

**W E. Tousley & Sons, Inc., and Stanley R. Rudin (Assignee for the benefit of creditors of W. E. Tousley & Sons, Inc.) its Alter Ego or Successor and Teamsters Local 317, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America. Case 3-CA-11052**

28 September 1984

## DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS  
HUNTER AND DENNIS

Upon a charge filed by the Union 1 June 1982, and amended 20 July 1982, the General Counsel of the National Labor Relations Board issued a complaint 22 July 1982 against the Company and the Assignee, the Respondents, alleging that they have violated Sections 8(a)(5) and (1) and 8(d) of the National Labor Relations Act. Although properly served copies of the charges and complaint, the Respondents have failed to file an answer.

On 14 March 1983 the General Counsel filed a Motion for Summary Judgment and on 15 March 1983 filed an errata thereto. On 18 March 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Assignee filed a response to the Notice to Show Cause.

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

### Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be admitted if an answer is not filed within 10 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 10 days of service, "all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Company, by letter dated 3 November 1982, and the Assignee, by letters dated 20 and 29 October 1982, were notified by the Regional Attorney for Region 3 that unless an answer was forthcoming a Motion for Summary Judgment would be filed. No answer has been filed.

In response to the Notice to Show Cause, counsel for the Assignee stated, *inter alia*, that since March 1982 the Assignee has been liquidating the assets of the corporation pursuant to the authority of the New York State Supreme Court in an assignment for the benefit of creditors, and asserts,

but submitted no evidence showing, that the corporation has not thereafter continued in business. The response further contended that monetary relief cannot be obtained from the Assignee because he has not operated the business.

Regarding the Respondent Assignee's contentions based on the liquidation of the business and on its asserted inability to satisfy the monetary liabilities imposed by a Board order, the Board has held that the collectibility of a judgment is not a basis for absolving a respondent from liability.<sup>1</sup> Moreover, the Respondent's contention is not an adequate explanation of its failure to file a timely answer to the complaint.

Good cause for the Respondents' failure to file a timely answer to the complaint has not been shown. Under the rule set forth above, the allegations of the complaint are deemed admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I JURISDICTION

The Company, a New York corporation, at all times material to this case has been engaged in the business of providing and performing trash collection and related services at its principal office and place of business in Clay, New York. At all times material to this case, the Company and Onondaga Environmental Systems have been employer members of an association which was composed of employers engaged in trash collection and related services, and which existed for the purpose, *inter alia*, of representing its employer members in negotiating and administering collective-bargaining agreements with the Union. During the year preceding issuance of the complaint, the Company, Onondaga Environmental Systems, and other employer members of the association singly or collectively performed services valued in excess of \$50,000 for enterprises such as Onondaga Solid Waste Disposal Authority and Onondaga County Agency Onondaga Solid Waste Disposal Authority, Onondaga County, and other entities for whom employer members of the association perform services are political subdivisions of the State of New

<sup>1</sup> See, e.g., *Bagel Bakers Council of New York*, 226 NLRB 622, 631 (1976), *enfd* 555 F.2d 304 (2d Cir. 1977).

<sup>2</sup> In granting the General Counsel's Motion for Summary Judgment, Chairman Dotson specifically relies on the total failure of the Respondents to contest either the factual allegations or the legal conclusions of the General Counsel's complaint. Thus, the Chairman regards this proceeding as being essentially a default judgment which is without precedential value.

York who singly or collectively annually purchase goods and materials valued in excess of \$50,000 shipped to them in New York State from points directly outside New York State.

Since on or about 8 March 1982, the Assignee was duly designated by the Company as assignee for the benefit of creditors with full authority to continue operations and exercise all powers necessary to the administration of the business of the Company. By virtue of such delegation, the Assignee is an alter ego of or successor to the Company, and responsible or liable, together with the Company, for remedying the unfair labor practices found. We find that the Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondents constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Employees who are engaged in the activities of the local trucking agreement as drivers, mechanics and greasers.

