

**Red-More Corporation, d/b/a Disco Fair, et al. and Retail Clerks Union, Local No. 899, Retail Clerks International Association, AFL-CIO. Case 31-CA-519**

January 30, 1968

## SUPPLEMENTAL DECISION

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On May 16, 1967, the National Labor Relations Board issued its Decision and Order in the above-captioned proceeding, granting the General Counsel's Motion for Summary Judgment that Respondents had refused to bargain with the Charging Union as the certified representative for an appropriate unit of Respondents' employees.<sup>1</sup> On June 5, 1967, Respondents filed a Motion for Reconsideration, Motion for Hearing, and Motion for Opening of Record. No opposition thereto was filed by either the Charging Union or the General Counsel.

### I. STATEMENT OF THE CASE

#### A. *The Representation Proceedings*

On June 28, 1966, the Regional Director issued a Decision and Direction of Election in which he found, on the basis of the hearing record, including license and lease agreements covering departments at Disco Fair's retail discount operations, that Disco Fair and its licensees and lessees were joint-employers, and that an overall unit of their employees was appropriate.<sup>2</sup> On July 8, 1966, Disco Fair filed a request for review with the Board, contending that by virtue of certain changes in its license and lease agreements since the proceeding in Case 21-RM-1162, there was no basis for a joint-employer finding. The request for review was denied by the Board on July 19, 1966, and, in the ensuing election, a majority of the employees in the unit voted for the Union. Thereafter, Disco Fair, again contesting the appropriateness of the unit based on the joint-employer relationship, filed with the Regional Director objections to the election, as well as a Motion for Reconsideration of the Decision and Direction of Election and a Stay of Certification. In a Supplemental Decision issued on September 27, 1966, the Regional Director overruled the objections, denied the motion, and certified the Union. Disco Fair made no request for review of the Regional Director's Supplemental Decision.

<sup>1</sup> 164 NLRB 638.

<sup>2</sup> *Red-More Corporation, d/b/a Disco Fair*, Cases 31-RC-210 and 31-RC-211 (not published in NLRB volumes). The Regional Director took official notice of the record and decision in Case 21-RM-1162, issued April 16, 1965, which also found, contrary to Disco Fair, a joint-em-

#### B. *The Unfair Labor Practice Proceeding*

Pursuant to a charge filed by the Union, the Regional Director issued a complaint on October 28, 1966, against Disco Fair and its licensees and lessees, alleging violations of Section 8(a)(5) and (1) of the Act. In substance, the complaint alleged the Union's certification, as described above, and that since October 3, 1966, the Respondents have refused to bargain with the Union, although requested by the Union to do so. Answers filed by the Respondents to the complaint admitted the above-recited matters pertaining to the representation proceeding and the refusal of the Union's post-certification request for bargaining, but denied the finding of a joint-employer relationship and the appropriateness of the unit based thereon. Upon the General Counsel's Motion for Summary Judgment, inasmuch as the pleadings presented no issues of fact or law requiring a hearing, the Board, on December 30, 1966, issued an Order Transferring Proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. Thereafter, the Respondents filed a Statement in Opposition to Motion for Summary Judgment, and a Response to Notice to Show Cause, in which, *inter alia*, it was contended generally that the form license and lease agreements between Disco Fair and the other Respondents have been changed to clarify or delete the provisions relied upon by the Regional Director to support his finding of a joint-employer relationship. As set forth above, the Board granted the General Counsel's Motion for Summary Judgment. In doing so, the Board noted that, assuming the agreement changes referred to in the Response to Notice to Show Cause were new, such changes were not particularized, nor were copies of the revised agreements submitted, in order to show the effect, if any, upon the finding of a joint-employer relationship in the prior representation proceedings.

### II. THE INSTANT MOTIONS

At the outset, Respondent defends its failure previously to submit the agreement changes on the ground that the requirement thereof by the Board in effect grants discovery rights to the General Counsel.<sup>3</sup> This is a procedural misconception. Once the complaint and answer establish, as in this case, the certification of the Union in the underlying representation case, and the subsequent request and refusal to bargain, a *prima facie* violation of Section 8(a)(5) has been shown. Even assuming that

ployer relationship.

