[The Board quashed the notice of hearing and dismissed the petition.]

Triumph Sales, Inc., Petitioner *and* Retail Clerks Union Locals 770 and 905, Retail Clerks International Association, AFL–CIO.
Case No. 31–RM–1 (formerly 21–RM–1102). August 31, 1965

DECISION AND DIRECTION OF ELECTIONS *

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Orville S. Johnson. The Hearing Officer's ruling made at the hearing are free from prejudicial error and are hereby affirmed.[1]

Upon the entire record in the case, including the briefs filed by the parties, the National Labor Relations 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-Petitioner.

3. The Employer-Petitioner, herein referred to as Triumph, is licensed by White Front, which owns a chain of discount department stores, to operate retail liquor departments on White Front premises. Triumph operates such departments at 11 White Front locations in the State of California, and it seeks an election among retail sales employees working at 9 of these liquor departments. White Front and Retail Clerks contend that the petition should be dismissed on the grounds that White Front and Triumph are joint employers of these employees, that the petition seeks an election in an inappropriate unit, and that the petition is barred by the agreement between White Front and Retail Clerks. In addition, Retail Clerks contends that the petition is barred by the bargaining agreements between Bristlo Liquor Inc.,[2] and Retail Clerks.

The Board on three occasions in the recent past has decided cases involving licensed departments at the White Front Stores, *Bab-Rand Company*, 147 NLRB 247, *Esgro Anaheim, Inc.*, 150 NLRB 401, *New*

* On September 22, 1965, the Board vacated the Decision and Direction of Elections insofar as it relates to units (1), (2), and (3) as, due to a change in method of store operation, these units are now one-employee units and the parties agree that no election should be held in these units.

[1] White Front Stores, Inc., herein referred to as White Front, and Retail Clerks Union Locals 324, 1167, and 1428, Retail Clerks International Association, AFL–CIO, were properly permitted to intervene at the hearing because of their contractual interests in this proceeding. All the unions which are parties hereto are herein collectively referred to as Retail Clerks.

[2] As described more fully below, Bristlo Liquor Inc., herein called Bristlo, operated liquor departments in a number of the White Front Stores prior to Triumph.

Fashion Cleaners, Inc., 152 NLRB 284. The White Front-Retail Clerks contracts, which are urged as bars to the petitions herein, are the same contracts as those involved in the *Bab Rand*, *Esgro*, and *New Fashion* cases. As described more fully in these earlier decisions, the contracts between White Front and Retail Clerks are effective from July 1, 1962, to June 30, 1967.[3] These contracts cover ". . . all retail store employees . . . (including . . . employees of lessees, licensees and concessionaires) employed in the retail stores and offices of the Employer located within the present geographical jurisdiction of the Union," and they provide 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." The license agreement between White Front and Triumph,[4] which is in relevant respects substantially the same as the license agreements between White Front and Esgro, Bab-Rand, and New Fashion, provides in pertinent part that Triumph ". . . is familiar with the terms and provisions of said White Front-Retail Clerks Agreement and, to the extent permitted by law, agrees to be bound by the terms and provisions and any amendment or extension . . . and further agrees, to the extent permitted by law, upon request of the Retail Clerks Union local which is party to such White Front-Retail Clerks Agreement, to execute a copy of said Agreement." Triumph has never executed an agreement with Retail Clerks. However, in 1963, Bristlo executed various agreements with Retail Clerks as bargaining representative of its employees in the liquor departments it operated at White Front Stores and making the terms of the White Front-Retail Clerks agreements applicable to Bristlo employees.

The initial contention of White Front and Retail Clerks is that White Front and Triumph are joint employers of the employees of Triumph, and, therefore, that the only appropriate unit is one comprising all employees of White Front and its licensees at each White Front location. Triumph contends, on the other hand, that the unit sought is appropriate because it is the sole employer of the employees in question. Where this issue has arisen in the past, the Board has found that joint-employer relationship exists only where the record established the licensor and the licensee had joint control over the employment relationship.[5] Significant for the purposes of deciding

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

[4] Triumph is a wholly owned subsidiary of Esgro, Inc.

[5] *Frostco Super Save Stores, Inc.*, 138 NLRB 125; *United Stores of America*, 138 NLRB 383. Cf. *S.A.G.E., Inc. of Houston and its Licensees*, 146 NLRB 325; *Spartan Department Stores*, 140 NLRB 608.

this case is the fact that the Board in *Bab-Rand*, *Esgro*, and *New Fashion* found that White Front and the licensees were not joint employers of the employees in the licensed departments involved. The Board in those cases, relying on the terms of the White Front-Retail Clerks agreements, the terms of the license agreements between White Front and the licensees, and upon the details of the day-to-day relationship between White Front and the licensees, concluded that the control of wages and fringe benefits, and the handling of grievances and other employee matters "were lodged with" the licensees rather than with White Front. Here, as noted, the same White Front-Retail Clerks agreement is involved; the license agreement is virtually the same as the licensee agreements involved in the earlier cases; and the record establishes that the day-to-day relationship between White Front and Triumph is substantially the same as that between White Front and the licensees in those cases. In view of these circumstances, and as no persuasive reason has been advanced for overruling our decisions in those cases, we find, for the reasons stated in those decisions, that White Front and Triumph are not joint employers of the employees working in the Triumph liquor departments. We therefore find no merit in the contentions of White Front and Retail Clerks that the unit sought is inappropriate.

