

grocery, produce, meat, and check-out. The food department manager exercises direct control over these employees, through section managers who supervise employees in these sections. As noted above, the entire food department of Fields' store is separately partitioned from the general merchandise department by high display shelves and the department has its own separate entrances and checkout stands. Chelmsford stocks and prices all of its own merchandise. Its employees punch timeclocks located in the food department.

In view of all the evidence that Chelmsford operates a separate and distinct food department in Fields' discount store and is an employer of the employees in that department, the lack of any controlling bargaining history, and the fact that the Intervenor does not now seek an election in any other unit, we find that the following employees constitute a separate appropriate unit for collective-bargaining purposes:³

All regular full-time and part-time employees employed by Chelmsford Food Discounters, Inc., in the food department of the Chelmsford, Massachusetts, store of F. F. Fields of Chelmsford, Inc., but excluding office clerical employees, professional employees, guards, and department managers, and all other supervisors⁴ as defined in the Act.

[Text of Direction of Election omitted from publication.]

³ *United Stores of America*, 138 NLRB 333; *Frostco Super Save Stores, Inc.*, 138 NLRB 125. See also *Duane's Miami Corporation*, 119 NLRB 1331; *The Sperry and Hutchinson Company*, 117 NLRB 1762.

⁴ The question was contested as to whether two employees (Strock and Testa), assigned to supervise sections within the food department, were supervisors. As these employees responsibly direct the employees in their respective sections, we find that they are supervisors within the meaning of the Act, and exclude them from the unit found appropriate herein. Frankel is included in the unit in accordance with the parties' agreement.

Inter-Mountain Dairymen, Inc.¹ and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local Union No. 537, Petitioner. *Case No. 27-RC-2358. July 23, 1963*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hearings were held before hearing officers F. T. Frisbey and W. Bruce Gillis, Jr.² The hearing officers' rulings

¹ The Employer's name appears as amended at the hearing

² The original hearing in this case was held on January 22, 1963. The Board thereafter remanded the proceeding for a further hearing, which was held on April 23, 1963. After receiving due notice thereof, the Employer participated fully in the hearing held on April 23, 1963, and all relevant issues of this case were heard at that time

made at the hearings are free from prejudicial error and are hereby affirmed.

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

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 organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Sections 9(c) (1) and 2(6) and (7) of the Act.

Inter-Mountain Dairymen, Inc., is a Colorado corporation engaged in the cooperative transporting and marketing of milk and milk products for its producer-members, with its main office at Colorado Springs, Colorado. Eastern Colorado Dairymen's Association and Western Colorado Milk Producers Association were cooperative associations of milk producers. On March 26, 1963, they consolidated their operations into a single cooperative, Inter-Mountain Dairymen, Inc., which is the Employer in this case.³ At the further hearing, the Employer moved to dismiss the petition because Eastern, the employer named in the Union's petition, no longer exists due to the merger.⁴ The Union thereupon amended its petition to name Inter-Mountain as the Employer herein.

It appears that Inter-Mountain has taken over the operations of both Eastern and Western, including all of their assets, liabilities, and contract obligations. Dwight Hull, formerly the manager of Eastern, has become the manager of Inter-Mountain. He has authority over what were formerly Eastern and Western, but are now denominated "eastern division" and "western division" of Inter-Mountain. These divisions are separated by the Continental Divide. Except for the corporate consolidation, there has been no change in the operations of the two enterprises since the petition was filed. Colorado Springs, formerly the main office for Eastern, is now the principal headquarters of Inter-Mountain; and Grand Junction, formerly Western's main office, currently serves as a branch office of Inter-Mountain. Essentially the same employees were retained at each location, and they have the same supervision as they had before the consolidation. Their work has not changed, salaried drivers are still hired locally by the

³ Herein referred to as Eastern, Western, and Inter-Mountain, respectively.

