

United Mercantile, Incorporated, a wholly owned subsidiary of Walgreen Co., d/b/a Globe Discount City and Retail Clerks Local Union 663, chartered by Retail Clerks International Association, AFL-CIO, Petitioner. Case 28-RC-1636

May 29, 1968

DECISION ON REVIEW AND DIRECTION

BY MEMBERS BROWN, JENKINS, AND ZAGORIA

On August 8, 1967, the Regional Director for Region 28 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found appropriate a unit of selling and nonselling employees at the Employer's El Paso, Texas, discount department store, excluding, *inter alia*, employees of licensed departments. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed with the National Labor Relations Board a timely request for review of said Decision, contending that the Regional Director erred in finding that no joint-employer relationship existed between the Employer and the licensed operators of the fine jewelry and shoe departments,¹ and further erred in excluding the employees of these two departments from the bargaining unit.

By telegraphic order dated September 6, 1967, the Board granted the request for review but ordered the Regional Director to conduct the election previously directed, to permit the employees in the fine jewelry and shoe departments to cast challenged ballots, and to impound all ballots cast pending the Board's decision on review. Thereafter, briefs on review were filed by the Employer (hereinafter called Globe), and by the respective licensees of the fine jewelry and shoe departments, namely, Zale Service-San Angelo, Inc., a wholly owned subsidiary of Zale Corporation (hereinafter called Zale), and Lesale Retailers of El Paso, a wholly owned subsidiary of Morse Shoe, Incorporated (hereinafter called Morse).

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the entire record in this case with respect to the issues under review, in-

cluding the briefs of the parties, and makes the following findings:

The Petitioner seeks a unit of all employees working in Globe's discount store, including the employees of Zale and Morse. Petitioner asserts that there is a joint-employer relationship between Globe and these licensees, that the employees of Globe and those of the licensed departments share a community of interest and that, therefore, they should all be included in one bargaining unit.

The Regional Director, in agreement with the contentions of Globe, Zale, and Morse, concluded that Globe and its licensees were not joint employers within the meaning of the Act because Globe has not controlled, and does not possess the potential power to control, the labor relations policies of its licensees. Accordingly, the unit sought by Petitioner was found to be inappropriate and an election was directed in a unit confined to the employees of Globe alone. On review, the Petitioner contends that the Regional Director erred in his findings on the joint-employer and unit issues because he did not give sufficient weight to evidence in the record indicating that Globe retained substantial power to control or influence the labor policies of the licensees. We find merit in Petitioner's contentions.

The discount department store operations involved herein consist of numerous departments owned and operated by Globe, the fine jewelry department operated by Zale, and the shoe department operated by Morse. Zale and Morse operate their respective departments under 5-year license agreements with Globe, each of which commenced November 1, 1965. The agreements require the licensees to pay a specified minimum licensee fee or a fee equal to a percentage of gross sales, whichever is greater. Globe and its departments have a complement of 130 nonsupervisory employees, Zale has 2, and Morse has 3. There is no history of collective bargaining for any of these employees and no union seeks to represent the employees of the licensed departments in separate units.

Globe and the licensees concede, and the Regional Director found, that they have established a uniform operation which gives the impression to the public of being one single enterprise in which each of the licensed departments appears as but one of many departments operated by Globe. Identifying signs both outside and inside the discount store bear only Globe's name. There are

¹ Other licensees operate a supermarket and an automotive service center but they are not involved herein as they are physically separated

from the discount store, their employees have unique and separate interests, and none of the parties seeks to have them included in the unit

no partitions or walls separating the licensed departments from the Globe-operated departments and customers move freely from one to the other. Further, the bags and wrappings used by all departments bear Globe's name only, a common switchboard and public address system service all departments, and all employees and customers use the same parking facilities.

Under Globe's license agreements with Zale and Morse, Globe determines the items and quality of merchandise which each licensee may sell and limits retail prices to a level no higher than those charged at other stores within a specified adjacent area; the licensees are obligated to conduct their businesses during the hours that Globe has the store open to the public, to have a sufficient number of employees to operate their departments efficiently, to maintain on hand an adequate merchandise supply, and to keep accurate daily records of sales and receipts available for Globe's audit and inspection. Globe also has the power to investigate and adjust, in its sole discretion, all customer complaints against the licensed departments.

