

**Mile Hi Metal Systems, Inc. and Sheet Metal Workers International Association, Local No. 9.** Cases 27-CA-9241, 27-CA-9418, 27-CA-9472, and 27-CA-10218

June 30, 1989

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

Upon charges<sup>1</sup> filed by Sheet Metal Workers International Association, Local No. 9, the Union, the General Counsel of the National Labor Relations Board issued an order consolidating cases, fourth consolidated amended complaint and notice of hearing, order setting settlement agreement aside on November 16, 1988, against the Company, the Respondent, alleging that it has violated Section 8(a)(5), (3), and (1) of the National Labor Relations Act. After being properly served copies of the charges, amended charges, and the fourth consolidated amended complaint, the Respondent filed an answer dated November 22, 1988. By letter dated February 10, 1989, the Respondent withdrew its answer.

On April 21, 1989, the General Counsel filed a Motion for Summary Judgment. On April 25, 1989, 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 Respondent filed no response. The allegations in the motion are therefore undisputed.

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 deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The fourth consolidated amended complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the Fourth Consolidated Amended Complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, by letter dated February 10, 1989, withdrew its answer to the fourth consolidated amended complaint.

<sup>1</sup> The original charge in Case 27-CA-9241 was filed May 10, 1985, and amended June 27, 1985, and September 11, 1986. The original charge in Case 27-CA-9418 was filed October 16, 1985, and amended October 22, 1985. The original charge in Case 27-CA-9472 was filed December 5, 1985, and amended January 23, 1986. The charge in Case 27-CA-10218 was filed August 24, 1987.

The Respondent's withdrawal of its answer has the same effect as failure to file an answer.<sup>2</sup> In the absence of good cause being shown for the failure to file a timely answer to the fourth consolidated amended complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all times material, the Respondent, a corporation with an office and place of business in Denver, Colorado, has been engaged in the construction industry as a heating and ventilation contractor. In the course and conduct of its business operations, the Respondent annually purchases and receives goods, materials, and services valued in excess of \$50,000 from other enterprises within the State of Colorado that received such goods, materials, and services directly in interstate commerce. The Respondent annually, in the course and conduct of its business operations, sells and ships goods, materials, and services valued in excess of \$50,000 directly to other enterprises within the State of Colorado that are directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(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. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Unit and the Union's Representative Status*

Since about July 1977 and at all material times, the Union has been the designated collective-bargaining representative of the employees in the bargaining unit described below, and since that time, the Respondent has so recognized the Union. That recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period July 1, 1983, to June 30, 1986. The following employees of the Respondent constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

All journeyman, apprentice, and preapprentice sheetmetal workers employed by Respondent but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

<sup>2</sup> See *Maislin Transport*, 274 NLRB 529 (1985).

At all times from July 1977 until June 30, 1986, the Union, by virtue of Section 9(a) of the Act, has been the exclusive representative of the unit employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

### B. *The Violations*

1. About April 12, 1985, the Respondent filed for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. By order dated May 17, 1985, the bankruptcy court issued an interim order pursuant to section 1113(e) of the Bankruptcy Code suspending the Respondent's obligation to make the contractually required contributions to the pension, health and welfare, and apprenticeship trusts, and to the National pension, training, and stabilization trusts established by the parties' July 1, 1983, through June 30, 1986 collective-bargaining agreement, pending a decision on the Respondent's petition for authorization to reject the contract. On June 10, 1985, the Respondent filed a petition in the bankruptcy court seeking authorization to reject the collective-bargaining agreement. About June 28, 1985, the bankruptcy judge granted the Respondent's petition to reject the collective-bargaining agreement pursuant to section 1113(e).

About November 13, 1986, U.S. District Judge Richard P. Matsch reversed the order of the bankruptcy judge. Subsequent to November 13, 1986, the Respondent filed an appeal of the U.S. district court's order that is currently pending before the Court of Appeals for the Tenth Circuit.