⁴ The Employer also questioned the adequacy of the Petitioner's showing of interest because of the consolidation of Eastern and Western which, in turn, brought about an increase in the work force of Inter-Mountain. We do not agree that a new showing of interest should be required of the Petitioner, since we are administratively satisfied that it made an adequate showing in the unit hereinafter found appropriate. See *J & W Coal Company*, 136 NLRB 393.

supervisors in each area,⁵ and the merger has brought no significant interchange of employees between the eastern and western divisions. On this record, we find that Inter-Mountain has replaced Eastern as the Employer of the employees whom the Petitioner seeks herein. As a change in the corporate structure of the Employer during the course of representation proceedings is not, by itself, sufficient to warrant such dismissal, the motion of Inter-Mountain to dismiss the petition is hereby denied.⁶

4. The Petitioner seeks a unit limited to the salaried drivers and helpers in the Employer's eastern division which, at the time of the hearing, consisted of employees located at its Colorado Springs and Burlington, Colorado, offices. It would exclude the owner-drivers and fieldmen in the eastern division as well as all employees operating out of the western division. The Employer contends that the appropriate unit should include all truckdrivers and helpers, both salaried and owner-drivers, as well as the fieldmen in both divisions of the Employer. In the alternative, the Employer would agree to a statewide unit limited to salaried drivers and fieldmen.⁷ No union is seeking to represent a more comprehensive unit as sought by the Employer, and there is no bargaining history for any employees of the Employer or its predecessors.

Assuming without deciding that the units requested by the Employer might be appropriate for collective bargaining, this does not mean that they are the only appropriate ones.⁸ Rather, we must also evaluate the appropriateness of the unit sought by the Petitioner.

The record clearly establishes the appropriateness of a unit limited to the Employer's eastern division under Section 9(b) of the Act. As previously indicated, functionally the eastern and western divisions of the Employer operate virtually the same as before the merger. Although Hull is ultimately responsible for Inter-Mountain's activities, each division is largely autonomous in its daily operations. Little, if any, interchange of drivers or fieldmen takes place between the divisions, and there is a substantial geographic separation between the trucking routes centralized in the Grand Junction area and those near Colorado Springs. The facts show that the consolidation has not significantly integrated the Employer's eastern and western divisions, and, accordingly, we find appropriate the Petitioner's requested unit limited to Inter-Mountain's eastern division.

The Petitioner would exclude the owner-drivers from the unit on the ground that they are independent contractors. The Employer

⁵ Within the eastern division of Inter-Mountain is a small office at Burlington, Colorado. This office, located 10 miles from the Kansas border, was formerly part of Eastern, and continues to serve producer-members operating in Kansas.

⁶ *New Laxton Coal Company*, 134 NLRB 927, 929

⁷ The parties stipulated that laboratory testers should be excluded from any unit, and, accordingly, we shall exclude them.

⁸ Cf. *P. Ballantine & Sons*, 141 NLRB 1103.

urges their inclusion. The relationship of the owner-drivers, or contract drivers, with the Employer is controlled by an agreement under which the Employer utilizes their equipment and services.⁹ The contract is effective for 1 year, with an option to renew annually, and may be terminated by either party upon 60 days' written notice. Under its terms the owner-driver is required to devote himself exclusively to Inter-Mountain.

Both the owner-drivers and the salaried drivers are assigned specific areas and producer-members whose milk they are to haul. Each owner-driver's contract contains an "exhibit" which sets forth the particular producer-members to whom he is allocated, and the owner-driver may not change routes or producer-members without approval of the Employer. Neither the owner-drivers nor the salaried drivers are required to work set hours or travel specific routes, but, because of spoilage and other factors, producer-members' milk must be picked up every other day. None of the drivers, whether owners or salaried, punch a timeclock. All are under the control and direction of the Employer's dispatcher and have their work and equipment regularly inspected by the Employer's fieldmen. When the occasion demands, the Employer issues written instructions to the owner-drivers which require them to conform to certain techniques and procedures in their daily work performance.

The record reveals that the Employer puts considerable emphasis on the proper testing of the producer-members' milk before it is pumped into the truck tanks at the farms. Both the owner-drivers and the salaried drivers are licensed by the Department of Agriculture to conduct tests and sampling of the milk, and the Employer requires all the drivers to conform strictly to its testing standards in order to insure that the milk is of proper quality.¹⁰ If the milk is unacceptable to the driver, it is left on the farm. Occasionally, a producer-member complains about a driver's testing technique, and, regardless of whether the driver is salaried or on contract, the Employer sends one of its fieldmen to doublecheck the driver's performance.

