

sional employees, watchmen, guards, and all supervisors as defined in the Act.⁴

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

⁴ The Employer would exclude, and the Union would include, the bulldozer operator 1, the bulldozer operator 2, and four kiln operators. The Employer concedes that all three classifications were within the unit historically represented by the Union and that their duties are unchanged, but contends that, following its purchase of the plant, the responsibilities of those occupying these classifications have been redefined in a manner establishing supervisory status. The record shows that the employees occupying these positions are engaged essentially in rank-and-file work and it is clear that while they exercise lead authority over other employees of lesser skill and experience, their duties neither entail the exercise of independent judgment nor reflect any other attributes of supervisory status sufficient to warrant their exclusion. Accordingly, we find they are not supervisors and include them in the unit herein.

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 10, 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.

Thriftown, Inc., d/b/a Value Village, E & L Distributors, Inc., and Astra Shoe Company and Retail Clerks International Association, AFL-CIO, Petitioner

Thriftown, Inc., d/b/a Value Village, Employer-Petitioner and Retail Clerks International Association AFL-CIO, Local Union No. 445.¹ Cases 25-RC-2761 and 25-RM-169. October 28, 1966

DECISION ON REVIEW

On March 30, 1965, the Regional Director for Region 25 issued a Decision and Direction of Election in the above-entitled proceeding in which he rejected as inappropriate the unit requested by the Petitioner in Case 25-RC-2761, comprising employees of Thriftown, Inc., and its licensees, E & L Distributors, Inc., and Astra Shoe Company (hereinafter referred to as Astra). Instead, he found appropriate a unit limited to the employees of Thriftown as sought by the Employer, and additional separate units of employees of Astra and E & L Distributors, Inc., respectively. Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Retail Clerks filed a timely request for review of the

¹ The names of the parties are designated in the caption in accord with the record evidence. Retail Clerks International Association, AFL-CIO, and Retail Clerks International Association, AFL-CIO, Local Union No. 445, are hereinafter referred to collectively as the Retail Clerks.

Regional Director's Decision, contending, *inter alia*, that the Regional Director erred in finding that the licensor and each of its licensees were not joint employers of the employees of the licensees. Thriftown filed a statement in opposition. The Board by telegraphic order dated June 22, 1965, granted the request for review and stayed the election pending review.² Thereafter, the Retail Clerks, Thriftown, and Astra filed briefs on review.³

The Board has considered the entire record with respect to the Regional Director's determination under review, together with all the briefs of the parties,⁴ and makes the following findings:

1. Thriftown, a wholly owned subsidiary of Kroger Company, presently owns and manages two discount department stores known as Value Village. This proceeding involves its store in Owensboro, Kentucky.⁵ This store consists of various departments which are either wholly owned and operated by Thriftown or are operated by separate employers pursuant to formal "Department Operating Agreements" with Thriftown. Thriftown and Astra are parties to an operating agreement governing the shoe department at Value Village.⁶ Astra employs approximately 6 employees, and depending upon the season, Thriftown employs between 75 and 120 persons in its directly operated departments. A general manager, employed by Thriftown, is responsible for the entire store operation and each department is separately supervised by an assistant manager. The entire Value Village operation is designed to create the appearance

² The Board permitted Amalgamated Clothing Workers of America, AFL-CIO, Interstate Department Stores, Inc., and Spartans Industries, Inc., to file *amici curiae* briefs. Interstate and Spartans filed a joint brief.

³ On August 4, 1965, Thriftown filed a motion to strike all posthearing evidence submitted by the Retail Clerks and the *amici curiae* in their respective briefs. Both the Retail Clerks and Interstate and Spartans filed statements in opposition. Thriftown's motion to strike is hereby denied. However, in making our Decision, we shall rely only upon factual allegations contained in the briefs which are supported by evidence in the record.

⁴ The Retail Clerks, Interstate, and Spartans requested oral argument. These requests are hereby denied because the record and the briefs adequately present the issues and positions of the parties.

⁵ Thriftown also operates a store in Moline, Illinois. The Retail Clerks was certified as bargaining representative of employees at that store after that union won an election pursuant to a Decision and Direction of Election issued in Case 13-RC-9751. None of the parties have raised an issue concerning the representation of employees at that store and its operations are not involved in this proceeding.