<sup>3</sup> In our original decision, we rejected a similar contention that the issuance of a notice to show cause gives discovery rights to the General Counsel which are not available to other parties, and shifts the burden of proof from the General Counsel to Respondent.

there was a further burden on the General Counsel to prove the continued existence of the joint-employer relationship, that burden was met by the finding thereof in the representation case, and the well-established legal principle that a state of affairs shown to exist is presumed to continue until the contrary is shown. The purpose of the Notice to Show Cause was to afford Respondent an opportunity to rebut the *prima facie* case so established by *going forward* with sufficient evidence to show that the circumstances upon which the representation case decision was based no longer existed. Unit determinations based upon fully litigated representation proceedings, such as the joint-employer relation here involved, are entitled to some degree of finality in a subsequent related unfair labor practice case. It is self-evident that we cannot countenance the circumvention of the joint-employer finding through the device of a general allegation of changes in the underlying agreements after each such finding, for to do so would prolong litigation and deny bargaining rights to the employees in the certified unit. Accordingly, we held that such allegation by Respondent in its response to the Notice to Show Cause was insufficient, and granted summary judgment.

Respondent now seeks belatedly to particularize the revisions relied upon, asserting that they are new and were not in existence at the time of the Regional Director's Decision and Direction of Election, issued June 28, 1966. The exact date of such revisions, however, is not set forth in the motions, and in any event Respondent failed to raise such revisions prior to the Regional Director's Supplemental Decision of September 27, 1966, or to issuance of the instant complaint on the following October 28. Moreover, even assuming that the revisions were not executed or effectuated until the latter date, and therefore could not have been raised before then, Respondent still showed a lack of diligence by waiting until after the adverse granting of summary judgment before taking proper steps to adduce the revisions which concededly were in existence at the time of the antecedent notice to show cause.

In any event, motions based on newly discovered evidence will not be granted unless such evidence will probably change the outcome of the litigation. We have considered the revisions particularized by Respondent and find them insufficient to establish that the circumstances upon which the joint employer finding in the representation case was based no longer exist. Those circumstances included uniform provisions in the license and lease agreements whereby (1) the licensees and lessees were required to abide by the rules and regulations of Disco Fair; (2) they were required to discharge any of their employees, whether or not for cause, when requested to do so by Disco Fair; and (3) they were

required to obtain the written consent of Disco Fair before entering into collective-bargaining negotiations for their employees, and to give reasonable notice to Disco Fair concerning the time, place, and subject matter of such negotiations. According to the motions, the corresponding revisions provide: (1) "It is understood and agreed that such rules and regulations as established by the Landlord shall not govern or affect the wages, benefits or conditions of employment of employees employed by Tenant"; (2) "Tenant agrees to maintain an adequate staff of competent, courteous and efficient personnel to conduct its business during business hours"; and (3) "Neither Landlord nor Tenant will enter into any negotiations or agreements, oral or written, with any labor organization with respect to employees without first giving written notice in advance of entering into any such negotiations. Moreover, either party will allow the other to sit in as an observer in any negotiations concerning labor relations and reasonable notice must be given concerning the time, place and subject matter of such negotiations." In addition, the motions assert that there has been added to the revised agreements the following clause: "Further, it is understood that this Agreement is in no way to be construed or interpreted as creating a partnership, joint venture, employer-employee, joint-employer or any other relationship other than Landlord and Tenant."

In our view, the revised agreements are basically the same as the old agreements in all material respects. The mere addition of a sentence reciting that Disco Fair's rules and regulations will not affect conditions of employment is insufficient, without more, to establish a change in circumstances which would undermine the previous unit determination. Moreover, the revised item (2) apparently reserves the right to Disco Fair to determine whether the licensees and lessees have "an adequate staff of competent, courteous and efficient personnel." Any possible doubt about the matter, however, is resolved by an examination of the revised item (3). Its original form is virtually identical with a provision which we have previously held to support a joint-employer finding.<sup>4</sup> The revised form is different only in that it does not require consent from Disco Fair before the licensees and lessees enter into collective-bargaining negotiations. We do not believe this difference is determinative, since the other restrictions in the revised item (3) reserve the right to Disco Fair of advance notice from the licensees and lessees as to the time, place, and subject matter before they can even *discuss their employees with a labor organization, and further to attend* such discussion. Even though Disco Fair's consent is no longer required, we believe that by virtue of these restrictions, Disco Fair remains in a position substantially to affect the employment conditions of the employees of its licen-

<sup>4</sup> *Frostco Super Save Stores, Inc.*, 138 NLRB 125, 127-128.

sees and lessees.<sup>5</sup> Accordingly, we are unimpressed by the recital in the revised agreements that it is not the intent of the parties thereto to create a joint-employer relationship. We find, therefore, that there has been insufficient change to affect the joint-em-

ployer relationship previously found, and reaffirm our finding that Respondents' refusal to bargain with the Union as the certified representative of the employees in the unit heretofore found appropriate is violative of Section 8(a)(5) of the Act.

---

<sup>5</sup> *S. S. Kresge Company, K-Mart Division, et al.*, 169 NLRB 422.