

In the Matter of ALASKA SALMON INDUSTRY, INC., EMPLOYER and
UNITED FISHERMEN OF ALASKA, AFFILIATED WITH THE SEAFARERS'
INTERNATIONAL UNION OF NORTH AMERICA, AFL, PETITIONER

Case Nos. 19-RC-94, 19-RC-95, and 19-RC-96.—Decided
March 10, 1949

DECISION
AND
ORDER

Upon separate petitions duly filed, a consolidated hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.¹

Upon the entire record in this case the Board finds:

1. The Employer, hereinafter called ASI, is engaged in commerce within the meaning of the National Labor Relations Act.²

2. The organization involved:

The Petitioner is a labor organization affiliated with the American Federation of Labor claiming to represent employees of the Employer. The Intervenor, Alaska Fishermen's Union, CIO, is a labor organization affiliated with the Congress of Industrial Organizations claiming to represent employees of the Employer.

3. The question concerning representation:

The Petitioner seeks in its petition filed in Case No. 19-RC-94 a unit of "all seine and gill fisherman employed by member companies of ASI in the Westward District of Alaska (including King Cove, Squaw Harbor, False Pass and Sand Point), being all waters of the Alaska Peninsula area, excluding therefrom the Port Moller area and the Chignik area."³ In Case No. 19-RC-95 the Petitioner re-

¹ The Petitioner moved at the hearing to bar the Intervenor from participation in this case because it is not in compliance with Section 9 (f), (g), and (h) of the Act. On the basis of its existing contract the hearing officer denied the motion and permitted the intervention. The Petitioner renewed its motion in its brief filed with the Board. The motion is hereby denied. *Matter of Norcal Packing Company, et al.*, 76 N. L. R. B. 254; *Matter of American Chain and Cable Co.*, 77 N. L. R. B. 850; *Matter of Bush Woolen Mills, Inc.*, 76 N. L. R. B. 618; *Matter of The Baldwin Locomotive Works*, 76 N. L. R. B. 922.

² The organization of ASI was discussed in *Matter of Alaska Salmon Industry, Inc.*, 61 N. L. R. B. 1508.

³ The description appears as amended at the hearing.

quested a unit of all seine and gill net fishermen employed by members of ASI in the Port Moller area, and in Case No. 19-RC-96 all those seine and gill net fishermen employed by members of ASI in the Chignik area.⁴

ASI, a nonprofit Delaware corporation, has its main office in Seattle, Washington. It was organized for the purpose of determining labor policies and acting for its members in labor relations matters. All companies engaged in the canning of fish and located in the three areas petitioned for are members of ASI. There is an existing contract between ASI and the Intervenor covering all cannery workers as well as all fishermen residing in the three areas.

The companies that are members of ASI purchase salmon, can it and ship it to the States for sale. The season runs from about June 1 to August 15 and is governed by the regulations of the Fish and Wildlife Service of the Department of the Interior. The fish canneries are located along the southern and northern coasts of the Alaskan Peninsula in a sparsely populated region. The cannery superintendent arrives several weeks in advance of the fishing season and makes oral agreements with the local fishermen to fish for him during the coming season. He deals only with the "skipper" of the boat who has already determined the make-up of his crew and if the superintendent is desirous of obtaining a particular "skipper" to fish for him, he will throw in as "cumshaw," or credit, free gasoline or boat repairs, or free food for the season.

The majority of the fishermen are natives and residents of the area. Although they are free to contract, either as skippers or through skippers, with any cannery they wish prior to the start of the fishing season, they usually fish for the same cannery each year. Approximately 85 percent of the fishing boats in the three areas are owned by or are in the process of becoming the property of local "skippers." Occasionally, the company assists fishermen in the purchase of their boats by permitting them to buy on an installment plan. In this manner, the company attempts to insure that the purchaser will fish for it, although no formal agreement is made to this effect. In the industry, skippers operating their own boats are referred to as "independent" fishermen to distinguish them from those who use company-owned boats and are called "company" fishermen.

