commerce within the meaning of the Act and that it would effectuate the purposes of the Act to assert jurisdiction in this proceeding.[4]

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 Sections 9(c)(1) and 2(6) and (7) of the Act.

4. In accordance with the stipulation of the parties, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining:

> All charwomen, porters, and elevator operators of the Employer located at the complex of buildings owned by the International Bank for Reconstruction and Development, 1818 H Street NW., 1800 H Street NW., and 718 18th Street NW., Washington, D.C., but excluding carpet layers, engineers, cafeteria employees, dining room employees, office clerical employees, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.] [5]

[4] The Board asserts jurisdiction on a plenary basis within the District of Columbia. *M. S. Ginn & Company*, 114 NLRB 112; *The Westchester Corporation*, 124 NLRB 194.

[5] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 5 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

K–Mart, a Division of S. S. Kresge Company; Gallenkamp Stores Co.; Mercury Distributing Company *and* Retail Clerks Union Local 770, Retail Clerks International Association, AFL–CIO, Petitioner. *Case 31–RC–141. June 13, 1966*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on November 29, 1965, before Hearing Officer Norman H. Greer.[1] The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. Briefs were filed by K–Mart, A Division of S. S. Kresge Company, hereinafter called K–Mart; by Gallenkamp Stores Co., hereinafter called Gallenkamp; by Mercury Distrib-

[1] After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director issued an order transferring this case to the Board for decision.

uting Company, hereinafter called Mercury; and by the Petitioner. Pursuant to permission granted by the National Labor Relations Board, Jackson, Michigan, K-Mart Plaza filed a brief as *amicus curiae*. The briefs have been considered by the Board.[2]

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 McCulloch and Members Jenkins and Zagoria].

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

1. The Employers, hereinafter found to be joint employers, are 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 organization involved claims to represent certain employees of the Employers.

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

4. K–Mart owns and manages retail department stores in Westminster, Santa Ana, San Fernando, Commerce, Montclair, and Costa Mesa, California. Within each K–Mart store are various departments, which are wholly owned or are operated by licensees pursuant to a uniform written agreement with K–Mart. The petition involved herein covers only the K–Mart store in San Fernando, California, and is for a unit of all employees at this store including employees of the licensees.[3] It is the Petitioner's contention that such a unit is appropriate as K–Mart and its licensees are joint employers of the

[2] K–Mart also filed a request for oral argument before the Board. K–Mart's request is hereby denied as the record, including the briefs, adequately presents the issues and positions of the parties

[3] The parties stipulated that the record made at a consolidated hearing on January 18–19, 1965, in *K–Mart, a Division of S. S. Kresge Company,* Cases 21–RC–9128, 9130, 9308, and 9309, still correctly represents the facts insofar as they are pertinent to this proceeding.

On February 24, 1965, the Regional Director issued a Decision and Direction of Elections in the above Cases 21–RC–9128; 9130; and 9309 (involving the Westminster, Santa Ana, and Commerce Stores), finding, *inter alia,* that K–Mart and its licensees (including Gallenkamp and Mercury) were joint employers of the employees in each of the respective licensed departments The Regional Director directed separate elections at the above stores, including in the units employees working in departments operated by K–Mart and in departments run by its licensees. On March 30, 1965, the Board by telegraphic order, denied requests for review of the above findings of the Regional Director on the ground that they raised no substantial issue warranting review. Thereafter, on April 12, 1965, the Acting Regional Director for Region 21 issued a Decision and Direction of Election in *K–Mart, a Division of S. S. Kresge Company,* Case 21–RC–9308, involving the instant San Fernando store. (Although this case had been consolidated for hearing with those discussed above, decision had been postponed pending compliance with an informal settlement agreement in a related case, 21–CB–2457) Finding that K–Mart and its licensees, Mercury and Gallenkamp, were joint employers of the employees in the San Fernando store, the Acting Regional Director directed an election in a unit of all store employees, including those in the leased departments. On May 5, the Petitioner filed a request to withdraw its petition in Case 21–RC–9308, which was granted by the Regional Director on May 6, 1965.

employees in the respective licensed departments. K–Mart and its licensees contend that they are not joint employers and that therefore the only appropriate unit is one that excludes employees in the licensed departments.

At the San Fernando store, where K–Mart employs 28 employees, there are 2 licensees: Mercury, which sells apparel and employs about 4 employees, and Gallenkamp, which sells shoes and has about 2 employees. The licensees are apparently separately owned and managed. No partnership or joint venture exists between K–Mart and either of the licensees.

Under the provisions of K–Mart's license agreements with Mercury and Gallenkamp, the licensees are required to pay K–Mart certain fees, including a fee of 2 percent of the gross sales of each licensee, as well as fees for the use of fixtures and storage space supplied by K–Mart. K–Mart, in turn, provides the licensees with advertising and promotional material, utilities, janitor service for the sales areas, customer credit facilities, guard service, and cash registers.

