Joseph L. Swilley d/b/a Swilley's Commercial Cleaning *and* Laborers' International Union of North America, AFL–CIO, Local Union No. 1012, affiliated with Federal Public Service Employee District Council 37. Case 4–CA–18671

December 13, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On September 9, 1991, Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified[1] and set forth in full below.

ORDER

The National Labor Relations Board orders that the Respondent, Joseph L. Swilley d/b/a Swilley's Commercial Cleaning, Maywood, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Laborers' International Union of North America, AFL–CIO, Local Union No. 1012, affiliated with Federal Public Service Employee District Council 37, as the exclusive bargaining representative of the unit employees by failing to make contributions to the Man-U-Service Contract Trust Fund and by failing to pay bargaining unit employees their earned wages, vacation benefits, and sick leave benefits as provided in the collective-bargaining agreement with the Union. The appropriate unit is:

All non-supervisory employees of Swilley's Commercial Cleaning, Inc., at the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania 19112.

(b) Failing to bargain in good faith with the Union concerning the effects on employees of its decision to cease operations at the Philadelphia Naval Shipyard.

(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) Make employees whole for any loss of wages or benefits resulting from the Respondent's unfair labor practices, in the manner set forth in the remedy section of the Decision and Order, as modified, by remitting contributions owed to the Man-U-Service Contract Trust Fund; by reimbursing employees, with interest, for expenses incurred as a result of the failure to make trust fund contributions; and by paying employees their accrued wages, vacation benefits, and sick leave benefits, as provided in the collective-bargaining agreement, with interest.

(b) On request, bargain collectively in good faith with the Union with respect to the effects on employees of its decision to cease operations at the Philadelphia Naval Shipyard and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Pay the former Philadelphia Naval Shipyard unit employees terminated by the Respondent when it ceased operations in February 1990 their normal wages for the period set forth in the remedy section of the Decision and Order, as modified.

(d) Preserve and, on 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 to analyze the amount of backpay due under the terms of this Order.

(e) Mail an exact copy of the attached notice marked ''Appendix''[2] to the Union and to all employees in the unit who were employed at Philadelphia Naval Shipyard when the Respondent ceased operations. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be mailed immediately.

[1] We agree with the General Counsel's contention that the judge's recommended Order fails to include remedial provisions corresponding to the judge's findings that the Respondent unlawfully failed to make contributions to the Man-U-Service Contract Trust Fund and unlawfully failed to pay employees their earned wages, vacation pay, and sick leave benefits. We also agree that the recommended Order does not contain language necessary to remedy the effects bargaining violation the judge found, as provided in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), see also *Metropolitan Teletronics Corp.*, 279 NLRB 957, 960–961 (1968), enfd. mem. 819 F.2d 1180 (2d Cir. 1987). We modify the remedy and recommended Order accordingly. We shall also provide that any additional amounts owed to the trust fund shall be determined in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Finally, we shall conform the notice with our Order.

[2] 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.''

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Laborers' International Union of North America, AFL–CIO, Local Union No. 1012, affiliated with Federal Public Service Employee District Council 37, as the exclusive bargaining representative of our unit employees by failing to make contributions to the Man-U-Service Contract Trust Fund and by failing to pay earned wages, vacation benefits, and sick leave benefits, as provided in our collective-bargaining agreement with the Union. The appropriate unit is:

> All non-supervisory employees of Swilley's Commercial Cleaning, Inc., at the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania 19112.

WE WILL NOT fail to bargain in good faith with the Union concerning the effects on employees of our decision to cease operations at the Philadelphia Naval Shipyard.

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 make employees whole for any loss of wages or benefits resulting from our unfair labor practices by remitting contributions owed to the Man-U-Service Contract Trust Fund; by reimbursing employees, with interest, for expenses incurred as a result of our failure to make trust fund contributions; and by paying employees their earned wages, vacation benefits, and sick leave benefits, as provided in the collective-bargaining agreement, plus interest.

WE WILL, on request, bargain collectively in good faith with the Union with respect to the effects on employees of our decision to cease operations at the Philadelphia Naval Shipyard and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL pay the Philadelphia Naval Shipyard employees we terminated when we ceased operations at the Philadelphia Naval Shipyard in February 1990 their normal wages for a period specified by the National Labor Relations Board, plus interest.

JOSEPH L. SWILLEY D/B/A SWILLEY'S COMMERCIAL CLEANING

Richard Wainstein, Esq., for the General Counsel.
Stephen C. Richman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was tried at Philadelphia, Pennsylvania, on December 3, 1990.[1] The original charge and the amended charge were filed by counsel for the Union on February 22 and June 28, 1990, respectively. The complaint and notice of hearing issued on June 29, 1990.

