

**William P. Riggin & Son, Inc. and National Maritime Union of America, AFL-CIO, Petitioner****Robert Robbins and National Maritime Union of America, AFL-CIO, Petitioner.** *Cases Nos. 4-RC-6272 and 4-RC-6273. July 7, 1965*

## DECISION AND DIRECTION OF ELECTIONS

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before Hearing Officer Alexander T. Graham, Jr. 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 National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel [Chairman McCulloch and Members Brown and Jenkins].

Upon the entire records in these cases, including a brief filed by the Petitioner, the Board finds:

1. The Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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

3. In Case No. 4-RC-6272, the Petitioner seeks to represent a unit consisting of all employees aboard clamming vessels owned by William P. Riggin & Son, Inc., but excluding the captains as supervisors. In Case No. 4-RC-6273, the Petitioner seeks to represent a bargaining unit consisting of all employees aboard clamming vessels owned by Robert Robbins, but excluding the captains as supervisors. The Employer in each case contends that the captains are independent contractors who lease their boats from the Employer and then engage a crew to perform work, and, therefore, that neither the captains nor the crewmen are its employees.

William P. Riggin & Son, Inc., hereinafter sometimes called Riggin & Son, is a New Jersey corporation owning commercial fishing boats which are engaged in the gathering of sea clams off the coast of New Jersey. Riggin & Son sells most of these clams to Riggin & Robbins, Inc., a clam processing firm. Robert Robbins is an individual who owns commercial fishing boats which are also engaged in the gathering of sea clams off the coast of New Jersey. Robert Robbins likewise sells most of his catch to Riggin & Robbins, Inc.<sup>1</sup>

<sup>1</sup> Riggin & Son and Robert Robbins are referred to herein as the Employers. The record establishes that the arrangements between the Employers and captains, the relationship of the Employers to captains and crewmembers, and the manner of operation of the clam boats by the Employers and captains, are identical in both of the cases herein.

The relationship between the Employers and the captains is governed by oral arrangements. Under these arrangements, which are terminable at will by either party, the Employer agrees to furnish to the captain the boat and equipment, and the captain agrees to oversee the clamming operation. The clam processors pay the Employers \$1.30 per bushel for the clams, from which amount the captain receives 62 cents per bushel. From this amount, the captain retains 26 cents per bushel and pays 36 cents per bushel to the crew, 12 cents to each crewmember if it is a three-man crew, and 18 cents to each crewmember if it is a two-man crew. The balance of the \$1.30 is retained by the Employers as compensation for use of the boats. The Employers pay all other expenses of the operation, including the cost of repairs, fuel, chart paper, liability insurance, and "maintenance and cure" insurance, which is an admiralty equivalent of workmen's compensation.

The boats operate 6 days a week, except for those days when bad weather, the need for repairs, or other emergencies make it impossible for them to engage in clamming operations. The captains have virtually complete control over the hiring and discharge of the crew and over all aspects of the clamming operation. The captains decide if the weather is too dangerous to work on any particular day; they select the site of the day's clamming operation, determine the hours of work of the crewmen, and order all the necessary supplies, charging them to the Employer's accounts.<sup>2</sup> Each captain has a separate checking account into which Riggin & Robbins, Inc., deposits funds representing the share of the captains and the crew of the proceeds from the sale of clams. The balance of the proceeds is paid directly to the Employers. The bookkeeper of Riggin & Robbins, Inc., who is authorized to sign the captain's name on checks, draws checks each week on the captain's account, payable to the captain and to each crewmember. When Riggin & Robbins, Inc., is unable to use the entire catch, the Employers will arrange that the surplus clams be sold to some other buyer. The captains are free to sell their catch elsewhere only on the rare occasion that the clams are not sold to Riggin & Robbins, Inc., and the Employers do not furnish another buyer. The sales price for clams is negotiated between the Employers and the buyers without participation by the captains. On occasion, the Employers have set limits on the daily catch, and the captains normally observe these limits. The boats are used exclusively for digging clams, except that the Employers may instruct the captains to dredge for oysters during the period that the State of New Jersey opens its oyster beds.

All parties agree that prior to November 1964, the captains and crewmembers were employees of the Employers. At that time, the crewmembers were paid weekly salary and the captains received 20

<sup>2</sup>The parties stipulated that if the Board finds that the captains are not independent contractors, they are supervisors as defined in the Act.

percent of the gross sales;<sup>3</sup> the Employers paid all expenses, carried insurance, controlled the disposition of the clams, and determined the compensation of the crew and the captains; and the captains had control over the crew, the vessel, and the clamming operation. The only significant change in the arrangement is that the captains now receive a flat sum per bushel, rather than a percentage of sales, and the crewmembers now receive a flat sum per bushel rather than a weekly salary.