The Respondent failed to continue in full force and effect all the terms of the collective-bargaining agreement by failing to make payments to the contractually established pension, health and welfare, and apprenticeship trusts, and to the National pension, training, and stabilization trusts for the period January 1, 1985, through April 22, 1985; and by failing to make payments to the contractually established vacation trust for the period January 1 through June 28, 1985. The terms and conditions of the agreement that the Respondent failed to continue in full force and effect relate to the wages, hours, and other terms and conditions of employment of the unit employees and are mandatory subjects of bargaining.

On or after June 28, 1985, the Respondent changed the unit employee wage structure and wages in a manner not encompassed by the wage proposal presented to the Union in connection with the Respondent's petition for authorization to reject the contract under section 1113(e) of the Bankruptcy Code. The Respondent engaged in

these acts and conduct without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees.

By this conduct, the Respondent has failed and refused, and is failing and refusing to bargain collectively and in good faith with its employees' representative. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.<sup>3</sup>

2. Since about April 16, 1985, certain employees of the Respondent represented by the Union ceased work concertedly and engaged in a strike. The strike was caused by the Respondent's unfair labor practices described above and was prolonged by the unfair labor practices of the Respondent. About September 4, 1986, the employees who engaged in the strike made an unconditional offer to return to their former positions of employment. About September 4, 1986, the Respondent failed and refused to reinstate the employees and since that date has continued to fail and refuse to offer to reinstate them to their former positions of employment. The Respondent engaged in the acts and conduct described herein because the employees joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection. By this conduct, the Respondent has discriminated and is discriminating in regard to the hire or tenure or terms or conditions of employment of its employees and has discouraged and is discouraging membership in a labor organization. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. Since about June 5, 1985, the Union has requested that the Respondent furnish it the following information: the names, addresses, telephone numbers, current wage rates, dates of any changes in pay rates, and the pay rates of unit employees from June 5, 1985, to June 30, 1986. Since about July 20 and August 7, 1987, the Union has requested that the Respondent furnish it the following information: a list of the Respondent's employees

<sup>3</sup> In the event that the order of the U.S. district court is affirmed on appeal, the Respondent has also violated Sec. 8(a)(5) and (1) of the Act by failing to make payments to the contractually established pension, health and welfare, apprenticeship, and vacation trusts, and the National pension, training, and stabilization trusts from June 28, 1985, to June 30, 1986, and by failing to pay the unit employees consistent with the wages and wage structure set out in the collective-bargaining agreement from June 28, 1985, to June 30, 1986.

classified as apprentices and preapprentices and a list of jobs performed by the Respondent from April 1985 to June 30, 1986, together with the hours of work performed by sheet metal employees on each job. The information described above is relevant and necessary to the Union's function as bargaining agent of the unit employees. Since about June 5, 1985, and July 20 and August 7, 1987, the Respondent has failed and refused to furnish the Union the requested information described above. By this conduct, the Respondent has failed and refused to bargain collectively and in good faith with its employees' representative. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

4. About October 16, 1985, the Respondent, acting through its president and agent, Kim Hansen, coerced its employees by conducting a poll among certain employees concerning their union sympathies. By this conduct, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed by Section 7 of the Act. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. About October 16, 1985, the Respondent withdrew recognition of the Union as the representative of the unit employees based on the results of the poll described above. By this conduct, the Respondent has failed and refused, and is failing and refusing to bargain collectively and in good faith with the employees' representative. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 8(d) of the Act.

6. About September 17, 1985, the Regional Director for Region 27 approved a settlement agreement in Case 27-CA-9241 previously executed and entered into by the Respondent. By its conduct described above occurring after approval of the settlement agreement, involving the poll, the refusal to reinstate striking employees, the withdrawal of recognition, and the failure and refusal to provide the Union the information it requested July 20 and August 7, 1987, the Respondent has violated the terms of the settlement agreement. The Regional Director vacated and set aside the settlement agreement in the fourth consolidated amended complaint.