The owner-drivers' compensation is determined by three factors, also set forth in each contract: (1) the total volume of milk in their given area; (2) the mileage hauled between the farms and the processing plants; and (3) the volume of milk of the individual producer-member actually hauled from the dairy farm. The owner-drivers receive certain flat rates for milk hauled additional distances. Deter-

⁹ The Employer stated that it supplies the tanks for some owner-drivers. In these instances, such owner-drivers' rates of pay are reduced accordingly

¹⁰ It appears that, from time to time, all drivers attend Department of Agriculture "schools" where they are kept up to date on testing and sampling developments. Generally, before the milk is hauled from the farm, the driver must be sure that it is cooled to 40°. He then tests the milk by taste to determine whether it has a weed or wheat taste which would warrant its rejection and samples are taken, one to remain at the dairy and the other to be brought to the Employer's laboratory

gents, cleaning compounds, and parts for dairy machines are brought to the farms from the Employer's office by both types of drivers, and the owner-drivers receive no additional compensation for this service. If an owner-driver's equipment were to break down, a salaried driver would be substituted for him on the route or the owner-driver would use some of the Employer's spare equipment until his was repaired. They do not receive the vacation and fringe benefits accorded the salaried drivers.¹¹ The owner-drivers obtain their own P.U.C. permits and licenses, have their own names painted on their trucks, and are responsible for the maintenance and insurance of their equipment. Each owner-driver hires and pays any replacement driver on his truck, but the Employer may veto the selection of any substitute if in its judgment he is not qualified.

On the entire record of this case, we conclude that the owner-drivers are employees of the Employer and not independent contractors. We have long held that whether an individual is an independent contractor or an employee under the Act is determined by the application of the "right of control" test.¹² If the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means by which the result is to be attained, an employer-employee relationship exists. A weighing of the facts of each case resolves this question, and no one factor is determinative.

There are several particularly significant matters which persuade us that this Employer has retained such control over the owner-drivers that their independence is minimal. Thus, we note the requirement that they haul the Employer's milk exclusively, the determination by the Employer of the quota of producer-members and the route assignments, the licensing of all drivers in the same manner for milk testing, the regular inspection of all drivers' testing and sampling performances by the Employer's fieldmen, the establishment of regulations applicable to both types of drivers, and the Employer's right to determine the qualifications of any substitute selected by an owner-driver. We do not view as inconsistent with the employer-employee relationship the fact that the owner-drivers have their own names on their trucks. By the very nature of the Employer's business, the advantage of having its name on every truck hauling its milk is minimal. The Employer, a dairy cooperative association representing the sum total of its members, is primarily engaged in having the products of its members brought to processing plants, and it would seem to have little need to advertise to the public.

¹¹ Upon request, Hull stated that the Employer would advance money to an owner-driver. If the owner-driver gives written authorization, the Employer will also deduct specified amounts from his monthly compensation.

¹² *Albert Lea Cooperative Creamery Association*, 119 NLRB 817, 821, 822; *National Van Lines*, 117 NLRB 1213, 1219.

On all the facts, we find that the owner-drivers retain little entrepreneurial independence in the operation of their vehicles. Therefore, we shall include them in the unit.

The Employer further contends that the fieldmen should be included in the drivers' unit. The Petitioner requests their exclusion. It appears that the fieldmen's primary function is to inspect various equipment on the farms, make sure standards of cleanliness are observed, and check up on the drivers' testing techniques. If the fieldmen find an unsatisfactory health condition on a farm, they report this both to Inter-Mountain and to the processing plant to which the producer normally sends his milk. The fieldmen use either Employer pickup trucks or their own cars to get from farm to farm. They do no hauling of milk, and are never used as substitutes for any of the drivers. On these facts, we find that driving a truck is only an incidental aspect of the fieldmen's duties. Their basic activities do not indicate a sufficient community of interest with the truckdrivers, and we shall, therefore, exclude them from the unit.

Accordingly, in view of all the foregoing, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All salaried and owner or contract drivers employed by the Employer at its Colorado Springs, Colorado, and Burlington, Colorado, offices, but excluding fieldmen, laboratory testers, and all supervisors as defined in the Act.¹³

[Text of Direction of Election omitted from publication.]

¹³ As the appropriate unit is larger than the unit sought, the Petitioner may withdraw its petition without prejudice upon notice to the Regional Director within 10 days from the date of this Decision.

Nello L. Teer Company and International Union of Operating Engineers, Local 542, AFL-CIO. *Case No. 4-CA-2713-3. July 24, 1963*

DECISION AND ORDER

On April 15, 1963, Trial Examiner Lloyd Buchanan issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Intermediate Report. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices, and recommended that those allegations of the complaint be dismissed. There-

143 NLRB No. 85.