The complaint alleges that Respondent engaged in violations of Section 8(a)(1) and (5) of the Act by repudiating its collective-bargaining agreement with the Union and failing and refusing to make certain contractually required payments to its employees. Furthermore, it is alleged that Respondent violated the Act by ceasing its operations at the Philadelphia Naval Shipyard without prior notice to the Union, and without bargaining about the effects on the employees.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material, a sole proprietorship engaged in the business of janitorial contracting from his office and place of business in Maywood, Illinois.

During the past year, in the course and conduct of these business operations, Respondent performed services valued in excess of $50,000 outside the State of Illinois. The Respondent's performance of services at the Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, are involved in this proceeding.

The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is now, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

At all times material, the Respondent has recognized the Union as the exclusive representative of the Respondent's employees at the shipyard in a unit referred to in the provision entitled ''Bargaining Unit,'' and in article I of the cur-

[1] All dates are in 1990 unless otherwise specified.

rent collective-bargaining agreement, effective October 1, 1989, to September 30, 1991, between the Union and the Respondent.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

Although the Respondent did not appear at the hearing and was not represented by counsel, it filed an answer admitting the allegations of the complaint with the exception of paragraph 7(b), which alleges that Respondent ceased its operations without prior notice to the Union, and without having afforded the Union an opportunity to negotiate and bargain, with respect to the effects of such acts and conduct. From October 1987 to March 1990, Respondent had a contract with the Philadelphia Naval Shipyard to perform cleaning and janitorial work at the shipyard. The contract was administered by the Facilities Support Contracts, a division of the Public Works Department at the shipyard. Respondent's employees worked out of building 151 on the premises of the shipyard.

Its operations were under the direction of Joseph Swilley, and his son Roman Swilley and daughter Gail Swilley.

When Respondent commenced to take over the shipyard janitorial contract in October 1987, it recognized the Union as the exclusive bargaining representative of the approximately 89 to 100 janitorial employees. Prior to Swilley taking over the contract, another contractor, A to Z, had the contract prior thereto. The janitorial employees at the shipyard had been represented by the Union since 1971. The last collective-bargaining agreement between Respondent and the Union was effective from October 1, 1989, to September 30, 1991.

It provided that Respondent be required to pay employees on a biweekly basis. Moreover, pursuant to the terms of the agreement, Respondent was required to pay unit employees certain wages, sick leave, and vacation pay. Respondent was also required to make contributions to the Man-U-Service Contract Trust Fund.

On Thursday, February 1, 1990, the first payday of the month, employees did not receive their paychecks. James Clarke, the Union's business manager, called Joseph Swilley at his office in Illinois. Swilley told Clarke that there had been a little problem but he took care of it. He went on to explain to Clarke that the shipyard had been fining him, but he gave him his assurance that the employees would be paid. The following week the employees did in fact receive their paychecks.

The next payday, February 15, Respondent again failed to deliver the employees paychecks. Arthur Raines and Learman Gonzales, shop stewards, approached Swilley at building 151 on February 15, inquiring about the paychecks. Swilley admitted that he had known for a week that the employees were not going to be paid, and he further stated that he had been fined by the shipyard and was going to meet with Public Works the following day. He advised the shop stewards that if things went as planned he would issue the paychecks on that day.

On February 16, Joseph Swilley and Raines met with the employees on the day and evening shifts. Swilley advised them that he did not know when he was going to be able to pay them. He asked them to continue to work, but advised that they would not be penalized if they did not work without their paychecks. He gave no explanation as to why he had not paid the employees but he appealed to them that he was a man of his word. The shop steward testified that when the employees commenced work for Swilley initially they did not get paid for 6 weeks and the first time they were paid their checks bounced. Therefore, shop steward Raines let the employees make their own decision whether they wanted to continue to work.

On February 16, Business Manager Clarke called Respondent's office and spoke with Gail Swilley. She told him that she would relay his message to her father. He also spoke to Roman Swilley at the shipyard. Roman Swilley told Clarke he had no authority to give him any information but he would leave a message for his father. Swilley had not contacted Clarke by February 22 and 23, so Clarke called him on those days and left messages which were never returned.

The employees worked on February 20 and 21 (February 19 was a holiday), despite being advised by Roman Swilley that there were no checks, and Respondent did not know when they were forthcoming. On February 22, when Roman Swilley told the employees they were not getting their paychecks that day and he could not say when or how they would be paid, the employees refused to work. On Friday, February 23, the employees showed up at building 151, which was locked and Respondent's management were not on the premises. The employees continued coming to the building for another month but Respondent never appeared.