⁶ Originally, Thriftown also had an agreement with E & L Distributors, Inc., governing the operation of an automotive department. However, subsequent to the Board's granting review in this proceeding, the Retail Clerks filed a motion for leave to bring new factual and decisional developments to the Board's attention and to dismiss E & L Distributors, Inc., as a party in this proceeding. The motion requested the Board to take notice of the fact that E & L is no longer operating the automotive department and that Thriftown is now operating the department with the same employees. Thriftown filed a response to this motion, a request to reopen the hearing, and a request to file a brief in response. In this document, Thriftown admits that E & L has ceased to operate the automotive department, but takes no position on the Retail Clerks' motion to dismiss E & L as a party. Accordingly, we shall no longer include E & L as a party to this proceeding. Thriftown's request to file a brief in response and to reopen the hearing are hereby denied.

of an integrated department store. Thus, all signs identify the store as Value Village rather than displaying the trade names of any individual department operators; all bags, wrapping materials, fixtures, and furnishings are of a uniform type; there are central checkout stands; there is no physical separation of the different departments; and there is only one switchboard, public address system, and parking lot for the entire store.

As noted, Thriftown and Astra are parties to a department operating agreement. This agreement contains detailed provisions relating to the financial arrangements between Thriftown and its operator governing the operation of the department. The agreement requires the operator to conduct its department "in such manner that it will appear to the public as a department of the business carried on in the store and not as though under separate management." It also provides that "nothing in this Agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto."

Under this agreement, Thriftown determines, controls, and administers all types of advertising and promotional activity; has the authority to inspect the operator's premises at all times for cleanliness and to order any corrective measures; retains the right to arrange store layout and in some instances to reduce the space assigned to the operator; retains the keys to the building; is empowered to audit and inspect records of the operators; approves all alterations, fixtures, and signs; has the authority to decide which articles the operator may sell; establishes pricing policies on merchandise; retains the full and exclusive right to adjust and settle customer complaints; controls the amount of overhead expenses which are shared by the parties on a *pro rata* basis; and maintains a financial interest in the licensee's operations to the extent that it receives a percentage commission of gross sales. Also, the agreement provides that operators must purchase from Thriftown certain supplies and they must see only the Thriftown name on its signs and labels.

Further, although the agreement provides that the operator without the participation of Thriftown, will hire, fire, and discipline its own employees, determine their wages, rates of pay, and other benefits, and establish its own deductions such as taxes and social security, it is apparent that Thriftown also exercises significant control over the operator's personnel policies. Thus, the agreement provides that Thriftown may establish conditions which all store employees must follow with respect to cleanliness, the wearing of a common uniform, and smoking, and that the operator shall employ "a sufficient number of qualified competent employees, including a department manager"

for the conduct of said department. In addition, the agreement provides that the "Operator will at all times in the conduct of its business strictly conform to the methods, rules, business principles, practices, policies and regulations which may be established and revised from time to time by THRIFTOWN during the term hereof."

Finally, the agreement provides that "THRIFTOWN may at any time, for good cause shown, terminate this agreement upon fifteen (15) days written notice to Operator," but in any event either party may terminate the agreement at any time upon 60 days' written notice to the other party.

The Board has held on a number of occasions that the licensor and each of its licensees⁷ in a discount department store are joint employers of the employees in the licensee's department where it is established that the licensor "is in a position to influence the licensee's labor policies."⁸ The Regional Director concluded here that "the influence Thriftown exercises over the wages, hours, and working conditions of its lessees' employees either by virtue of the lease agreement or actual practice is indirect and too insignificant (compared to the lessees') to constitute control of labor relations as that term is used in Board Decisions." We believe that the Regional Director failed to take into consideration the special nature of the relationship which exists between the parties in a discount department store, and therefore did not give sufficient weight to those factors which establish actual or potential control by Thriftown over the labor policies of its operator, Astra.

Experience has demonstrated that participants in discount store establishments, although retaining their separate corporate identities, strive to create the appearance of a single-integrated enterprise in order to obtain the mutual business advantages derived from this type of operation. Given this business arrangement, it is apparent that any disruption of operations, including that resulting from labor dispute involving an operator, will almost necessarily adversely affect the operation of the entire store. It follows, therefore, that the owner of the discount store in some manner will retain sufficient control over the operations of each department so that it will be in a position to take those steps necessary to remove the causes for the disruption in store operations.⁹

An examination of the operating agreement herein makes it clear that Thriftown has retained just such power to control the operations

⁷ In this case, as noted, Astra is referred to in the operating agreement as "operator" rather than licensee. However, the same considerations apply regardless of which term is used to describe the parties to such agreements.

⁸ *David Gold and Harvey Tesler d/b/a Grand Central Liquors, et al*, 155 NLRB 295; *Spartan Department Stores*, 140 NLRB 608; *Frostco Super Save Stores, Inc.*, 138 NLRB 125.

⁹ *Trade Winds Motor Hotel & Restaurant*, 140 NLRB 567.

of the shoe department. Thus, Thriftown can significantly affect the profits of its operators through its control over the allocation and reduction of floor space, over the amount of overhead expense which is shared on a *pro rata* basis, and over advertising, pricing policies, and items of merchandise to be sold. Further, Thriftown maintains significant control over the day-to-day operations of the operators by virtue of the provision of the operating agreement which requires the operators to conform to Thriftown's "methods, rules, business principles, practices, policies and regulations." Finally, Thriftown has the power to cancel the agreement on only 60 days' notice without cause and on 15 days' notice for "good cause" (not otherwise defined). In the context of this agreement, an operator could not easily resist Thriftown's views concerning the labor policies applicable to leased department employees.

