

ALASKA SALMON INDUSTRY, INC. and ALASKA FISHERMEN'S UNION,
 PETITIONER. *Cases Nos. 19-RC-1486 and 19-RC-1487. November
 17, 1954*

Decision and Order

Upon separate petitions duly filed under Section 9 (c) of the National Labor Relations Act, a consolidated hearing was held before Robert E. Tillman, 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 consolidated proceeding, the Board finds:

1. The Employer, herein called the ASI, is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent employees of the Employer.

3. In this consolidated proceeding, the Petitioner seeks to represent, in four separate geographical units, fishermen known as "company" fishermen,¹ who supply fish to member companies of the ASI in the Cook Inlet, Chignick, Port Moller, and Westward districts² in the Territory of Alaska. The ASI contends that the units sought are inappropriate on the ground that company fishermen are not employees within the meaning of the Act, but are independent contractors.

The ASI, a nonprofit membership corporation, is composed of companies engaged in the processing and canning of salmon in the Territory of Alaska. It determines common labor policies for its member companies and represents them in all labor relations matters.³ For many years, the ASI and the Petitioner have negotiated contracts regulating the employment of union members and the prices to be paid for salmon supplied by fishermen to ASI members. Recently, the Federal Trade Commission issued a complaint against various Alaska salmon canning companies and unions, including the ASI and the Petitioner, concerning the practice of fixing prices to be paid for salmon. Thereafter a consent settlement agreement, approved by the Federal Trade Commission, was executed by the parties wherein they agreed to refrain from price fixing and providing that the companies could bargain with unions as to those fishermen who were actually employees. As a consequence, the employment status of company fishermen has been challenged and the parties herein seek Board determination of that issue.

¹ Company fishermen include boat fishermen, set netters, drift gillnet, hand trap, and beach and purse seine fishermen.

² The Westward district includes King Cove, Squaw Harbor, False Pass, and Sand Point

³ The business of the ASI and its members is more fully set forth in an earlier decision of the Board. *Alaska Salmon Industry, Inc., et al.*, 61 NLRB 1508.

Fishing areas and fishing seasons in Alaska are determined by, and are under the control of, the United States Fish and Wildlife Service of the Department of the Interior. The salmon season in the districts herein involved generally runs from May to mid-August. Before the beginning of each season, the various canning companies contract with individual fishermen and captains of fishing boats to purchase their catch for the season. The fishermen, in turn, agree to sell their entire catch to the company. Fishermen customarily return each year to fish for the same company. However, they are free to contract each season with any company they desire. A majority of the fishermen own their own boats and equipment. They are classified in the industry as "independent" fishermen to distinguish them from those fishermen who use boats and equipment owned and furnished by the canning companies. The latter, designated as company fishermen, are among the fishermen sought to be represented by the Petitioner herein. Fishermen employ different methods of catching salmon which include the use of set nets, hand traps, drift gillnets, and purse seines. Some companies employ company fishermen to operate hand traps for which the companies furnish wire web, poles, and other equipment necessary to operate the traps.

The captain of each fishing boat selects his own crew and determines the share that each crew member will receive. The companies supply service scows or fish tenders to pick up the salmon caught, without distinction as to whether the fish were caught by company or independent fishermen. Fishermen are notified where the tenders will be located. Except that, and in so far as, the location of the tenders may limit the general area in which fishermen may profitably operate, the company prescribes no restrictions as to where fishermen may fish, thus leaving the selection of a fishing site to each captain. The tender takes the salmon from the fishing boats, and transports the fish to the canneries, keeping a tally of the salmon delivered to it by each boat captain. Full settlement for payment of salmon is made at the close of the season with the captain of each boat, the captain in turn settling with his boat crew.⁴

The companies do not supervise the fishing operations of company fishermen and exercise no control over their activities as such or those of their crews. The fishermen, however, are expected to be at the respective canneries a few days before the season starts in order to prepare their boats and equipment for fishing. For this maintenance work, they are paid the prevailing wage rate. This specific compensation is separate and distinct from the payment that they receive for the fish which, as fishermen, they deliver to the company for can-

⁴ At the request, and for the convenience of the captain, and in accord with his directions, a company will issue separate checks to crew members out of the captain's compensation.

ning. In some districts, men who serve as fishermen may, if they so desire, work around the cannery before and after the fishing season, performing longshoremen's work or other work that may be available. For this work, they receive regular wages.⁵

As previously noted, the prices to be paid for salmon caught and delivered to the companies are established before the season starts by an agreement negotiated by the ASI on behalf of its company members and the Petitioner as representative of the fishermen in these areas. These prices vary according to the size and variety of the salmon and the particular area in which they are caught. The same price is paid to both independent and company fishermen. To compensate the company for the use of its boats and equipment, one-third of the agreed contract price is deducted from the sum paid company fishermen for the fish supplied.