The employees were not aware that on December 29, 1989, the shipyard issued the Respondent a ''Cure letter'' detailing certain areas where the Respondent was not performing in compliance with its contract with the shipyard. The letter gave the Respondent 10 days to cure its performance for the shipyard or terminate the contract as the result of a default. On February 23, the shipyard issued the Respondent a ''Show Cause letter,'' citing Respondent's continued lack of performance and giving it 5 days to show cause why the shipyard should not terminate the contract. The shipyard offered Respondent an alternative to the default proceedings wherein Respondent had the option of signing a neutral agreement to terminate the janitorial contract. Respondent accepted this alternative method and, on March 5, Joseph Swilley signed an agreement terminating Respondent's contract with the shipyard, effective March 1, 1990. Respondent never communicated to the Union that the shipyard had instituted default proceedings against it or that it might lose the janitorial contract, or that it was negotiating an agreement to terminate the contract. Respondent never communicated to the Union that it had indeed agreed to terminate the contract nor did it ever inform the Union or the employees that the employees were laid off or terminated. Moreover, the Respondent did not give the Union any notice, prior to February 15, that it was not going to pay the employees on that day nor was any notice of the lockout given prior to February 23, when the employees found the building locked.

Pursuant to the collective-bargaining agreement the Respondent was to make monthly contributions on behalf of its employees to the health and welfare fund, known as the Man-U-Service Contract Trust Fund. Payment each month was due on the 20th of the following month. Respondent never notified the Union that it would not make these payments. Respondent admits it failed to make payments due on

September 20 and October 20, 1989. It also admits it failed to make any payments under the latest agreement for the month of October 1989 to date. Pursuant to the recent collective-bargaining agreement, Respondent was also obligated to pay employees their earned wages and earned vacation benefits and sick leave. On February 15, and thereafter, Respondent failed to meet these obligations thereby repudiating the collective-bargaining agreement.

Conclusion and Analysis

The facts in this case are essentially undisputed.

Respondent officially ceased to operate at the shipyard on March 5, when it signed the agreement with the shipyard, terminating the janitorial contract. The Union, was not given any prior notice and Respondent has never informed the Union even after the fait accompli, nor was the Union told the employees would be locked out on February 23. Furthermore, neither the Union or the employees were told that paychecks were not forthcoming, despite Joseph Swilley's acknowledgment to the shop stewards that he had prior knowledge of this, 1 week earlier.

As early as December 1989, Respondent was involved in default proceedings and had several opportunities to so advise the Union, but chose a path of secrecy.

The Union was therefore denied the opportunity to bargain over the effects of Respondent's decision to cease doing business at the shipyard in violation of Section 8(a)(1) and (5) of the Act.

Furthermore, Respondent's failure to make contributions to the Health and Welfare Fund (Man-U-Service Contract Trust Fund) constitutes a unilateral act of repudiation of the collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.

Respondent further repudiated the collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act, by failing to pay sick leave, vacation, and wages to the employees. Any averment that it was financially unable to make the payments is no defense to Respondent's failure to abide by and observe the terms of the collective-bargaining agreement.

I therefore conclude, that by all the above acts, Respondent has engaged in violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's employees at the shipyard referred to in the provision entitled ''Bargaining Unit'' and in article I of the current collective-bargaining agreement (effective October 1, 1989, to September 3, 1991), between the Union and the Respondent is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the designated exclusive bargaining representative of the employees in the unit described above.

5. By its repudiation of the collective-bargaining agreement and its refusal to bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to designed to effectuate the policies of the Act.

It is recommended that Respondent be required to make whole its employees for its unlawful failure to make payments into the Man-U-Service Contract Trust Fund by transmitting the required contributions to the fund, and further to make whole employees for any losses they may have suffered or expenses they may have incurred by reason of Respondent's failure to make payments to the fund.

Respondent should also be required to make employees whole by paying their earned wages, vacations benefits, and sick leave benefits and any other unpaid contractual benefits with interest.

It also is recommended that Respondent be ordered to pay backpay as set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968). It is recommended that Respondent be ordered to pay backpay to all the employees at the shipyard facility at the time of the closing until the occurrence of the earliest of the following conditions:

(1) The parties bargain to agreement; (2) the parties reach bona fide impasse; (3) the failure of the Union to request bargaining within 5 days of the issuance of the bargaining order, or to commence negotiations within 5 days of the employers notice to the Union of its desire to bargain; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employees exceed the amount which each would have earned as wages from the time Respondent terminated its shipyard facility to the time each secured equivalent employment elsewhere, or the date on which Respondent shall have offered to bargain, whichever occurs first; provided, however, in no event shall the sum be less than such employees would have earned for a 2-week period at the rate of their normal wages when last in Respondent's employ.

Backpay should be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest paid in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In view of the fact that Respondent is no longer performing work at the shipyard facility, posting of a notice at such facility would be a study in futility. I therefore recommend that the Respondent be required to mail the notice marked ''Appendix A'' to the most recent address of all of Respondent's employees who had worked at the shipyard facility at the time of the closing.

[Recommended Order omitted from publication.]