

Esgro Anaheim, Inc., Petitioner and Retail Clerks Union, Local 324, AFL-CIO

Esgro Valley, Inc., Petitioner and Retail Clerks Union, Local 770, AFL-CIO

Esgro Jefferson, Inc., Petitioner and Retail Clerks Union, Local 770, AFL-CIO

Esgro Olympic, Inc., Petitioner and Retail Clerks Union, Local 770, AFL-CIO

Esgro Central, Inc., Petitioner and Retail Clerks Union, Local 770, AFL-CIO

Esgro Victory, Inc., Petitioner and Retail Clerks Union, Local 905, AFL-CIO

Esgro Covina, Inc., Petitioner and Retail Clerks Union, Local 1428, AFL-CIO

Esgro San Bernardino, Inc., Petitioner and Retail Clerks Union, Local 1167, AFL-CIO. *Cases Nos. 21-RM-1001, 21-RM-1002, 21-RM-1003, 21-RM-1004, 21-RM-1005, 21-RM-1006, 21-RM-1007, and 21-RM-1016. December 16, 1964*

DECISION AND DIRECTION OF ELECTIONS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Shirley N. Bingham of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

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

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organizations involved claim to represent certain employees of the Employer.

3. Questions affecting commerce exist concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

White Front is a discount department store chain engaged in retail selling. The Employer-Petitioners, herein referred to collectively as Esgro, are separate corporate entities engaged in the retail sale of jewelry, cameras, photographic supplies, and related products at

¹ The Hearing Officer referred to the Board the motion of White Front Stores, Inc., herein called White Front, to be given full status as an Intervenor. In view of White Front's contractual interest in this proceeding, the motion is hereby granted.

various locations in the White Front stores.² Each is a wholly owned subsidiary of Esagro, Inc., which is a wholesale company and distributor and is the purchasing agent for the Employers involved in this proceeding. The Esagro retail business is conducted on a lease-department basis at the White Front stores, and the relationship between White Front and Esagro is governed by separate license agreements between them. The license agreements provide for the financial arrangements between the parties and for the operation of the licensee's departments as integral parts of the White Front stores.

Esagro seeks elections in a unit or units composed of its retail sales employees who are employed at the several White Front store locations, excluding all other employees, White Front employees, guards, and supervisors. Esagro has had concessions in White Front stores since 1956. In 1960 Esagro executed separate collective-bargaining contracts with Retail Clerks 777, the predecessor of Local 770, covering Esagro's employees at the Esagro Central store and Esagro Valley's only store at that time located in Van Nuys. At the expiration of these agreements Esagro filed RM petitions, and there were Board-conducted elections in separate units of Esagro employees in these two stores. The employees voted against union representation by Local 770. Since 1962 Esagro has had no collective-bargaining relationship with any labor organization for its sales employees in any of the White Front stores.

Retail Clerks Union, Locals 324, 770, 905, 1428, and 1167, AFL-CIO, herein referred to collectively as the Retail Clerks, contends that current collective-bargaining contracts between White Front and the various Retail Clerks locals are bars to these petitions, and that the requested units are inappropriate. Retail Clerks argues that the contracts between it and White Front are firm evidence of the existence of single, storewide bargaining units composed of the employees of White Front and the employees of lessees, licensees, and concessionaires of White Front. It contends that Esagro became bound by all terms of this contract immediately upon execution of the license agreements with White Front. White Front joins in these contentions, except as to the employees of Esagro Central, Inc., and Esagro Valley, Inc. As to Esagro's operations in these two White Front stores, White Front relies on the facts that these stores were found to be separate appropriate units in Board-conducted elections in 1962, and that the license agreement between White Front and Esagro excludes from the contract unit any leased departments which the Board finds to be separate bargaining units.

² Each of the separate Esagro corporations operates in a separate White Front store except for Esagro Valley, Inc., which now has departments in three White Front stores, at Van Nuys, Canoga Park, and Pacoima, California. Esagro, Inc., also operates several liquor concessions in White Front stores, which are not involved in this proceeding, through Triumph Sales, another wholly owned subsidiary of Esagro, Inc.