#### CONCLUSIONS OF LAW

1. By failing and refusing to continue in full force and effect all the terms of their collective-bargaining agreement with the Union, by failing to

make payments to the contractually established pension, health and welfare, apprenticeship, and vacation trusts, and the National pension, training, and stabilization trusts, and by unilaterally changing the employees' wage structure and wages, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

2. By failing and refusing to reinstate unfair labor practice strikers on their unconditional offer to return to their former positions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

3. By conducting a poll among employees concerning their union sympathies, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By withdrawing recognition of the Union as the unit employees' representative based on the results of the unlawful poll, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

5. By failing and refusing to provide the Union the information it requested June 5, 1985, and July 20 and August 7, 1987, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), Section 8(d), and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully failed and refused to bargain with the Union, we shall order the Respondent to recognize and bargain with the Union. We shall also order the Respondent to continue in full force and effect the terms and conditions of the collective-bargaining agreement including making payments to the contractually established pension, health and welfare, and apprenticeship trusts, and to the National pension, training, and stabilization trusts for the period January 1 through April 22, 1985; and making payments to the contractually established vacation trust for the period January 1 through June 28, 1985, in the manner prescribed in *Merryweather Op-*

*tical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).<sup>4</sup> The Respondent shall also reimburse employees for any expenses ensuing from the Respondent's unlawful failure to make such payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall further order the Respondent to bargain with the Union concerning changes to the employee wage structure and wages on or after June 28, 1985, and, on request, to rescind the changes. We shall order the Respondent to make whole the unit employees for any loss of wages they may have suffered as a result of the unlawful changes<sup>5</sup> in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest.<sup>6</sup>

We shall further order the Respondent to offer its striking employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings they may have suffered as a result of the discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest.<sup>7</sup> We shall also order the Respondent to remove from its files any reference to the unlawful refusal to reinstate the striking employees and to notify the employees that this has been done and that the refusal to reinstate will not be used against them in any way. Finally, we shall order the Respondent to provide the Union the information it requested on June 5, 1985, and July 20 and August 7, 1987.

#### ORDER

The National Labor Relations Board orders that the Respondent, Mile Hi Metal Systems, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union.

(b) Failing to continue in full force and effect all the terms and conditions of the collective-bargain-

ing agreement including making payments to the contractually established pension, health and welfare, apprenticeship and vacation trusts, and to the National pension, training, and stabilization trusts.

(c) Changing the employee wage structure and wages unilaterally or in a manner not encompassed by the wage proposal presented to the Union in connection with the petition for authorization to reject the collective-bargaining agreement under section 1113(e) of the Bankruptcy Code.

(d) Failing and refusing to reinstate unfair labor practice strikers on their unconditional offer to return to their former positions of employment.

(e) Conducting polls among employees as to their union sympathies.

(f) Withdrawing recognition of the Union as the unit employees' representative based on the results of unlawful polls.

(g) Failing and refusing to provide the Union the information it requested June 5, 1985, including the names, addresses, telephone numbers, current wage rates, dates of any changes in pay rates, and the pay rates of unit employees from June 5, 1985, to June 30, 1986; and the information it requested July 20 and August 7, 1987, including a list of Respondent's employees classified as apprentices and preapprentices and a list of jobs performed by the Respondent from April 1985 to June 30, 1986, together with the hours of work performed by sheet metal employees on each job.

(h) 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) Recognize and bargain with Sheet Metal Workers International Association, Local No. 9, as the exclusive bargaining representative of its employees in the following unit:

All journeyman, apprentice, and preapprentice sheetmetal workers employed by Respondent but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

(b) Continue in full force and effect the terms and conditions of the collective-bargaining agreement including making required payments to the contractually established pension, health and welfare, vacation and apprenticeship trusts, and to the National pension, training, and stabilization trusts in the manner set forth in the remedy section of this decision.

(c) Bargain with the Union concerning changes to the employee wage structure and wages on or

<sup>4</sup> In the event that the order of U.S. District Judge Matsch is affirmed on appeal, we shall additionally order the Respondent to make employees whole by making payments to the contractually established pension, health and welfare, apprenticeship, and vacation trusts, and to the National pension, training, and stabilization trusts for the period June 28, 1985, through June 30, 1986.

