

**Webb Tractor and Equipment Company and Inland Machinery Co. and Lodge No. 1123, International Association of Machinists and Aerospace Workers, AFL-CIO. Case 19-CA-3389**

February 19, 1970

**SUPPLEMENTAL DECISION AND ORDER**

BY MEMBERS FANNING, BROWN, AND JENKINS

On September 11, 1967, the National Labor Relations Board issued a Decision and Order in this proceeding,<sup>1</sup> finding that Respondent Webb Tractor and Equipment Company had violated Section 8(a)(1) of the National Labor Relations Act, as amended, and, *inter alia*, ordering Webb to bargain with Lodge No. 1123, International Association of Machinists and Aerospace Workers, AFL-CIO.

Subsequent to the hearing in that proceeding, Inland Machinery Co. purchased Webb's Wenatchee facilities and Caterpillar franchise business. Thereafter, a controversy arose as to Inland's responsibility to bargain with the Union. On September 13, 1968, the Acting Regional Director for Region 19 issued and served upon Webb and Inland a notice of supplemental hearing for the purpose of determining whether Inland became a successor to Webb, and whether Inland should be required to bargain with the Union. Webb and Inland filed answers thereto. On December 12 and 13, 1968, a hearing was held before Trial Examiner Maurice Alexandre. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues to be heard.

On June 11, 1969, the Trial Examiner issued his Supplemental Decision, finding that Inland is a successor to Webb and ordering it to bargain with the Union as set forth in the attached Trial Examiner's Supplemental Decision. Thereafter, Respondent Inland filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Supplemental Decision and the entire record in this case, including the exceptions and brief,<sup>2</sup> and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.<sup>3</sup>

<sup>1</sup>167 NLRB No 46

<sup>2</sup>Respondent Inland challenges the entire validity of the supplemental proceeding herein, and alleges that the Board is precluded from proceeding against it without having made it a party to the original proceeding against

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Supplemental Order of the Trial Examiner, and hereby orders that the Respondent, Inland Machinery Co., Wenatchee, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Supplemental Order.

Webb We find no merit in Inland's contentions. We affirm the Trial Examiner's findings and conclusions on those issues for the reasons he gives and upon the authorities he cites.

<sup>3</sup>The Board has also reviewed this case in the light of the Supreme Court's opinion in *NLRB v Gissel Packing Company*, 395 US 575, and is satisfied that, in view of the nature and extent of the unfair labor practices committed in this case, the purposes of the Act can best be effectuated by the imposition of a bargaining order upon successor Inland.

**TRIAL EXAMINER'S SUPPLEMENTAL DECISION**

MAURICE ALEXANDRE, Trial Examiner: On September 11, 1967, the Board issued a Decision and Order in which it found, among other things, that Respondent Webb Tractor & Equipment Company (hereafter called Webb Tractor) had violated Section 8(a)(1) of the National Labor Relations Act, as amended; that certain objections to the election held among the employees comprising the appropriate unit at Webb Tractor's store-shop at Wenatchee, Washington, were meritorious; that Lodge No. 1123, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter called the Union), which lost the election, had a majority in the said unit on the date of its request for recognition and bargaining; and that Webb Tractor's actions were designed to undermine and destroy that majority and exhibited a complete rejection of the collective bargaining principle. Accordingly, the Board set aside the election and ordered Webb Tractor and its "successors," upon request, to bargain with the Union as the exclusive representative of the said appropriate unit. *Webb Tractor and Equipment Co.*, 167 NLRB No. 46.

In its Decision and Order, the Board denied a motion to dismiss the complaint made by Webb Tractor, which alleged that it had ceased to own or operate any business in or near Wenatchee. In denying the motion, the Board stated that the question whether Webb Tractor has gone out of business and the responsibility of any successor employer "are issues more properly to be decided in the compliance stage of this proceeding." On September 13, 1968, the Acting Regional Director issued and served upon Webb Tractor and on Inland Machinery Co. (hereafter called Inland) a notice of supplemental hearing alleging that Inland had acquired Webb Tractor's Wenatchee facility on February 1, 1967, under circumstances which charged Inland with notice of the unfair labor practice proceeding pending against Webb Tractor on the latter date; that Inland retained a majority of the employees in the unit found to be appropriate; that since that time, Inland had continued without substantial change the same business activities as Webb Tractor had previously carried on at that location, that accordingly Inland was a successor to Webb Tractor and was obligated to comply with the requirements of the Board's

Decision and Order of September 11, 1967; and that neither Webb Tractor nor Inland had complied with such requirements.

Thereafter, Webb Tractor and Inland filed answers to the said notice, and a supplemental hearing was held before me on December 12 and 13, 1968, at which time Webb Tractor and Inland both appeared and were afforded the opportunity to participate. At the close of the hearing, I requested the parties to furnish a stipulation regarding certain evidence which was not available at the time. Such stipulation together with attachments bearing the designation Exhibits A, B, and C were received on May 28, 1969 and are hereby made a part of the record herein and identified as TE Exh. 1. The questions presented are (1) whether or not Inland became a successor to Webb Tractor under circumstances which obligate it to comply with the requirements of the Board's Decision and Order of September 11, 1967; (2) if so, whether or not the imposition of such an obligation would unlawfully deprive Inland of due process of law; and (3) whether or not the supplemental proceeding is procedurally defective.

Upon the entire record,<sup>1</sup> my observation of the witnesses, and the briefs filed by the General Counsel and Inland, I make the following:

## FINDINGS AND CONCLUSIONS<sup>2</sup>

### I. INLAND'S RESPONSIBILITY

In *Perma Vinyl Corp.*, 164 NLRB 968, *enfd. sub nom. U.S. Pipe & Foundry Co. v NLRB*, 398 F.2d 544 (C.A. 5), the Board stated that.

... one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct. [Footnote omitted.]

In imposing this responsibility upon a bona fide purchaser, we are not unmindful of the fact that he was not a party to the unfair labor practices and continues to operate the business without any connection with his predecessor. However, in balancing the equities involved there are other significant factors which must be taken into account. Thus, "It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace" [Footnote omitted.] When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide

purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices. [Footnote omitted.]

Conceding that Inland was a bona fide purchaser, the General Counsel contends that under *Perma Vinyl*, it is nevertheless responsible for remedying Webb Tractor's unfair labor practices. Inland contends that it should not be held responsible for several reasons: it is not a successor to Webb Tractor; the information it received prior to the time it began operations at the Wenatchee facility formerly operated by Webb Tractor cannot be deemed to constitute notice of the unfair labor practice proceedings against Webb Tractor; in any event, it will be deprived of due process of law if it is required to comply with the Board's bargaining order against Webb Tractor; and the supplemental proceeding is procedurally defective and should be dismissed. These contentions are considered immediately below.

### A. The Successorship Issue

#### 1. The employing industry

##### a. The evidence

Prior to February 1, 1967, Webb Tractor was a franchised retailer of Caterpillar machinery and equipment in the central part of the State of Washington. In addition, it also sold the John Deere and certain other lines of machinery and equipment, sold parts therefor, and serviced and repaired all these items. Webb Tractor operated through stores in four cities: Yakima, Pasco, Ellensburg and Wenatchee. The Wenatchee store is the one involved in this proceeding. Webb Tractor's headquarters were at Yakima, where the main business records were housed, although the Wenatchee store billed its customers directly. The supervisory hierarchy included Company President Webb, a general sales manager, a general service manager, and a general parts manager. Each of the four stores had a store service manager, a store parts manager, and a store manager who also served as the store sales manager. Webb, who was called as a witness by Inland, testified on direct examination that each store was fairly autonomous, that the store service and parts managers were under the supervision of the store manager, that the store manager was directly responsible to Webb, and that the general service and parts managers would also "check in" with the store manager before conferring with the store parts or service manager. On cross-examination by the General Counsel, he testified that the store service and parts managers were also responsible to the general service and parts managers, respectively, and that the store manager was responsible to the general sales manager. According to the uncontradicted testimony of Webb, there was some interchange of employees among the branch stores.

In the spring of 1966, Webb Tractor informed Caterpillar Tractor Co. that it wished to relinquish its franchise. Caterpillar thereupon initiated a search for a new dealer; and in September of that year, it entered into negotiations with Inland, which then held a Caterpillar

<sup>1</sup>Inland's unopposed motion to correct the transcript is granted.

<sup>2</sup>No issue of commerce is presented. The notice of supplemental hearing alleges, and Inland admitted and stipulated to, facts which, I find, establish that it is an employer engaged in commerce and in operations affecting commerce within the meaning of the Act.

franchise in Oregon.<sup>3</sup> Caterpillar sent Inland a letter indicating its intention to execute a franchise contract with that company if it could satisfy certain financial and other conditions. Inland then began preparations for commencing business in central Washington, and its representatives made several trips to that area and entered into negotiations with Webb Tractor respecting the rental of some of its realty and the purchase of some of its assets. As a result of these negotiations, Inland leased most of the land and buildings formerly used by Webb Tractor in Yakima, Pasco, and Wenatchee, purchased some of Webb Tractor's assets, and purchased from Caterpillar Tractor certain machinery which the latter had repurchased from Webb Tractor preparatory to termination of the latter's Caterpillar franchise. Directly and indirectly, Inland purchased Webb Tractor assets valued at \$368,849.<sup>4</sup>

Webb Tractor's Caterpillar franchise was terminated on January 31, 1967. Inland discontinued its operations in Oregon, transferred assets valued at \$1,124,000 from that State,<sup>5</sup> and commenced operations in central Washington on February 1, 1967.<sup>6</sup> Inland now maintains operations in three cities, Yakima, Pasco, and Wenatchee, where it sells and services the Caterpillar and certain other lines of machinery, equipment and attachments.<sup>7</sup> Its headquarters are at Yakima, where it keeps its principal records. All of Inland's statements to customers are sent from Yakima, and about 90 percent thereof are paid at that location. Its operational structure is as follows: Spitzer, its vice president and general manager, is in charge of overall operations. In addition, there is a general parts manager, a general service manager, and a general sales manager. Each of its three stores has a parts manager, a service manager, and a store manager.<sup>8</sup> The general sales, parts, and service managers establish the policies governing the various branch store managers. Although Spitzer testified that the store service manager and store parts manager are "primarily" responsible to the corresponding general manager, it appears from a close reading of his testimony that they also have some responsibility to the store manager; and that although the latter's prime responsibility is in connection with sales, to which he devotes approximately 80 percent of his time, the store manager, at least in the case of Wenatchee Store Manager O'Connell, "is in charge of the store."

Immediately before the termination of its franchise, Webb Tractor's total work force was somewhere between 110 and 124 employees, of whom 20-odd were employed in the Wenatchee store. When Inland began operations on February 1, 1967, it had a total of 90 or 92 employees. Of these, 31 had been transferred from Oregon, about 55 were former employees of Webb Tractor and 6 were newly hired. Of the total, 15 were supervisory employees,

of whom 3 were former Webb Tractor employees. One of the three, Everett Miller, had been employed by Webb Tractor at its Wenatchee store. At the hearing herein, the parties stipulated that immediately prior to February 1, 1967, Webb Tractor had in its employ at its Wenatchee store approximately 14 or 15 rank-and-file shop and service employees in the unit found to be appropriate. It was further stipulated that when Inland began operations in Wenatchee on that date, it had 10 rank-and-file employees in its parts and shop departments, consisting of 8 former members of the Webb Tractor Wenatchee bargaining unit, Morrison who had been a supervisor at Wenatchee, and 1 employee who had been transferred from Inland's Oregon operation. The parties further stipulated that such majority of former Webb employees continued until February 21, 1967. According to Spitzer's uncontradicted testimony, there has been some interchange of employees among Inland's stores.

Following termination of its Caterpillar franchise, Webb Tractor was left with an inventory of used Caterpillar machines and several new Caterpillar machines, upon which Spitzer placed a valuation of over \$1 million and \$125,000, respectively.<sup>9</sup> Since that time Webb Tractor, directly and through a subsidiary, has continued in business in central Washington, but only at Yakima and Ellensburg, where it sells and services used Caterpillar machines, the John Deere and certain other lines of new machinery and Westrac parts.<sup>10</sup> It maintains no facilities at Pasco or Wenatchee. However, it has continued to service used Caterpillar and other machinery in the Wenatchee area, and its general service manager has visited the area about once a month. In addition, since about 2 months before the hearing herein, one of its employees, who spends about 90 percent of his time traveling about to collect bills, has also attempted to sell merchandise in Wenatchee. During that 2-month period, Webb Tractor's sales in the Wenatchee area amounted to \$10,000, as compared with total gross sales of about \$3 million in that area during 1966. Inland's sales in the Wenatchee area amounted to \$1,600,000 during 1967. The John Deere industrial line of machinery and the Westrac parts which Webb Tractor sells compete to some extent with the Caterpillar machinery and parts sold by Inland.

As of February 1, 1967, Webb Tractor was left with about 40 employees. In August 1967, when it transferred part of its John Deere line to its subsidiary, it also transferred about half of its employees, and currently employs about 20 employees, including 2 parts and 9 service employees at Ellensburg and 4 service employees at Yakima.

#### b Contentions; concluding findings

Inland contends that it is not a successor to Webb Tractor because it commenced a new operation in central Washington and did not merely continue Webb Tractor's former operation. In support of this position, it relies on the following principal claims: (1) it did not take over Webb Tractor as a going business, but merely purchased, directly and indirectly, a portion of Webb Tractor's assets to supplement the large quantity of its own assets transferred from Oregon; (2) its work force differs from

<sup>3</sup>Inland was also a dealer in the John Deere line.

<sup>4</sup>These assets included new machinery, attachments, parts, tools, fixtures, and furniture. Inland had purchased an additional \$106,000 in parts sold by Webb Tractor to Caterpillar, but thereafter returned them to Caterpillar pursuant to authorization contained in their agreement.

<sup>5</sup>These included new and used machinery, parts, furniture, fixtures, tools, trucks, and automobiles. Inland also had Oregon accounts receivable valued at \$786,000.

<sup>6</sup>It is not clear whether Inland's franchise contract with Caterpillar was signed on that date or shortly thereafter. Its Caterpillar franchise in Oregon was terminated on February 15, 1967.

<sup>7</sup>Inland did not lease Webb Tractor's premises at Ellensburg, but merely placed two resident servicemen there with service trucks containing sufficient tools and machines to make most repairs in the field from these vehicles.

<sup>8</sup>Spitzer is the store manager at Yakima.

<sup>9</sup>It is not clear from the record whether the new machines had already been sold or whether the sales were made at a subsequent date.

<sup>10</sup>It acquired the Westrac line largely in order to obtain replacement parts at wholesale prices, and sells at retail no more than half its Westrac purchases.

Webb Tractor's because there was an almost complete change in supervisory personnel and a substantial change in rank-and-file employees after Inland replaced Webb Tractor; (3) its operational structure is substantially different in that whereas Webb Tractor's stores were independent operations supervised by the store managers, Inland's stores are integrated with the various store supervisors responsible only to their respective superiors based at its headquarters in Yakima; because of such integration as well as the interchange of employees among its stores, a unit confined to its parts and service employees at Wenatchee is not appropriate; and (4) Webb Tractor has continued to conduct business in central Washington in competition with Inland.

