OPINION
66-434

January 26, 1966 (OPINION)

Mr. Jack D. Paul, Executive Secretary

North Dakota Trade Commission

RE: Trade Commission - Retail Outlets - License

This is in reply to your letter dated January 18, 1966, wherein you made reference to an opinion given to the North Dakota Trade Commission on November 5, 1965, and asked for further clarification of chapter 51-10 of the North Dakota Century Code.

With your letter you enclosed three letters received by the Trade Commission. All of these letters concerned the question of whether a company that has retail outlets, etc., throughout the state must pay one retail license fee which would cover all such outlets, etc., or whether each retail outlet must secure a retail license of its own. You asked specifically that we answer this question. You advised us that "The Trade Commission has determined that all retail outlets must be licensed in order that the intent of the law not be thwarted or circumvented. The commission after much deliberation and discussion concluded that the legislative intent was to require licensing of each separate business location in order to fairly and equitably implement the administration of the law. The commission also concluded that a parent company located outside the state need not be licensed as essentially it would be a supplier, but that the retail outlets and separate locations operating through these parent organizations must be licensed in order to ensure compliance with the intent of the law and ensure equitable distribution of responsibility under the law."

In our earlier opinion referred to above we discussed the question of whether or not a door-to-door salesman would be covered by the act. After stating that it was our opinion that he would be, we went on to say that "Whether the salesman himself or his superior would have to pay the license fee would depend upon the legal status of the salesman. If he were a mere 'agent' or employee of the superior, then only the superior would be required to pay a license fee which would cover all of his 'agents' and employees. The superior in such case would be responsible for the acts of such 'agents' and employees. If, on the other hand, the salesman was an independent contractor he would be required to pay his own license fee and would be responsible personally for any violations of the act. Who would be an 'agent' or employee and who would be an independent contractor would depend upon the facts of each individual case. To say that each door-to-door salesman must have a license regardless of his legal status would be the same as requiring that each store clerk must obtain a license. This was obviously not the intent of the Legislature." The above reasoning is based on the premise that a "mere agent or employee" would not be a retailer within the definitions set forth in chapter 51-10 of the North Dakota Century

Code, whereas an independent contractor would be. Chapter 51-10 does not require the licensing of retail business places; it requires the licensing of retailers. Although the concept of "independent contractor vis-a-vis agent or employee" does not fit nearly where two or more corporations rather than individual persons are involved the basic principle would be the same. Thus, the question still is, who is the retailer?

The determination to be made with reference to corporations which have outlets within the state would be whether or not the managers of the outlets are running their own businesses or whether they are running the corporation's businesses. More specifically, whether the manager of each outlet is running his own business under a lease-franchise arrangement or whether he is being paid a salary to carry on the corporation's business. Thus, in determining whether a license is required for each outlet the most important consideration would be the agreements between the corporation and the manager regarding the outlet premises and the manager's compensation. The normal mode of operation with "chain stores" is to lease the premises to the manager, bind him under an exclusive franchise agreement, and allow him to make his living from the profit he brings in. The exact terms of these arrangements would, of course, be as varied as there are numbers of "chain stores"; the pattern, however, is generally the same. Under such cases each outlet would have to have its own license. In other cases the corporation will hire a manager on a salary basis or combination salary-commission basis to run their outlet. They will retain direct control over his operation and allow him only such discretion in his activities as is necessary to run an efficient business. In such cases the "parent" corporation's license would cover the outlet.

Other factors which might be useful in determining the exact nature of the outlet's business would be: Whether he has final authority to set prices, even though he has guidelines that he must follow; who is responsible for maintenance bills such as lights, heat, etc.; what is the manager's authority as far as binding the main company; are outlets treated as separate entities for income tax purposes; are outlets treated as separate entities for Social Security and unemployment purposes; do they have separate risk numbers with the Workmen's Compensation Bureau; can the manager be dismissed at will; can he hire other employees without approval from the "parent" corporation; etc.

None of these factors would in and of themselves be determinative of the legal relationship between the "parent" corporation and the outlet but they will help the Trade Commission in reaching its decision in questionable cases.

In the last analysis it boils down to what we stated in our earlier opinion "Making an initial determination of the individuals covered by this chapter is an administrative function and should be determined by the Trade Commission." Such a determination must not, of course, be arbitrary, but must be made in accordance with the guidelines set forth in the law.

HELGI JOHANNESON

Attorney General