

**Woodrich Industries, Inc. and International Ladies' Garment Workers' Union, AFL-CIO. Case 10-CA-13257**

October 12, 1979

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS JENKINS  
AND MURPHY

On July 23, 1979, Administrative Law Judge David L. Evans issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed cross-exceptions 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 authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge except as modified here, and to adopt his recommended Order. Although we agree with the Administrative Law Judge's conclusion that Respondent did not violate Section 8(a)(5) of the Act by refusing to bargain with the Union, we find, on the totality of the circumstances, that Respondent is not a legal successor to Murcel Manufacturing Corp., herein called Murcel, because the changes effectuated by Respondent constitute a substantial and material change in the employing industry.<sup>1</sup>

In determining whether there is sufficient continuity of the employing industry to warrant a finding of successorship, the Board looks to several factors, including whether there is substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product, and services.<sup>2</sup> Here, the predecessor, Murcel, a New York corporation,<sup>3</sup> was in operation until sometime in July 1975, when the plant was shut down. There was then a 3-week hiatus before Respondent began operations. Whereas Murcel manufactured uniforms consisting only of standardized dresses or pants suits for sale to retail stores, Respondent, a Georgia corporation,<sup>4</sup> is a contractor that sews garments for various manufacturers in the fashion in-

dustry.<sup>5</sup> Moreover, according to the testimony of Respondent's Vice President Frank DiBartolo,<sup>6</sup> as a contractor, Respondent, unlike Murcel, never sells its garments to retail stores or any other operation. Nor does Respondent, contrary to Murcel, design or manufacture its own goods or buy its materials. Rather, the garments made by Respondent are designed by the contracting party with materials furnished by the contracting party. Unlike the standardized dresses manufactured by Murcel, Respondent makes a variety of styles.<sup>7</sup>

There are also differences in the jobs and working conditions under Respondent. The work of Murcel employees was apparently routinized. Because Murcel manufactured essentially one product—uniforms—sewing operators performed chiefly one operation. Respondent's sewing operators, however, perform several different operations. As Frank DiBartolo explained, unlike a uniform business such as Murcel in which a sewing operator would stay sometimes for months on one operation, such as setting a pocket or setting a collar, in a fashion business, such as Respondent's, sewing operators perform several jobs day to day.

There are also differences in the materials and fabrics used by Respondent. In making uniforms, Murcel used only one grade of material consisting of a staple cloth made of cotton or nylon. Respondent, however, employs several grades and types of materials, including cotton, polyester, cotton blend, nylon, single and double knit, printed cloth, and a georgette. Further, Respondent's use of these various materials has necessitated different equipment. Respondent added six cutting tables<sup>8</sup> and three new spreading machines that can spread double knits, single knits, and various types of cloth. Because the different types of fabrics used produce dust, Respondent installed a compressor to absorb the dust from the air.

It is also apparent that other considerable changes were made in the machinery, equipment, and methods of production used by Respondent at a cost of over \$32,000. In explaining the differences from the uniform manufacturing operation of Murcel, Frank DiBartolo stated that Respondent was unable to use at least one-half of Murcel's equipment. Some of this equipment consisted of heavy duty and fancy stitch machines that are unsuitable for Respondent's opera-

<sup>1</sup> According to the testimony of employee Anna Loutrell Futch, contract work was very rare under Murcel's operation.

<sup>2</sup> Frank DiBartolo's testimony regarding the differences between the operations of Murcel and Respondent is essentially supported by the testimony of employees Betty Blocker and Anna Loutrell Futch, both of whom worked for Murcel as well as for Respondent.

<sup>3</sup> Whereas the chief product manufactured by Murcel was uniforms, Respondent has never made uniforms.

<sup>4</sup> According to Frank DiBartolo, there previously was only one cutting machine which Respondent was unable to use.

<sup>1</sup> See *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964); *Lincoln Private Police, Inc. as successor to Industrial Security Guards, Inc.*, 189 NLRB 717, 719-720 (1971).

<sup>2</sup> *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234, 236 (1972).

<sup>3</sup> Murcel was a subsidiary of W. Kotkes & Sons, Inc., which owned several other plants.