When the fishing season opens, the skippers, both "company" and "independent," take their crews and go to the area in which they are going to fish.⁵ The fish caught are picked up by a company tender

⁴ At the close of the hearing, the Petitioner further amended its petitions to exclude from the three requested units all purse seiners operating out of Puget Sound.

⁵ These areas have been fixed by custom among the fishermen themselves and are subject to sale and transfer.

at regular intervals, a tally is made and the fish are sent to the cannery. Each skipper decides where he will fish, what method he will use and how much time will be devoted each week to the catching of fish.

The "fish price" to be paid by the canneries to the fishermen is negotiated by the AFU and ASI before the beginning of the season, and varies according to the area and type of fish caught. A record of the season's catch for each crew is kept by the cannery for the account of the skipper. The skipper of the boat, whether "independent" or "company," receives a share of the catch equal to that of the members of his crew.⁶ Being almost entirely dependent on the cannery's stores for their food and supplies, the fishermen have credit accounts with the stores which are carried in the name of the skipper. All members of his crew draw food and supplies through the skipper's account and at the end of the season the amount due is deducted from the amount credited to the skipper for the catch and the balance is paid to him. He then settles the account by deducting the charges from the shares of the individual crew members. The agreements between the AFU and ASI have included clauses which permit the canneries to limit the amount of fish they will buy within a 24-hour period, and to terminate their agreement with any skipper during the season if the fish are badly damaged or of poor quality.

In all of the respects noted above, the relationship between the companies and the fishermen is virtually identical whether the fishermen are "independent" or "company," with two exceptions: (1) Social Security and Income Tax deduction are withheld by the company for the "company" but not for the "independent" fisherman. However, both "company" and "independent" fishermen pay their own fishing license and Alaska School tax.⁷ (2) The "fish price" paid the "company" fishermen is generally lower than that paid "independent" fishermen, but the differential is for the purpose of compensating the "independents" for depreciation of their boats.⁸ Both "independent" and "company" fishermen have been covered in contracts between ASI and AFU and the instant petitions make no distinction between the two groups.

Although none of the parties actually takes the position that the fishermen involved herein are "independent contractors," within the meaning of the Act, as amended, on the basis of the facts before us in

⁶ The record is somewhat ambiguous on this point. There is evidence in the record that the skipper may receive more than the members of the crew, particularly on "company" boats. The weight of the testimony, however, affirms this statement.

⁷ This is occasionally paid by the Company as an inducement to a particular skipper to fish for it.

⁸ This is done in one area by a lower "fish price" paid to "company" fishermen. In another area, part of the catch is set aside for the company to compensate for the use of the company boat. A portion of the share allotted to a company boat is given to more skillful skippers so they will fish for the same cannery the following season.

the record we regard the question of whether the fishermen sought to be represented are employees or independent contractors⁹ as the threshold issue in this case.¹⁰

The standards to be applied in determining who is an independent contractor within the meaning of Section 2 (3) of the Act, were thoroughly discussed in our decision in the *Steinberg* case.¹¹ As noted in that decision, the legislative history of Section 2 (3) indicates that Congress intended the Board to give to the terms "employee" and "independent contractor" their conventional meaning and to follow the ordinary tests of the law of agency.¹² As we further pointed out at that time, the general test contemplated is the "right-of-control" test, by which an employee relationship rather than that of an independent contractor is found to exist where the person for whom the services are performed reserves the right (even if not exercised) to control the manner and means by which the result is accomplished.¹³

Applying these standards to the facts noted above we are persuaded that the fishermen involved herein are independent contractors. Although some elements of the relationship between the fishermen and the canneries suggests that they are employees, an over-all view, in our opinion, compels a contrary finding. In particular, we note that: (1) a large percentage of fishermen own their own boats and gear; (2) they determine where and how they'll fish; (3) the crew members determine among themselves how much each member of the crew will be paid; (4) the skippers, both "company" and "independent," select their own crews; (5) the charge account at the cannery store is kept in the name of the skipper and he is responsible for its payment; (6) the contract is renewed each year and, occasionally, fishermen fish for a different cannery than the year preceding; (7) the fishermen are not supervised by the cannery and they frequently have exclusive rights in a certain area; (8) no income or Social Security taxes are

⁹ Section 2 (3) of the Act provides in part: "The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor . . ." [Emphasis supplied.]