The successorship issue presented in this proceeding is whether the employing industry at *Wenatchee* remained substantially unchanged after February 1, 1967. I find that it did. Like Webb Tractor prior to that date, Inland has continued to sell and service Caterpillar and other lines of machinery and equipment at Wenatchee; it has done so at the same premises in Wenatchee as those formerly utilized by Webb Tractor; and it hired for its parts and service departments at Wenatchee a majority of the employees who were formerly in Webb Tractor's Wenatchee unit. It is not decisive that Inland hired fewer than all the Wenatchee supervisory and unit employees formerly employed by Webb Tractor, and purchased only some of the assets owned or formerly owned by Webb Tractor to supplement its own.<sup>11</sup>

Moreover, I reject Inland's contention that a unit confined to the parts and service employees at its Wenatchee facility is not appropriate. The background of the unit question is as follows. In February and March 1966, petitions for certification were respectively filed by Webb Tractor and by the Union. The former sought an election in a unit embracing its shop and service employees at all four stores; the latter urged a unit limited to such employees at the Wenatchee store. Following a hearing, the Regional Director issued a Decision and Direction of Election on April 1, 1966, directing an election in a unit limited to the Wenatchee store-shop. Webb Tractor did not seek Board review of that determination. The election was held on April 28, 1966, and resulted in 7 ballots for and 8 against the Union. The Union then filed objections to conduct affecting the results of the election, as well as unfair labor practice charges, and these were consolidated for hearing before a Trial Examiner. Although Webb Tractor contended at that hearing that the unit designated by the Regional Director was not appropriate, the Trial Examiner found that the issue was not relitigable and, without making an independent determination on the merits of the issue, adopted the Regional Director's unit determination as controlling. Thereafter, the Board affirmed the Trial Examiner's action,<sup>12</sup> and in its bargaining order, expressly found that "the appropriate unit" is as follows:

All shop department and parts department employees employed by Respondent at its Wenatchee, Washington, tractor store-shop, excluding janitors, salesmen, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

That unit is identical with the one designated by the Regional Director.

I find that there is insufficient evidence in the record before me to warrant a finding that the Wenatchee store-shop unit designated in the Board's Decision and Order is no longer appropriate. In his Decision and Direction of Election, the Regional Director, based on *Sav-On Drugs*, 138 NLRB 1032, designated as the appropriate unit the Wenatchee store-shop unit rather than a division-wide unit in view of several factors: the geographical separation of the Wenatchee employees from those at Webb Tractor's other stores, the substantial authority of each store manager, the minimal interchange of employees among the stores, the absence of a bargaining history, and the fact that no labor organization was seeking to represent the employees on a broader basis.<sup>13</sup> Contrary to Inland's contention, I find that the record fails to establish substantially more interchange of employees among its stores since February 1, 1967 than among Webb Tractor's stores prior to that date. Similarly, although Inland seeks to minimize the authority of its store managers, I find that the record does not establish a substantial difference between their authority and that given to the store managers by Webb Tractor. And since there is no evidence that the remaining factors referred to above have changed, I conclude that the Wenatchee store-shop unit designated by the Board continues to be the appropriate unit.

Finally, the record establishes that Webb Tractor operates no facilities in Wenatchee, that it sells no new Caterpillar machinery in that area, and that it does not otherwise compete significantly with Inland in the area. I therefore find that Webb Tractor cannot be regarded as having remained in business as a serious competitor of Inland in the Wenatchee area. Accordingly, it is unnecessary to decide whether a finding of successorship would be precluded if Webb Tractor were a serious competitor to Inland.