Esgro argues that the license agreements do not require it to sign collective-bargaining agreements with the Retail Clerks. It asserts that these license agreements clearly contemplate National Labor Relations Board elections as the method for designating a bargaining representative. Esgro further contends that the agreements between White Front and the Retail Clerks cannot constitute bars to these proceedings as it has signed no collective-bargaining agreements with the Retail Clerks. Esgro adds that if the combined effect of the contract between White Front and the Retail Clerks, which has a union-security clause, and the labor clauses of the license agreement between White Front and Esgro, is construed as requiring union membership of all Esgro employees, such a contract is unlawful on its face and cannot constitute a bar to an election.

The contracts between White Front and the Retail Clerks, urged as bars, are effective from July 1, 1962, to June 30, 1967.³ The bargaining units cover "all retail store employees and office clerical employees whose work is related to the operation of the retail stores (including, subject to the provisions of Section E hereof, employees of lessees, licensees and concessionaires employed in the retail stores and offices of the Employer [White Front] located within the present geographic jurisdiction of the Union. . . ." The contracts further provide that "should the Employer acquire, establish or operate an additional store or department within the present geographic jurisdiction of the Union, this Agreement shall apply to the retail store employees and office clerical employees as defined above employed in such store or department." Section E of the contracts, referred to in the recognition clauses, provides that the Employer will require operators of leased departments to agree to be bound by the terms of the agreement, and, "upon request of the Union, to execute a copy thereof, provided that such requirement is not contrary to law." An appendix C of the contracts amends section E so as to provide that the provisions of section E shall take effect, with respect to any new leased department, "immediately upon execution of the lease, sublease, license, or concessionaire agreement"; and with respect to "any present leased department which agrees in writing to be bound by the terms of this Agreement, immediately upon so agreeing in writing." Appendix C further provides that wage rates and commissions for employees of any leased department shall be subject to negotiations between the Retail Clerks locals and the operator of the leased department.

Under the license agreements between White Front and Esgro, the latter "to the extent permitted by law, agrees to be bound by the terms and provisions and any amendment or extension of the White

³ There are separate, but identical, contracts between each of the Retail Clerks locals and White Front.

Front-Retail Clerks Agreement which covers the White Front employees in the store or stores in which said Licensee operates, and further agrees, to the extent permitted by law, upon request of the Retail Clerks Union local which is a party to such White Front-Retail Clerks Agreement, to execute a copy of said Agreement." Esagro further agreed, "to the extent permitted by law, that in the event Licensor shall, during the term hereof, enter into any collective-bargaining agreement with a labor organization for employees employed in any store not covered by any of the collective bargaining agreements . . . covering classifications of work performed by Licensee's employees in such store or stores, the Licensee shall, upon receipt of Licensor's written demand, agree in writing to be bound by the terms and provisions of said collective bargaining agreement or agreements and any amendment or extension thereof."

The license agreement, however, provides that these provisions "shall be inapplicable to the department of the Licensee in any store where the employees of such Licensee have been or may hereafter be determined by the National Labor Relations Board to constitute a separate bargaining unit until and unless the Retail Clerks local in question is certified as the collective bargaining representative of such employees." It further provides that the licensee's failure to comply with these provisions "shall not be deemed a default under this Agreement if Licensee, upon demand by any of the labor organizations . . . for compliance with any of the provisions of said subparagraphs, promptly commences proceedings before the National Labor Relations Board . . . to seek determination of the applicability of such provision or provisions of this paragraph to any of Licensee's employees."