We find no merit in the contention of the Employers that the captains are independent contractors and not employees. We note initially that the arrangement between the Employers and the captains leaves little room for the captains to make decisions which will affect their profit and loss.<sup>4</sup> The captains are not free to sell their clams to the highest bidder, but must deliver them to a buyer designated by the Employers at a price over which they have no control. Because the Employers pay all expenses of the clamming operation, any savings effected by the captains' more efficient or economical management of their boats does not increase the captains' compensation but inures entirely to the benefit of the Employers. At the same time, because the captains are paid a flat sum per bushel of clams, they do not risk any losses which may come from inefficient management on their part. Further, while the captains ostensibly have discretion to set wages for the crew, since the standard wage in the area is well-established, the captains are not in a position to increase their income by varying substantially from that schedule. As a matter of fact, the only way in which a captain may increase his income is by catching more clams and even that is subject to the Employers' authority to set a limit on the daily catch.

Further, while the captain is, in accord with the tradition of the sea, complete master aboard his boat, the Employers have retained the sort of control over the business operation which is characteristic of an employment relationship.<sup>5</sup> This control is established by the facts that the Employers own the boats, the agreements between the Employers and the captains are oral and terminable at will, the Employers decide to whom the clams will be sold, the Employers have authority to set daily limits on the catch and have exercised such authority, the sale price of the clams is set by negotiation between the Employers

<sup>3</sup> On the basis of a sales price of \$1.30 per bushel, the captains, under the old arrangement, would have received 26 cents per bushel as their compensation. Under the new arrangement, they also receive 26 cents.

<sup>4</sup> One of the factors considered by the Board in deciding whether an individual is an independent contractor or an employee is his opportunity to make decisions which will affect his profit and loss. See, for example, *Servette, Inc.*, 133 NLRB 132, 139, reversed 313 F. 2d 67 (C.A. 9); *Smith's Van & Transport Company, Inc., et al.*, 126 NLRB 1059, 1060; *U.S. v Silk, doing business as Albert Silk Coal Co.*, 331 U.S. 704, 719.

<sup>5</sup> The fact that the captains, because of their skill and experience, are permitted to exercise their own judgment in connection with the daily operation of the boats, does not preclude our finding that they are employees rather than independent contractors. *South-ern Shellfish Co., Inc.*, 95 NLRB 957, 962.

and prospective buyers, the Employers make all decisions concerning when and where major repairs are to be made to the vessels, and the Employers pay the expenses of the entire operation.

In view of the foregoing and the entire record in these cases, we conclude that the captains are not independent contractors, but employees of the Employers, as are the crewmembers.<sup>6</sup> We therefore find that questions affecting commerce exist concerning the representation of certain employees of the Employers within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The parties are otherwise in agreement and we find that the following employees of the Employers constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

(1) In Case No. 4-RC-6272, all employees aboard clamming vessels owned by William P. Riggins & Son, Inc., excluding the captains.

(2) In Case No. 4-RC-6273, all employees aboard clamming vessels owned by Robert Robbins, excluding the captains.

[Text of Direction of Elections omitted from publication.]

<sup>6</sup> *East Coast Trawling & Dock Company, Inc.*, 153 NLRB 1354; *Robert Casebeer & Herman Foland, d/b/a Casebeer & Foland, a Partnership*, 149 NLRB 742; *Southern Shellfish Co., Inc.*, *supra*, footnote 5.

**Humble Oil & Refining Company, Petitioner and Industrial Employees Association, Inc.,<sup>1</sup> and Local Union No. 553, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.<sup>2</sup> Case No. 29-UC-2. July 8, 1965**

#### DECISION AND ORDER

Upon a petition for clarification duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Jordan Ziprin. All parties appeared and were given full opportunity to participate at the hearing. Thereafter, Petitioner and Local 553 filed briefs in support of their respective positions.

The National Labor Relations Board has considered the Hearing Officer's rulings made at the hearing and finds that no prejudicial error was committed. The rulings 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 [Members Fanning, Brown, and Jenkins].

<sup>1</sup> Hereinafter called Industrial.

<sup>2</sup> Hereinafter called Local 553.