Further, the agreements give Globe the authority to issue rules and regulations governing the licensees' "sales, operational, merchandising and pricing practices" and provide that any violation thereof will constitute a default of the entire license agreement. In addition, Globe has the right to require the discharge of licensed department employees who, in Globe's opinion, conduct themselves in an improper manner or are discourteous to customers, to Globe, or to other licensees. While it appears from the record that Globe has not promulgated any written rules and regulations and has never required the discharge of any licensed department employee, it clearly has the authority to do so and Globe's manager conceded that it was his responsibility to see to it that all employees, including those in the licensed departments, conducted themselves properly with respect to customers, dress, and general demeanor, and conformed with Globe's prohibitions against smoking and eating on the selling floor.

Finally, in the event that Zale defaults in complying with any of the conditions of its license, Globe may terminate the agreement immediately if said default continues for 10 days after written notice thereof is given. Similarly, Globe has the power to terminate the Morse license if such default continues for 30 days after written notice. Furthermore, all parties have the power to terminate the

agreements without cause, as of a specified annual date, provided that 2 months' notice is given in the case of Zale and 3 months' in the case of Morse.²

The Joint-Employer Issue

Relying on the criteria set forth in the Board's decision in *Thriftown, Inc., d/b/a Value Village*,³ the Regional Director concluded that Globe and its licensees were not joint employers of the latter's employees because, although Globe exercised substantial control over the licensees' operational policies, it lacked the power—which was present in *Thriftown*—to control or influence their labor relations policies. We disagree.

In reaching his conclusion, the Regional Director asserted that the specific powers retained by Globe over its licensees are significantly weaker in degree and effect than the powers retained by the licensor in *Thriftown*. Thus, the Regional Director pointed to the fact that the licensee in *Thriftown* was obligated to conform to the "methods, rules, business principles, practices, policies and regulations" promulgated by the licensor, while here the licensees need conform only to rules and regulations pertaining to "sales, operational, merchandising and pricing practices." We, however, perceive no meaningful difference between the latter provision and the aforementioned provision of the *Thriftown* license. For, notwithstanding the fact that this provision of the Globe license is expressed more briefly than the comparable provision in *Thriftown*, Globe, just like the licensor in *Thriftown*, retains the authority to issue rules which are broad in scope, cover the regulation of operational practices, and are binding upon the respective licensees. Similarly, although the authority to terminate the license agreements without cause in this case is limited as to its effective date and is subject to a possible restriction in the case of Zale,⁴ Globe nevertheless has considerable power to influence its licensees' labor policies, particularly as the agreements give it the unrestricted right to terminate the licenses on short notice should the licensees default on any of the covenants contained in the agreement or on any of the rules and regulations which Globe may choose to promulgate thereunder.

The Regional Director also placed some reliance on a provision appearing only in the Globe-Morse license agreement, wherein it is stated that Morse shall have complete responsibility for deciding its own labor policies and that nothing contained in

² In the Globe-Morse agreement only, the option to terminate without cause cannot be exercised if the gross sales of Morse's department during the preceding year were \$282,525 or more. There is nothing in the record

which would indicate whether such sales level has been achieved

³ 161 NLRB 603

⁴ See fn 2, *supra*

the agreement shall be construed as an exercise of control by Globe over Morse's personnel or labor policies. But such a conclusionary and self-serving disclaimer of control over labor policies cannot be sufficient by itself to determine the legal question whether Globe and Morse are joint employers. For the answer to such a question must necessarily take into account all aspects of the licensor-licensee arrangement. Furthermore, this very license provision—which avers that Morse has complete responsibility for deciding its own labor policies—explicitly excepts from its coverage Globe's authority to require the discharge of Morse's employees and Globe's authority to promulgate rules and regulations whose violation would place Morse in default of the license.⁵ That the parties found it essential to exempt Globe's discharge and rulemaking powers from this specific provision, establishes that there is a connection between Globe's retained authority and Morse's labor policies and clearly suggests that the parties themselves recognized that Globe can exercise such powers for the purpose of controlling or influencing Morse's labor relations.