We shall first address ourselves to the nature of the relationship between White Front and Esagro in respect to the employees sought herein. Significant in this connection are, of course, the above contract between White Front and the Retail Clerks, and the license agreement between White Front and Esagro. The contract between White Front and the Retail Clerks specifically provides that "wage rates and commissions for any employees of any leased department . . . shall be subject to negotiations between the Union and such leased department . . ." And the license agreement provides that Esagro shall "employ and be responsible for help in [its] department." As to these matters, the record shows that Esagro does, in fact, hire and discharge its own employees, and sets their wage rates. Esagro also determines their work and vacation schedules. Without consultation with White Front, it grants fringe benefits, which are available only to its employees, and which do not arise from either

the contract or license agreement.⁴ There is no interchange of Esagro's employees with any White Front employees, or those of other licensees, and the contract provides that their seniority is to be separate from that of White Front employees. Such control as White Front exercises over Esagro's operations appears to be limited to the extent necessary for efficient operation of the White Front stores and to give the appearance to the public of one integrated retail operation.⁵ The license agreement further provides that "this agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee. . . ." Neither the contract nor the license agreement provides for the *common handling* of labor relations for Esagro's employees; and there is no evidence to show that such joint control was contemplated. While the Retail Clerks points out articles of the license agreement governing the operation of the licensee's department as an integral department of the store, it has not shown that White Front has exercised control over Esagro's employees so as to affect their working conditions or tenure of employment. Nor has any evidence been produced to show that White Front has ever had any part in settling grievances of Esagro's employees.⁶

Although, under its license agreements, Esagro agreed to be bound by the contracts between White Front and the Retail Clerks, Esagro was never a party to these contracts.⁷ Nor has Esagro entered into any oral or written agreements with the Retail Clerks. The only agreements affecting Esagro's employees are between Esagro and White Front. The agreements between White Front and the Retail Clerks state that White Front's obligation with respect to operators of leased departments is limited to requiring "the operators of leased departments to agree to be bound by the terms of this Agreement, and, upon request of the Union, to execute a copy thereof, provided

⁴ These benefits include overtime pay, vacations, life insurance, and hospitalization. Esagro also sponsors special incentive contests, to stimulate sales, in which only Esagro employees may participate.

⁵ See *Atlantic Mills Servicing Corporation of Cleveland, Inc., et al.*, 117 NLRB 65, 67.

⁶ Prior to the opening of new stores, Esagro participates in the mass advertising which is done to facilitate the staffing of new stores. Although White Front may screen applicants and refer satisfactory applicants, as our dissenting colleagues point out, Esagro personnel interview applicants for work in its department, and such applicants are required to fill out Esagro's own application forms. Only Esagro determines whether or not the applicants will be hired. While it is true that Esagro's department is opened during the same hours as the entire store, we attach more significance to the fact that the working hours and shifts of Esagro's employees are determined by Esagro alone. Nor do we attach any weight to the fact that White Front and Esagro may work together in resolving customer complaints, as there is no evidence that White Front has overruled Esagro's decisions with respect to such complaints, and Esagro asserts that it alone has final authority to adjust complaints.

⁷ While Esagro agreed to be bound by these contracts, the license agreements also provide for Board-conducted elections to resolve any question concerning representation.

that such requirement is not contrary to law." The contracts further provide that White Front "shall not be liable for any breach of contract or failure of a leased department to abide by the wages, hours, and working conditions set forth in this Agreement."⁸ Significant in this respect, is the fact, already mentioned, that the license agreements provide that the terms and provisions of the Retail Clerks contract shall be inoperative should the Board determine that Esagro's employees constitute separate appropriate units.

It is thus apparent from all the foregoing that control of wages, fringe benefits, day-to-day operations, the handling of grievances, and other employee matters are lodged with Esagro notwithstanding the license agreement between Esagro and White Front and the existing contract between White Front and Retail Clerks. In the absence of such joint control of labor relations by Esagro and White Front, it is clear, and we find, that Esagro and White Front are not joint employers of the employees herein.⁹

