

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENZ-RYAN PLUMBING AND HEATING, INC.

and

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 10

Case 18-CA-18763

**ACTING GENERAL COUNSEL'S MEMORANDUM IN SUPPORT OF
JOINT MOTION TO WITHDRAW EXCEPTIONS AND CROSS-EXCEPTIONS
AND VACATE ADMINISTRATIVE LAW JUDGE'S DECISION**

I. Procedural Background

On February 11, 2009, Administrative Law Judge Arthur J. Amchan issued a Decision in this case (JD-09-09). Counsel for the Acting General Counsel filed exceptions on March 10, 2009. Sheet Metal Workers International Association, Local No. 10 (the Union and Charging Party), filed exceptions on March 11, 2009. Genz-Ryan Plumbing And Heating, Inc. (Respondent) filed cross-exceptions on March 25, 2009.

On December 10, 2010¹ Counsel for the Acting General Counsel submitted a Joint Motion to Withdraw Exceptions and Cross-Exceptions and Vacate Administrative Law Judge's Decision based on a non-Board settlement agreement that resolves the issues raised in this case as well as other litigation pending between them and the

¹ All dates hereafter are in 2010.

trustees of several employee benefit funds. The Joint Motion requested remand to the Regional Director for Region 18 for further action consistent with the parties' settlement agreement. Upon request of the Executive Secretary's office dated December 10, this memorandum is filed in support of the non-Board settlement agreement, a copy of which (in three parts) is attached.

II. Unfair Labor Practice and Related Litigation

The principal issue raised by the complaint is whether Respondent was bound to the terms of a collective bargaining agreement that included health and pension benefits administered through a joint labor-management trust agreement. After Respondent declared itself free of the contract obligation, it reduced wages, and implemented an independent health plan and a 401(k) plan. The ALJ rejected Counsel for the Acting General Counsel's complaint in major part, finding only two allegations sustained – transfer of unit work of two employees out of the unit, and implementation of a 401(k) plan slightly different from the one proposed and discussed at the bargaining table. Counsel for the Acting General Counsel considers backpay uncertain on either of those findings, and in any event has not investigated the amount that might be in issue.

Apart from the unfair labor practice charges, the trust funds that administered the benefit plans filed a suit in federal court seeking to bind Respondent to the plans and to collect delinquencies, basically cumulative of Counsel for the Acting General Counsel's unilateral change theory. On August 5, Respondent, the Charging Party, and the trust funds reached an agreement in principle ("Agreement," attached), which was finalized

on October 25 (“Settlement Agreement and Mutual Release” and “Allocation Agreement,” attached). Under this agreement, the Charging Party agreed to request withdrawal of this ULP charge and disclaim interest in further representation of the unit; Respondent agreed to pay \$77,500 to the NLRB for distribution to unit employees as backpay and to pay at least \$697,500 to the trust funds; and the trust funds agreed to dismiss the federal lawsuit.

III. The Parties’ Non-Board Settlement is Reasonable

[I]n evaluating such [non-Board] settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Independent Stave Co., 287 NLRB 740, 743 (1987)

Regarding the first factor, the Charging Party and the Respondent, represented by competent counsel, have clearly agreed. The opinions of individual unit employees have not been solicited, and at this juncture it would be impractical to do so. As noted, their bargaining representative has agreed to the settlement on their behalf. Counsel for the Acting General Counsel supports approval of the settlement agreement.

Second, Counsel for the General Counsel believes the settlement is reasonable, particularly in light of the nature of the violations alleged, the risks inherent in litigation,

and the stage of the litigation. Although we can speculate about the amount of backpay that might be at issue if the complaint had been sustained, the Administrative Law Judge on the contrary rejected the main theory of the complaint and the basis for virtually all of the backpay originally sought. Backpay under the ALJ's opinion is limited to the likely speculative value of unilateral elimination of two unit jobs and a profit sharing component of a 401(k) plan.

Although the Union's disclaimer of interest is not contemplated either by the complaint or the ALJD, we believe it, too, is reasonable in light of the highly uncertain risks of further litigation, the length of time that has passed since the alleged violations occurred, and the pending decertification petition. The Charging Party is in the best position to evaluate the possibility of rebuilding support in the unit and agreed to the disclaimer.

Third, there is no indication of fraud or duress. On the contrary, all parties were represented by competent counsel, and the settlement was supervised by federal Special Master Jonathan C. Lebedoff, a former United States Magistrate Judge.