A meaningful interpretation of the provisions of the Globe licenses and a consideration of their purpose and effect must, in our opinion, take full cognizance of the entrepreneurial context in which these licenses are utilized. That context is a commercial venture in which separate corporate entities combine their resources and create the appearance of a single integrated enterprise under the same roof in order to obtain the mutual business advantages to be derived from this type of operation. As the Board said in *Thriftown*:

Given this business arrangement, it is apparent that any disruption of operations, including that resulting from a labor dispute involving an operator [of a licensed department] will almost necessarily adversely affect the operation of the entire store⁶

There flows, therefore, from the very nature of such a venture, a need for the licensor to control the operations and labor relations of its licensees if they are to succeed in business together. While we would not postulate the existence of a joint-employer relationship merely on the basis of such a need—and so stated in *Thriftown*⁷—we will make such a finding where the license arrangements objectively demonstrate a response to that need. Here there is ample proof of such a response. Thus, as set forth in detail above, Globe maintains the following specific controls over the labor force employed by Zale and Morse—Globe requires that

such force be of sufficient size to operate each licensed department efficiently; Globe has the right to require the discharge of licensee employees who, in its opinion, are guilty of improper or discourteous behavior; and Globe's manager has the responsibility for securing conformance by licensed department employees with Globe's standards for conduct toward customers, dress, and general demeanor, as well as adherence to its rules against smoking and eating during working time. Globe also retains the right to establish further controls under its authority to issue rules and regulations. The failure of the licensee to comply with any of the foregoing specific personnel controls established by Globe, or to comply with any other rules and regulations to be issued by Globe, places the licensee in default of the agreement. Since Globe retains the right to terminate either license for default, it has insured that its wishes in regard to labor relations matters will be carried out by the licensees.

Contrary to the Regional Director, we conclude that Globe's power to control or influence the labor policies of its licensees—occurring, as it does, in the context of the same type of joint business venture as was present in *Thriftown*—is substantially the same as the power retained by the licensor in *Thriftown*. Upon the foregoing and the entire record in this case, we find that Globe is a joint employer with Zale and Morse, respectively, of the employees of these two licensees at the discount department store.

The Unit Issue

As noted above, the entire discount store, including both Globe and licensee operated departments, physically appears as a single uniform enterprise operated by Globe. All employees work under the same roof in the same general area, perform similar work, have some common overall supervision, and make use of such common facilities as the restrooms, snackbar, restaurant, and parking lot. In view of these factors indicating a close community of interest and as there is no history of collective bargaining and no union seeks to represent a more limited unit, we find that a unit embracing the employees of Globe and its licensed departments is appropriate.⁸

We therefore find that the following employees constitute an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: All regular full-time and part-time

⁵ I.e., rules and regulations pertaining to Morse's "sales, operational, merchandising and pricing practices."

⁶ *Thriftown, Inc., d/b/a Value Village, supra*, 606.

⁷ *Id.* at 607.

⁸ *Thriftown, Inc., d/b/a Value Village, supra*.

selling and nonselling employees employed by the Employer at Globe Discount City, 6375 Montana Avenue, El Paso, Texas, including employees of the departments operated under license agreements with Zale Service-San Angelo, Inc., and Lesale Retailers of El Paso, Inc.; but excluding employees of the licensees Global Automotive Enterprises and Allied Discount Foods, Division of Allied Supermarkets, Inc., the store manager, all department managers, assistant department managers, management trainees, registered pharmacists, security guards, professional employees, guards, and supervisors as defined in the Act.

Accordingly, we shall direct that all ballots, including those of the employees in the licensed fine jewelry and shoe departments, be opened and counted; that a tally of ballots be prepared and served on the parties; and that the Regional

Director then proceed further in accordance with the Board's Rules and Regulations.

DIRECTION

It is hereby directed that the Regional Director for Region 28 open and count the ballots impounded pursuant to our Order of September 6, 1967; that he issue and serve on the parties a tally of ballots; and that he thereafter proceed in accordance with his Decision and Direction of Election of August 8, 1967, as modified by this Decision on Review and Direction, and in accordance with the customary postelection procedures as set forth in the National Labor Relations Board Rules and Regulations and Statements of Procedures, Series 8, as amended.