

the Respondent resorting to other acts of interference, restraint, and coercion in violation of the Act. He therefore will recommend that the Respondent be ordered to cease and desist from in any manner infringing upon the rights of the employees as guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Trial Examiner makes the following.

CONCLUSIONS OF LAW

1. United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, and International Association of Machinists, District 83, AFL-CIO, are labor organizations within the meaning of Section 2 (5) of the Act.

2. By discriminating in regard to the hire or tenure of employment of:

Ruth Milner	William Orr
Blanche King	Beverly J Rice
Geraldine Crawford	Florence Richards
Arlene Baker	Theresa M Scapatucci
Ernest Frankenberg, Jr.	Cora Seber
Mary Walker	Arvilla Settlementre
Nettie Carder	Catherine Slocum
Matilda McDaniel	Walter Lee Snyder
Hazel L White	

the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

3. By such discrimination, and by interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) and 8 (a) (5) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[Recommendations omitted from publication]

Duane's Miami Corporation and Retail Clerk's International Association, Local 1625, AFL-CIO, Petitioner. Case No. 12-RC-170. January 15, 1958

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Herbert B. Mintz, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Jenkins].

Upon the entire record in this case, the Board finds:

1. The Employer is a Florida corporation operating a retail shoe department under lease in the Jordan Marsh Department Store at Miami, Florida. Its annual sales, all of which are intrastate, approximate \$600,000; and its annual purchases, all of which are from out of

State, approximate \$330,000. Thus, the Employer has insufficient outflow or inflow to warrant the assertion of jurisdiction over it as a separate entity.¹ However, in its lease the Employer “. . . covenants that a subsidiary of International Shoe Company of St. Louis, Missouri, is and shall continue to be the owner of more than a majority of its voting shares of stock.” The lease further provides that the Employer “. . . shall not assign this agreement nor sublet the premises or privileges herein granted except to International Shoe Company or another majority owned subsidiary thereof, without prior written consent of Licensor.” Moreover, as previously found by the Board, said International Shoe Company has approximately 50 shoe manufacturing plants located in various States of the United States, and at 1 plant alone has direct inflow of almost \$3,000,000 annually and direct outflow of approximately \$2,500,000 annually.² Accordingly, as the Employer is a subsidiary of International Shoe Company, and as the lease shows further integration between the Employer and International Shoe Company, we find that the operations of the Employer and International Shoe Company are sufficiently integrated to constitute them a single employer.³ Consequently, as the combined operation has direct outflow in excess of \$50,000 annually, we find that it will effectuate the policies of the Act to assert jurisdiction over the Employer. We therefore deny the Employer’s motion to dismiss the petition on the asserted ground that it does not meet the Board’s jurisdictional standards.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

The Employer and Jordan Marsh Co., the Intervenor herein, contend that the shoe department employees involved herein are not employees of the Employer but are employees of the Intervenor. In support of this contention, they introduced testimony to show that: (1) The Intervenor’s handbook is distributed to all employees in the store, including shoe department employees, and the working conditions and benefits set forth in this handbook, such a working hours, lunch time, payday, dress requirements, merchandise discounts, holidays, and contributory life insurance, are equally applicable to all employees in the store; (2) the Intervenor president is the overall operations manager of the entire store, including the shoe department; (3) the Intervenor hires shoe department employees in its

¹ See *Hogue and Knott Supermarkets*, 110 NLRB 543; *The T. H. Rogers Lumber Company*, 117 NLRB 1732.

² See *International Shoe Company*, 93 NLRB 907, 918.

³ See *Warrior Cooperative Mercantile Company*, 117 NLRB 1773.

personnel office; (4) the Intervenor transfers employees in and out of the shoe department; (5) shoe department employees are paid by Intervenor check; (6) no shoe department employees are hired or fired without Intervenor approval, but the Intervenor can hire or fire such employees without the Employer's approval; (7) the shoe department employees take the Intervenor training program; (8) the Intervenor has a blanket fidelity bond covering all employees in the store; and (9) the Intervenor has ultimate labor relations control over all employees in the store.

We note, however, that the license agreement between the Employer and the Intervenor, which of course represents the contract between the parties which legally governs their relationship, contains the following provisions: article 5 states that there shall be deducted from the monthly settlement between the Intervenor and the Employer ". . . all monies that Licensor may have advanced for the . . . Licensee for payment of salaries of employees . . .," which clearly indicates that the payment of shoe department employees by Intervenor check only represents an advance of money by the Intervenor, with such employees actually being paid their wages by the Employer. Article 7 contains three references to "Licensee's employees," thus clearly indicating that the parties themselves consider the employees in issue as employees of the Employer; and further states that "Licensee . . . shall reimburse Licensor for whatever portion of employee sick benefit costs (including necessary administrative costs) as may be paid by Licensor to or for the benefit of Licensee's employees," which clearly indicates that shoe department employee sick benefits also represent only an advance with actual payment by the Employer. Article 9 states that "Licensee agrees that all employees *employed by it* . . . shall be contracted for in Licensee's name through Licensor's employment division" [emphasis supplied], which not only constitutes further evidence that the parties themselves consider the employees in issue as employees of the Employer, but also shows that the Intervenor only acts as an agent of the Employer in hiring shoe department employees with the Employer being the actual hiring employer. Article 9 further provides that "Licensee shall have the right to fix and regulate the salaries, commissions, bonuses, gratuities, and vacations of Licensee's employees, except that Licensee shall conform to the minimum standards established by the Licensor with respect to earnings, hours, and other basic conditions of employment, and shall also conform to all the laws and regulations now in force or which may be enacted by any governmental authority." Thus, except for adherence to minimum standards established by the Intervenor or by law, the Employer has the all-important right to fix and regulate the pay and other benefits of the employee in issue. Article 9 further provides that ". . . the said shoe department . . . shall be under the