Finally, Respondent has not engaged in any history of other violations of the Act or of any other settlement agreements. The only other charges filed against it in this Region were filed subsequent to the case in issue, and all allegations found meritorious in the other cases were, as a technical matter, added by amendment to the present case and the specific charges in which those allegations were first raised were withdrawn.² In other words, the only meritorious unfair labor practice allegations ever

² Case 18-CA-18814, filed July 31, 2008; Case 18-CA-18833, filed August 25, 2008; Case 18-CA-19397, filed May 6, 2010; and Case 18-CA-19398, filed May 6, 2010.

made against Respondent known in this Region are resolved by this settlement agreement.

Accordingly, Counsel for the Acting General Counsel respectfully requests that the Joint Motion to Withdraw Exceptions and Cross-Exceptions and Vacate Administrative Law Judge's Decision should be granted, and the case should be remanded to the Regional Director for Region 18 for further proceedings consistent with the parties' settlement agreement.

Dated at Minneapolis, Minnesota, this 14th day of December, 2010.

/s/ Joseph H. Bornong

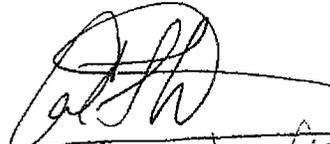
Joseph H. Bornong
Counsel for the Acting General Counsel
National Labor Relations Board
330 South Second Avenue, Suite 790
Minneapolis, Minnesota 55401

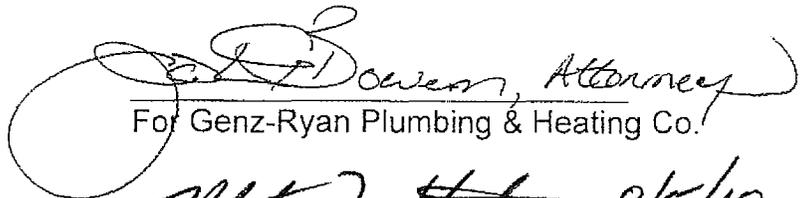
AGREEMENT

On August 5, 2010, with the assistance of Special Master Jonathan G. Lebedoff, the parties made the following agreement:

1. Sheet Metal Workers' Local #10 will waive its bargaining rights with respect to Genz-Ryan's employees.
2. Genz-Ryan will execute a Confession of Judgment in the amount of \$1,300,000.00 with a 30 day cure period. The Confession of Judgment will not be filed unless Genz-Ryan does not satisfy the following obligations:
 - A. Payment of \$75,000.00 to the Fringe Benefit Funds, the alleged discriminatees in the NLRB case, and the Union within 30 days.
 - B. Timely payment of \$700,000.00 over 48 months in equal payments of \$14,583.34 to the Fringe Benefit Funds, the alleged discriminatees in the NLRB case, and the Union.
3. The terms of the settlement are not confidential.
4. The parties intend to enter into a written settlement agreement with full release excluding withdrawal liability, if any.
5. Dismissal with prejudice of litigation and Board proceedings subject to NLRB disbursement of funds to the alleged discriminates.
6. Any disputes over the settlement terms shall be resolved by Special Master Jonathan G. Lebedoff by way of binding arbitration.

Date: Aug. 5, 2010


For fringe benefit funds
Carl S. Wasniak, Attorney


For Genz-Ryan Plumbing & Heating Co.


1 FOR SHEET METAL WORKERS LOCAL #10

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE ("Agreement") is made by and between the Sheet Metal Workers International Association, Local No. 10 ("Union"), the Trustees of the Sheet Metal #10 Benefit Fund, the Trustees of the Sheet Metal Workers' Local 10 Supplemental Retirement Fund, the Trustees of the Sheet Metal Workers' Local 10 Pension Plan the Trustees of the Sheet Metal Workers' National Pension Fund, the Trustees of the Metropolitan Sheet Metal Journeymen and Apprenticeship Training Trust Fund, the Trustees of the Florence Carlough Scholarship Fund, the Trustees of the International Training Institute for the Sheet Metal and Air Conditioning Industry, and the Trustees of the Sheet Metal Local 10 Control Board Trust Fund (collectively "Trustees") and Genz-Ryan Plumbing and Heating Co. ("Genz-Ryan"). The Union Trustees and Genz-Ryan shall collectively be referred to as the "Parties."