With respect to the allegation of contract bar, we are persuaded and find that the Retail Clerks contracts with White Front do not bar the present petitions. The mere fact that Esagro agreed with White Front, under its license agreement, to be bound by the White Front-Retail Clerks contracts, does not constitute a consummated agreement with the Retail Clerks as envisioned by the *Appalachian Shale* doctrine.¹⁰ Esagro is not a party to any written agreement with the Retail Clerks and has not been since 1962. The only agreement affecting its employees is with White Front alone, and that agreement provides, in effect, that the contractual arrangements between them shall not preclude a Board determination as to the appropriate unit of the employees of this licensee where, as here, the licensee seeks a Board determination as to unit. Accordingly, in view of our findings that White Front and Esagro are not joint employers, and in the absence of any separate agreement between

⁸ The contracts between White Front and the Retail Clerks did not, as already noted, provide for wage rates or commissions for any leased department employees, but provide that such wage rates and commissions are to "be subject to negotiations between the Union and such leased department . . ."

⁹ The cases, *Checker Cab Company* and its members, 141 NLRB 583, and *Overton Markets, Inc.*, 142 NLRB 615, upon which the dissent relies for reaching a contrary result, are not analogous situations. In the *Checker* case, the Board found, *inter alia*, that the members of Checker surrendered to Checker a considerable measure of control over the employment conditions of the drivers employed by each member, including authority in the Checker Board of Review to discipline them. In the instant case, Esagro alone controls the employment conditions of its employees. In the *Overton* case, there, unlike here, the Board was concerned with members of a family who operated with interdependent corporations, as shown by the fact that some had interlocking officers, by their identical and transferable employee profit sharing and insurance plans, and by their common purchasing.

¹⁰ *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161.

Esgro and the Retail Clerks, we find that there is no agreement covering Esgro's employees sufficient to constitute a bar.¹¹

4. Esgro requests that elections be directed in a single unit or separate units composed of its retail sales employees who are employed at the several White Front store locations, excluding all other employees, White Front employees, guards, and supervisors. Esgro suggests that there are three types of units which may be considered appropriate, single-store units; a single unit of employees in all stores; or a separate unit for the employees of each Esgro corporate entity, which would result in combining the employees of three stores in a single unit, while granting separate units for the employees in each of the other stores.¹² White Front and the Retail Clerks contend that only storewide units are appropriate.

The record does not show any changes in Esgro's operations, since the prior elections in 1962, which would warrant the establishment of a unit coextensive with all the corporate entities of Esgro, or of each corporation. Nor does the record indicate that there is any interchange of employees among the three stores of Esgro Valley, Inc., located in separate communities, that their store managers have less autonomy than the managers of the other Esgro operations, or that there is any difference in the day-to-day operations of these facilities from that of Esgro's other facilities. Therefore, we perceive no basis upon which to predicate a three-store unit, and conclude that units of the employees in each of the stores embraced by the petitions herein, being coextensive with the operations of Esgro therein, are here appropriate.

We find therefore, that the following employees constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(1) All retail sales employees employed at Esgro Anaheim's facilities at 222 S. Harbor Boulevard, Anaheim, California, excluding all other employees, guards, and supervisors as defined in the Act.

(2) All retail sales employees employed at Esgro Valley's facilities at 21300 Roscoe Boulevard, Canoga Park, California, excluding all other employees, guards, and supervisors as defined in the Act.

(3) All retail sales employees employed at Esgro Valley's facilities at 9725 Laurel Canyon Boulevard, Pacoima, California, excluding all other employees, guards, and supervisors as defined in the Act.

¹¹ *Bab-Rand Company*, 147 NLRB 247. There is no reason to believe that Esgro's operations in White Front's other stores differ in any respect from its operations in Esgro Valley and Esgro Central, as to which White Front concedes the contracts are not bars.

Inasmuch as we hold the contracts are not bars, we find it unnecessary to consider Esgro's contention that the labor clauses of the White Front-Retail Clerks contracts are unlawful on their face as they seek to require union membership without an election.

¹² Esgro Valley, Inc., has departments in three White Front stores, at Van Nuys, Canoga Park, and Pacoima, California.

(4) All retail sales employees employed at Esgro Valley's facilities at 16040 Sherman Way, Van Nuys, California, excluding all other employees, guards, and supervisors as defined in the Act.

