§ 779.222 Ownership as factor.

As pointed out in § 779.215 ''unified operation'' and ''common control'' do not refer to the ownership of the described activities but only to their performance. It is clear, however, that ownership may be an important factor in determining whether the activities are performed through ''unified operation or common control.'' Thus common control may exist where there is common ownership. Where the right to control, one of the prerogatives of ownership, exists, there may be sufficient ''control'' to meet the requirements of the statute. Ownership, or sufficient ownership to exercise control, will be regarded as sufficient to meet the requirement of ''common control.'' Where there is such ownership, it is immaterial that some segments of the related activities may operate on a semi-autonomous basis, superficially free of actual control, so long as the power to exercise control exists through such ownership. (See *Wirtz* v. *Barnes Grocer Co.*, 398 F. 2d 718 (C.A. 8).) For example, a parent corporation may operate a chain of retail or service establishments which, for business reasons, may be divided into several geographic units. These units may have certain autonomy as to purchasing, marketing, labor relations, and other matters. They may be separately incorporated, and each unit may maintain its own records, including records of its profits or losses. All the units together, in such a case, will constitute a single enterprise with the parent corporation. They would constitute a single business organization under the ''common control'' of the parent corporation so long as they are related activities performed for a common business purpose. The common ownership in such cases provides the power to exercise the ''control'' referred to in the definition. It is clear from the Act and the legislative history that the Congress did not intend that such a chain organization should escape the effects of the law with respect to any segment of its business merely by separately incorporating or otherwise dividing the related activities performed for a common business purpose.

§ 779.223 Control where ownership vested in individual or single organization.

Ownership, sufficient to exercise ''control,'' of course, exists where total ownership is vested in a single person, family unit, partnership, corporation, or other single business organization. Ownership sufficient to exercise ''control'' exist also where there is more than 50 percent ownership of voting stock. (See *West* v. *Wal-Mart*, 264 F. Supp. 168 (W.D. Ark.).) But ''control'' may exist with much more limited ownership, and, in certain cases exists in the absence of any ownership. The mere ownership of stock in a corporation does not by itself establish the existence of the ''control'' referred to in the definition. The question whether the ownership in a particular case includes the right to exercise the requisite ''control'' will necessarily depend upon all the facts in the light of the statutory provisions.

§ 779.224 Common control in other cases.

(a) As stated in § 779.215 ''common control'' may exist with or without ownership. The actual control of the performance of the related activities is sufficient to establish the ''control'' referred to in the definition. In some cases an owner may actually relinquish his control to another, or by agreement or other arrangement, he may so restrict his right to exercise control as to abandon the control or to share the control of his business activities with other persons or corporations. In such a case, the activities may be performed under ''common control.'' In other cases, the power to control may be reserved through agreement or arrangement between the parties so as to vest the control of the activities of one business in the hands of another.

(b) Activities are considered to be performed under ''common control'' even if, because of the particular methods of operation, the power to control is only seldom used, as where the business has been in operation for a long time without change in methods of operation and practically no actual direction is necessary; also common control may exist where the control, although rarely visibly exercised, is evidenced

by the fact that mere suggestions are adopted readily by the business being controlled.

(c) In the retail industry, particularly, there are many instances where, for business reasons, related activities performed by separate companies are so unified or controlled as to constitute a single enterprise. A common example, specifically named in the definition, is the leased department. This and other examples are discussed in §§ 779.225 through 779.235.

LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

§ 779.225 Leased departments.

(a) As stated in section 3(r) of the enterprise includes ''departments of an establishment operated through leasing arrangements.'' This statutory provision is based on the fact that ordinarily the activities of such leased departments are related to the activities of the establishment in which they are located, and they are performed for a common business purpose either through ''unified operation'' or ''common control.'' A general discussion will be found in part 776 of this chapter.

(b) In the ordinary case, a retail or service establishment may control many of the operations of a leased department therein and unify its operation with its own. Thus, they may operate under a common trade name: The host establishment may determine, or have the power to determine, the leased department's space location, the type of merchandise it will sell, its pricing policy, its hours of operation and some or all of its hiring, firing and other personnel policies; advertising, adjustment and credit operations, may be unified, and insurance, taxes, and other matters may be included as a part of the total operations of the establishment. Some or all of these and other functions, which are the normal prerogatives of an independent businessman, may be controlled or unified with the store's other activities in such a way as to constitute a single enterprise under the Act.

(c) Since the definition specifically includes in the ''enterprise,'' for the purpose of this Act, ''departments of an establishment operated through leasing arrangements,'' any such department will be considered a part of the host establishment's enterprise in the absence of special facts and circumstances warranting a different conclusion.

(d) Whether, in a particular case, the relationship is such as to constitute the lessee's operation to be a separate establishment of a different enterprise rather than a ''leased department'' of the host establishment as described in the definition, will depend upon all the facts including the agreements and arrangements between the parties as well as the manner in which the operations are conducted. If, for example, the facts show that the lessee occupies a physically separate space with (or even without) a separate entrance, and operates under a separate name, with his own separate employees and records, and in other respects conducts his business independently of the lessor's, the lessee may be operating a separate establishment or place of business of his own and the relationship of the parties may be only that of landlord and tenant. In such a case, the lessee's operation will not be regarded as a ''leased department'' and will not be included in the same enterprise with the lessor.

(e) The employees of a leased department would not be covered on an enterprise basis if such leased department is located in an establishment which is not itself a covered enterprise or part of a covered enterprise. Likewise, the applicability of exemptions for certain retail or service establishments from the Act's minimum wage or overtime pay provisions, or both, to employees of a leased department would depend upon the character of the establishment in which the leased department is located. Other sections of this subpart discuss the coverage of leased retail and service departments in more detail while subpart D of this part explains how exemptions for certain retail and service establishments apply to leased department employees.

§ 779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.

While certain franchise and other arrangements may operate to bring the