<sup>4</sup> Respondent had never done any business with Murcel.

tion. Respondent therefore stored this unusable equipment in a warehouse it rented in Glenville.<sup>9</sup> Respondent also purchased new equipment. In addition to the cutting and spreading machines mentioned above, Respondent added sewing machines, single-needle machines, tacking machines, pressing equipment, and racks for hanging the garments. After being hung on a plastic or metal hanger in a polybag, Respondent's garments are then shipped out on hangers by truck. At Murcel, the uniforms were placed in plastic bags by a bagging machine and then placed in cardboard boxes for shipment.

Finally, it is apparent that, of Respondent's eight supervisors only one, Mattie Todd, was a supervisor at Murcel.<sup>10</sup> It must be recognized, therefore, that Respondent's supervisory hierarchy bears little resemblance to that formerly existing at Murcel.

Based on the foregoing factors, we conclude that, on balance, the nature and character of the employing industry has been sufficiently altered so that Respondent is not a successor to Murcel.<sup>11</sup> Accordingly, we shall dismiss the complaint in its entirety.

### 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 Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

<sup>9</sup> Because of the cost involved, Respondent, at the time of the hearing, was apparently planning on bringing this equipment back to the main plant for storage in the boiler room.

<sup>10</sup> This is evident from the testimony of both Anna L. Futch and Frank DiBartolo. Respondent's other supervisors are Loretta Manor, Rachael Cammack, Ann Lou Morris, Jenny Stevens, Kathy Carter, Odessa Martin, and Peter Trione, plant manager.

<sup>11</sup> The Administrative Law Judge found it unnecessary to decide whether the changes effectuated by Respondent constitute a "substantial and material change in the employing industry." Rather, the Administrative Law Judge based his recommendation that the complaint be dismissed upon his finding that the Union did not represent a majority of Respondent's employees when it requested recognition on September 12, 1977, the date termed critical by the Administrative Law Judge. Even assuming, however, that, for purposes of determining successorship here, the critical date should be on or about the week of August 28, 1975, when Respondent reached a full complement of employees and when the Union may have represented a slim majority of these employees, we would still find, on balance, that this factor is outweighed by the changes in the supervisory hierarchy, business operations, equipment, methods of production, main product, and working conditions effectuated by Respondent. Also significant in this regard is the 3-week hiatus between the shutdown of the Murcel plant and Respondent's commencement of operations.

### DECISION

#### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge: This case was heard before me on March 12, 1979, in Claxton, Georgia. The charge was filed by International Ladies' Garment

Workers' Union, herein called the Union, on November 18, 1977. The complaint alleges that Respondent, as a successor to Murcel Manufacturing Corporation, has violated Section 8(a)(5) of the National Labor Relations Act, as amended, by refusing to bargain with the Union. On August 25, 1977, in *Murcel Manufacturing Corp.*, 231 NLRB 623 (1977), the Board found that the Union had represented a majority of Murcel's production and maintenance employees at its Glenville, Georgia, plant since February 12, 1973, and in that Decision the Board ordered Murcel to bargain with the Union. The complaint alleges that on or about July 4, 1975, Respondent purchased the business assets of Murcel and since that date has operated the business from the same building, engaged in substantially the same business, using substantially the same machinery, employing substantially the same supervisors and a majority of the employees previously employed by Murcel. The complaint concludes that Respondent is, therefore, a successor to Murcel and that because the Union requested bargaining on September 12, 1977, and Respondent has refused to bargain with the Union since November 1, 1977, Respondent has violated Section 8(a)(5) of the Act. Respondent admits that it has refused to bargain with the Union, but it denies that it has a legal obligation to do so. More specifically, Respondent denies that it is a "successor" as that term is used in the case law because it is not engaged in substantially the same business as Murcel, does not use substantially the same machinery, has not employed substantially the same supervisors, and did not employ a majority of Murcel's employees at the time it reached its full complement of employees or thereafter. Finally, Respondent contends that, because of certain exchanges in stock ownership of Respondent, it is not actually an immediate successor of Murcel, but a remote successor who had no knowledge of, and therefore no duty to remedy the unfair labor practices of, Murcel.

Pursuant to notice, a hearing was held before me with the General Counsel and Respondent represented. Each was afforded full opportunity to be heard, to introduce relevant evidence, and to present oral argument. Both the General Counsel and Respondent have filed briefs which have been carefully considered.

Upon the entire record in the case, including my observation of the witnesses, I make the following:

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

Respondent is a Georgia corporation with an office and place of business located at Glenville, Georgia, where it is engaged in the manufacture and sale of women's apparel. During the year preceding the issuance of the complaint herein, Respondent sold and shipped finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia. Accordingly, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

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

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Facts

On April 12, 1973, an election was conducted among Murcel's Glenville, Georgia, production and maintenance employees. The Union failed to secure a majority in that election, but it filed objections to the election and unfair labor practice charges against Murcel. On April 18, 1974, Administrative Law Judge Ramey Donovan issued his Decision finding that because of numerous unfair labor practices Murcel the election should be set aside. He further found that on February 2, 1973, the Union had secured majority status by virtue of authorization cards signed by a majority of the employees in Murcel's production and maintenance unit which he found to consist of 148 employees on that date. Because of the unfair labor practices by Murcel, and pursuant to the authority of *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), Administrative Law Judge Donovan recommended that Murcel be required to bargain with the Union. On August 25, 1977, the Board adopted this recommended Order in its Decision in *Murcel Manufacturing Corp., supra*.

While the Murcel case was pending before the Board, the Company changed hands.

Murcel's authority to transact business in Georgia was revoked on June 10, 1974. One Marvin Wood was then an employee of W. Kotkes & Sons, Inc., which owned Murcel and several other clothing factories. Wood was commissioned by Kotkes to find a buyer for Murcel. Although the authority to transact business had been revoked, Murcel continued to operate at the subject plant until sometime in July 1975. During that month Wood and Richard Russo purchased all of Murcel's stock from Kotkes. Wood became owner of 20 percent of the stock, and Russo 80 percent, and the corporation formed was named Woodrich Industries, Inc. The plant was shut down for 3 weeks, and its first week of operations as Woodrich was that of August 7, 1975, but it was not until October 12, 1977, that the Union requested Woodrich to bargain with it as the legal successor to Murcel.

The General Counsel here charges Respondent with a duty to bargain with the Union as the successor of Murcel. To determine "successorship" as the term is used at law, the Board and the courts look to see if there has been a change in the employing industry. To tell if a phenomenon constitutes a change, one logically needs to know how things existed before the event in question. However, the General Counsel made no attempt to secure testimony or critical records from Murcel (if it still exists) or Kotkes (which does exist), and I refused to allow him to attempt to fill the *lacunae* in his case with verbal recitations from the palpably deficient memories of two employee witnesses. Therefore there is in evidence only one of Murcel's records which would permit comparisons of its employee complement to that of Woodrich.

Over Respondent's objection, I received in evidence a computer printout which listed all hourly paid personnel employed by Murcel at the plant involved during the week of Murcel's operation. There are several weaknesses in the document standing alone. In the first place it lists 56 persons as hourly paid, but it does not reflect whether this was a greater or lesser number than the usual complement of employees and supervisors employed by Murcel between February 12, 1973, and July 1975. During the last week of its operation Murcel may have been employing only the employees necessary to wind down the remaining orders and therefore the persons listed may have only been a fragment of the usual complement of the employees of Murcel and the percentage of former Murcel employees employed by Respondent may have actually been much larger than proved. On the other hand Murcel may have employed many one-time-only employees to meet some deadline for closing up shop. In this event the persons listed on the final Murcel payroll would not have been regularly employed and, in determining whether a majority of Respondent's employees were formerly employed by Murcel, would not be counted. Seven employees listed worked less than 10 hours during that week, and an additional eight worked less than 20 hours. Whether these persons regularly worked these few hours, whether they were hired only for these few hours during the last week, or whether they were simply terminated earlier in the week than the remaining employees cannot be made out by this exhibit. Finally, the document, except for handwritten notations which were excluded from the offer, does not identify any classification of any employee or the identity of any supervisor.

Therefore, while the computer printout of Murcel's last payroll was properly identified as a business record (having been previously submitted as such to the regional office by counsel) and relevant, the weight which can be assigned to it is reduced by these factors.

The exhibits list 56 individuals as hourly paid personnel. At least three of these were supervisors according to the testimony of the General Counsel's own witnesses: Othedis Coward, Margarte Joseph and Mattie Lou Todd. Therefore only 53, at maximum, may be considered to have been statutory employees, and for the purposes of discussion, I shall assume that all 53 hourly paid individuals listed on the printout were regularly employed production and maintenance employees of Murcel.

The plant was closed for 3 weeks. The first week of operation by Respondent was that ending August 7, 1975. During that week, according to an exhibit placed in evidence by the General Counsel, Respondent employed a total of 59 employees, 40<sup>1</sup> of whom were listed on Murcel's last payroll. It is undisputed that none of the former Murcel employees involved in this initial hiring were required by Respondent to fill out applications.

In the week of August 28, Respondent reached its full production complement of 95 employees. Of these, 43 were listed on Murcel's last payroll, and an additional 10 were included on the list submitted to the regional office on

<sup>1</sup> From an attachment to his brief, it appears that the General Counsel would additionally include in this figure Lillie Mae Causey and Odessa Martin. I disagree: Causey is not listed on the printout and Martin, according to her own testimony on behalf of the General Counsel, had been a supervisor with Murcel.

March 29, 1973, by Murcel in compliance with an order of the Regional Director pursuant to *Excelsior Underwear Inc. and Saluda Knitting Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), herein called the *Excelsior* list. General Counsel would include all employees on the *Excelsior* list as well as those on Murcel's last payroll in figuring whether a majority of the employees hired by Respondent were previously employed by Murcel, and therefore presumably represented by the Union. Obviously, if this position is sustained, the Union had a slight majority at the time Woodrich reached its full complement, as well as a clear majority during the initial week of operation. However, in view of my ultimate conclusion herein, I need not decide the validity of this position.

Frank DiBartolo was vice president of Woodrich at the time of the hearing, and his brother Salvatore was president. Frank DiBartolo testified that in early 1976 Wood approached him and his brother Salvatore and attempted to convince them that they should purchase Russo's 80 percent ownership of Woodrich. The DiBartoloes instructed Wood to negotiate the purchase without disclosing their identity because they believed that would cause Russo to raise his price. Wood did as he was told and on May 4, 1976, the DiBartoloes became owners of Russo's shares.<sup>2</sup> In negotiating this transaction, Wood concealed the existence of the potential bargaining order against Murcel (its successors and assigns) from the DiBartoloes in addition to concealing the identity of the DiBartoloes from Russo.

Frank DiBartolo testified that he and his brother distrusted Wood's ethics, but he did not say why. At any rate, because of this distrust and other factors the DiBartoloes bought Wood in December 1976. Wood did not mention the *Murcel* case then either. The first time any official of Respondent heard of the case was in 1977, apparently upon receipt of the Union's September 12 demand for bargaining. Frank DiBartolo testified that *thereafter*, at Christmas 1977, Wood visited him. Among the topics brought up was the Union's demand to bargain and the subject changed. Russo *then*, for the first time, acknowledged the existence of a potential labor dispute but told DiBartolo not to worry about it. DiBartolo did not state what he responded to Wood.<sup>3</sup>

On September 12, 1977, the date the Union requested Respondent to bargain, Respondent employed 172 employees, 24 of whom worked for Murcel during its last week and an additional 17 of whom appeared on the 1973 *Murcel Excelsior* list.

According to Frank Bartolo, there are a number of differences in the operations of Murcel and Respondent which may be summarized as follows: When the employees worked for Murcel, they manufactured nurses uniforms consisting only of standardized dresses or pants suits made of one grade of material. At Woodrich they have manufactured a multiplicity of styles for the five or six seasons of the fashion year using a variety of fabrics. The work of Murcel

<sup>2</sup> Respondent placed in evidence its listing of production and maintenance employees as of May 6, 1976. There are some 172 employees listed of whom 44 were also listed on Murcel's last payroll and an additional 16 appeared on the 1973 *Excelsior* list.