The license agreement places certain restrictions upon the conduct of each licensee's business. Thus, the licensee must "conduct sales on the premises solely under the name of K–Mart," and may not engage in advertising activity or sell goods not specified in the license agreement without the consent of K–Mart. K–Mart also retains the right to audit the licensee's sales records and to change the location and size of the licensed area. Finally, the licensee is required to comply with certain written rules regulations promulgated by the licensor which may include rules pertaining to "employment practices, personal and store policies . . . ."

The rules and regulations which, according to K–Mart's Western Region Director, Kenneth G. Sanger, govern the day-to-day operation of the store, give K–Mart control over customer exchanges, refunds, and complaints, as well as over lost articles. Authority to price merchandise and to apprehend shoplifters is committed to the licensee.

Although all hiring and terminations are under the supervision of the licensee's manager, the rules and regulations authorize K–Mart's personnel supervisor to receive applications from persons desiring employment. The applications are made available to the licensee on request. Each party agrees that it will not "hire an employee or former employee of the other without first checking" with the other. Further, K–Mart's manager is given the broad authority to request "immediate action" from the licensee if the manager believes that the licensee has not provided "sufficient help, or if any employees are inefficient or objectionable."

Certain aspects of the conduct and appearance of the licensees' employees are specifically regulated by the rules and regulations and

are applied uniformly to K–Mart's employees and those of the licensees. Thus, there are regulatory provisions relating to employee discipline, wearing apparel, identification badges, extra clothing, rest periods, and the greeting of customers. Briefing and training sessions, attended by K–Mart's employees, are also mandatory for employees of Mercury and Gallenkamp.[4] The license agreement and the rules and regulations are silent on this, but Sanger testified that the licensee retains control over the supervision of its employees' work, as well as over their wages, fringe benefits, and hours of work. Time and attendance records, payroll checks and tax deductions are handled by the licensee. There is no employee interchange between K–Mart and the licensees.

The entire operation of the San Fernando store, including that of Mercury and Gallenkamp, is designed to create the appearance to the public of an integrated department store. Goods, including shoes and apparel sold by the licensees, are bagged or wrapped in unmarked paper at central checkout stands, where the employees say, "Thank you for shopping at K–Mart." All adjustments, including those for goods purchased from Gallenkamp and Mercury, are made at a service desk manned by K–Mart employees, although, where shoes or apparel are involved, a leased department employee is called in to approve the refund. K–Mart credit cards, approved by K–Mart's Detroit office, may be used by customers in the licensed departments, and licensed department employees are required to honor them. Uniformity of dress is maintained throughout the store and all employee badges are of the same type. Advertising for apparel and shoes appears under the K–Mart name only, and, although each of the licensed departments has a separate telephone number, the listing in the telephone book does not mention the names "Gallenkamp" or "Mercury," but appears under the name of "K–Mart," with the subheading "shoes" or "apparel." Similarly, signs used by Gallenkamp and Mercury inside the store are obtained from K–Mart, and do not in any way indicate that the shoe and apparel departments are separately run. The licensees also must adjust the hours they are open for business to those of K–Mart. To achieve uniformity by the licensees with K–Mart's general appearance as a discount-type department store, the rules and regulations provide that the licensees must be competitive in their trading area and must not "offer any merchandise for sale at normal suggested list prices without the express permission" of K–Mart, or make any fair trade agreement with respect to items sold.

[4] Sanger testified that in practice "a very small percentage" of the licensees' employees attends the meetings, although, on occasion, K–Mart calls this fact to the attention of the managers of the licensed departments. No testimony was given as to what percentage of K–Mart's employees attends these meetings or as to how the attendance of K–Mart's employees compared with that of those working for Mercury and Gallenkamp.

Under the heading "General Operation of Store," in the rules and regulations, the licensee is required to "Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operation of other Licensees or Licensor."

In support of their contention that K–Mart and its licensees are not joint employers, K–Mart, Mercury, and Gallenkamp, and the *amicus curiae* all rely on those facts which appear to show separate supervision and control of working conditions by the licensees for their own employees. And on that basis they argue the applicability here of those cases [5] in which, because of the absence of control by the licensor of the licensee's labor relations or employment conditions, the Board has refused to make a joint employer finding.

In its brief, the Petitioner refers to the Board's decision of June 24, 1964, in *K–Mart, A Division of S. S. Kresge Company*, 21–RC–8194.[6] In that case, a petition was filed by the instant Petitioner for a single unit of all employees, including those of the licensees, at K–Mart's City of Commerce and San Fernando stores. The Regional Director issued a Decision and Direction of Election in which he found that K–Mart and its licensees, including Gallenkamp and Mercury, were joint employers. An election was conducted on June 5, 1963, in which the Petitioner failed to receive a majority of the ballots cast. Thereafter, the Petitioner filed objections which alleged, *inter alia*, that a change in the Sunday rate of pay for employees of Gallenkamp at the Commerce store prior to the election had interfered with the election. The Board ordered a hearing on the objection.

