusion. No party has cited, nor has my independent research uncovered, any cases which disengage parties from the statutory collective-bargaining scheme simply upon their separate opinions and surmise of the effects of the other's conduct.

Moreover, even assuming the Employer unilaterally could presume its proposals had been rejected, and that presumption were correct, it is clear that the initial rejection could be revoked at any time before an effective withdrawal. This is so because federal labor policy and principles encourage the formation of collective-bargaining agreements as a stabilizing factor in labor-management relations (*Pepsi Cola*, supra; *Penasquitos Gardens*, 236 NLRB 994, 995 (1978), enfd. 603 F.2d 225 (9th Cir. 1979).

In conclusion, I find the Employer's November 17 proposals were open for acceptance on November 27 and the Union's November 27 telegram constituted their acceptance before withdrawal so as to create a binding collective-bargaining agreement between those parties. Accordingly, I also find the Employer's November 28 withdrawal of recognition untimely, as it occurred during the term of the contract which became effective the previous day (*Consumat Systems*, supra, fn. 4 and cases cited therein; *Belcon, Inc.*, supra).

On the basis of the above factual findings and upon the entire record in the case, I make the following

CONCLUSIONS OF LAW

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

2. Shopmen's Local Union No. 501, a/w International Association of Bridge, Structural and Ornamental Iron Workers (AFL–CIO) is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including working foremen, engaged in the fabrication of iron, steel, metal, and other products, or in maintenance work in or about the vicinity of the Employer's Hudson, Massachusetts facility, but excluding all office clerical employees, guards and supervisors as defined in the Act (except working foremen) constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.[14]

4. Ratification, by the Union's general membership, of terms for collective-bargaining agreements between the Employer and Union involved in this case is not required to form a binding collective-bargaining agreement.

5. The Employer's November 17, 1988 proposals for a collective-bargaining agreement remained pending for acceptance on November 27.

6. The Union's November 27, 1988 telegram constituted acceptance of the Employer's November 17 proposals and created a collective-bargaining agreement which the parties are bound to sign.

7. The Employer's November 28, 1988 withdrawal of recognition from the Union was untimely.

8. By failing to sign a collective-bargaining agreement containing the terms of the November 17 proposals, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

9. By having withdrawn recognition from the Union on November 27, 1988, the Employer engaged in, and is engaging in, a refusal to bargain in violation of Sections 8(a)(5) and (1) of the Act.

10. The unfair labor practices identified above in Conclusions of Law 8 and 9 affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The unfair labor practices found require that the Employer be ordered to cease and desist from continuing them and to take certain affirmative action designed to effectuate the policies of the Act.

To rectify the Employer's unlawful failure to sign and implement a collective-bargaining agreement, and its untimely withdrawal of recognition, I find it necessary to order the Employer, upon the Union's request, to reduce to writing, sign, and retroactively implement the collective-bargaining agreement which I have found was created on November 27, 1988.

Also, I will order the Employer to make whole all employees to whom the aforesaid collective-bargaining agreement applies for any loss of wages and other benefits suffered as a result of the Employer's failure to sign and give timely effect to that agreement. Those wages and benefits, if any, shall be computed in accordance with the Board's formula in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest computed under *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, the order will require the Employer to refrain from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights which the Act guarantees.

Finally, the Employer will be ordered to post an appropriate notice to employees.

On the above findings of fact, conclusions of law, and the entire record, I issue the following recommended[15]

ORDER

The Respondent, Auciello Iron Works, Inc., Hudson, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[14] This unit description conforms to the parties' agreement (see fn. 2 above).

[15] 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.

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining representative of employees in the bargaining unit found appropriate.

(b) Failing and refusing to sign and implement the collective-bargaining agreement which has been found to have been created on November 27, 1988.

(c) 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.

(a) On the Union's request, reduce to writing, sign, and implement retroactively to November 27, 1988, the collective-bargaining agreement which the Union accepted on that date.

(b) Make whole all employees to whom the November 27, 1988 collective-bargaining agreement applies, including such employees who may have left the payroll since that date, for any loss of wages or other benefits suffered by reason of the Employer's failure to sign that collective-bargaining agreement and its withdrawal of recognition from the Union. Monies due under this make-whole provision are to be computed according to the formulas described in the remedy section above.

(c) Preserve and, upon 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 and relevant to determine the amounts owing under the terms of this Order.

(d) Post at its Hudson, Massachusetts facility copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 1, 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 the Respondent has taken to comply.

[16] 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.''