

**Miami Industrial Trucks, Inc. and Bobcat of Dayton, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, Petitioner. Case 9-AC-55**

December 22, 1975

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN MURPHY AND MEMBERS  
FANNING AND PENELLO

On April 10, 1975, the Acting Regional Director for Region 9 issued a Decision and Clarification of Bargaining Unit<sup>1</sup> in the above-entitled proceeding in which he clarified the currently existing bargaining unit at Miami Industrial Trucks, Inc., to include all employees, including journeymen, mechanics, and mechanic-learners, employed by Bobcat of Dayton, Inc. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Employer filed a timely request for review of the Acting Regional Director's decision on the grounds that, in finding that Miami and Bobcat constitute a single employer and that the employees of Bobcat constitute an accretion to the existing Miami unit, the Acting Regional Director departed from officially reported Board precedent and made findings of fact which are clearly erroneous on the record.

By telegraphic order dated June 9, 1975, the Board granted the request for review and requested the parties to submit briefs relative to the issue of whether Bobcat is a successor to a portion of Miami's operations. Thereafter, the Employer and Petitioner filed briefs on review.

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 entire record in this proceeding with respect to the issues under review, including the briefs on review filed by the parties, and makes the following findings:

Miami is engaged in the sale and service of industrial equipment at its Dayton and Springfield, Ohio, locations. Prior to the incorporation of Bobcat in January 1975, Miami was the dealer for two separate divisions of the Clarke Equipment Company: the Industrial Truck and the Melroe divisions.<sup>2</sup> In July or September 1974, the Melroe division requested Deuber, the president and majority stock-

holder of Miami, to establish a separate dealership for its equipment. Pursuant to this request, Bobcat was incorporated. Since January 1975, Bobcat has been engaged exclusively in the sale and service of the Melroe line of equipment at its Dayton, Ohio, location.

Deuber owns 50 percent of the stock of Bobcat. He is also the president of Bobcat and a member of Bobcat's board of directors. Chris Fuerst and Ruton Pettie, both former Miami employees, each owns 25 percent of the remaining stock of Bobcat.<sup>3</sup> Fuerst is Bobcat's vice president and service manager. Fuerst and Pettie manage the day-to-day operations of Bobcat.

Bobcat commenced operations with a service department staffed by three service employees who had previously been employed by Miami. These employees continued to perform the same basic functions for Bobcat that they had previously performed for Miami. Moreover, they continued to service the same product line for the same customers. They also continued to work the same hours and receive the same compensation and fringe benefits.

The Acting Regional Director concluded that Bobcat and Miami constitute a single employer because he found there is common ownership and financial control of both entities; they are both located in the same geographic area and perform essentially the same type of business; and there is common control over the formulation of labor relations policies for both. We do not agree.

Contrary to the Acting Regional Director, the record does not support the conclusion that there is common control over the formulation of labor relations policies for both corporations. Specifically, the record does not reveal that Deuber exercises any control over Bobcat's labor relations policies. Thus, though Deuber acts as a member of each corporation's board of directors and possesses ownership interests in each corporation, there is no evidence that he has ever participated in the formulation of Bobcat's labor relations policies.<sup>4</sup> Rather, the record reveals that Fuerst and Pettie manage the operations of Bobcat. Deuber's only involvement with Bobcat is that Fuerst and Pettie may occasionally solicit his advice, where his ability and experience may be of assistance.

The foregoing facts reveal, at most, that Deuber, as 50-percent stockholder, possesses potential, as opposed to actual or active, control over the formulation of Bobcat's labor relations. This potential

<sup>1</sup> The Acting Regional Director treated the petition to amend the certification as a petition to clarify the unit which the Petitioner currently represents at Miami.

<sup>2</sup> The Industrial Truck product line consists primarily of forklift trucks and the Melroe product line consists of bucket or scoop-type trucks and some agricultural implements.

<sup>3</sup> Fuerst had been with Miami for 17-1/2 years and at the time he left Miami he held the position of service manager. Pettie had been employed as a salesman with Miami.

<sup>4</sup> Deuber maintains no office at Bobcat and he receives no compensation from Bobcat.

common control does not, however, establish that Miami and Bobcat together constitute a single employer.<sup>5</sup> Further, as noted by the Acting Regional Director, Bobcat and Miami operate as separate legal entities and maintain separate books, records, and payrolls. Also, there has been no interchange of employees or tools between the two corporations since Bobcat commenced operations. In sum, in view of the foregoing facts, and particularly in view of the lack of common control over the formulation of the labor relations policies of both entities, we conclude that Bobcat and Miami are not a single employer. *A fortiori*, the Bobcat employees do not constitute an accretion to the existing Miami unit and the Miami unit cannot be clarified to include the Bobcat employees.

While the facts do not establish that Bobcat and Miami constitute a single employer, we find, for the reasons stated below, that Bobcat is a successor to a portion of Miami's business, consisting of the Melroe product line.

