

A. Paladini, Inc., and Fishermen & Allied Maritime Workers Division of National Maritime Union of America, AFL-CIO, Petitioner.¹ Case 20-RC-7713

December 19, 1967

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN McCULLOCH AND MEMBERS
BROWN AND JENKINS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before David J. Salniker, Hearing Officer. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 20, this case was transferred to the National Labor Relations Board for decision. Briefs have been filed by the Employer and the Petitioner.

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.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, including the briefs filed by the parties, the Board finds:

1. 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. The Petitioner seeks to represent in a single unit the crewmembers of three of the Employer's drag fishing boats which operate out of the San Francisco area. The Company urges dismissal of the petition on either of the following two grounds: (a) it argues that the crewmembers sought are not its employees, but the employees of the captains of the boats, who are alleged to be independent contractors; and (b) it contends that, even if the Board views the crewmembers as its employees, Petitioner is ineligible to represent them since Petitioner's recent affiliation with the San Francisco Crab Boat Owners Association (herein referred to as CBOA) has created a material conflict of interest.

A. The Employer predicates its contention that it has no employment relationship with the crewmembers upon the Board's earlier decision in *Frank Alioto Fish Co. and Boat Seaworthy*,² a 1960 case which included the same Employer, and

in which, on similar facts, the Board concluded that the captains were independent contractors and the sole employers of the crewmembers.

Except as indicated, the present facts do not differ materially from those considered in *Alioto*. And, we are here concerned with the similar issue of whether the crewmembers employed on vessels owned and maintained by the Employer, but operated by the captains under an oral agreement with the Employer, are employed by the Employer. In *Alioto*, the Board examined the relationship between the Employer and the boat captains, and although it viewed many elements thereof to be indicative of an employment relationship, it regarded certain other factors as negating any basis for finding that the captains were supervisors, and the crewmembers employees of the Company. In reaching this result, the Board relied on the captains' substantial independence of control concerning the seaborne operations of the vessels.

The Board has frequently held that, when persons are alleged to be independent contractors, the determination requires the application of the "right of 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 to the result sought, the relationship is that of an independent contractor. The resolution of this determination depends on the facts of each case, and no one factor is dispositive.³

As was observed in *Alioto*, when such an issue presents itself, there usually are many factors which will support a finding of independent contractor or of employment. However, more recent decisions caution against resolution of this issue through mechanical application of the right-of-control test. Rather, it has been necessary to apply the control test in light of the economic realities of the particular situation.⁴ In this connection, 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 profits and loss.⁵ Since the record herein shows that the captains have little opportunity to make business decisions materially affecting their opportunity for gain, as well as other factors indicative of the extensive control retained by the Employer over operation of the boats, it is our opinion, upon reconsideration, that an employment relationship, rather than one of independent contractor, exists between the Employer and the captains.

Thus, considering the economic realities, we are satisfied that the Company retains sufficient control

¹ Hereinafter referred to as NMU or the Union.

² 129 NLRB 27.

³ *F. H. Snow Canning Co.*, 156 NLRB 1075, 1078; *Eureka Newspapers, Inc.*, 154 NLRB 1181, 1184

⁴ *Deaton Truck Lines, Inc.*, 143 NLRB 1372, 1377

⁵ *William P. Riggan & Son, Inc.*, 153 NLRB 1358, fn. 4, and cases cited therein

not only over the end result, but also as to the manner and means by which it is accomplished. As a source of fish, the boats are engaged in an integral part of the Employer's overall operations as a processor and distributor of seafood products. The captains invest little more than their services in the fishing venture. The Company owns the ships, and places them in the charge of the captains without lease or other formal arrangement. It retains responsibility for maintenance and repair of the vessels in connection with the fishing operations, responsibility for maintenance and repair of the vessels, and carries both property and liability insurance in connection with the fishing operations. All costs of voyages for such matters as food, ice, and fuel are covered by charges to the Company, and paid for by the latter out of the proceeds of the catch.⁶ The Company pays the crews weekly by check and is responsible for withholding income taxes, social security taxes, and unemployment compensation (maintenance and cure). It is thus apparent that the captains have no interest in the boats, make no financial outlays in connection with fishing trips, and assume no significant responsibility for the administrative matters entailed in operating the vessels or marketing the catch.

Added to the Company's assumption of all entrepreneurial risks in connection with the fishing venture is the fact that the oral agreement with the captains is terminable at will. The agreement requires the captains to furnish their entire catch to the Company, and they cannot sell elsewhere.⁷ The Company sets the limit on the amount of fish to be caught and purchased by it at previously negotiated prices.⁸ The excess must, subject to the exception noted above, be sold to the Company at prices negotiated with the captain on a daily basis.

Against this background, any finding that the captains are independent contractors must be made on the strength of the following: (1) the captains select their own crews and with the crewmembers determine the proceed shares of each member; (2) the captains select the place where they fish; (3) the Company negotiates the price to be paid for the fish with the captains; and (4) the captain is responsible for internal discipline and labor relations aboard the vessel. In our opinion these factors, when considered separately or in combination, do not, in the circumstances of this case, warrant an independent contractor finding. The captains' control over hiring, firing, and internal discipline accords with the role of a master of a seaborne vessel under maritime

tradition and would obtain whether an employment or independent contractor relationship existed. Nor do we find significance in the captains' role in negotiating prices and selecting fishing sites. For, in our opinion, the Employer's economic strength and contribution to the fishing venture, in relation to the services provided by the captains, establish to our satisfaction that the Company's role in such negotiations is not markedly different from that of employers in dealing with acknowledged employees; the strength of the captain's negotiating position will invariably depend upon the value placed upon his personal services by the Company. The captain's authority to select fishing sites is also affected by the economic strength of the Company, since his judgment must be exercised in a manner which produces a catch sufficient to insure that the Company will continue his services.

In sum, as we view the facts, the captains bear little resemblance to the independent business man, who through exercise of judgment and investment of capital can materially affect personal opportunities for profit. They are engaged in a venture, in which they assume no financial risks but provide their services only, while dependent upon the Company to provide all financial advances, equipment, and administrative services. The Company controls the manner in which the captains perform their services, not only by the actual limitations regularly imposed on the amount of the catch and the places where the fish can be marketed, but also by virtue of the control retained through the terminable nature of the relationship⁹ and the captain's dependence on the Company's economic contribution to the venture.¹⁰

Accordingly, we conclude, on all the facts, that the Employer has reserved, and actually exercises, control over the manner and means, as well as the result, of the captains' work, and that the captains are not independent contractors but supervisors of the crewmembers, who are employees of the Employer. Upon reconsideration, the Board's Decision in *Frank Alioto Fish Co. and Boat Seaworthy*, *supra*, is hereby overruled to the extent that it is inconsistent herewith.

B. The Company further contends that, even if the crewmembers are found to be its employees, the Petitioner, by virtue of its affiliation with CBOA, is barred by a conflict of interest from representing the crewmembers. In this connection, the record shows that CBOA is composed of most operators of independently owned crab boats in the San Fran-

⁶ The wages of captains and crew consist of the shares of the boat's portion of the income. The total gross income of the boat has subtracted from it the cost of fuel and supplies. Then, after the Company deducts its 40 percent share, the remainder is divided among the captain and crew in accordance with their agreement, with the captain getting a share slightly higher than each crewmember.

⁷ A fourth boat owned by the Company and not subject to this petition, the *Achille Paladini*, operates out of Fort Bragg and may sell its excess fish to an animal feed processor at Fort Bragg.

⁸ Twice a year the Company and captains negotiate the price the Company is to pay per pound. That price remains in effect throughout the season.

⁹ *Eureka Newspapers, Inc.*, 154 NLRB 1181.