In *Wiley & Sons, Inc v. Livingston*, 376 U.S. 543, 549, the Supreme Court stated

Employees . . . ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

And in *NLRB v. McFarland*, 306 F.2d 219 (C.A.-10), the court stated that in ascertaining whether the employing industry remains unchanged after a change in ownership, "we necessarily deal in terms of succession of employment, and not succession of employers, i.e. in terms of the continued nature of the employment rather than the source of the employment." Here, the replacement of Webb Tractor by Inland in the Wenatchee area resulted in no substantial change in the "nature of the employment." I therefore find that the employing industry at Wenatchee remained unchanged after Inland began operations.

<sup>11</sup> *Western Freight Assn.*, 172 NLRB No. 46, *Johnson Ready Mix Co.*, 142 NLRB 437; cf. *McGuire v. Humble Oil & Refining Co.*, 355 F.2d 352 (C.A. 2).

<sup>12</sup> The Board adopted the Trial Examiner's findings, conclusions and recommendations "to the extent consistent" with the Board's Decision and Order, and did not otherwise refer to his views respecting the unit.

<sup>13</sup> I take official notice of the Regional Director's Decision and Direction of Election.

## 2 Inland's notice of the proceeding against Webb Tractor

As noted above, Inland representatives made several trips to central Washington after receiving the October 20, 1966, letter of intent from Caterpillar Tractor. On October 24, 1966, Spitzer, Inland's executive vice president and general manager, met with Webb for the first time. Thereafter, the two had additional conversations 2 weeks later, in late November 1966, on December 15, 1966, and on December 16, 1966. Although initially, Spitzer was somewhat evasive in his testimony, he finally admitted, and I find, that during December, i.e., well before Inland commenced operations on February 1, 1967, Spitzer was told several times by Webb that Webb Tractor was having problems with the National Labor Relations Board. I further find that in the same month, Spitzer was told by Morrison, Webb Tractor's parts manager at Wenatchee, that he was probably the cause of the union problems at Webb Tractor. By the time Inland acquired that information, the hearing in the unfair labor practice proceeding against Webb Tractor had been held. I find that such information was sufficient to charge Inland with notice of that proceeding. Spitzer testified that he ignored such information because he "felt that it was Webb's problem and not Inland's." But it is clear that the problem also concerned Inland. *Perma Vinyl Corp.*, *supra*. As the court pointed out in enforcing the order against the successor in that case,<sup>14</sup> although the Board changed its position regarding the responsibility of the successor subsequent to the latter's purchase of the business, "that was a risk entailed in the purchase."

## 3. Concluding findings

It is undisputed that Webb Tractor at no time complied with the Board's Order of September 11, 1967; that on October 16, 1967, the Union requested Inland to bargain with it as representative of the employees in the above mentioned appropriate Wenatchee unit; and that on November 6, 1967, Inland refused. Since Inland is a successor charged with notice as found above, I find that it is responsible for remedying Webb Tractor's unlawful conduct *Perma Vinyl Corp.*, *supra*. Although the remedy in that case consisted only of reinstatement of discriminatees, the remedial principle announced therein applies equally to the bargaining order here involved *The Alexander Milburn Co.*, 78 NLRB 747, cited with approval by the Board in *Perma Vinyl*; see also *Cohen Bros Fruit Co.*, 166 NLRB No. 2, fn. 13, and cf. *Ramada Inns, Inc.*, 171 NLRB No. 155.<sup>15</sup>

### B. The Due Process Issue

It is undisputed that Inland was given, and availed itself of, the opportunity to resist the allegations contained in the notice of supplemental hearing. Accordingly, it cannot properly be claimed, and Inland does not assert, that it has been deprived of due process of law in that respect. Inland does insist, however, that before it can be held responsible for remedying the unfair labor practices found to have been committed by Webb Tractor, due process of law entitles it to the opportunity to resist such findings through presentation of evidence, cross-examination of

witnesses, and opportunity for argument; that since the Regional Director had notice on March 14, 1967 that Inland had begun operation of the Wenatchee facility,<sup>16</sup> the General Counsel could have joined Inland as a party to the proceeding against Webb Tractor before the Trial Examiner, who had not yet issued his Decision, or at least could have petitioned the Board for a remand to the Trial Examiner after the latter issued his Decision on March 29, 1967. Since he did not do so, Inland asserts, it has not "been afforded the right to contest upon the merits the factual and legal issues in the prior hearings herein involving Webb Tractor & Equipment Company and the prior Board decision therein reported at 167 NLRB No. 46, all of which were conducted and rendered without Inland being a party thereto." Accordingly, it is Inland's position that the instant proceeding against it must be dismissed I disagree.