The keystone in determining successorship is whether there is substantial continuity of the employing industry.<sup>6</sup> As noted by the Employer, the Board looks to several factors in determining whether there is sufficient continuity of the employing industry to warrant a finding of successorship. These factors include whether there is substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product, and services.<sup>7</sup>

Contrary to the Employer, we believe that there is substantial continuity of these factors in this case. With respect to the continuity of business operations, the fact that Bobcat took over only the Melroe product line from Miami, and Miami continues to sell and service other equipment, does not alter the fact that, with respect to the Melroe line of

equipment, the business operations of Bobcat remain substantially the same as those of Miami.<sup>8</sup> As recognized by the Employer in its brief on review, "the machinery, equipment and methods of service used by Bobcat are similar to those used at Miami when Bobcat equipment was sold." A finding of continuity of business operations is further supported by the facts that there has been no hiatus in operations and Bobcat continues to serve the same customers previously served by Miami.<sup>9</sup> Perhaps most importantly, the record reveals substantial continuity in Bobcat's work force. While not entirely clear from the record, it appears that Bobcat now employs approximately 10 employees, including Fuerst and Pettie.<sup>10</sup> Of these 10, a maximum of 4 appear to be service employees in mechanic classifications that previously fell within the scope of the certified Miami production and maintenance unit.<sup>11</sup> As noted above, three of the four Bobcat service employees were formerly employed in unit positions at Miami. Contrary to the Employer, we do not find it determinative that Bobcat employs less than a majority of Miami's unit employees or that less than a majority of all the Bobcat employees (both those within and outside the proposed unit) are former Miami unit employees.<sup>12</sup> Rather, we believe that the relevant inquiry is whether there is a substantial continuity of work force here.<sup>13</sup> As three of the four Bobcat service employees are former Miami unit employees, we conclude that such is the case.

In sum, on the foregoing facts, we find that Bobcat is a successor to that portion of Miami's operations which involves the Melroe product line. Accordingly, we will amend the current certification, which presently covers a unit of production and maintenance employees of Miami,<sup>14</sup> by adding thereto that

employs approximately 60 employees. Approximately 30 to 36 of these employees are included in the Miami production and maintenance unit.

<sup>11</sup> Fuerst, who formerly acted as Miami's service manager, now acts as Bobcat's service manager.

<sup>12</sup> *United Maintenance & Manufacturing Co., Inc.*, 214 NLRB No. 31 (1974).

<sup>13</sup> The instant case is factually distinguishable from *Atlantic Technical Services Corporation*, 202 NLRB 169 (1973), cited by the Employer. Thus, in that case, the Board declined to find successorship, relying on the diminution in the scope of the unit (from a 14,000-plus multilocation unit to a single mailroom unit of 41 employees) and the material differences in size and organizational structure of the new employer. The former employer, TWA, was a large company engaged primarily in transportation and related fields with contracts throughout the country, while the new employer was a small organization which had only the single contract involved in the case.

<sup>14</sup> In Cases 9-RC-9290 and 9-RM-646, the Petitioner was certified as the exclusive bargaining agent for the employees of Miami Industrial Trucks, Inc., in the following unit:

All production and maintenance employees, including mechanics, parts department employees, truckdrivers, and plant clerical employees, but excluding all office clerical employees, sales employees, professional employees, guards and supervisors as defined in the Act.

<sup>5</sup> *Milo Express, Inc.*, 212 NLRB 313 (1974); *Drivers, Chauffeurs and Helpers Local No. 639, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Poole's Warehousing, Inc.)*, 158 NLRB 1281 (1966).

<sup>6</sup> *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964).

<sup>7</sup> *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972).

<sup>8</sup> In *Lincoln Private Police, Inc. as Successor to Industrial Security Guards, Inc.*, 189 NLRB 717 (1971), the Board recognized that where sufficient other indicia exist successorship can be found where the new employer acquires less than the predecessor's entire business. See also *Royal Brand Cutlery Company*, 122 NLRB 901 (1959); *Maintenance, Incorporated*, 148 NLRB 1299 (1964); *Quaker Tool & Die, Inc.*, 162 NLRB 1307 (1967); *The Westgate Corporation*, 196 NLRB 306 (1972).

<sup>9</sup> *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO*, 417 U.S. 249 (1974), cited by the Employer, is factually distinguishable from the instant case. Further, that case is inapposite since the Supreme Court holding was limited to a finding that the employer there was not a successor for the purpose of imposing an obligation on the employer to arbitrate with the union representing the predecessor's employees. The Supreme Court specifically did not pass on whether the employer was a successor for other purposes; i.e., the duty to recognize and bargain with the union.

<sup>10</sup> While also unclear from the record, it appears that Miami presently

Petitioner now also represents, in a separate unit, the production and maintenance employees of Bobcat.<sup>15</sup> Consistent therewith, we will amend the description of the unit covering the Miami employees to exclude the employees of Bobcat.

#### ORDER

It is hereby ordered that the Certification of Representative issued to the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, in Cases 9-RC-9290 and 9-RM-646 be, and it hereby is, amended to read:

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is the exclusive bargaining representative for the employees of Miami Industrial Trucks, Inc., in the following unit:

<sup>15</sup> Although defined as "all production and maintenance employees" the

All production and maintenance employees, including mechanics, parts department employees, truckdrivers, and plant clerical employees; but excluding all office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act, and all employees of Bobcat of Dayton, Inc.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, is the exclusive bargaining agent for the employees of Bobcat of Dayton, Inc., in the following unit:

All production and maintenance employees, including mechanics, parts department employees, truckdrivers, and plant clerical employees; but excluding all office clerical employees, sales employees, professional employees, guards, and supervisors as defined in the Act.

unit in fact consists of the service employees in mechanic classifications.