

B, and their apprentices;<sup>15</sup> but excluding jig bore operators A and B, engine lathe operators A and B, toolroom welders A, heat treaters A, external grinders B, heat treaters senior, lathe and bench operators, kirksite form and die makers, sheet metal tool repairmen A and B, experimental sheet metal mechanics, all other employees, and all supervisors as defined in the Act.

If a majority vote for the Petitioner they will be taken to have indicated their desire to constitute a separate appropriate unit, and the Regional Director conducting the election directed herein is instructed to issue a certification of representatives to the Petitioner for the unit described above which the Board, under such circumstances, finds to be appropriate for purposes of collective bargaining. In the event a majority vote for the Intervenor, the Board finds the existing unit to be appropriate and the Regional Director will issue a certification of results of election to such effect.

[Text of Direction of Election omitted from publication in this volume.]

<sup>15</sup> The Employer maintains a formal apprentice program for 8 to 10 apprentice tool and die makers, which is approved by the Department of Labor.

ROYAL CROWN BOTTLING COMPANY OF PUERTO RICO *and* UNION DE TRABAJADORES DE LA INDUSTRIA DE LA ROYAL CROWN COLA (FLT), PETITIONER. *Case No. 24-RC-462. January 15, 1953*

### Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Roy J. Cohen, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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

1. The Employer, a Puerto Rican corporation, has an exclusive franchise from Nehi Corporation of Columbus, Georgia, for the bottling and distribution of Royal Crown beverages on the islands of Puerto Rico and Vieques. During 1951, the Employer received shipments of syrup, advertising material, and bottle caps valued at approximately \$60,000 from outside Puerto Rico. During the same period, the Employer made sales valued at approximately \$200,000, all within Puerto Rico.

We find, contrary to the contention of the Employer, that it is engaged in commerce within the meaning of the Act.<sup>1</sup>

<sup>1</sup> *Royal Crown Bottling Company of Puerto Rico*, 93 NLRB 371.

2. The Petitioner is a labor organization which claims to represent certain employees of the Employer.

3. A 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.

4. The Petitioner seeks to represent driver-salesmen who sell and deliver the Employer's bottled soft drinks. The Employer contends that the driver-salesmen are not employees but independent contractors, and therefore are not covered by the Act. In the event that this contention is rejected, the Employer urges that driver-salesmen should be established in a separate unit apart from the production and maintenance employees now represented by the Petitioner. The Petitioner is neutral as to the unit placement of driver-salesmen.

There are approximately six driver-salesmen involved in this proceeding. The Employer has assigned to each of them a specific territory. The driver-salesman has broad discretion in servicing his customers. He is not permitted, however, to sell other products, whether or not competitive with those of the Employer.

Ninety-five percent of the driver-salesman's sales are for cash. The remainder are for credit extended by the Employer, who bills such credit customers directly, although the driver-salesman makes the deliveries.

The driver-salesman makes his deliveries in a truck owned by the Employer and carrying the latter's distinctive emblem. The Employer pays all expenses connected with the operation of the truck, including that for gas, oil, insurance, license fees, and repairs. For the use of the trucks, the Employer charges the driver-salesman 2 cents for each case of soft drinks sold. The driver-salesman must return the truck to the plant each evening unless he has received permission to keep it overnight. He can use the truck for personal business only by permission and by the payment of a mileage rental charge.

If a driver-salesman is temporarily absent, the Employer assigns one of its employees to service the route of the absentee. The driver-salesman receives no compensation for deliveries made during his absence. Each driver-salesman has a helper whom he pays out of his own earnings and at a rate which he himself sets.

The driver-salesman receives no salary or other fixed compensation. His earnings represent the difference between the selling price to the customer and the cost to the driver-salesman of the beverages sold, less the truck rental charges and the amount paid the helper. Both the selling price and the cost to the driver-salesman are fixed by the Employer. The driver-salesman makes no payment to the Employer

in advance of sales. At the end of each day he pays the Employer the charge price for the soft drinks sold that day, plus auto-rental charges, and less returns. The driver-salesman also receives a bonus of 1 cent per case at the end of each week. According to the Employer, this bonus is intended to cover advertising and other expenses. According to 1 of the driver-salesmen, this 1 cent a case is given as an attendance bonus. It is paid only if the driver-salesman has worked a full week.

The Employer does not consider the driver-salesmen to be its employees. It does not include them in its employee payroll, does not pay social-security taxes on their earnings, and does not carry workmen's compensation insurance for them.<sup>2</sup>

Whether an individual is an independent contractor or an employee under the Act must be determined by the common law "right of control" test. No single factor is determinative. Resolution of this issue can be made only by a consideration of all the facts, both pro and con.<sup>3</sup>

We believe that the weight of the evidence supports the conclusion that these driver-salesmen are commission salesmen rather than independent business men. In reaching this conclusion, we have given consideration to the relationship which exists between the driver-salesmen and their helpers. Accordingly, we find that the driver-salesmen are employees of the Employer within the meaning of the Act.<sup>4</sup>

The driver-salesmen have interests different from those of the production and maintenance employees. Accordingly, as urged by the Employer, we shall establish them in a separate unit.

We find that all driver-salesmen employed by Royal Crown Bottling Company of Puerto Rico, Hato Rey, Puerto Rico, excluding helpers, executive, administrative, office clerical, and professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

[Text of Direction of Election omitted from publication in this volume.]

MEMBER HOUSTON took no part in the consideration of the above Decision and Direction of Election.

<sup>2</sup> In support of its contention that the driver-salesmen are independent contractors, the Employer put into evidence a letter from the Puerto Rican Social Security Bureau for Chauffeurs, State Insurance Fund, dated July 29, 1952, which reads: ". . . we have decided that these persons [driver-salesmen], besides being chauffeurs at the service of the Company on the basis of an employer-employee relation . . . are also found to be *independent contractors* . . . Therefore, this Bureau will not consider said independent contractors as chauffeurs of the Royal Crown Bottling Company of Puerto Rico." This letter apparently finds the driver-salesmen to have a dual relationship. It is therefore neutral evidence.

<sup>3</sup> *Golden State Agency, Inc.*, 101 NLRB 1775.

<sup>4</sup> *Ibid.*