WHEREAS, the Trustees initiated litigation in the U.S. District Court for the District of Minnesota, Civil File No. 08-4752 ("Federal Court Action") asserting claims against Genz-Ryan for failure to make certain fringe benefit contributions as allegedly required by a Collective Bargaining Agreement;

WHEREAS, Genz-Ryan denied and asserted defenses to the Trustees' claims;

WHEREAS, the Union was a Charging Party/Labor Organization in proceedings against Genz-Ryan as Respondent/Employer before the National Labor Relations Board, Case No. 18-CA-18763 ("NLRB Case");

WHEREAS, Genz-Ryan denied and asserted defenses to the allegations made in the NLRB Case;

WHEREAS, on August 5, 2010, the Parties participated in a Federal Court Action mediation before Special Master Jonathan G. Lebedoff, at which time duly authorized representatives of the National Labor Relations Board were apprised of the agreements reached by the parties and set forth herein without objection, and

WHEREAS, the Parties desire to fully and finally, mutually resolve, compromise and settle all claims and defenses that have been brought or could have been brought as between them without further cost or expense to the Parties.

NOW, THEREFORE, in consideration of the above recitals and the mutual covenants, conditions, promises and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. **Payment.** Genz-Ryan shall make payment to the Trustees, the Union, and alleged affected individual employees as directed by the National Labor Relations Board in the amount of One Million Three-Hundred Thousand and no/100 (\$1,300,000 00) Dollars, which amount can be reduced to Seven Hundred Seventy-Five Thousand and no/100 (\$775,000.00) Dollars as set forth below. Of this amount, Seventy-Five Thousand and no/100 (\$75,000.00) Dollars shall be paid by October 15, 2010. The remaining payments totaling Seven Hundred Thousand and no/100 (\$700,000.00) Dollars, without interest, shall be made in Forty-Eight (48) monthly payments of Fourteen Thousand Five Hundred Eighty Three and 34/100 (\$14,583.34) Dollars, with the first such monthly payment being due on or before November 15, 2010, and each succeeding monthly payment being due on or before the 15th day of each

succeeding month. There shall be no penalty for early payment of all remaining outstanding amounts owed under this Agreement.

All payments by Genz-Ryan required by this Agreement shall be made to the Trustees through their attorneys at the following address.

Carl S. Wosmek, Esq.
Amy L. Court, Esq.
McGrann Shea Carnival Straughn & Lamb, Chartered
800 Nicollet Mall, Ste. 2600
Minneapolis, MN 55402-7035

2. **Confession of Judgment**. As a further inducement to the Trustees and the Union to enter into this Agreement, Genz-Ryan agrees to enter into a Confession of Judgment pursuant to which the Trustees, Union, and the National Labor Relations Board shall have the right to enter a judgment by confession against Genz-Ryan in the event of a default of this Agreement in the amount and as set forth in such Confession of Judgment, the form of which is attached hereto as "Exhibit A".

3. **Notice of Default**. In the event Genz-Ryan fails to make the initial payment of \$75,000 or any of the Forty-Eight monthly payments referenced in paragraph 1 hereof, Genz-Ryan shall, after being provided written notice of their default, have Thirty (30) days in which to cure or correct said default. If, at the expiration of that time period, Genz-Ryan has not cured the noticed default, the Trustees, Union, and national Labor Relations Board shall be entitled to exercise all available rights under the Confession of Judgment against Genz-Ryan as permitted in the Confession of Judgment referenced herein. Notice shall become effective upon mailing to the addresses provided herein. The Trustees' and/or Union's and/or National Labor Relations Board's refusal or choice not to exercise their rights hereunder in the event of

a default by Genz-Ryan shall not be deemed a waiver to exercise their right in the event of any future breach.

4. **Notice Provision.** All notices required to be given under this Agreement shall be made by First-Class U.S. Mail to the addresses set forth below:

Genz-Ryan

Jon Ryan, Secretary-Treasurer
Bob Ryan, Vice President
Genz Ryan Plumbing & Heating, Inc.
2200 W Hwy 13
Burnsville, MN 55337

with a copy to:

John F. Bowen, Esq.
John F. Bowen, LTD
8400 Normandale Lake Blvd. Ste 920
Minneapolis, MN 55437

Trustees

Carl S. Wosmek, Esq.
Amy L. Court, Esq.
McGrann Shea Carnival Straughn & Lamb, Chartered
800 Nicollet Mall, Ste. 2600
Minneapolis, MN 55402-7035

Union

Brendan D. Cummins, Esq.
Miller O'Brien Cummins, PLLP
One Financial Plaza, Suite 2400
120 South Sixth Street
Minneapolis, MN 55402

5 **Mutual Releases.** The Parties hereby forever mutually release and discharge each other and each parties' respective owners, officers, directors, employees, trustees, agents, insurers, attorneys, representatives, members, successors

and assigns from all claims, whether at law or in equity, that were brought or could have been brought in any legal or administrative proceeding up to the date of this Agreement. However, the parties acknowledge that no issues or claims of withdrawal liability are affected by this Agreement or Dismissal of the Federal Court Action or Dismissal of the NLRB Case.