<sup>3</sup> Wood did not testify. This paragraph is a summary of Frank DiBartolo's un rebutted testimony on the point which I credit.

employees was routinized; at Woodrich they are required to perform a number of different types of sewing functions.

Murcel purchased its own cloth, manufactured the uniforms, and sold directly to retailers. Woodrich is a contractor; it accepts fabric owned by other manufacturers, sews it to design, and ships it back to the manufacturer who markets the clothing to retailers.

#### B. Conclusions

Following the decision of the Supreme Court in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), there have been a large number of cases defining just what is a "successor" and the nature of the obligations attendant to a finding of successorship. As summarized by the Board in *Mondovi Foods Corporation*, 235 NLRB 1080, 1082 (1978):

When all or part of a business is sold, certain legal obligations of the seller devolve upon the purchaser. Where there is substantial continuity in the identity of the employing enterprise, one such obligation will be that of the employer to recognize and bargain with a union which represents the former owner's employees. However, if in the course of the transfer there have been substantial and material changes in the employing enterprise, the new employer will not be found to have succeeded to the bargaining obligation of the former employer.<sup>4</sup>

In cases involving the successorship issue, the Board's key consideration is "whether it may reasonably be assumed that, as a result of transitional changes, the employees' desires concerning unionization [have] likely changed."<sup>5</sup> The Board considers a variety of factors in determining whether the new employer has succeeded to the former employer's bargaining obligation. Certainly a prime factor is whether the purchaser has hired a sufficient number of former employees of the seller to constitute a majority of the employee complement of the appropriate unit.<sup>6</sup>

<sup>4</sup> *Lincoln Private Police, Inc.*, 189 NLRB 717 (1971).

<sup>5</sup> *Ranch-Way, Inc.*, 183 NLRB 1168, 1169 (1970).

<sup>6</sup> See *N.L.R.B. v. Burns, supra; Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249 (1974); *Spruce Up Corporation*, 209 NLRB 194 (1974).

As further stated in *Pre-Engineered Building Products, Inc.*, 228 NLRB 841, fn. 1 (1977), citing *The Daneker Clock Company, Inc.*, 211 NLRB 719, 721 (1974), enfd. 516 F.2d 315 (4th Cir. 1975) and *C. G. Conn, Ltd.*, 197 NLRB 442 (1972), in determining whether a purchaser required as a "successor" to recognize a union: "... it is well established that the critical date for determining the union's majority status is the date on which the request for bargaining is received by the employer."

With this plainly stated rule of law established, I need not decide on whether a bargaining order could have been predicated on a majority which is presumed from the scant records and testimony received herein had there been a request to bargain at the time Respondent was formed and began operations (August 7, 1975), at the time Respondent reached its full complement (August 28, 1975), or at the time the DiBartoloes bought out Russo (May 4, 1976). Nor

need I decide whether the changes effectuated by Woodrich constitute a "substantial and material change in the employing industry" as that phrase is used in the cases cited. Nor need I determine the effect, if any, of the December 1976 stock transaction or the significance of Respondent's ignorance of Murcel's violations.

While the 4-year lapse in issuing the Decision in *Murcel Manufacturing Corp.*, was unfortunate, it was certainly no fault of Respondent herein. Nor did this lapse of time excuse the Charging Party from the exercise of due diligence; nothing prevented it from demanding recognition from Respondent when, according to the General Counsel's theory, it still possessed a presumptive majority. By the time the Union demanded recognition it represented only 26 percent of the employees of Respondent, indulging in all of the assumptions and presumptions invoked by the General Counsel. Since the Union did not, in fact, represent a majority of Respondent's employees at the time it requested recognition, there was no duty on the part of Respondent to honor that request, and its refusal to do so did not violate Section 8(a)(5) of the Act.

Accordingly, I shall recommend that the complaint be dismissed in its entirety.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>4</sup>

The complaint is dismissed in its entirety.

<sup>4</sup>In the event no exceptions are filed as provided in Sec. 102.48 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.