In view of Thriftown's extensive powers to control the operations of Astra, as shown by its ultimate right to dissolve the relationship entirely, its retention of overall managerial control, and the extent to which it has retained the right to establish the manner and method of work performance, it is clear, and we find, that Thriftown is in a position to influence the labor relations policies of licensee Astra. Since the power to control is present by virtue of the operating agreement, whether or not exercised, we find it unnecessary to consider the actual practice of the parties regarding these matters as evidenced by the record.

We do not intimate by this holding that licensor-licensee arrangements in a discount department store necessarily create a joint-employer relationship. Nor does the fact that we find a single unit appropriate herein mean that we will automatically include all the employees of the joint-employers in a single unit. However, where, as here, the parties operate an integrated business enterprise under a single roof and the provisions of the operating agreement establish that the owner possesses significant control over the operational and personnel policies of the operator, we conclude that the owner and operator are joint employers of the employees of the operator.

Contrary to the suggestion of our dissenting colleagues, our Decision is based on a realistic evaluation of the effect of the department operating agreement upon the employment conditions of leased department employees viewed in light of the purposes of this Act.¹⁰ It is not based upon mere "appearances" or upon whether the agreement of the parties "as between themselves" establishes a particular type of business entity, "in law."

Our dissenting colleagues rely heavily on the parties' disavowal, in their operating agreement, of any intent to create a joint-employer

¹⁰ Cf. *N.L.R.B. v. Checker Cab Company, etc.*, 367 F.2d 692 (C A 6).

relationship. This, however, is no more than the parties' own conclusory statement and has no more effect in determining the actual relationship that exists than would a disclaimer of negligence after an accident. Indeed, the very disclaimer that "nothing in this agreement shall in any way be construed" as creating such a relationship relied on by our dissenting colleagues strongly suggests recognition by the parties themselves that the terms of the agreement to tend to create a joint-employer relationship.

In suggesting that the power to terminate is the sole criterion upon which the majority relies, the dissent still ignores the very significant impact upon this case of "the special nature of the relationship." We reiterate that we will not automatically find a joint-employer relationship in every discount store operation involving a licensor-licensee agreement, without more. There is, in our view, enough "more" here to warrant such a finding.

The fact that Astra is also granted the ultimate right to terminate its agreement with Thriftown does not mean that we would also find Astra to be the employer of Thriftown's employees. It is plain from the agreement that the dominant party is Thriftown, not Astra, and the bulk of the provisions to which we refer go to show Thriftown's control over Astra, not the converse, and establish requirements that Astra must live up to, not the converse.

2. The Retail Clerks seeks a unit of all employees at the Thriftown store. The Employer filed a petition requesting a unit of only the employees employed by Thriftown, excluding the employees at each of its operator's departments. There is no history of bargaining. As found above, Thriftown's operation resembles in its physical aspects a single retail department store. Further, all employees at Value Village are subject to common overall supervision, they use common facilities, and there is a similarity of working conditions. In view of the indicia of their mutuality of employment interests, and as no union seeks a more limited unit, we find a unit embracing the employees of the licensor and its licensed department to be appropriate.

Accordingly, the case is hereby remanded to the Regional Director for Region 25 for the purpose of holding an election, pursuant to his Decision and Direction of Election, as amended by the unit findings herein, except that the period for determining eligibility shall be the payroll period immediately preceding the date below.

CHAIRMAN McCULLOCH and MEMBER FANNING, dissenting:

Although we accept the basic facts as stated in the majority opinion and agree that Thriftown and Astra have created the appearance of a single-integrated enterprise as far as the public is concerned, we

find unwarranted our colleagues' further conclusion that Thriftown and Astra, as between themselves, have established through their operating agreement the relationship, in law, of joint employers of Astra's employees working in the Astra-leased department at Thriftown's retail department store.

