

that has taken place since the filing of the petition, that the showing does not meet our requirements as to substantial representation before we conduct an election. Accordingly, our direction of an immediate election herein shall be subject to the submission by the Petitioner of a sufficient showing of interest among the employees in the unit when such unit was substantial and representative.<sup>4</sup> As already found, that occurred as of the time of the hearing. In the circumstances, we deny the motion.

[Text of Direction of Election omitted from publication.]

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

<sup>4</sup> Cf. *Mrs. Tucker's Products, Division of Anderson, Clayton & Company, Inc.*, 106 NLRB 583 at 535.

**Albert Lea Cooperative Creamery Association<sup>1</sup> and General Drivers, Inside Workers & Helpers, Local Union No. 845, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,<sup>2</sup> Petitioner**

**Albert Lea Cooperative Creamery Association and United Packinghouse Workers of America, AFL-CIO, Petitioner. Cases Nos. 18-RC-3357 and 18-RC-3369. December 13, 1957**

#### DECISION, ORDER, AND DIRECTION OF ELECTION

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

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Murdock and Jenkins].

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

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations involved claim 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.

<sup>1</sup> The name of the Employer appears as corrected at the hearing.

<sup>2</sup> The Board having been notified by the AFL-CIO that it deems the Teamsters' certificate of affiliation revoked by convention action, the identification of this union is hereby amended.

4. The Employer is engaged in the processing and retail and wholesale distribution of dairy products. It operates 2 plants, one at Albert Lea, Minnesota, where its butter and milk processing operations are located, and the other about 9 miles away at Twin Lakes, Minnesota, where it is engaged in milk drying operations.

United Packinghouse Workers of America,<sup>3</sup> the Petitioner in Case No. 18-RC-3369, seeks a unit of all production and maintenance employees at both plants,<sup>4</sup> including all truckdrivers. The employer agrees that a two-plant unit is appropriate, but disagrees as to the unit placement of certain employees. General Drivers, Inside Workers & Helpers, Local Union No. 845, the Petitioner in Case No. 18-RC-3357, seeks a unit of all inside employees<sup>5</sup> at the Twin Lakes plant only, and does not wish to participate in an election if the Board finds that only a two-plant unit is appropriate. There is no history of bargaining at either plant.

At the Albert Lea plant, there are approximately 53 employees within the unit sought by the UPWA, including butter manufacturing employees; grade A milk processing employees; laboratory employees; storage and shipping employees; retail store employees; and truckdrivers, who are classified as farm can pickup haulers, bulk-tank pickup haulers, and retail and wholesale salesmen. Each of these departments is under the supervision of a foreman who has the authority to hire and fire or effectively recommend such action. The Twin Lakes plant was established about 2 years ago to house the Employer's milk-drying operations. This site was selected because zoning restrictions at Albert Lea prevented expansion of the Albert Lea plant for that purpose. At the time of the hearing there were approximately 10 employees at the Twin Lakes plant, including a foreman, a weighman, a separator man, a pan man, and storage and warehouse employees.<sup>6</sup>

There is a considerable degree of integration between the Albert Lea and Twin Lakes plants. Both are under the direct supervision of the Employer's general manager. Further, while the present Twin Lakes foreman, who is relatively new in that position, was being trained, the supervisor of quality control and field service, who is stationed at Albert Lea, was placed in charge of the Twin Lakes plant.

<sup>3</sup> Hereinafter referred to as the UPWA.

<sup>4</sup> The unit as described in the UPWA's petition is "production and maintenance and laboratory employees and truckdrivers, excluding office, clerical, and supervisory employees." The UPWA's specific unit contentions as developed at the hearing are discussed hereinafter.

<sup>5</sup> The unit as described in the petition excludes office clerical employees, salesmen, and supervisors. However, the record indicates that there are no office clerical employees, salesmen, or truckdrivers employed at the Twin Lakes plant.

<sup>6</sup> The Twin Lakes operation is seasonal in that production expands during the summer months, and the Employer expected to lay off two employees shortly after the hearing. However, the increase in the employee complement appears to be slight, and there was no contention that any election herein should be postponed until the next peak season.

At the time of the hearing, this supervisor was serving in an advisory capacity to the Twin Lakes foreman, visiting the Twin Lakes plant each morning to check on the operation. There is only one business office, located at Albert Lea, at which all permanent production records are kept,<sup>7</sup> and all payroll,<sup>8</sup> accounting, purchasing, and sales functions are handled. Personnel functions are centered at Albert Lea, all recommendations for hiring and firing of personnel being passed upon by the general manager.<sup>9</sup> The foreman of the Twin Lakes plant has a desk at the Albert Lea plant for his files and papers pertaining to the operation at Twin Lakes. In the course of operations, it is normal for various Albert Lea employees to work in both locations.<sup>10</sup> Fieldmen stationed at Albert Lea and laboratory employees from the Employer's only laboratory, which is located at Albert Lea, go to Twin Lakes for sampling; maintenance employees from Albert Lea go to Twin Lakes in the event of major breakdowns; production employees and farm can pickup haulers may be sent to Twin Lakes to assist in loading during peak production periods; and the same haulers make deliveries to both plants, all instructions to the haulers being given from the Albert Lea plant. There is also some interchange of materials. Although the milk to be processed at each plant is usually delivered directly to that plant and each plant has its own weighing room, excess grade A milk is sent from Albert Lea to Twin Lakes for drying, and the milk delivered to Twin Lakes is separated and the cream sent to Albert Lea for processing.

On the basis of these facts, particularly the temporary assignment of Albert Lea employees to assist at Twin Lakes; the integration of the work of the haulers, fieldmen, and laboratory employees with the operations of both plants; and the centralized control of the Employer's operations, labor relations policy, and management functions, we find that only the two-plant unit sought by the UPWA is appropriate.<sup>11</sup> We shall, therefore, dismiss the petition in Case No. 18-RC-3357.

<sup>7</sup> The foreman at the Twin Lakes plant keeps production records which he sends to Albert Lea daily. Apparently no permanent records of any kind are maintained at Twin Lakes.

<sup>8</sup> The Twin Lakes plant employees are paid on an hourly basis, whereas all but 3 or 4 employees at the Albert Lea plant are salaried. The timecards of the Twin Lakes employees are forwarded to the office at Albert Lea, where the wages are computed and payroll checks issued. The checks are usually delivered to the Twin Lakes foreman for distribution but on occasion the head of the payroll section distributes such checks.

<sup>9</sup> Application for employment at the Twin Lakes plant is made to the foreman of that plant, who interviews the applicant and refers the application to the general manager for decision. Apparently the same procedure may be followed at the Albert Lea plant. It appears that in case of any serious misconduct, all foremen have the authority to discharge without prior consultation with the general manager but subject to his later review of the action.

<sup>10</sup> There is one instance of a permanent transfer of an employee from Albert Lea to Twin Lakes, and one employee was permanently transferred from Twin Lakes to the milk room at Albert Lea. Twin Lakes employees have not been temporarily assigned to assist at the Albert Lea plant, since the larger staff at the latter plant makes this unnecessary.

<sup>11</sup> See *Poultry Producers Association*, 114 NLRB 1186.

The UPWA would include and the Employer would exclude all truckdrivers (farm can and bulk-tank pickup haulers and retail and wholesale driver-salesmen), the foremen of the milk room bottling department, the fieldman for the quality control program on manufactured milk and cream, one laboratory employee, and the butterfat tester.

The Employer takes the position that "because of the transition that is being made and has been going on for at least a year or 2" under which all of its haulers and salesmen will be placed on a contract basis and allegedly become independent contractors, all such *truckdrivers* should be excluded from the unit. At the time of the hearing, there were only 2 retail and 1 wholesale salesmen working under contract.<sup>12</sup> As to the employee salesmen and the haulers, since a unit determination must depend on the present status of the employees involved and not on speculation as to possible future methods of operation, and since no labor organization is seeking to represent them separately, we shall include the noncontracting retail and wholesale salesmen and the farm can and bulk tank pickup haulers in the unit.<sup>13</sup>

