

Mister Softee of Indiana, Inc. and Curb Service of Indianapolis, Inc.¹ and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Petitioner. Case 25-RC-3259. December 22, 1966

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer William A. Molony of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer filed a brief which has been considered by the Board in making its decision in this case.

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 McCulloch and Members Brown and Zagoria].

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

1. Mister Softee of Indiana, Inc., and Curb Service of Indianapolis, Inc., which are at the same location, are owned, managed, and controlled by individuals of the same family, and the same policies and practices are in effect for both corporations. We find, in view of the virtual agreement of the parties and upon the entire record, that these corporations, herein referred to jointly as the Employer, constitute a single employer herein.

The Employer is 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 Employer.

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

4. The Petitioner seeks a unit of all single-owner drivers and nonowner drivers operating equipment under permanent leases with the Employer and all drivers operating the Employer's equipment in the Indianapolis, Indiana, area. The Employer, which does not otherwise dispute the appropriateness of the unit sought, contends only that the single-owner drivers are independent contractors and not employees.

The Employer is the Indiana representative of Mister Softee, Inc., located in New Jersey, which is not a party to this proceeding. This

¹ The name of the Employer appears as amended at the hearing.

corporation, herein called the New Jersey Corporation, has entered into a 20-year franchise agreement with the Employer and the single-owner drivers, who are referred to in the agreement and herein as dealers. By the terms of this agreement, each dealer is granted an exclusive territory in which to sell Mister Softee soft-serve ice cream. At any time after 2 years from the institution of the agreement, the Employer can, in its discretion, reevaluate the territory, and either require the dealer to purchase another truck or reduce his franchise area. The agreement further states that if a dealer desires to sell his franchise, he must first secure the Employer's consent.

As further provided in the agreement, the Employer sells to the dealer a Mister Softee ice cream truck. As a matter of practice, the Employer finances the purchase for the dealer or helps the dealer secure financing. The dealer is required to keep his truck in a clean and sanitary condition, in accordance with the various health laws and regulations as well as the standards set by the New Jersey Corporation. In order to assure compliance with this requirement, the Employer's agent is given the right to inspect the truck at any time and any place, and there is testimony that the Employer has keys to many of the trucks.

The dealer is also required by the agreement to maintain and operate his truck in strict conformance with the plans, procedures, policies, and promotional directives prescribed by the New Jersey Corporation. The right to enforce these controls is in the Employer, as the agreement provides that, in the event of a breach by the dealer which is not remedied within 10 days after notice from the Employer, the Employer has the right to terminate the agreement, and to purchase the truck at a rate established by the agreement.

Although the exact hours of work are not set, the agreement requires the dealer to devote full time to the conduct of the business during the period from April 1 to October 31. There is no specific restriction as to the price which the dealer must charge for the product, but the price at which he purchases the mix from which the ice cream is made is determined by the agreement. The New Jersey Corporation designates the dairies which are to supply the mix, and the dealer is required to purchase at least 2,500 gallons of mix a year. As a matter of practice, the Employer requires the dealer to purchase other products through it, rather than at more economical prices for which such products are sometimes offered if purchased directly from the distributor.

Many dealers perform their duties with the aid of helpers. The agreement provides that these helpers are to wear a special uniform, and are to be paid such wages as required by law. An official of the Employer, asked at the hearing if he had ever requested a dealer to

discharge a helper, replied, “. . . only if there was something known about this man that would make him undesirable.”

The dealer is required by the agreement to provide workmen's compensation insurance for the helpers. The agreement also requires the dealer to purchase both products liability and personal injury insurance, for amounts stated in the agreement, although the dealer is free to choose the carrier he wishes. The Employer is not required to pay social security or to withhold income taxes for the dealers or their helpers, licenses and certificates are usually taken out in the dealer's own name, and neither the dealers nor the helpers appear on the books of the Employer.

The Board has frequently held that, in determining the status of persons alleged to be independent contractors, the Act requires application of the “right to control” test. 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; on the other hand, where control is reserved only as 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.

On the basis of the foregoing and the entire record, we are satisfied that the single-owner drivers are employees and not independent contractors. We are aware that the evidence discloses several factors which are usually considered to indicate an independent contractor status, but the presence of such factors does not alone establish such status. Thus, we are not persuaded by and do not regard as controlling, the fact that the franchise agreement describes the dealer as not an agent or servant of the Employer; that the dealer furnishes his own equipment, which he is required to purchase from the Employer; that the dealer hires and pays helpers; or that the Employer does not make the usual payroll deductions.²

The result to be accomplished is the sale of Mister Softee products to the public. In accomplishing this result, the dealers bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies, personal investment and expenditures, and market conditions. The “exclusive territory” can at any time after 2 years be unilaterally decreased by the Employer if the driver does not purchase another truck which the Employer deems necessary; and the dealer cannot assign the franchise without the consent of the Employer. The price of the mix, and the gallonage requirement are controlled by the agreement, and the dealer must purchase the mix from dairies designated by the New Jersey Cor-

² *Eureka Newspapers, Inc.*, 154 NLRB 1181; *Pepsi-Cola Bottling Company of Michigan, Grand Rapids Division*, 156 NLRB 80.

poration. The New Jersey Corporation has the right to control the operations of the dealers by its apparently unlimited right to prescribe plans, procedures, and policies relating to the operation and maintenance of the truck, and the Employer carries out this control by virtue of its authority to terminate the agreement. The fact that the drivers are not paid wages does not in and of itself establish that they are free of the Employer's control over the critical cost factors which are determinative of their pay.³

Accordingly, on all the facts, we conclude that the Employer has reserved the right to control the manner and means as well as the result of the single-owner drivers' work, and that these drivers are, therefore, employees and not independent contractors.

We therefore find that a unit of the following employees of the Employer is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All single-owner drivers and all nonowner drivers operating equipment under permanent leases with the Employer; and all drivers operating the Employer's equipment who are employed by the Employer in the Indianapolis, Indiana, area, excluding all multi-owner drivers, guards, and supervisors as defined in the Act.

[Text of Direction of Election omitted from publication.]⁴

³ See *The Seven-up Bottling Company of Detroit*, 120 NLRB 1032, 1034.

⁴ An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 25 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all the parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

Karat Inc. d/b/a The Stardust Hotel and American Federation of Casino and Gaming Employees. *Case 31-CA-341. December 23, 1966.*

DECISION AND ORDER

On August 26, 1966, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had not engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel filed exceptions to the Decision and a supporting brief, and the Respondent filed a brief in support of the Trial Examiner's Decision and in opposition to the General Counsel's exceptions.