In past cases involving the issue of "joint-employers" of employees of a licensee in a discount department store, the Board has found such a relationship only where the license agreement or the actual practice of the parties established that the licensor was empowered to exercise control over the licensee's labor policies.¹¹

In the case now before us, the operating agreement not only specifically states that "nothing in this agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto"; it also specifically provides that Astra, without the participation of Thriftown, will hire, fire, and discipline its own employees, determine their wages, rates of pay, and other benefits, and establish its own deductions for taxes, social security, and related items. These provisions are clearly at odds with a contractual intent on the part of Thriftown and Astra to create a joint-employer relationship. Nor are there in this record other facts from which such an intent may reasonably be inferred. We look in vain in our colleagues' opinion for evidence that Thriftown has actually controlled Astra's labor policies. Our colleagues rely upon (1) vague provisions in the license agreement requiring Astra to conform to Thriftown's "methods, rules, business principles, practices, policies and regulations," and (2) the power granted to Thriftown to cancel the agreement upon only 60 days' notice without cause and upon 15 days' notice for good cause. We believe, however, that this evidence is insufficient to support a legal conclusion that Astra and Thriftown are joint employers. The conformity requirements are quite clearly aimed at fostering the public appearance of a single-integrated enterprise. They have nothing to do with the employment relationship as such. Nor do we think it controlling on the issue before us that the operating agreement grants Thriftown the ultimate right to dissolve the licensor-licensee relationship entirely. To our knowledge this is the first time that such a factor has been considered to be evidence of a joint-employer relationship. In fact, in the recent *Bab-Rand Company*¹² case, one of the reasons upon which the Board relied in refusing to

¹¹ Compare *Grand Central Liquors*, *supra*, footnote 8, *Spartan Department Stores*, *supra*, footnote 8, *Frostco Super Save Stores, Inc*, *supra*, footnote 8, and *K-Mart*, 159 NLRB 256, with *S A G B., Inc. of Houston*, 146 NLRB 325, and *Esgro Anaheim, Inc*, 150 NLRB 401. See also *N L R B. v. New Madrid Manufacturing Company, d/b/a Jones Manufacturing Co*, 215 F 2d 908, 912-913 (C A 8).

¹² 147 NLRB 247.

find a joint-employer relationship was that the lease agreement gave the licensor the right to terminate the lease within 24 hours if the licensee became involved in a labor difficulty that might lead to picketing of the store. We note parenthetically, that the operating agreement also grants Astra the "ultimate right" to terminate the lease agreement. Would the majority conclude from this that Astra is an employer of Thriftown's employees?

The majority attempts to buttress its joint-employer finding by generalized references to Thriftown's "extensive powers to control the operations of Astra," "its retention of overall managerial control," and "the extent to which it has retained the right to establish the manner and method of work performance." We do not agree that the record in this case supports such broad conclusionary assertions. However, even if it did, these considerations appear to us to provide only a further indication of the parties' concern with creating the public impression of a unified enterprise. They are not enough to show that the parties *have established in fact* a joint-employer relationship with respect to the licensee's employees. Substantially the same factors were present in *S.A.G.E., Inc. of Houston*.¹³ Although finding in that case that the licensor and licensee had created the impression of a single-integrated enterprise, the Board nevertheless declined to find that the licensor and licensee were joint employers, and this because neither the license provisions nor the actual practice of the parties revealed that the licensor had the power to exercise, or actually did exercise, control over the labor policies of the licensee. We believe the same conclusion is compelled in this case for the same reason.

The majority states that it does "not intimate by [its] holding that licensor-licensee arrangements in a discount department store necessarily create a joint-employer relationship." Yet, the majority reverses the Regional Director's conclusion that Thriftown and Astra are not joint employers for the declared reason that the Regional Director "failed to take into consideration the special nature of the relationship which exists between the parties in a discount department store." From our reading of the majority opinion we take it that our colleagues consider the creation of the outward appearance of a unified enterprise to be the mark of the "special nature of the relationship" to which they allude. If that is so, we find it difficult to conceive of a situation where the majority would not almost as a matter of course find a joint-employer relationship present in any discount store operation involving a licensor-licensee arrangement. In that respect we think our colleagues go too far. We still believe in

¹³ *Supra*, footnote 10.

accordance with past precedent that there must be some legal foundation for a holding of a joint-employer relationship, supported either by language in the license agreement establishing that the licensor is empowered to influence the licensees' labor policy, or by a showing that the licensor has actually done so, from which the power to do so may be inferred. As there is no support for such a holding in this case, we dissent.

General Electric Company and International Union of Electrical, Radio and Machine Workers, IUE, AFL-CIO, Petitioner. *Case 1-RC-8712. October 28, 1966*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pursuant to a stipulation for certification upon consent election executed on November 17, 1965, an election by secret ballot was conducted on December 9, 1965, under the direction and supervision of the Regional Director for Region 1 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that of approximately 1,070 eligible voters, 1,008 cast ballots, of which 469 were for, and 538 against, the Petitioner, and 1 ballot was challenged. Thereafter, the Petitioner filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and, on January 25, 1966, issued and duly served upon the parties his report on objections in which he recommended that the objections be overruled in their entirety, and that a certification of results of election be issued. Thereafter, the Petitioner filed timely exceptions to the Regional Director's report.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer is engaged in commerce within the meaning of the National Labor Relations Act, as amended, and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

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