supervision of a competent and experienced manager," which reserves to the Employer the immediate supervision over the shoe department and the employees thereof. Article 13 requires "Licensee . . . to carry Workmen's Compensation insurance for employees of this department . . .," another indication of the licensee's employer status.⁴ Article 14 provides that "Licensor agrees to allow *employees of Licensee* the same discount on purchases made in other departments of the store as Licensor allows *its own employees*; and Licensee agrees to allow *employees of Licensor* the same discount on purchases made in this department." [Emphasis supplied.] This latter provision constitutes additional proof that the parties themselves consider the employees in issue as employees of the Employer as distinguished from the Intervenor's own employees. Article 19 provides that "Licensee agrees to assume exclusive liability for the payment of any sums imposed by Federal and/or State and/or local authorities upon its employees or others, for or relating to unemployment insurance, old age pensions, health or life insurance or the social security of employees or other persons who perform work or services for it in said department," which is further evidence of the employer status of the Employer. Finally, article 22 contains further references to "employees of Licensee."

The Board has recently indicated that the question as to whether the lessor or the lessee is the employer of leased department employees in this type of case is determined by which of the two has the primary right of control over matters fundamental to the employment relationship.⁵ In the instant case, it appears that the lessee has this primary right of control. Thus, under the controlling license agreement, the lessee has the following elements of control over the employment relationship: (1) the lessee pays the wages of the employees; (2) the lessee pays for employee sick benefit costs; (3) the lessee is the actual hiring employer; (4) except for adherence to minimum standards established by the lessor or by law, the lessee has the all-important right to fix and regulate the pay and other benefits of the employees; (5) the lessee exercises immediate supervision over the employees; (6) the lessee carries the workmen's compensation insurance for the employees;⁶ and (7) the lessee makes Federal and/or State and/or local unemployment insurance, old age pension, health and life insurance, and social-security payments for the employees.

⁴ There was also testimony that the Employer submits withholding tax returns for the employees in issue.

⁵ See *The Sperry and Hutchinson Company*, 117 NLRB 1762.

⁶ Although not provided for in the lease, it is also clearly established that the lessee submits withholding tax returns for the employees.

Moreover, with its many references thereto, the license agreement clearly shows that the parties themselves consider the employees in issue as employees of the lessee. Accordingly, and as we are convinced that such control as the lessor exercises over the shoe department employees is limited to the extent necessary for efficient operation of the lessor's store, we find that the Employer-lessee is the employer of the shoe department employees.⁷

4. The Petitioner seeks a unit of the shoe department employees of the Employer. The Employer and the Intervenor take the position that only a storewide unit, including all employees of the Intervenor, is appropriate. In view of our finding above that the shoe department employees are employed by a separate employer who has the primary right of control over their terms and conditions of employment, as the shoe department employees therefore have interests separate and distinct from those of the other store employees, and because the Board usually excludes leased department employees from storewide units, we find that the leased department employees sought constitute a separate appropriate unit.⁸

The Employer also employs 2 office clerical employees at the store, and 5 other office clericals at a different address 10 blocks away in Miami, Florida. Under established Board Practice of grouping selling and nonselling employees of a retail department store in 1 unit, it is clear that the 2 office clericals at the store should be included in the unit.⁹ Moreover, despite the physical separation of the other five clericals, this practice also requires their inclusion.¹⁰

Accordingly, we find that all employees in the Employer's shoe department in the Jordan Marsh Department Store at Miami, Florida, including office clerical employees, and also including the Employer's office clerical employees at 1721 N. E. Miami Court, Miami, Florida, but excluding supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication.]

⁷ See *The Sperry and Hutchinson Company, supra*; *Maas Brothers, Inc.*, 88 NLRB 129, 134, 135; *The P. B. Magrane Store, Inc.*, 84 NLRB 345, 347, 348. Cf. *Stack & Company*, 97 NLRB 1492, 1493, 1494, where the lessor rather than the lessee had almost complete control over the employment relationship.

Accordingly, we deny the motions of the Employer and the Intervenor to dismiss the petition on the asserted ground that the Intervenor rather than the Employer is the employer of these employees; and we further deny the motion of the Petitioner to amend the petition to include the Intervenor as the employer herein.

⁸ See cases cited in footnote 7, *supra*. Accordingly, we deny the Intervenor's motion to dismiss the petition on the asserted ground that the unit sought is inappropriate.

⁹ See *J. J. Moreau & Son, Inc.*, 107 NLRB 999.

¹⁰ See *J. J. Moreau & Son, Inc., supra*.