6. **Dismissal of Federal Court Action.** The Trustees and Genz-Ryan hereby authorize and direct their respective counsel of record to dismiss, with prejudice, all claims in the Federal Court Action, with each party to pay its own costs and attorneys' fees.

7. **Dismissal of NLRB Case.** The Union agrees to withdraw the NLRB Case with prejudice subject to NLRB disbursement of funds to the alleged affected individual employees.

8. **Benefit.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective owners, partners, shareholders, members, governors, officers, directors, trustees, employees, insurers, attorneys, agents, successors and assigns.

9. **No Third Party Rights.** No third-party beneficiary rights are created by the terms of this Settlement Agreement.

10. **No Duress or Coercion.** The Parties hereto acknowledge and agree that they have entered into this Agreement of their own free will and volition following court-directed mediation, and were not coerced to do so nor were they under duress at the time they executed this Agreement.

11 **Counterparts.** This Agreement may be executed in counterparts, which when taken together shall constitute one and the same instrument

12. **Complete Agreement.** By signing this Agreement, the Parties acknowledge that there are no covenants, promises, undertakings or understandings outside the scope of this Agreement, except as specifically set forth herein, and any modification of, or addition to, this Agreement must be in writing and signed by the Parties

13 **Construction.** This Agreement shall not be construed or interpreted for or against any Party hereto because that Party drafted or caused that Party's legal representative to draft any of its provisions. The Parties agree that, to the extent federal law does not apply, this Agreement shall be interpreted as a whole in accordance with the laws of the State of Minnesota and any action relating to this Agreement shall be exclusively venued within the State of Minnesota.

14. **Authority.** The Trustees of the Sheet Metal Local 10 Control Board Trust Fund warrant and represent that they have the authority to enter into and sign this Agreement on behalf of all Funds identified in the applicable Collective Bargaining Agreement; and all individuals signing this Agreement on behalf of the Parties warrant and represent that they are authorized to do so.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year set forth below.

Dated: October 25, 2010

TRUSTEES OF SHEET METAL LOCAL 10
CONTROL BOARD TRUST FUND

By 
Its Trustee

Dated: October 25, 2010

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL NO. 10

By Mark J. Stet

Its BUS. MGR. / PRESIDENT

Dated: October 25, 2010

GENZ-RYAN PLUMBING AND HEATING
COMPANY

By [Signature]

Its [Signature]

By [Signature]

Its [Signature]

450696 DOC

ALLOCATION AGREEMENT

THIS ALLOCATION AGREEMENT is made by and between Sheet Metal Workers International Association, Local No. 10 (“Union”) and the Trustees of the Sheet Metal #10 Benefit Fund, the Trustees of the Sheet Metal Workers’ Local 10 Supplemental Retirement Fund, the Trustees of the Sheet Metal Workers’ Local 10 Pension Plan, the Trustees of the Sheet Metal Workers’ National Pension Fund, the Trustees of the Metropolitan Sheet Metal Journeymen and Apprenticeship Training Trust Fund, the Trustees of the Florence Carlough Scholarship Fund, the Trustees of the International Training Institute for the Sheet Metal and Air Conditioning Industry, and the Trustees of the Sheet Metal Local 10 Control Board Trust Fund (collectively “Trustees”). The Union and Trustees shall collectively be referred to as the “Parties.”

WHEREAS, the Union and Trustees have entered into a Settlement Agreement and Mutual Release with Genz-Ryan Plumbing and Heating Company (“Genz-Ryan”) to resolve litigation in the U.S. District Court for the District of Minnesota, Civil File No. 08-4752 (“Federal Court Action”) and proceedings before the National Labor Relations Board, Case No. 18-CA-18763 (“NLRB Case”).

WHEREAS, the Settlement Agreement and Mutual Release requires the payment of money to the Trustees, the Union, and affected individual employees as directed by the National Labor Relations Board.

WHEREAS, as a condition of entering into a global settlement of their respective cases, and in consideration of the mutual benefits of resolving those cases, the Parties have agreed to an allocation of the settlement payments.