As to the contract salesmen, under the terms of the retail salesman contract, which is terminable upon 30 days' notice, the Employer agrees to sell its product to the salesman for delivery on a route or in an area determined upon and established by the Employer, for resale at prices to be determined based on market conditions, and to keep records and do all bookkeeping for the salesman at a fixed fee per month. The salesman agrees to furnish and maintain a truck and any other necessary equipment, to carry property damage and public liability<sup>14</sup> insurance, to settle with the dairy at least monthly, and to furnish a \$1,000 indemnity bond. The contract further provides that the salesman shall be responsible for all accounts, that he "may have certain approved charge accounts," and that the Employer will be of such assistance as it can in handling collections. The wholesale salesman contract is substantially the same, but the wholesale salesman agrees to make daily deliveries to the retail commercial trade in the territory designated, to obtain signed receipts from customers

<sup>12</sup> The record does not indicate the total number of drivers in the disputed categories. The general manager testified that some of the farm can pickup haulers were working under contract but that he was not certain of the number. However, by a letter from the Employer's attorney, which by stipulation of the parties we hereby incorporate into the record of this case, this testimony was corrected to show that none of those haulers were under contract at that time. The general manager further testified that some 9 months prior to the hearing the Employer's Board of Directors had decided that the farm can pickup routes were to be put under contract as soon as possible where good, reliable men could be secured to operate the trucks.

<sup>13</sup> *Plankinton Packing Company (Division of Swift & Co.)*, 116 NLRB 1225; *Aluminum Company of America (Harvard Plant, Cleveland)*, 80 NLRB 1342. We do not decide whether in the event these employees are placed on a contract basis they will remain employees or become independent contractors.

<sup>14</sup> In practice, the employer is a party to and pays a percentage of the premium for the public liability insurance.

for deliveries, and to report deliveries daily to the Employer. Both retail and wholesale salesmen agree to account daily for any cash payments received, and, in the event of termination of the contract for any reason, not to compete with the Employer for a period of 6 months.

In practice, contract salesmen finance the purchase of their own equipment and pay for all maintenance.<sup>15</sup> However, these trucks bear the name of the Employer, are indistinguishable from trucks driven by employee-salesmen, and are used exclusively in performing services for the Employer.<sup>16</sup> The Employer furnishes the salesmen with a list of customers and assists them in working up their routes. Contract and noncontract salesmen are under the same supervision, and they apparently perform identical duties, the difference being that the contract salesmen are responsible for collections whereas employee salesmen are not. However, the Employer bills directly some wholesale customers of the wholesale contract salesman and credits the salesman's account. Contract salesmen are paid solely on a commission basis,<sup>17</sup> represented by the difference between the selling price to the customer and the cost of the products to the salesmen, whereas employee salesmen receive a salary plus commission. However, contract salesmen follow the same procedure as employee salesmen in securing the Employer's products for resale, completing the same type of order form, having their trucks loaded in the same fashion, and making no payment to the Employer in advance of sales to customers. At the end of each day, contract salesmen are credited for unsold products remaining on their trucks. The Employer testified that if a contract salesman were not serving his route satisfactorily, the contract right to terminate would probably be exercised. In the event of a contract salesman's inability to serve his route for any reason, one of the checkers and sometimes the supervisor substitutes for him.

The Board has frequently held that in determining the status of persons alleged to be independent contractors, the Act requires the application of the "right of control" test.<sup>18</sup> Where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved

<sup>15</sup> Contract salesmen may make their own selection of a garage to service their trucks, but the Employer has a "fleet" arrangement with several garages and the contract salesmen actually select one of these garages for repairs.

<sup>16</sup> The general manager testified that the trucks of the contract salesmen were not supposed to be used for other purposes, and if they were so used it was without his knowledge.

<sup>17</sup> Withholding taxes are deducted only if the contract salesman requests it. No social-security payments are made for them, and the Employer did not know whether they would be covered by workmen's compensation or unemployment compensation.

