170 NLRB No. 159 (N.L.R.B.), 170 NLRB 1332, 67 L.R.R.M.
(BNA) 1582, 1968-1 NLRB Dec. P 22351, 1968 WL 19359

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

The Southland Corporation, d/b/a Speedee 7-Eleven
and
Retail Store Employees Union, Local 428, Retail Clerks International Association, AFL-CIO, Petitioner

Case 20-RC-7806
April 12, 1968

DECISION AND ORDER

**1 BY CHAIRMAN MCCULLOCH AND MEMBERS BROWN AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Elizabeth M. Bianchi, Hearing Officer. 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 Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

1. The labor organization involved claims to represent certain employees of the Employer.

2. No 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 for the following reasons:

Petitioner seeks to represent the employees at Speedee Mart Store 465-420A located at Mountain View, California. This store is operated by Wallace S. George, Sr., under a franchise agreement with Southland Corporation.

Petitioner contends that Southland exercises a sufficient degree of control over the store operated by George that it must be considered the employer of the employees in that store. It further asserts that George is a Southland supervisor or branch manager of this store. Alternatively, the Petitioner contends that Southland and George are joint employers.

Southland and George have entered into a standard franchise agreement which Southland has with a number of other franchises in California for the operation of a small convenience-type neighborhood food store.

Southland surveys prospective store sites, buys or leases the property, and arranges for the construction of the store. Southland then leases or buys the fixtures and outfits the store with a complete stock of goods. This “package” is handed over to the franchisee and, pursuant to the franchise agreement, the franchisee leases the store and fixtures from Southland and is licensed to use either the 7-Eleven or Speedee Mart trade name and operational system. The franchisee provides the operational capital and the inventory. The initial inventory requirement under the agreement is $10,500. The franchisee is expected to put up a substantial portion of this in cash. [1] The amount by which the inventory and working capital exceeds the franchisee's equity is financed by an open interest-bearing account owed by the franchisee to Southland.

Southland also provides a number of services to the franchisee after the store is opened. These are discussed below.

Under the bookkeeping service set forth in the franchise agreement the franchisee deposits daily in the Southland's account all cash sales proceeds which remain after cash purchases and reserves needed by the franchisee. This sum is then credited once a week to the franchisee's open account with Southland. Invoices from "authorized" vendors are sent by the franchisee to Southland headquarters and are paid by Southland out of this open account. The amount by which income items exceed purchase and expense items is accumulated as current profits and reduces the balance of the franchisee's open account payable to Southland.

**2 This procedure is repeated each week for 13 weeks, at which time the franchisee is furnished a financial report reflecting his quarterly income statement and balance sheet.

Franchisees with a net worth of $7,500 or more may withdraw all their current operating profits;[2] those with less equity are required to leave part of their profits in the business in order to repay part of Southland's loan. Franchisees file their own tax returns, reporting profits as self-employment income and scheduling store income and expense. No withholding taxes or Social Security taxes are deducted by Southland.

Franchisees who work in their store may draw a fixed weekly amount against the store's anticipated profits for the quarter. As George does not work in the store but instead employs his son to manage the store, he takes no draw. In return for services rendered, Southland receives 55 percent of the adjusted gross profits of the franchisee.

Under the franchise agreement, exclusive control over labor relations is vested in the franchisee. Article 14 of the franchise agreement states in relevant part: "Owners [franchisees] agree to exercise full and complete control over and have full responsibility *1333 for any and all labor relations, including the hiring, firing, disciplining, compensation and work schedules of their employees."

Although Southland makes out the wage checks to employees, this is merely a convenience for the franchisees, who furnish Southland's computer with all relevant wage information, whereupon Southland routinely makes out the checks in the appropriate amounts. The franchisee's account is debited accordingly.

There is no evidence that Southland has ever exercised any contol over any of the terms of employment of the store employees.

Petitioner bases its contention that Southland is the employer primarily on the following:
1. The Southland Policy Manual

2. The Retail Pricing Arrangement

3. The Right to Terminate the Relationship

4. Southland's alleged control over the franchisee's source of supplies.

It argues that an analysis of these factors reveals that Southland so controls George's operation of the store that Southland not only controls the result but also the means by which it is accomplished. Thus, Petitioner contends, George is not an independent contractor but is an agent of Southland.

We do not agree. Although the policy manual furnished to each franchisee describes in meticulous detail virtually every action to be taken by the franchisee in the conduct of his store, there is no evidence that these are more than recommendations made consistent with sound retail store business practice. Nowhere in the franchise agreement is there any indication that these recommendations are mandatory. Indeed, the record reveals that most franchisees, including George, maintain a rather casual

attitude toward the manual and refer to it only infrequently. Nor is there any evidence that Southland has sought to secure compliance with the manual recommendations or that it considers its terms to be more than recommendatory.

**3 Petitioner also asserts that Southland controls George's pricing structure. While it is true that Southland sends its franchisees periodic price recommendations as to many of the various products carried by the store, it is clear that this is done for the purpose of informing franchisees of the current market prices in the area in order to enable franchisees to keep their prices competitive. The record reveals that these suggested prices are merely suggestions and that Southland does not insist upon them. George has, on a number of occasions, set his prices either above or below these suggested prices. It is noteworthy that any deviation from the suggested prices affects the franchisee's profits. Southland receives 55 percent of the franchisee's gross profits based on the differential between the wholesale price and Southland's suggested retail price. If the franchisee charges more than the suggested price, his profits are increased. If he sells for less, his profits are correspondingly decreased.