In enforcing the Board's Order against the successor in *US Pipe & Foundry v NLRB.*, *supra*, the court expressly stated that the successor was not claiming the right to contest the original complaint against the predecessor, and hence that that issue was not before the court. Inland thus correctly states that the *US Pipe* decision is not dispositive of the due process here presented. What I deem to be dispositive at this stage of the proceeding is that so far as the record shows, Inland has never requested the Board to afford it the opportunity to resist the Decision and Order against Webb Tractor.<sup>17</sup> Of course, prior to *Perma Vinyl*, which was decided on May 24, 1967, a bona fide purchaser of a business with knowledge of unfair labor practices by the seller was not held responsible for remedying the unfair labor practices. *Symms Grocer Co.*, 109 NLRB 346. Accordingly, prior to that date, there was no reason for Inland to seek such opportunity, nor was there any reason for the General Counsel to seek the joinder of Inland. In *Perma Vinyl*, the Board expressly reversed *Symms* to the extent that it was inconsistent therewith. But although Inland was chargeable with notice of the *Perma Vinyl* decision, it is perhaps arguable that there was nevertheless no reason for Inland at that time to have sought to intervene in the unfair labor practice proceeding against Webb Tractor,<sup>18</sup> inasmuch as the Trial Examiner did not recommend issuance of a bargaining order against Webb Tractor. Moreover, it was not necessary that the General Counsel request joinder of Inland in that proceeding after *Perma Vinyl*, since the issues of successorship and a successor's responsibility are litigable at the compliance stage of this proceeding. *Webb Tractor & Equipment Corp.*, *supra*, 167 NLRB No. 46.

After issuance of the Board's bargaining order against Webb Tractor on September 11, 1967, however, Inland was on notice that it might now be held responsible as a successor to Webb Tractor in a supplemental proceeding. As a potential successor, Inland has been an interested party which could move to intervene in the Board's proceedings against Webb Tractor. And as an intervenor, it has been able to file a motion for reconsideration,

<sup>14</sup>Inland predicates such notice upon a charge filed against it on that date, alleging among other things that it had refused to hire certain individuals because they had testified at the hearing on the complaint against Webb Tractor. The Regional Director subsequently refused to issue a complaint on that charge because of insufficient supporting evidence.

<sup>15</sup>Inland has at no time indicated in what respect the Board erred in that Decision and Order. Indeed, it has not even asserted that the Board erred.

<sup>16</sup>That proceeding had already been transferred to, and was pending before, the Board at the time it decided *Perma Vinyl*.

<sup>14</sup>*US Pipe & Foundry Co v NLRB.* *supra*

<sup>15</sup>An order to bargain is, of course, prospective and does not raise the retroactivity problem involved in connection with backpay in *Perma Vinyl*.

rehearing or reopening of the record in that proceeding.<sup>19</sup> Since Inland has never filed such a motion, it is difficult to see how it has been prejudiced. I therefore reject its due process argument.

### C. The Defective Procedure Issue

Inland asserts that an employer can be made a party to a proceeding before the Board only in the manner prescribed by the Act, that Section 10(b) of the Act sets forth the procedure to be followed, i.e., a timely charge followed by a complaint against the employer; that no charge or complaint was issued against it; and that a charge is now barred by the 6-month limitation in Section 10(b).<sup>20</sup> Accordingly, Inland contends that the Notice of Supplemental Hearing, which Inland labels a "complaint," was improperly issued. Alternatively, Inland argues that the relief sought by the Notice of Supplemental Hearing amounts to a request for enforcement against Inland of the Board's Decision and Order against Webb Tractor, and that the only appropriate forum for an enforcement order is a circuit court of appeals. I disagree.