We also find, for the reasons stated in our earlier decisions, that the Retail Clerks contracts with White Front do not bar the petition. Thus, as in the earlier cases, although Triumph agreed to be bound by the White-Front Retail Clerks contracts, Triumph has never entered into an agreement with Retail Clerks covering these employees. Indeed, the agreement between White Front and Retail Clerks explicitly provides that their contractual arrangement shall not preclude a Board determination as to the appropriate unit of the employees of the licensee where, as here, the licensee seeks a Board determination as to unit. Accordingly, in view of these circumstances, and as White Front and Triumph are not joint employers of the employees sought in the petition, we find that there is no agreement covering Triumph employees sufficient to bar the petition.[6]

Retail Clerks further contends that the contracts between Bristlo and Retail Clerks are a bar to the petition. The record shows in this connection that prior to 1964 White Front licensed Bristlo to operate liquor departments in a number of White Front stores. On various dates during 1963, Bristlo entered into separate bargaining agreements with Retail Clerks covering these employees at the White Front stores.[7] By their terms these contracts are apparently effective

[6] See *Appalachian Shale Products Co.*, 121 NLRB 1160.

[7] The record contains a copy of a contract between Bristlo and Local 770 and a copy of another contract between Bristlo and Local 324. In addition, there is evidence in the record that Bristlo entered into agreements with other locals of Retail Clerks.

from July 1, 1962, until June 30, 1967.[8] Triumph itself has never entered into collective-bargaining agreements with Retail Clerks nor has it assumed the obligations of Bristlo's contracts. Retail Clerks argues, however, that Triumph is a successor to Bristlo and, therefore, that the Bristlo contracts bar elections among the employees at the stores covered by the contracts. While the Board has held that a successor is not bound by a predecessor's collective-bargaining agreement unless it has assumed such agreement,[9] Retail Clerks contends that in view of the Supreme Court decision in *John Wiley & Sons, Inc.* v. *David Livingston*,[10] the Board should reexamine this doctrine.

In determining whether an employer is a successor to another, the Board normally applies the test whether "the 'employing industry' remain essentially the same after a transfer of legal ownership." [11] On the basis of the record as a whole, we are satisfied that the "employing industry" is not essentially the same and therefore that Triumph is not a successor to Bristlo. Thus, of the 7 employees of Bristlo, only 3 were working for Triumph when Triumph began operations as licensee of White Front, and Triumph has hired 17 additional employees; Triumph's employees work under supervision different from that of Bristlo's employees; Bristlo operated 7 liquor departments while Triumph is operating 11 departments, including 3 new locations and a Bristlo department which had been closed; and Triumph has added a line of gourmet foods not previously handled by Bristlo. Further, prior to Triumph's operation of these liquor departments, Bristlo went through bankruptcy proceedings; and Triumph purchased merchandise, equipment, and State liquor licenses from Bristlo through the receiver in bankruptcy and its licenses to operate the liquor departments were obtained from White Front. As Triumph is not a successor to Bristlo, we find that the Bristlo contracts do not bar the petition.[12]

4. Triumph requests an election in a single unit composed of all its employees at White Front stores. The record shows that the nine Triumph liquor departments which are involved in this case, five are located within the corporate limits of the city of Los Angeles and the other stores are located in Anaheim, Torrance, San Bernardino,

[8] In view of our finding, *infra*, that Triumph is not a successor to Bristlo, we find it unnecessary to determine whether these contracts would otherwise be a bar to the petition filed by Triumph on July 2, 1964.

[9] *General Extrusion Company, Inc., General Bronze Alwintie Products Corp.*, 121 NLRB 1165, 1168.

[10] 376 U.S. 543. In that case, the Supreme Court held that where two corporations merge and one thereby disappears, the surviving corporation is obligated to arbitrate claims arising under a collective-bargaining agreement of the disappearing corporation.

[11] *Johnson Ready Mix Co*, 142 NLRB 437, 442, and cases cited therein at footnote 5

[12] We therefore find it unnecessary to reexamine at the present time the *General Extrusion* rule in light of the *Wiley* v. *Livingston* decision.

and Covina, California. Also as noted above, Bristlo was party to various agreements with Retail Clerks covering their employees at White Front stores. These agreements were apparently on a single-store basis, except that a single agreement covered all employees within the corporate limits of the city of Los Angeles. In view of these circumstances, and as both Triumph and Retail Clerks indicated at the hearing their willingness to proceed to elections in the units herein found appropriate, we find that Triumph employees working in each of the Triumph departments located in Anaheim, Torrance, San Bernardino, and Covina constitute separate appropriate units and that all the employees working in the Triumph departments located within the corporate limits of the city of Los Angeles also constitute a separate appropriate unit.[13]

The following employees constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section (b) of the Act:[14]

(1) All retail sales employees employed at Triumph Sales' facilities at 2222 South Harbor Boulevard, Anaheim, California, excluding all other employees, guards, and supervisors as defined in the Act.

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

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

(4) All retail sales employees employed at Triumph Sales' facilities at 21300 Roscoe Boulevard, Canoga Park, California; 9725 Laurel Canyon Boulevard, Pacoima, California; 16040 Sherman Way, Van Nuys, California; 5435 West Jefferson Avenue, Los Angeles, California; and 7651 South Central Avenue, Los Angeles, 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:

This case is not materially different in any respect from *Esgro Anaheim, Inc.*, 150 NLRB 401. For the reasons set forth in our dissent there, we again dissent from the conclusions our colleagues reach here.

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[13] *Sav-On Drugs, Inc.*, 138 NLRB 1032.

[14] The record shows that Triumph's facility at 1151 North Azusa Avenue, Covina, California, has only one employee. As the Board does not certify one-man bargaining units, we hereby dismiss the petition insofar as it relates to that facility.