<sup>5</sup> In the event that the order of U.S. District Judge Matsch is affirmed on appeal, we shall order the Respondent to make the unit employees whole by paying them in accordance with the wages and wage structure set out in the collective-bargaining agreement for the period June 28, 1985, through June 30, 1986.

<sup>6</sup> See *New Horizons for the Retarded*, supra.

<sup>7</sup> See *New Horizons for the Retarded*, supra.

after June 28, 1985, and, on request, rescind the changes.

(d) Make whole any employees who suffered losses because of the Respondent's failure to honor the agreement or to bargain concerning changes in the wage structure and wages in the manner set forth in the remedy section of this decision.

(e) Offer its striking employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(f) Remove from its files any reference to the unlawful refusal to reinstate the striking employees and notify the employees that this has been done and that the refusal to reinstate will not be used against them in any way.

(g) Provide the Union the information it requested June 5, 1985, including the names, addresses, telephone numbers, current wage rates, dates of any changes in pay rates, and the pay rates of unit employees from June 5, 1985, to June 30, 1986; and the information it requested July 20 and August 7, 1987, including a list of the Respondent's employees classified as apprentices and preapprentices and a list of jobs performed by the Respondent from April 1985 to June 30, 1986, together with the hours of work performed by sheet metal employees on each job.

(h) 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.

(i) Post at its Denver, Colorado facility copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

(j) 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.

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 fail or refuse to recognize and bargain with Sheet Metal Workers International Association, Local No. 9.

WE WILL NOT fail to continue in full force and effect all the terms and conditions of the collective-bargaining agreement including making payments to the contractually established pension, health and welfare, apprenticeship, and vacation trusts, and to the National pension, training, and stabilization trusts.

WE WILL NOT change the employee wage structure and wages unilaterally or in a manner not encompassed by the wage proposal presented to the Union in connection with our petition for authorization to reject the collective-bargaining agreement under section 1113(e) of the Bankruptcy Code.

WE WILL NOT fail or refuse to reinstate unfair labor practice strikers on their unconditional offer to return to their former positions of employment.

WE WILL NOT conduct polls among our employees to determine their union sympathies.

WE WILL NOT withdraw recognition of the Union as the unit employees' representative based on the results of unlawful polls.

WE WILL NOT fail or refuse to provide the Union the information it requested June 5, 1985, including the names, addresses, telephone numbers, current wage rates, dates of any changes in pay rates, and the pay rates of unit employees from June 5, 1985, to June 30, 1986; and the information

<sup>8</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."

it requested July 20 and August 7, 1987, including a list of our employees classified as apprentices and preapprentices and a list of jobs we performed from April 1985 to June 30, 1986, together with the hours of work performed by sheet metal employees on each job.

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 recognize and bargain with Sheet Metal Workers International Association, Local No. 9, as the exclusive bargaining representative of our employees in the following unit:

All journeyman, apprentice, and preapprentice sheetmetal workers employed by us but excluding office clerical employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL continue in full force and effect the terms and conditions of the collective-bargaining agreement, and WE WILL make required payments to the contractually established pension, health and welfare, vacation, and apprenticeship trusts, and to the National pension, training, and stabilization trusts.

WE WILL bargain with the Union concerning changes to the employee wage structure and wages on or after June 28, 1985, and, on request, WE WILL rescind the changes.

WE WILL make whole any employees who have suffered losses because of our failure to honor the agreement or to bargain concerning changes in the wage structure and wages, with interest.

WE WILL offer our striking employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest.

WE WILL remove from our files any reference to our unlawful refusal to reinstate the striking employees and WE WILL notify them that we have done so and that the refusal to reinstate will not be used against them in any way.

WE WILL provide the Union the information it requested June 5, 1985, including the names, addresses, telephone numbers, current wage rates, dates of any changes in pay rates, and the pay rates of unit employees from June 5, 1985, to June 30, 1986; and WE WILL provide the information it requested July 20 and August 7, 1987, including a list of our employees classified as apprentices and preapprentices and a list of jobs we performed from April 1985 to June 30, 1986, together with the hours of work performed by sheet metal employees on each job.

MILE HI METAL SYSTEMS, INC.