All of these contentions were raised and rejected in *Alexander Milburn Co.*, 78 NLRB 747. That case, which preceded and was overruled by *Symms Grocer Co.*, *supra*, has now been restored by *Perma Vinyl*. It is true that in *Milburn*, the successor was made a party, following the Board's Order against the predecessor, by a subsequent Board Order reopening the record and remanding the proceeding for the purpose of receiving evidence relating to the matter of successorship and the responsibility of anyone found to be a successor. Here, on the other hand, the Regional Director proceeded to reopen the proceeding without a Board Order. Since this procedure has resulted in no apparent prejudice to Inland, I can see no objection to it. As already noted, the Board expressly stated in its Decision and Order against Webb Tractor that the issues of successorship and of any successor's responsibility, "are issues more properly to be decided at the compliance stage of the proceeding." 167 NLRB No. 46, fn. 10.

### CONCLUSIONS OF LAW

1. Respondent Inland is, and since February 1, 1967, has been, a successor of Webb Tractor.
2. Respondent Inland had notice, at the time it commenced operations in Wenatchee, Washington, on February 1, 1967, of the unfair labor practice proceeding then pending against Webb Tractor.
3. Respondent Inland is responsible for remedying the unfair labor practices found by the Board to have been committed by Webb Tractor.
4. The Wenatchee store-shop unit designated by the Board in *Webb Tractor and Equipment Co.*, 167 NLRB No. 46, continues to be the appropriate unit.

### RECOMMENDED SUPPLEMENTAL ORDER

It is recommended that Respondent Inland Machinery Co., its officers, agents, successors, and assigns, shall take the following action which, I find, will effectuate the

<sup>19</sup>See the Board's Rules and Regulations, Series 8, as amended, Secs 102.48(d) and 102.29, cf *Potter v. Castle Construction Co.*, 355 F 2d 212, 216 (CA 5).

<sup>20</sup>Inland argues that if it was a successor, it became one on February 1, 1967, that if it was obligated to recognize the Union, its refusal occurred on November 6, 1967, and that the charge filed on November 9, 1967, based on such refusal was withdrawn.

policies of the Act:

A. Upon request, bargain collectively, with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached, with Lodge No. 1123, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of Inland's employees in the following appropriate unit:

All shop department and parts department employees employed by Respondent at its Wenatchee, Washington, tractor store-shop, excluding janitors, salesmen, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

B. Post at its Wenatchee, Washington, place of business, copies of the attached notice marked "Appendix."<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 19, Seattle, Washington, after being duly signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

C. Notify the Regional Director for Region 19, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.<sup>22</sup>

<sup>21</sup>In the event that this Recommended Supplemental Order is adopted by the Board, the words "a Supplemental Decision and Order" shall be substituted for the words "the Recommended Supplemental Order of a Trial Examiner" in the said notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted the the words "a Supplemental Decision and Order"

<sup>22</sup>In the event that this Recommended Supplemental Order be adopted by the Board, this provision shall be modified to read "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith"

### APPENDIX

#### NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Supplemental Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL, upon request, bargain collectively with Lodge No. 1123, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive representative of all our employees in the following unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All shop department and parts department employees employed by us at our Wenatchee, Washington, tractor store-shop, excluding janitors, salesmen, office clerical employees, professional employees, guards, and supervisors as defined in the act.

INLAND MACHINERY CO.  
(Employer)

Dated

By

(Representative)

(Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice

or compliance with its provisions they may communicate directly with the Board's Regional Office, Republic Building, 10th Floor, 1511 Third Avenue, Seattle, Washington 98101, Telephone 583-7473.