NOW THEREFORE, in consideration of the above recitals and the mutual covenants, conditions, promises and agreements contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The Parties agree to the following allocation of settlement payments: 84% to the Trustees, 10% to the National Labor Relations Board (“NLRB”) for distribution to the affected individual employees, and 6% to the Union. These amounts were determined based on a pro rata calculation of amounts claimed by the Trustees, the NLRB, and the Union. Because the NLRB has requested a six-month payment schedule which is significantly more accelerated than the 48-month payment period established in the Settlement Agreement, the parties have agreed to the following structure of payments.
2. Genz-Ryan’s first payment of \$75,000.00 shall be apportioned as follows: \$65,500 to the Trustees, \$5,000 to the NLRB for distribution to the affected individual employees, and \$4,500 to the Union.
3. Genz-Ryan’s next five (5) monthly payments of \$14,583.34, due on the 15th of each month, shall be distributed as follows: \$14,500 shall be distributed to the NLRB from each monthly payment. The remaining \$83.34 per monthly payment shall be distributed according to the following formula: 94% to the Trustees and 6% to the Union.
4. Thereafter all of Genz-Ryan’s payments shall be distributed according to the following formula: 94% to the Trustees and 6% to the Union.
5. It is understood that the total payment from Genz-Ryan allocated to the NLRB shall be \$77,500 (10% of the total settlement amount of \$775,000), and shall not exceed

that amount. If Genz-Ryan makes timely payments under its Settlement Agreement with the Trustees and the Union, the full amount of \$77,500 is expected to be paid to the NLRB within six months of the first payment date.

6. This Agreement does not impose any obligation or commitment on the part of the Trustees or the Union to pay any money to the NLRB, other than to promptly transmit to the NLRB settlement monies paid by Genz-Ryan according to the allocation percentages and timetable set forth herein. Should Genz-Ryan fail to make its payments timely, it is understood that the NLRB's remedy is against Genz-Ryan, not the Trustees or the Union.
7. It is understood that the total amount of back pay due to affected individual employees for distribution by the NLRB for the time period between Genz-Ryan's unilateral implementation of its "final offer" in June 2008 through the commencement of the unfair labor practice strike in July 2008 shall not exceed \$10,000.00.
8. It is further understood that the NLRB will bear sole responsibility for distribution of back pay directly to affected individual employees from the amount allocated for that purpose by this Agreement, and that the Trustees bear sole responsibility for distribution of money allocated to them by this Agreement to the various Trust Funds.
9. All payments by Genz-Ryan required by this Agreement shall be made to the Trustees through their attorneys at the following address:

Carl S. Wosmek, Esq.
Amy L. Court, Esq.
McGrann Shea Carnival Straughn & Lamb, Chartered
800 Nicollet Mall, Ste. 2600
Minneapolis, MN 55402-7035

The attorneys for the Trustees will deposit said payments in their Lawyers' Trust Account and will be responsible for promptly transmitting the designated amounts received from Genz-Ryan to the NLRB and to the Union according to the terms set forth in this Allocation Agreement.

10. By signing this Agreement, the Parties acknowledge that there are no covenants, promises, undertakings or understandings outside the scope of this Agreement, except as specifically set forth herein, and any modification of, or addition to, this Agreement must be in writing and signed by the Parties.
11. No third-party beneficiary rights are created by the terms of this Allocation Agreement.
12. This Agreement shall not be construed or interpreted for or against any Party hereto because that Party drafted or caused that Party's legal representative to draft any of its provisions. The Parties agree that, to the extent federal law does not apply, this Agreement shall be interpreted as a whole in accordance with the laws of the State of Minnesota, and any action relating to this Agreement shall be exclusively venued within the State of Minnesota.
13. The Trustees of the Sheet Metal Local 10 Control Board Trust Fund warrant and represent that they have the authority to enter into and sign this Agreement on behalf of all Funds identified in the applicable Collective Bargaining Agreement; and all individuals signing this Agreement on behalf of the Parties warrant and represent that they are authorized to do so.

IN WITNESS WHEREOF, this Agreement has been executed as of the day and year set forth below.

Dated: November _____, 2010

**TRUSTEES OF SHEET METAL LOCAL 10
CONTROL BOARD TRUST FUND**

By 

Its Trustee

Dated: November 1, 2010

**SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION, LOCAL
NO. 10**

By 

Its BUSINESS MANAGER/PRESIDENT

CERTIFICATE OF SERVICE

This is to certify that Counsel for the Acting General Counsel's Memorandum in Support of Joint Motion to Withdraw Exceptions and Cross-Exceptions and Vacate Administrative Law Judge's Decision was served by e-mail (PDF attachment) on the following:

John F. Bowen, Attorney
jfbowen@johnfbowen.com
John F. Bowen, Ltd.
8400 Normandale Lake Boulevard
Suite 920
Minneapolis, MN 55437

Brendan D. Cummins, Attorney
bcummins@m-o-c-law.com
2400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402

and by e-filing on the following:

Lester A. Heltzer, Executive Secretary
NLRB, Office of the Executive Secretary

/s/ Joseph H. Bornong

Joseph H. Bornong, Counsel for the
Acting General Counsel
National Labor Relations Board
Region Eighteen