¹⁰ ASI takes the position that other agencies of the Government have traditionally considered these fishermen as employees and requests that the Board assume jurisdiction "whether or not the technical and legal relationship of an employer-employee may exist." The Intervenor takes no position regarding the employee status of the fishermen but believes the petition should be dismissed because the fishermen already have representation.

¹¹ *Matter of Morris and Julian Leshe Steinberg, d/b/a Steinberg and Co.*, 78 N. L. R. B. 211; see also: *Matter of San Marcos Telephone Company*, 81 N. L. R. B. 314.

¹² H. R. Conference Rep. No. 510, 80th Cong., 1st Sess. (1947) 32-33; H. R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 18; 93 Cong. Rec. 6441-6442.

¹³ *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; *United States v. Wholesale Oil Co., Inc.*, 154 F. (2d) 745 (C. A. 10); *R. F. C. v. Merryfield*, 134 F. (2d) 988 (C. A. 1); *Restatement, Agency*, Sections 2 and 220.

deducted from the sum due the vast majority of the fishermen; and (9) for the most part, the skippers stand to lose or gain by the quantity and quality of work performed by those working under them.

In the *Steinberg* case we found the trappers engaged in trapping muskrats were employees and not independent contractors within the meaning of Section 2 (3). We distinguish this case, however, from the *Steinberg* case in that here there exists no power to control the personal freedom of the fishermen to go where they please and to fish in any manner and for any length of time they wish.¹⁴ In the instant case the skipper selects his own crew and the arrangements and final agreement are made between the skipper and the superintendent of the cannery; there is no power to check the daily catch or inspect the premises or equipment of the fishermen and many of the localities in which the skippers fish are considered their own exclusive property subject to sale and transfer, much like a mining claim. Furthermore, the fish, unlike the furs in the *Steinberg* case, do not become the property of the cannery until delivered to the cannery tender or the cannery.

The Petitioner has directed our attention to the need which these fishermen have for collective bargaining through their own representatives. We are aware, moreover, of the fact that all of the parties involved herein desire that the Board take jurisdiction in this case. We cannot, however, go contrary to the express mandate of Congress by asserting jurisdiction over persons whom the Act expressly removes from our jurisdiction. Applying to the term "independent contractor" the common-law tests of gency and giving the term its conventional meaning, as Congress says we must, we conclude in view of the above circumstances that the seine and gill net fishermen herein petitioned for are independent contractors within the meaning of the Act.¹⁵ Accordingly, we find that no question affecting commerce exists concerning the representation of employees of the Employer, within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act, and, we shall, therefore, dismiss the petitions.

¹⁴ Subject to the rules and regulations of the Fish and Wildlife Service, Department of the Interior.

¹⁵ The result we have reached finds direct support in existing court decisions. In *Columbia River Packers Association v. Hinton*, 315 U. S. 143, the Supreme Court held that fishermen operating similarly to the ones here involved were "independent entrepreneurs" and not employees within the purview of the Norris-La Guardia Act. Likewise, a Federal District Court held in *Emard v. Squire*, 58 F. Supp. 281, that the common-law test as to an independent contractor must be applied in determining who is employee and therefore entitled to benefits under the Social Security Act. The Court found salmon fishermen in another part of Alaska organized and operating in the same manner as those in the instant case were independent contractors, and therefore outside of the Act.

ORDER

Upon the basis of the entire record in this case, the National Labor Relations Board hereby orders that the petitions filed in the instant matter be, and they hereby are, dismissed.

CHAIRMAN HERZOG took no part in the consideration of the above Decision and Order.