

IN the Matter of THE TIMKEN SILENT AUTOMATIC COMPANY, A CORPORATION and EARL P. ORMSBEE, CHAIRMAN, EXECUTIVE BOARD, OIL BURNER MECHANICS ASSOCIATION

Case No. C-10

Dissolution: respondent subsidiary dissolved by parent after hearing and before Board's order; parent, as successor, assumed obligation and liabilities of respondent—*Recommended Modification of Order:* Board recommends to Circuit Court of Appeals that Order against respondent, amended to meet changed conditions, be enforced.

Mr. Jacob Blum and *Mr. Daniel Baker*, for the Board.

Alexander & Green, by *Mr. Herbert S. Ogden*, of New York City, for the respondent.

Mr. Frank Scheiner, of New York City, for the Union.

Mr. Robert L. Condon, of counsel to the Board.

SUPPLEMENTAL FINDINGS OF FACT
AND
RECOMMENDATIONS

March 3, 1939

On March 17, 1936, after a hearing, the National Labor Relations Board, herein called the Board, issued a decision in this case¹ in which it found that The Timken Silent Automatic Company, a corporation, Long Island City, New York, herein called the respondent, had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. The unfair labor practices so found consisted in discrimination against 18 of the respondent's employees in regard to hire and tenure of employment, thereby discouraging membership in Oil Burner Mechanics Association, herein called the Union; in the refusal to bargain collectively with the Union; and in interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act. The Board in

¹ 1 N. L. R. B. 335.

11 N. L. R. B., No. 71.

substance ordered the respondent to cease and desist from such practices; upon request, to bargain collectively with the Union; to offer employment to the 18 employees who had gone out on strike as a result of the unfair labor practices of the respondent and had not been reemployed, to the extent that work was available and was being performed by persons hired since September 24, 1935, the date of the strike; to make whole those who were refused employment for any loss of pay they might have suffered by the respondent's refusal to employ them; and to place on a preferred list those employees for whom employment was not available.

On March 24, 1936, the respondent, by its attorneys, filed a motion to amend the Board's Decision, and exceptions thereto. The Board duly considered the motion to amend and the exceptions and, on April 6, 1936, denied the motion. Pursuant to Section 10 (e) of the Act, the Board, on August 13, 1937, petitioned the United States Circuit Court of Appeals for the Second Circuit, herein called the Court, for the enforcement of its Order. Thereafter, the Board learned that the respondent claimed to be dissolved, and on December 22, 1937, it filed with the Court a motion to remand the proceeding to it for further proceedings in which additional evidence might be adduced upon the question of the dissolution of the respondent, any successor or successors to its operations, and the obligation of the respondent and any successor to comply with the Board's Order. On January 24, 1938, the Court granted the Board's motion to remand.

Pursuant to notice duly served upon The Timken Detroit Axle Company, herein called the Axle Company, the parent of and successor to the respondent, and the Union, a hearing was held in New York City, on May 9, 1938, before Harold Stein, a Trial Examiner duly designated by the Board, and on July 15 and 29, 1938, before Howard Myers, a Trial Examiner similarly designated. The Board, the respondent, and the Union were represented by counsel² and participated in the hearing. Counsel for the respondent also appeared specially for the Axle Company for the sole purpose of objecting to the Board's jurisdiction. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the hearing evidence was adduced showing the amounts earned by the 18 individuals concerned after they were discriminatorily refused reinstatement. We set forth these amounts in Appendix A for the guidance of the Regional Director.

During the course of the hearing before Trial Examiner Myers, counsel for the respondent moved to dismiss the proceeding on the

² Counsel for the respondent appeared as *amicus curiae* for the respondent, since he claimed that the dissolution of the respondent made impossible its being a party to the proceeding.

grounds that the respondent had dissolved and ceased to exist and hence the Board was powerless to enforce its Order against it, or, in the alternative, if the proceeding be considered as against the Axle Company, it should be dismissed because the latter was not named in either the charge or the complaint, nor was there any allegation that the employees here concerned were ever employees of the Axle Company. The Trial Examiner denied this motion. The Trial Examiner made several other rulings on motions and on objections to the admission of evidence. The Board has reviewed the rulings of the Trial Examiner and finds that no prejudicial errors were committed. The rulings are hereby affirmed.