After the close of the hearing, the Hearing Officer filed a report in which he recommended that the objection be sustained. In its exceptions to the Hearing Officer's report K–Mart contended that, "The *only* reason that the licensee shoe department employees were paid time and one-half for Sunday work was to conform to the policy of K–Mart to do so." In its exceptions, the licensee stated, "The institution of Sunday pay by Shoe Corporation [the licensee] was merely an implementation of the policy and obligation of Shoe Corporation under its license agreement with K–Mart to conform its wages, hours and working conditions to those of its licensor."

The Board found as follows:

> The record shows that Smith, the manager of the K–Mart City of Commerce store, received the Kresge directive relating to premium pay for Sunday work about the middle of April 1963. He immediately posted a notice on a bulletin board, accessible to all employees alike—Kresge's as well as employees of all

[5] *Esgro Anaheim, Inc.*, 150 NLRB 401, *Bab-Rand Company*, 147 NLRB 247; *New Fashion Cleaners, Inc.*, 152 NLRB 284; *Triumph Sales, Inc.*, 154 NLRB 916, *S.A G E., Inc. of Houston*, 146 NLRB 325.

[6] Not published in NLRB volumes.

licensees, including those in the licensed shoe department—that the new rate would be promptly paid to K–Mart's employees for Sunday work. On the same day Smith advised Owens, manager of the licensed shoe department, that he should contact his superior about paying the same rate to employees within the latter department for Sunday work. The record further shows that Owens agreed to do so, and had several later conversations with Smith about the matter. Thereafter the increased Sunday rate was paid to the 3 or 4 employees within the licensed shoe department for work performed on Sunday, May 26, 1963, and Sunday, June 2, 1963. . . .

That the increased pay for the licensed shoe department employees was not received simultaneously with the increases granted all other employees of the Joint-Employers is not here controlling. As found by the Regional Director in his Decision and Direction of Election, the City of Commerce store here involved is operated as a single, integrated department store by K–Mart, a Kresge subsidiary, and the several licensees pursuant to substantially uniform agreements with K–Mart. . . . Under the agreement, K–Mart had the power to make rules and regulations governing employment practices, personnel and store policies. In these circumstances, we find that the notice of the increased pay for Sunday work which was posted in the normal course of business during mid-April 1963 for the attention of all employees at the City of Commerce store constituted sufficient notice to the employees within the licensed shoe department that they, like all other store employees, would be paid time and a half for Sunday work. Accordingly, as in the case of K–Mart employees, we find that the increase in pay for Sunday work was given employees of the licensed shoe department, in the normal course of business and not calculated to interfere with the election.

The above facts, as found by the Board, demonstrate that in practice K–Mart exercises substantial control over the employment conditions of employees in the licensed departments.[7] On the basis of

[7] The licensees contend that, as the Board, in overruling the objections in Case 21–RC–8194, relied on the Regional Director's prior finding of a joint employer relationship, the Board's holding is merely the "law" or "rule" of that case and cannot be dispositive of the issues presented herein. In reaching the result herein, we have not necessarily felt bound by any prior conclusions of law made by the Board or Regional Director in cases involving either the San Fernando store or other California K–Mart stores. Rather, we have carefully reviewed the evidence herein in the light of all the precedents, including those cited to us by the parties. We believe, however, that it is proper for us to consider factual findings of the Board made on the basis of uncontroverted evidence taken at recent hearings involving these same parties where such findings may throw light on the parties' interpretation of the still current and unchanged uniform license agreement and rules and regulations, which apply not only to the Commerce store but to the San Fernando store as well

the entire record and bearing in mind particularly (1) the sharing of control of certain aspects of the working conditions of the licensee's employees as provided in the license agreement and the rules and regulations; (2) the evidence of actual control of wage rates as detailed above; and (3) the provision in the rules and regulations prohibiting the continuance of labor disputes involving the licensees—we find that K–Mart is a joint employer of the employees in each of the licensed departments.[8]

We find, in accordance with the stipulation of the parties,[9] and our findings above, that the following employees of K–Mart and its licensees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and part-time employees, including employees of K–Mart and those of its licensees, employed at K–Mart's San Fernando, California, store, including selling, nonselling, and office clerical employees, but excluding professional employees and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.][10]

[8] *Esgro Anaheim, Inc.*, 150 NLRB 401, and cases cited *supra*, footnote 6, relied upon by K–Mart and the licensees, are, in our opinion, inapposite.

[9] The parties stipulated that a single-store unit was appropriate and that the inclusions and exclusions listed in the petition herein were also correct.

[10] An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Joint Employers with the Regional Director for Region 31 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

Jervis Corporation, Bolivar Division *and* John David Craft

Jervis Corporation *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO

Jervis Corporation *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, AFL–CIO, Petitioner. *Cases 26–CA–2019, 2065, and 26–RC–2317. June 13, 1966*

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On December 20, 1965, Trial Examiner Herman Tocker issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices,