

PUERTO RICO DAIRY, INC., SAN JUAN DAIRY, INC., SAN JOSE CORPORATION¹ and UNION DE TRABAJADORES DE LA INDUSTRIA LESHERA DE LA PUERTO RICO DAIRY, AFFILIATED WITH UGT DE P. R. *Case No. 24-RC 219. June 26, 1952*

Supplemental Decision and Order

On October 2, 1951, the Board issued a Decision and Direction of Election² in the above-entitled proceeding. On November 9, 1951, the Regional Director for the Twenty-fourth Region issued a certification of representatives. Thereafter on March 12, 1952, the Board granted the Employer's motion, made on December 21, 1951, for an "Extension of Hearing" to clarify the unit, which previously had been stipulated. On April 23, 1952, a hearing was held before Philip Licari, hearing officer, for the purpose of adducing additional evidence with respect to the status of certain individuals designated as "commission men" and "helpers of commission men." The Board³ has reviewed the rulings of the hearing officer and finds that no prejudicial error was committed. The rulings are hereby affirmed.

The record shows that the "commission men," whom the Employer would exclude from the unit as independent contractors, sell milk in the metropolitan area of San Juan, Puerto Rico, under an oral agreement with the Employer terminable at will. The milk sold bears the label of the Employer, i. e., "Puerto Rico Dairy Milk." The commission men drive trucks which are owned by the Employer and bear the name "Puerto Rico Dairy, Inc.," the license and ownership documents being in the name of the San Juan Corporation. The Employer pays for the gasoline used to operate the trucks and makes all repairs to them. In the event of a breakdown, the commission men call the Employer and the latter sends out another truck as replacement. The commission men wear uniforms supplied by the Employer at the latter's expense. The uniforms have the Employer's name on them.

Each commission man receives the milk in the morning, leaves with a loaded truck, makes the daily deliveries of milk, and returns in the evening at which time he turns in to the Employer the amount of money collected.

¹ As no evidence was introduced at the hearing with respect to "San Jose Corporation," we are not in this decision passing on the Employer's contention that "San Jose Corporation" be omitted as a party herein.

² Unpublished.

³ Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Herzog and Members Styles and Peterson].

The commission men are compensated weekly on the basis of 11½ cents for each quart of milk.⁴ They are held accountable for the quantities of milk received, reimbursing the Employer for spoilage and unsold milk. It is the normal practice of the Employer to give them an annual "present," usually in the sum of either \$25 or \$50.

The Employer determines the price at which the milk is sold and the men are not supposed to sell below or above that price.

Although there are no fixed working hours, the exigencies of the work requires the men to receive and distribute the milk on a reasonably regular basis each day.

When complaints are made as to the service, they are generally made to the Employer. Thus, while the commission men seek out customers, it appears from the record that the customers look to the Employer when not satisfied with the way in which they are being serviced. The Employer's president, Torres, explained that because the milk bears the Employer's label, customers call the plant under such circumstances.

As to the relationship between the Employer and the commission men, Torres testified further that if a commission man became drunk or did not perform his work in some other manner, "I think we could fire him."⁵

The Employer deducts sums for social security and makes workmen's compensation payments for the commission men.⁶ They are not under bond.

So far as the record shows, the commission men perform services exclusively for the Employer. Indeed, one of the men testified that he *cannot* transport milk of another dairy because "I consider that the vehicle is not mine."⁷

The Employer's witness testified that the commission men decide by themselves which route each is to take and also devise new routes and redistribute old ones. However, when a route was about to be discontinued in the city of Rio Piedras and its suburbs, it was the

⁴ There was testimony that the rate of compensation was originally 1 cent per quart; that Ruiz, the union representative, took up the matter of an increase in rate with the Employer's president, that the two "discussed it"; and that as a result, the rate was raised to 1½ cents a quart. The Employer's president testified that this occurred, but stated that he told Ruiz at the time that the commission men were not members of the contracting union.

⁵ Although Torres testified at first that "we can't fire them for not delivering the milk," he was asked later, "Suppose a commission man does not perform well, he does not deliver the milk or he does not bring you the money. What do you do about it?" And his answer was, "Well, if he does not bring the money, he would have to be fired unless he produces the money."

⁶ The Employer's attorney stated that this is done under "local law." There is no amplification in the record with respect to this explanation.

⁷ The Employer's attorney explained that a regulation of the Department of Health of Puerto Rico prohibits doing this.

Employer, and not the commission men, who sent out a "notice to our customers and clients residing in Rio Piedras and its Suburbs,"⁸ advising the customers of this fact. Although President Torres explained that the notice was sent at the request of the commission men, it seems clear from the contents of the notice that the Employer regards the discontinuance of routes as its own province, and notifies the customers in terms indicating that it considers them its *own* customers.

We believe that the preponderance of the evidence indicates that the relationship of the commission men to the Employer is that of employees rather than of independent contractors.⁹ Accordingly, we find, contrary to the Employer's contention that the commission men are employees within the meaning of the Act and shall include them in the unit.¹⁰

We shall therefore amend the unit description in the Decision and Direction of Election heretofore issued herein in conformity with our above findings.

Order

IT IS HEREBY ORDERED that the unit description in the Decision and Direction of Election heretofore issued herein be, and it hereby is amended to read as follows:

All production, maintenance, and distribution employees, including bottle washer operators, filling machine operators, bottle carriers, can washing machine operators, tank washers, icebox men, ice plant men, cheese men, helpers of cheese men, maintenance men (janitors), all chauffeurs, assistants to chauffeurs, mechanics, tinsmiths, night milk vendors, and commission men, employed at the Employer's dairy at Santurce, Puerto Rico, excluding all executives, administrative and professional personnel, office clerical employees, administrative chauffeurs, bottle receivers, temporary maintenance men, truck washers, guards, and supervisors as defined in the Act.

⁸ "Notice to our customers and clients residing in Rio Piedras and its Suburbs: We wish to make it known that beginning on the first day of the coming November and until further notice, due to justified causes not under our control, we will have to suspend our home delivery service of homogenized milk in the city of Rio Piedras and its suburbs. We wish to express our profound thanks for the cooperation which we have received and we hope to be able to serve you again in the future at a date which we will in due time notify you."

Signed, PUERTO RICO DAIRY, INC.

⁹ *Toledo Scale Company*, 82 NLRB 826.

¹⁰ While it appears that on occasion some commission men hire a helper for various periods to assist them in the distribution of the Employer's products or to replace them temporarily while they are on vacation, we do not regard that factor as sufficient to constitute the commission men as supervisors within the meaning of the Act. As it appears that the helpers are casual employees, we shall not include them in the unit.