On February 6, 1939, the Board issued an order directing issuance of proposed supplemental findings of fact and proposed recommendations for modification of the Board's Order; directing that no Intermediate Report be issued; and granting the right, within ten (10) days, to file exceptions and to request oral argument and permission to file briefs; and, pursuant thereto, issued proposed supplemental findings of fact and proposed recommendations for modification of the Board's Order. Copies of the order and of the proposed supplemental findings of fact and proposed recommendations for modification of the Board's Order were duly served upon the respondent and the Union. More than ten (10) days have elapsed since such service, and neither the respondent nor the Union has filed exceptions, or requested oral argument or permission to file a brief.

Upon the entire record in the case, the Board makes the following:

SUPPLEMENTAL FINDINGS OF FACT

I. DISSOLUTION OF THE RESPONDENT

A. *Relation of the respondent to the Axle Company*

The Timken Detroit Axle Company is an Ohio corporation engaged in the manufacture and sale of axles, engines, machinery, equipment, oil burners, boilers, air-conditioning devices, fire hydrants, and other products; and its plant and principal place of business are located in Detroit, Michigan. Prior to 1925, the Axle Company was engaged principally in the manufacture of axles and other automotive products. It was not then manufacturing oil furnaces, oil boilers, water heaters, or related products.

Sometime in 1925 the Axle Company acquired an oil-furnace and oil-boiler business which it purchased from the Socony Burner Corporation, a subsidiary of the Standard Oil Company of New York. On August 15, 1925, The Timken Silent Automatic Company, the respondent herein, was incorporated, as a wholly owned subsidiary of the Axle Company, in order to carry on the business of manufacturing, selling, installing, and repairing oil boilers, oil furnaces, water

heaters, and heating accessories and parts.³ The respondent manufactured its products in Detroit, Michigan, in a four-story building; it retailed through a number of branches and dealers. The first floor of the Detroit building was utilized by the respondent for the production of furnaces, boilers, and related products, and the top three floors were used by the Axle Company for its offices. The record indicates that the Axle Company closely supervised the activities of its subsidiary, the respondent. Wages and working conditions of employees of the respondent were determined by officials of the Axle Company, and at all times prior to its dissolution policy-making positions in the respondent were held by officers of the Axle Company. Although the respondent's sales and advertising were independently handled and its books kept separate from those of the Axle Company, it is apparent that in fact the Axle Company dominated and controlled the affairs of the respondent.

B. Circumstances surrounding the dissolution of the respondent

On January 15, 1936, after the original hearing in this proceeding, but before the Board's Order was issued, the Axle Company, as sole stockholder of the respondent, by a stockholder's resolution, conveyed all the property of the respondent to itself in consideration of its assumption of all the respondent's debts and obligations and the surrender of all the respondent's capital stock to the respondent for cancelation. The respondent's articles of incorporation on this occasion were amended to provide for the expiration of its charter on January 31, 1936. On the same day that this resolution and amendment were adopted, the directors of the Axle Company voted to dissolve all its wholly owned subsidiaries, including the respondent, and to have conveyed to the Axle Company all their property in complete liquidation of such subsidiaries.

At the time of dissolution the respondent had the following officers: Williard Rockwell, president; Walter Rockwell, R. J. Goldie, W. J. Roberts, and M. E. Powers, vice presidents; W. C. Wood, secretary and treasurer. The officers of the Axle Company on this occasion were as follows: Williard Rockwell, president and general manager; R. J. Goldie and Walter Rockwell, vice presidents; and W. C. Wood, secretary and treasurer.

After the dissolution the business formerly carried on by the respondent was continued in exactly the same way by the newly created Timken Silent Automatic Division of the Axle Company, herein called the Division.⁴ Furnaces and boilers were manufac-

³ Apparently the respondent was first called the Timken Detroit Company, but prior to 1933 the articles were amended to change the name to The Timken Silent Automatic Company.

⁴ The Axle Company subsequently incorporated a non-operating company called Timken Silent Automatic Company in order to protect this name.

tured in the same building and by the same employees as prior to the dissolution. The branches of the respondent were likewise unaffected by the transfer, with the exception of a few unimportant changes in personnel. The Axle Company renewed the licenses of its dealers in the name of the Division and assumed all the obligations under the contracts which had been made by the respondent. Hawkins, the treasurer of the Axle Company, testified, and we find, that no changes in the physical operations of the furnace and boiler business were made that would not have been made had the respondent continued to exist as a separate corporation. In short, the dissolution of the respondent and the transfer of its assets to the Axle Company constituted a mere bookkeeping entry, and for all practical purposes the Division is identical in nature with the respondent.

C. The history of the Long Island branch after the dissolution

The controversy with which we are concerned existed between the respondent and the employees of its Long Island branch.⁵ The only result of the change in the corporate structure, in so far as the operations of the Long Island branch were concerned, was that after the dissolution different letterheads and stationery were used, and that advertising was in the name of the Division of the Axle Company and not the respondent. Shipments came from Detroit in exactly the same way as they had come before the dissolution. The branch continued to serve the same customers with the same type of merchandise. Personnel in the plant was unaffected by the dissolution.⁶

There had been, however, a notable personnel change as a result of the strike in September 1935 in that a number of employees were hired during and subsequent to the strike to replace the strikers, whom the Board had ordered the respondent to reinstate.⁷ The Axle Company has failed to comply with the Board's Order.

After the dissolution and until March 1937 the Long Island branch continued to function in much the same manner as it had previously, although there was apparently some diminution in business as a result of the strike. In March 1937, the branch moved from Long

⁵ For a detailed description of the activity of the Long Island branch prior to dissolution, see the original opinion of the Board in this proceeding, 1 N. L. R. B. 335, 338-339.

⁶ There is one possible exception since two major supervisory employees were replaced shortly after the dissolution. It does not appear whether this replacement was the result of the dissolution, whether it was an aftermath of the strike, or whether it was for other reasons.

⁷ Two professional strikebreakers, Spielman and Lynch, were hired during the strike and continued working until the summer of 1937. In addition the following employees were hired after the strike, although they had either no previous employment record or had not worked for the respondent for at least a year prior to the strike; York, Gordon, Kobler, Citronio, Tripp, Vallee, Weber, Arnold, Fasey, Slosser, Driscoll, Cole, Waitwoot, Tate, and Christiansen. The last two named transferred to the Long Island branch from other branches of the respondent. The record upon which the order of March 17, 1936, was based reveals that some 20 new men were hired in place of and in preference to the strikers. 1 N. L. R. B. 335, 342-343.

Island to the Bronx, and at that time the Axle Company transferred to private dealers part of the territory formerly handled by the Long Island branch. From March 1937 to January 1938, the Bronx branch continued the business of receiving, selling, installing, and servicing of oil furnaces, oil burners, water heaters, and heating accessories and parts, within a part of the territory theretofore served by the Long Island branch. The record reveals that the personnel of the Long Island branch was transferred to the Bronx intact, although a number of lay-offs were then necessitated by the smaller amount of business done by the Bronx branch. On January 1, 1938, the Axle Company turned over all of the work formerly done by the Bronx branch to private dealers and the branch was discontinued. Thereupon all employees of the branch were laid off.

D. Obligation of the Axle Company to comply with the Board's Order

On March 24, 1936, by permitting the filing in the respondent's name of exceptions to the Board's Order and a motion to amend it, the Axle Company concealed from the Board the fact that it had dissolved the respondent and affirmatively held out that the respondent on that date enjoyed corporate existence.⁸ A similar representation was made to the Union.⁹ The Board was, therefore, unaware of any change in the respondent's status until after it had petitioned the Court for enforcement of its Order on August 13, 1937.¹⁰ The Axle Company, however, was well aware that the proceeding herein was pending against the respondent at the time it caused all the respondent's property to be transferred to itself.

We believe that the Axle Company is under obligation to comply with our Order against the respondent. As we have indicated above, its officers were, almost without exception, identical with those of the respondent. It owned all the respondent's stock, dictated its labor policies, and controlled and dominated its affairs. By assuming all the obligations and liabilities of the respondent with notice

⁸The motion, signed in the name of the respondent by its attorneys, asked that the Board's original Decision be amended by the incorporation of a stipulation signed by the Board and the respondent. This amendment would have included the following: "The Timken Silent Automatic Company . . . is a Michigan corporation, and from a time long prior to July 5, 1935, has continuously been and still is duly authorized as a foreign corporation to do business in the State of New York . . ." [Italics ours.]

⁹Board Exhibit No. 15 is a letter from counsel for the respondent to counsel for the Union. It states:

re: *The Timken Silent Automatic Company*

Referring to your letter of the 27th ultimo Our client has instructed us to advise you that it does not recognize the validity of the order of the National Labor Relations Board and has filed exceptions thereto.

Yours very truly

ALEXANDER & GREEN.

This letter is dated April 2, 1936.

¹⁰The first notice the Board had of the dissolution of the respondent was contained in a letter from the respondent's attorneys, dated November 22, 1937.

of this proceeding, it stands in exactly the same position as the respondent, and should be required to comply with our Order.¹¹

Since the record reveals that no change was made in the physical operations of the oil-furnace and oil-boiler business that would not have been made had the respondent continued its corporate existence, we believe that the liability assumed by the Axle Company was a continuing one. Hence the Axle Company should be required to comply for the entire period during which it ignored the Order. If there had been compliance with our Order, many of the men discriminated against would have had employment until March 1937, when the Long Island branch was discontinued. Some doubtless would have been employed at the Bronx branch until January 1, 1938. We find that the Axle Company is a successor of the respondent. It must, therefore, make whole the employees for the entire loss in pay that was caused by the unlawful conduct of the respondent and the Axle Company.

II. THE REMEDY

The Axle Company has assumed the obligation of the respondent and at all times has been under a duty to comply with our Order against the respondent.¹² We shall recommend, however, that our Order against the respondent be amended to meet the changed conditions. Since the Axle Company no longer maintains a branch in the New York City area, we shall recommend that the requirement that the respondent bargain collectively with the Union, and the requirement that it reinstate the 18 employees to their jobs be stricken from our Order. The Order should, however, require the respondent, and its successor, to cease and desist from the unfair labor practices, and make the 18 employees whole for loss of pay they have suffered by reason of their failure to obtain reinstatement by payment to each of them of a sum equal to the amount he normally would have earned as wages from the date of the failure to reinstate him after

¹¹ Cf. *National Labor Relations Board v. Hopwood Retinning Company*, 98 F (2d) 97, (C. C. A. 2d) (1938).

¹² Michigan Statutes Annotated, Title 21, Chapter 195, Section 75 provides: "All corporations whose charters shall have expired by limitation or dissolution or shall be annulled by forfeiture or in any other way or manner have become void shall nevertheless continue to be bodies corporate for the further term of three (3) years from such expiration, dissolution or forfeiture for the purposes of prosecuting or defending suits for or against them and of enabling them gradually to settle and close their affairs and to dispose of and convey their property and to divide their assets; but not for the purpose of continuing the business for which such corporations were organized; *Provided, That with respect to any action, suit or proceeding begun or commenced by or against the corporation prior to such expiration, dissolution or forfeiture and with respect to any action, suit or proceeding begun or commenced by the corporation within three (3) years after the date of such expiration, dissolution or forfeiture, such corporation shall only for the purposes of such actions, suits or proceedings so begun or commenced be continued a body corporate beyond said three (3) year period and until any judgments, orders or decrees shall be fully executed; . . .*" [italics ours.]

request to the date on which his services would normally have been discontinued prior to January 1, 1938, when the Bronx branch was closed, less his net earnings¹³ during said period. We shall look to the Axle Company for compliance with our Order as amended.

RECOMMENDATIONS FOR MODIFICATION OF THE BOARD'S ORDER

Upon the basis of the above supplementary findings of fact, and the findings of fact, conclusions of law, and Order of the Board issued March 17, 1936, and pursuant to Section 10 (e) of the National Labor Relations Act, the National Labor Relations Board hereby recommends to the Circuit Court of Appeals for the Second Circuit that the Order of the Board against The Timken Silent Automatic Company be amended to read as follows:

Upon the basis of the findings of fact and conclusions of law issued March 17, 1936, and the foregoing supplemental findings of fact, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, The Timkin Silent Automatic Company, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Oil Burners Mechanics Association or any other labor organization of its employees, by discharging, laying off, or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of their employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

¹³ By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, or its successor, which would not have been incurred but for the unlawful refusal to reinstate and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company* and *United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects are not considered as earnings but, as provided below in the recommendation for modification of our Order, shall be deducted from the sum due the employee, and the amount thereof shall be paid over to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.

(a) Make whole Walter E. Moran, John Kohut, Bernard Mulcahy, Harold J. Schultheis, Anthony Bero, John William Derwoechter, Earl P. Ormsbee, Eugene Ryan, John R. Romann, Daniel Gardner, Edward J. Lennon, Ira S. Zweicher, James Kavanagh, Everett N. Korn, Julius Schwartz, Philip Theiss, Thomas O'Reilly, and Patrick Burns for any loss of pay they may have suffered by reason of the failure of the respondent, and its successor, to reinstate them, by payment to each of them, respectively, of a sum of money equal to that which he would normally have earned as wages from October 8, 1935, to the date upon which his services would normally have been discontinued prior to January 1, 1938, less his net earnings during such period; deducting, however, from the amount otherwise due to each of the said employees, monies received by said employee during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects;

(b) Notify the Regional Director for the Second Region in writing within ten (10) days from the date of this Amended Order what steps the respondent has taken to comply herewith.

APPENDIX A

Name	Earnings from September 24, 1935 to January 1, 1938 ¹⁴	Federal, State, county, municipal and other government relief	Wages from respondent in year prior to September 24, 1935 ¹⁵
James Kavanagh.....	\$390 00	-----	\$650 63
Philip Theiss.....	¹⁶ 1, 104 00	-----	1, 445. 61
Thomas O'Reilly.....	479 62	-----	20. 70
Ira S. Zweicher.....	¹⁷ 3, 115 00	-----	1, 737 36
Earl P. Ormsbee.....	¹⁷ 2, 280 00	-----	864 74
Everett N. Korn.....	¹⁷ 3, 025. 00	-----	1, 564 57
John R. Romann.....	2, 292. 11	-----	1, 968 75
Julius Schwartz.....	1, 006 00	-----	1, 420 30
Anthony Bero.....	1, 126 73	\$600 16	1, 142. 03
Daniel Gardner.....	¹⁸ 1, 862. 59	-----	1, 451 12
John Kohut.....	391. 46	336 00	495. 45
Eugene Ryan.....	¹⁹ 270 00	-----	1, 066. 51
Harold J. Schultheis.....	2, 238 00	(²⁰)	956 86
Bernard Mulcahy.....	²¹ 2, 118 00	-----	1, 210 46
Edward J. Lennon.....	(²²)	-----	(²³)
John William Derwoechter.....	²⁴ 385. 00	-----	2, 048 13
Patrick Burns.....	²⁴ 1, 600 00	-----	250 10
Walter E. Moran.....	²⁴ 575. 00	240. 00	1, 272. 92

¹⁴ These figures are based upon computations from the testimony given as to earnings.

¹⁵ Data from Respondent Exhibit No. 1, offered July 29, 1938.

¹⁶ Earnings until May 1937.

¹⁷ Earnings until June 5, 1937.

¹⁸ Earnings until May 29, 1937.

¹⁹ Earnings until July 15, 1936, at which time Ryan obtained and still has a job paying \$135 a month.

²⁰ Schultheis was on relief from March through July 1936, but the amount received was not indicated.

²¹ Earnings until November 1937.

²² Lennon was not called, and the Board made an offer of proof that if Lennon were called he would testify that he was unemployed for a month after the strike, and then gained steady employment which continued past January 1938.

²³ No figures were given in Respondent Exhibit No. 1.

²⁴ Information obtained from offer of proof by the Board.