Since about 1973 the Union has been the designated exclusive collective-bargaining representative of the Respondents' employees in the unit described above, and the Union has been recognized as such representative by the Respondents. Such recognition has been embodied in collective-bargaining agreements, the most recent of which was effective for the period 1 April 1979 through 31 March 1982.

Since on or about 10 February 1982 the Respondents changed the working conditions of the unit employees by discontinuing contributions to the Union's health, hospital, and pension fund. Based on the above, we find that the Respondents have, since on or about 10 February 1982, refused to bargain collectively with the Union as the exclusive bargaining representative of the unit employees, and that the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Sections 8(a)(5) and (1) and 8(d) of the Act.

## CONCLUSIONS OF LAW

1. The Respondents, W. E. Tousley & Sons, Inc., and Stanley R. Rudin, assignee for the benefit of creditors of W. E. Tousley & Sons, Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 317, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discontinuing contributions to the Union's health, hospital, and pension fund since on or about 10 February 1982, the Respondents have refused to bargain with the Union and thereby have engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and 8(d) and Section 2(6) and (7) of the Act.

4. By the aforesaid conduct, the Respondents have interfered with, restrained, and coerced the unit employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

## REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondents to make whole the unit employees by paying all health, hospital, and pension fund contributions, as provided in the expired collective-bargaining agreement, which have not been paid and which would have been paid absent the Respondents' unlawful unilateral discontinuance of such payments,<sup>3</sup> and by reimbursing unit employees for any expenses ensuing from the Respondents' failure to make such required payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1982).

## ORDER

The National Labor Relations Board orders that the Respondents, W. E. Tousley & Sons, Inc., Clay, New York, and Stanley R. Rudin (Assignee for the benefit of creditors of W. E. Tousley &

<sup>3</sup> Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld payments. We leave to the compliance stage the question of whether the Respondents must pay any additional amounts into the benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Sons Inc ) its Alter Ego or Successor their officers, agents successors, and assigns, shall

1 Cease and desist from

(a) Refusing to bargain with Teamsters Local 317, affiliated with International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America by unilaterally discontinuing payments into the Union's health, hospital, and pension fund

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

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

(a) Make its employees whole by paying all health hospital, and pension fund contributions as provided in the expired collective bargaining agreement, which have not been paid and which would have been paid absent the Respondents unlawful unilateral discontinuance of such payments and by reimbursing unit employees for any expenses ensuing from the Respondents unlawful failure to make such payments, in the manner set forth in the section of this decision entitled The Remedy

(b) 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 amounts due under the terms of this Order

(c) Post at its facility in Clay New York copies of the attached notice marked Appendix 4 Copies of the notice on forms provided by the Regional Director for Region 3 after being signed by the Respondents' authorized representative shall be posted by the Respondents 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 Respondents to ensure that the notices are not altered defaced, or covered by any other material

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply

<sup>4</sup> If this Order is enforced by a Judgment of a United States Court of Appeals the words in the notice reading Posted by Order of the National Labor Relations Board shall read Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board

## APPENDIX

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

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

WE WILL NOT refuse to bargain with Teamsters Local 317 affiliated with International Brotherhood of Teamsters Chauffeurs Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit by unilaterally discontinuing payments into the Union's health, hospital, and pension fund

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 our unit employees whole by paying all health hospital and pension fund contributions, as provided in the collective bargaining agreement effective 1 April 1979 through 31 March 1982 which have not been paid and which would have been paid absent our unilateral discontinuance of such payments and by reimbursing our unit employees, plus interest, for any expenses ensuing from our unlawful failure to make such required payments

W E TOUSLEY & SONS, INC , AND  
STANLEY R RUDIN (ASSIGNEE FOR  
THE BENEFIT OF CREDITORS OF W E  
TOUSLEY & SONS INC ) ITS ALTER  
EGO OR SUCCESSOR