<sup>18</sup> *American Broadcasting Company, a Division of American Broadcasting-Paramount Theatres, Inc., et al.*, 117 NLRB 13; *The H. E. Koontz Creamery, Inc.*, 102 NLRB 1619.

only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative. We are satisfied, on the basis of the entire record, that the contract salesmen are employees of the Employer. The facts that social-security and withholding taxes may not be deducted and that the contract salesmen own and maintain their own equipment are not controlling.<sup>19</sup> The Employer's assistance in building up routes; the limitation on the prices which the salesmen may charge; the requirement that it approve charge accounts of retail salesmen; the requirement of daily reports and daily settlement of cash receipts; the fact that the Employer maintains all records, although a fee is charged; and the fact that the contract salesmen's trucks are indistinguishable from those driven by the noncontract salesmen and may not be used for purposes other than making the Employer's deliveries are consonant with an employer-employee relationship, rather than with the independent contractor status of the disputed salesmen. This indicates that the Employer exercises a substantial measure of control over the means, as well as the results, of their work.<sup>20</sup> Accordingly, as we find that the contract salesmen are employees, we shall include them in the unit along with the employee salesmen.<sup>21</sup>

The Employer contends that the fieldman for the quality control program on manufactured milk and cream<sup>22</sup> should be excluded as a supervisor and as a managerial employee, since he has the power to make decisions. This employee works largely without supervision. His duties include visiting the farmer-producers to check their compliance with city, State, and Federal public health laws; making microscopic tests for bacteria count and reporting the results of the tests to the producers; and making recommendations to the producers to help them eliminate difficulties. The fieldmen are required to be licensed by the State as graders and testers<sup>23</sup> and anyone with a State license can refuse to buy dairy products that are unfit for human consumption. It is this authority on which the Employer bases its contentions. As to his alleged supervisory status, the disputed employee exercises no supervisory authority as defined in Section 2 (11) of the Act, and is therefore not a supervisor within the meaning of the Act. As to his alleged managerial status, the Board does not consider the performance of duties requiring the exercise of judgment to be an in-

<sup>19</sup> *American Broadcasting Company, a Division of American Broadcasting-Paramount Theatres, Inc.*, *supra*; *The H. E. Koontz Creamery, Inc.*, *supra*.

<sup>20</sup> *The H. E. Koontz Creamery, Inc.*, *supra*; *Burton Beverage Company*, 116 NLRB 634; *Royal Crown Bottling Company of Puerto Rico*, 102 NLRB 309.

<sup>21</sup> *The H. E. Koontz Creamery, Inc.*, *supra*.

<sup>22</sup> The parties agreed that the supervisor of quality control and field service and the fieldman for grade A milk and supervision, who perform similar duties, also perform supervisory functions and should be excluded from the unit.

<sup>23</sup> The disputed employee, who recently came to work for the Employer from another State, was asked at the time he was hired to secure such a license, but the general manager testified that he did not know whether the employee had done so.

dication of managerial status *per se*,<sup>24</sup> nor do the lack of close supervision and freedom to exercise considerable discretion render an employee managerial where his decisions must conform to the employer's established policy.<sup>25</sup> Since the fieldman for the quality control program on manufactured milk and cream is clearly not on the policy-making level of the Employer's organization, we find that he is not a managerial employee.<sup>26</sup> Accordingly, we shall include him in the unit.

The Employer would exclude as a technical employee the laboratory tester who makes standard microscopic and plate-count reading tests for bacteria count.<sup>27</sup> This tester is licensed by the State as a grader and tester but performs routine, standardized tests and has only a high school education.<sup>28</sup> We have frequently held that testers performing similar functions are not technical employees,<sup>29</sup> and since we have consistently held that testers and inspectors have interests which are sufficiently allied to those of production and maintenance employees to warrant their inclusion in the same unit,<sup>30</sup> we shall include the laboratory tester in the unit herein.

The Employer would exclude the butterfat tester as a supervisor or as a technical employee. This employee works in the butter department and occasionally helps in other departments. He is the only person performing the butterfat tests, which appear to be routine, and has no employees working under him.<sup>31</sup> Since the butterfat tester has no supervisory functions, he is not a supervisor within the meaning of the Act;<sup>32</sup> and since he performs routine tests, he is not a technical employee.<sup>33</sup> Accordingly, we shall include him in the unit.