As persuasive of an employer-employee relationship between company fishermen and the canning companies, the Petitioner points to the fact that some canneries deduct social-security and withholding taxes from the amounts paid company fishermen for compensation to them for their services, including those of their crews. However, not all the companies included herein deduct such taxes; and furthermore, no evidence was presented to show that the companies who make the deductions are required to do so. These deductions are made, so far as the record shows, because a legal determination has not yet been made as to whether company fishermen are employees subject to social-security and withholding taxes, and a doubt exists as to the several companies' liability for such taxes in the event captains of the individual company boats do not collect them from their several crew members.

The Petitioner also contends that its contract with ASI for company fishermen in the Port Moller district is tied in to the Bristol Bay district⁶ contract, in that it provides that payment for salmon, longshoremen's work, and other preseason and postseason work will be at the rate set forth in the Bristol Bay contract, and since the Bristol Bay company fishermen have been found by the Board to be employees within the meaning of the Act,⁷ it follows that the company fishermen in the Port Moller district are also employees within the meaning of the Act. We do not agree. Although there are similar provisions in the contracts of these two districts, such as the furnish-

⁵ The parties agree and we find that during the periods when fishermen perform pre-season and postseason maintenance work around the canneries they are employees of the canning company and not independent contractors.

⁶ Fishermen in the Bristol Bay district are not sought in this proceeding.

⁷ In *Alaska Salmon Industry, Inc.*, 94 NLRB 1211, footnote 1, the Board, in accordance with the agreement of the parties, found that the company fishermen in the Bristol Bay area, unlike Alaskan fishermen in other areas, were employees of the company and not independent contractors. Accordingly, they were included in an overall unit with cannery employees.

ing of company gear and equipment, transportation costs, and run money to company fishermen, it is clear that Bristol Bay companies under their contract exercise closer supervision and control over the activities of their company fishermen than is authorized by the Port Moller contract. Thus, unlike the Port Moller contract, the Bristol Bay contract empowers ASI members in that district to designate which boat a fisherman will use; to order fishing boats to a different fishing station from that to which they were originally ordered; to select replacements of fishing partners; to provide penalties for failure to abide by its fishing regulations; and to restrict the fishing season for their fishermen.

There has been a long history of bargaining between the ASI and the Petitioner, and its predecessors, on a multiemployer basis within each of the fishing areas herein involved covering company fishermen and independent fishermen in the same contract units. In 1949, petitions were filed with the Board for certifications within such units. After full consideration of all the facts and circumstances, the Board concluded that both independent and company fishermen in these four areas were independent contractors within the meaning of the Act, and accordingly dismissed the petitions.⁸ The instant record discloses that there has been no substantial change in fishing operations in these districts since these prior decisions.⁹ Accordingly, upon all the circumstances, including the facts that company fishermen retain substantial independence in their operations; that they operate in substantially the same manner as independent fishermen; that company boat captains hire their own crews, select their own fishing "spots"; and to some extent control their private profits by determining the share to be paid their several crew members; that the fishing season established in the contracts fixes the duration of the relationship between company fishermen and the companies; and that the prices to be paid for salmon are established by agreement prior to and for the duration of each fishing season, we find that the company fishermen in the areas sought are not employees of the companies herein within the meaning of the Act.¹⁰ We therefore 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. We shall therefore dismiss the petitions herein.

[The Board dismissed the petitions.]

⁸ *Alaska Salmon Industry, Inc.*, 81 NLRB 1335 and 82 NLRB 1056.

⁹ So testified all available witnesses. At the time of the present hearing in Seattle, practically no fishermen were available as witnesses because the fishing season in Alaska was in full swing.

¹⁰ *J. Howard Smith, Inc*, 95 NLRB 21. Cf. *Southern Shellfish Co., Inc.*, 95 NLRB 957.