¹⁰ "The test for determining whether the employer-employee relationship exists is the right to control, not the actual exercise of control." *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F.2d, 759 (C.A.3), enfg. 88 NLRB 75.

cisoco area. In addition to crabs, the crab boat operators also catch salmon. Members of CBOA make their sales to restaurants and fish dealers in the San Francisco area.

In March 1967, the CBOA, by execution of an affiliation agreement, became an autonomous division of Petitioner. This agreement amounted to an implementation of a resolution adopted by Petitioner at its recent annual convention designed to assist all fishermen in the United States in improving conditions in the fishing industry. Through its affiliation CBOA is to receive NMU's assistance in lobbying for beneficial legislation for the entire industry, including tax relief. The affiliation agreement calls for CBOA's separate and autonomous existence and, pursuant thereto, CBOA's individual members are assessed \$1.50 per person monthly.

The Company contends that, since it purchases crabs from CBOA members and sells crabs in competition with CBOA members, the affiliation agreement with CBOA would require Petitioner, if bargaining agent for the employees in question, not to take any position with respect to them likely to affect crab boat owners adversely. Thus, the Company argues, any action the Union takes regarding the Company would have to give consideration to that possibility and would therefore be subject to considerations other than those relevant to representation of the employees. In its brief, the Company further argues the possibility of the Union's making intemperate bargaining demands which would be likely to cause a strike among its employees and thereby eliminate the Company as a competitor of crab boat owners in the crab business. It also points to the possibility of the Union seeking and obtaining passage of legislation which would benefit crab fishermen by limiting the amount of crabs which could be caught by drag boats or preventing the fishing for crabs by drag boat fishermen altogether. The Union contends that its affiliation agreement with CBOA will in no way interfere with its representation of the Company's employees.

On this record we find no merit on the Employer's position. There appears to be no likelihood that the affiliation agreement will affect collective bargaining if the Union is chosen by the employees

as their representative. Upon examination of the nature and purpose of the affiliation arrangement, it is our opinion that the events contemplated by the Company are neither a natural, probable, nor logical consequence of the relationship between NMU and CBOA, but are mere matters of conjecture bearing no real relationship to the facts established. We note, additionally, that we are not here concerned with a labor organization that has embarked upon a business enterprise, and now seeks to organize employees of a competing employer.¹¹ Nor is this a case where a union has made a loan or otherwise committed itself financially to competitors of the Employer of the employees petitioned for.¹² Here, the only financial linkage between CBOA members and the Petitioner is the dues requirement of \$1.50 monthly per member. This factor is no more suggestive of a conflict of interest than would exist if the Employer had competitors whose employees were dues-paying members of Petitioner and within bargaining units represented by that Union.

Accordingly, as the evidence in the record fails to disclose or suggest that Petitioner is likely to recognize the interests of CBOA in areas other than those beneficial to the fishing industry in general, of that Petitioner's role as collective-bargaining representative might be limited in any way by its relationship with CBOA, we find, contrary to the Employer, that NMU is not barred from participating as Petitioner in this proceeding. We therefore find that 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. In accordance with the agreement of the parties, we find that the following employees of the Employer constitute a unit appropriate for collective bargaining with the meaning of Section 9(b) of the Act:

All crewmembers employed by the Employer on the *Henrietta Paladini*, the *Catherine Paladini*, and the *Alex Paladini*, but excluding all other employees, guards, and supervisors as defined by the Act.

[Direction of Election¹³ omitted from publication.]

¹¹ *Baush & Lomb Optical Co*, 108 NLRB 1555, 1558.

¹² *N.L.R.B. v David Buttrick Co.*, 361 F.2d 300 (C.A.1). But see *David Buttrick Co.*, 167 NLRB No 58.

¹³ 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 20 within 7 days after the date of this Decision and

Direction of Election. The Regional Director shall make the list available to all 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. *Excelstor Underwear Inc.*, 156 NLRB 1236.