The UPWA contends that the foreman of the milkroom bottling department is not a supervisor because he spends the greater portion of his time on production work, and therefore should be included in the unit. As previously noted, the Employer seeks the exclusion of this foreman. Although the general manager was unable to cite specific instances of the exercise of such authority, apparently this employee has the authority to hire and fire and recommend such action.<sup>34</sup> In addition, although the foreman fills in for absent production employees as needed, the testimony indicates that he is

<sup>24</sup> *Eastern Corporation*, 116 NLRB 329.

<sup>25</sup> *Northwestern Bell Telephone Company*, 79 NLRB 549.

<sup>26</sup> *Northwestern Bell Telephone Company*, *supra*.

<sup>27</sup> The laboratory tester also tests for butterfat content on occasion.

<sup>28</sup> Although the general manager testified that this position requires certain qualifications, he did not state what they were, and he did not know where the tester presently employed had secured her training.

<sup>29</sup> *Prairie Farms Creamery of Bloomington*, 116 NLRB 1237; *Wells Dairies Cooperative*, 107 NLRB 1445; *Greenbrier Dairy Products Company*, 100 NLRB 432.

<sup>30</sup> *Prairie Farms Creamery of Bloomington*, *supra*.

<sup>31</sup> In the event he needs assistance, the laboratory employees do some of the testing.

<sup>32</sup> *Vernon Calhoun Packing Company, Inc.*, 117 NLRB 104.

<sup>33</sup> *Greenbrier Dairy Products Company*, *supra*.

<sup>34</sup> The Board has held that it is the existence, not the exercise, of such authority that determines whether an employee has supervisory status. *The Eavey Company*, 115 NLRB 1779.

responsible for the operation of his department and directs the work of the other six employees in the milkroom bottling department. In view of these factors, we find that the foreman of the milkroom bottling department is a supervisor and shall exclude him from the unit.<sup>35</sup>

We find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All production and maintenance employees<sup>36</sup> at the Employer's Albert Lea and Twin Lakes, Minnesota, plants, including all truckdrivers,<sup>37</sup> the fieldman for the quality control program on manufactured milk and cream, the laboratory tester, and the butterfat tester, but excluding office clerical employees, retail store employees,<sup>38</sup> the supervisor of quality control and field service, the fieldman for grade A milk service and supervision, the foreman of the milkroom bottling department, the supervisor of farm pickup, the supervisor of the bulk division,<sup>39</sup> and all other supervisors as defined in the Act.

[The Board dismissed the petition in Case No. 18-RC-3357.]

[Text of Direction of Election omitted from publication.]

<sup>35</sup> *Pearl Packing Company*, 116 NLRB 1489.

<sup>36</sup> Since the record does not reveal whether employees laid off at the end of the Twin Lakes plant's peak season have a reasonable expectancy of reemployment, such laid-off employees may vote subject to challenge, and we will further investigate the facts relating to their status in the event that their votes become determinative of the results of the election.

<sup>37</sup> As indicated above, this category includes all farm can pickup haulers, all bulk tank pickup haulers, and all retail and wholesale salesmen.

<sup>38</sup> The parties agreed to the exclusion of the two employees who work in the Employer's retail store.

<sup>39</sup> Although the UPWA and the Employer agreed that the supervisor of the bulk division should be included because he spends the greater portion of his time performing non-supervisory duties, the testimony indicates that he performs functions similar to those of the supervisor of farm pickup, whom the same parties agreed is a supervisor and should be excluded. Since the testimony indicates that those functions include the authority to hire and fire or effectively recommend such action, we find that the supervisor of the bulk division is a supervisor within the meaning of the Act and exclude him from the unit, notwithstanding the agreement of the parties. *Jones-Dabney Company, Division of Devoe & Reynolds Co.*, 116 NLRB 1556.

**Sylvania Electric Products, Inc. and International Union of Electrical, Radio and Machine Workers, AFL-CIO, Petitioner.**  
*Cases Nos. 6-RC-1851 and 6-RC-1852. December 13, 1957*

**SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION**

Pursuant to a Decision and Direction of Election issued March 22, 1957,<sup>1</sup> elections by secret ballot were conducted on April 12, 1957,

<sup>1</sup> Not reported in printed volumes of Board Decisions and Orders.