Petitioner's contention that Southland totally controls George's source of products appears to be equally lacking in merit. For various reasons (e.g., price concessions which it may negotiate on behalf of franchisees), Southland will suggest that franchisees deal with certain "authorized vendors." Southland sets up its computer system in such a manner as to make it more convenient for franchisees to deal with these vendors than with others. For example, invoices of "authorized" vendors are processed directly by Southland's computer and payments are debited from the franchisee's account. Southland's computer is not programmed for other vendors, and in order for the franchisee to purchase goods from such vendors he must pay cash and engage in a certain amount of paperwork to record purchases and sales. Nevertheless, the record is clear that nothing in the franchise agreement forbids such purchases from nonauthorized vendors; and it is equally clear that almost all franchisees, including George, purchase some products from nonauthorized vendors.

Finally, Petitioner argues that article 15 of the franchise agreement allows Southland to terminate the relationship without cause upon 30 days' notice. This provision, it contends, may be used as a club to force franchisees to accede to its demands upon threat of severance of the relationship. However, the Board has never held that this right to terminate, standing alone, negates the existence of an independent contractor status. As we held in *Clark Oil & Refining Corp.*, 129 NLRB 750,

> It is true that there is a residual authority in the Respondent, upon 30 days' notice, to terminate the dealership of anyone whom it considers to be conducting an unsatisfactory operation. ... Such conditions, however, neither create nor preserve an employee status. The most that can be said is that they establish a month-to-month tenancy-a not-insubstantial tenure-and one not ordinarily associated with master-servant relationships. Under the circumstances here such a condition does not negate the existence of an independent contractor status.

**4 On the above facts we are unable to find that Southland so controls the means by which George operates his store to warrant finding his employees *1334 to be employees of Southland. We find George to be an independent contractor.

Remaining for consideration is Petitioner's contention that, notwithstanding a finding that George is an independent contractor, he and Southland together should be regarded as joint employers. We find no merit in this contention.

We have long held that the critical factor in determining whether a joint employer relationship exists is the control which one party exercises over the labor relations policy of the other.[3] It is immaterial whether this control be actually exercised so long as it may potentially be exercised by virtue of the agreement under which the parties operate.[4] In the instant case Southland neither exercises actual, nor possesses potential, control over the store's labor relations under the franchise agreement. It is undisputed that George alone and exclusively hires, fires, and in every other respect sets the terms and conditions of employment of the store's employees. There is no evidence that the clear language of article 14 of the franchise agreement granting complete control over store labor relations to the franchisee has ever been disregarded by the parties or that Southland has ever sought to interpret the agreement in such a way as to vest in itself the right to influence George's labor relations policies.[5]

In its brief Petitioner advances the contention that Southland "in practice does keep a check on the number of employees, their hours and wages," by means of article 21 of the franchise agreement. Article 21 states that if the franchisee's payroll "exceeds 8 percent of net sales for said preceding week, or $200, whichever is greater, the remittance (the owner's weekly draw) may be reduced by the amount of such excess." But it does not require George to reduce the number of hours or wages of its employees.

We are of the opinion that the impact of this contractual provision upon George's employees is too remote and conjectural to warrant a finding that Southland has any meaningful control over George's labor relations policies. Moreover, there is no evidence that George has ever been affected by this provision. Indeed, the record shows that George does not even take a draw. Further, even if George did accept a draw it would be sheer speculation to assume that the terms of employment of his employees would in any way be affected by the draw restriction.

For the foregoing reasons we find on the present record that George and Southland are not joint employers of the store employees within the meaning of the Act. Accordingly, as George is the sole employer and as George's annual retail sales are less than the Board's minimum retail jurisdictional standards, we find that it will not effectuate the policies of the Act to assert jurisdiction herein, and we shall dismiss the petition.

ORDER

****5** It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

Footnotes

1 George originally invested $4,000 and within a few months invested an additional $5,000. His present equity in the store is approximately $15,000.

2 George has a net worth substantially in excess of $7,500 but has allowed his profits to accumulate instead of withdrawing them.

3 *S.A.G.E., Inc. of Houston and its Licensees*, 146 NLRB 325.

4 *Thriftown, Inc.*, 161 NLRB 603. Although in *Thriftown* the Board found the termination clause in the parties' agreement to be significant in establishing a joint employer relationship, this was found to be so because of the "special nature of the relationship," i.e., a discount department store in which all the leased departments were under one roof and were held out to the public to be part of an integrated enterprise. Moreover, the lease agreement specifically reserved to Thriftown the right to control its lessees' labor relations, a right which would normally be exercised in order to prevent a dispute involving one lessee from adversely affecting the operation of the entire store.

5 In this regard it is noteworthy that on one occasion a customer complained to Southland about the conduct of a clerk in George's store. Although a Southland representative suggested to George that the employee be fired, George rejected the suggestion and continued to employ the clerk. Southland thereafter made no attempt to alter George's decision.

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