(5) All retail sales employees employed at Esgro Jefferson's facilities at 5435 W. Jefferson Avenue, Los Angeles, California, excluding all other employees, guards, and supervisors as defined in the Act.

(6) All retail sales employees employed at Esgro Olympic's facilities at 5555 East Olympic Boulevard, Los Angeles, California, excluding all other employees, guards, and supervisors as defined in the Act.

(7) All retail sales employees employed at Esgro Central's facilities at 7651 S. Central Avenue, Los Angeles, California, excluding all other employees, guards, and supervisors as defined in the Act.

(8) All retail sales employees employed at Esgro Victory's facilities at 21250 Hawthorne Boulevard, Torrance, California, excluding all other employees, guards, and supervisors as defined in the Act.

(9) All retail sales employees employed at Esgro Covina's facilities at 1151 N. Azusa Avenue, Covina, California, excluding all other employees, guards, and supervisors as defined in the Act.

(10) All retail sales employees employed at Esgro San Bernardino's facilities at 499 Orangeshow Road, San Bernardino, California, excluding all other employees, guards, and supervisors as defined in the Act.

[Text of Direction of Elections omitted from publication.]

MEMBERS BROWN and JENKINS, dissenting:

We would find, contrary to our colleagues, that White Front and Esgro are joint employers of the employees working in the Esgro leased departments at the various White Front retail chain department stores.

The contractual efforts of White Front and Esgro to maintain separate employer relationships do not require a finding that they were successful. Nor is it controlling that White Front and Esgro failed to act jointly in all matters relating to labor relations concerning the leased department employees. It is the existence of White Front's authority and the fact that it is in a position to exercise control over Esgro's labor policies which are material. The record establishes such authority and power and that they are actually exercised in substantial matters. Thus, White Front places newspaper advertisements in its own name for employees, conducts screening interviews, and refers satisfactory applicants to Esgro and other leased department operators for possible hiring, and all employees, including those of Esgro, wear the same White Front uniform and badge and their working hours must conform in gen-

eral to the hours when the store is open. The entire store operation, leased departments included, is held out to the public as a single enterprise in all respects, with all business done in the name of White Front and all adjustments of customer complaints made to the satisfaction of White Front supervisors.

The record thus discloses a retail leased department operation of a type which has become a commonplace method of conducting a department store business. Generally speaking, the lessor establishes the store and holds himself out to the public as the sole entrepreneur, whereas in fact some or all of the departments are operated by lessees who assume some of the risk. Such operation, viewed realistically, is for all significant purposes a single business, with the lessor and lessee functioning jointly insofar as the particular leased department is concerned.¹³ Under these circumstances, the Balkanization of the bargaining unit must result in decreased effectiveness of collective bargaining as to those matters which are of common concern to all similarly placed sales personnel and in an increased potential for industrial strife. The effects of our colleagues' decision is, therefore, virtually to preclude meaningful collective bargaining in this rapidly expanding type of retail operation, and thereby frustrate the effective application of the policies of the Act to this area of our national economy.

We would, accordingly, find that White Front and Esagro are joint employers and would dismiss the petitions herein.

¹³ For analogous situations, see *Checker Cab Company and its members*, 141 NLRB 533; *Overton Markets, Inc.*, 142 NLRB 615.

Remington Rand, Division of Sperry Rand Corporation and Local 2104, International Association of Machinists, AFL-CIO,¹ Petitioner

Remington Rand, Division of Sperry Rand Corporation and Office Employees International Union, AFL-CIO, Local No. 212, Petitioner. *Cases Nos. 3-RC-423, 3-RC-429, and 3-RC-1869. December 16, 1964*

DECISION AND ORDER CLARIFYING BARGAINING UNIT

On June 23, 1950, following a Board-ordered election, the Regional Director issued a certification of representatives in Cases Nos. 3-RC-423 and 3-RC-429, in which he certified the United Electrical, Radio and Machine Workers of America, Local 304 (hereinafter referred to

¹ The name of the Petitioner in Cases Nos. 3-RC-423 and 3-RC-429 appears as amended at the hearing.