

United Dairies, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local No. 537. *Case No. 27-CA-1303. August 22, 1963*

DECISION AND ORDER

On May 15, 1963, Trial Examiner Louis S. Penfield 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. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief. The Charging Party filed a brief in support of the Intermediate Report.

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 Leedom and Brown].

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

United Dairies, Inc., the Respondent herein, is engaged in the processing and distribution of milk products in the Denver, Colorado, metropolitan area. On February 12, 1962, the Union filed a petition seeking to represent drivers engaged in the retail home delivery of the Respondent's milk products (Case No. 27-RC-2185). Thereafter, the Respondent and the Union entered into a consent-election agreement, under which they agreed to a unit which included both retail route drivers and "distributors and/or owner-operator drivers."¹ The Union won the ensuing election which was held on February 26, 1962, and on March 6 was certified as the collective-bargaining representative in the above unit. During the contract negotiations which followed, the Respondent refused to bargain for the distributors, contending that they were independent contractors and not employees. On May 31, the Respondent and the Union entered into a collective-bargaining agreement covering employees in the above unit, except for distributors. It was understood, however, that the Union did not thereby waive its position that the distributors were employees within

¹ Hereinafter referred to as distributors.

the unit, for whom it was entitled to bargain. Between October 1962 and February 1963, the Respondent entered into new distributorship contracts with 11 of its route drivers.

The Trial Examiner found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively with the Union as the representative of its distributors and by unilaterally changing the status of certain of its route drivers into that of distributors.

The Trial Examiner rejected the Respondent's contention that its distributors were independent contractors and made a determination on the merits that these distributors were employees. We find it unnecessary to make a determination as to whether on the evidence adduced the distributors were employees or independent contractors. Rather, we find that since the Respondent in a consent-election agreement agreed to the inclusion of these distributors as employees in a unit appropriate for collective bargaining² and did not challenge the right of its distributors to vote in a Board-conducted election, it cannot in the instant proceeding, in which it is charged with a refusal to bargain with the Union as the representative of these distributors, contend that they are not employees or that they must be excluded from that unit.³ The Board has long refused to permit relitigation in subsequent unfair labor practice proceedings of issues determined previously in representation proceedings. This rule has been applied both to cases in which the facts relating to appropriate units have been determined by the Board upon the record of a hearing⁴ and to cases in which the parties, in a consent-election agreement, have agreed to the determinative facts.⁵ In refusing to allow litigation of a unit agreed upon by the parties, the Board has recognized the value of such agreements not only in saving the expenditure of time and effort by the Government, but also because of their tendency to stabilize labor-management relations and to expedite the settlement of labor disputes. The Respondent here has offered no satisfactory explanation as to why the Board should now make a new determination as to the composition of the unit rather than accept the unit which the Respondent itself agreed to when it entered the consent-election agreement with the Union and to which it did not object

² Like the Trial Examiner, and for the reasons stated by him, we find no merit in the Respondent's contention that the term "distributor and/or owner-operator drivers" which appeared in the consent-election agreement and the certification referred to a group of employees other than the distributors herein disputed.

³ In view of Respondent's agreement that the distributors are employees, we agree with the Trial Examiner that Respondent's assertion that the issue must be resolved by arbitration is without merit.

⁴ *General Instruments Corporation*, 140 NLRB 18. This rule is also applicable to cases where the Board determination as to unit has been made by the Regional Director and the Board has denied a request for review of such determination. See Section 102.67(f) of the Board's Rules and Regulations, Series 8

⁵ *The Baker and Taylor Co.*, 109 NLRB 245, 246; *Parkhurst Manufacturing Company, Inc.*, 136 NLRB 872.

at the time of the election. It does not contend that the unit agreed upon which included distributors was so arbitrary as to make its approval an abuse of discretion by the Regional Director. Nor does it contend that the evidence relating to the distributors, which it was permitted to adduce at the hearing in the present case, is newly discovered, or was unavailable to it at the time of the representation proceeding. We accordingly find that the Respondent's distributors are employees, that they were included in the certified unit, and that the Respondent was obliged to bargain with the Union as their certified representative.

ORDER

The Board adopts as its Order the Recommended Order of the Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

STATEMENT OF THE CASE

This proceeding, with all parties represented, was heard before Trial Examiner Louis S. Penfield, in Denver, Colorado, on February 11 and 12, 1963, on a complaint of the General Counsel and answer of United Dairies, Inc., herein called the Respondent. The issues litigated were whether the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act.¹ At the hearing a motion was granted to amend the complaint and all formal papers to show the correct name of the Respondent to be United Dairies, Inc. A motion by Respondent to dismiss the complaint was denied at the hearing. On similar grounds Respondent renewed its motion to dismiss the complaint in its brief subsequent to the hearing. For reasons which will be set forth below, this motion is also denied.

Upon the entire record, including consideration of briefs filed by the parties, and upon my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Colorado corporation with its office and principal place of business located in Denver, Colorado, is engaged in the business of processing and distributing milk products at both wholesale and retail. During the course and conduct of such business Respondent annually receives goods and materials valued in excess of \$50,000, which are shipped directly to its place of business from points outside the State of Colorado, or are shipped directly to its place of business from suppliers located within the State of Colorado, who receive such goods and materials directly from points outside the State. Upon the basis of the foregoing I find that Respondent is engaged in an integrated enterprise of both a retail and nonretail nature. Since it meets current Board nonretail standards I find that it is engaged in a business that affects commerce within the meaning of the Act, and that assertion of jurisdiction is warranted.²

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local No. 537, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

¹ The complaint issued December 28, 1962, based on a charge filed with the National Labor Relations Board, herein called the Board, on October 19, 1962. Copies of the complaint and charge have been duly served upon the Respondent.

² *Man Products, Inc.*, 128 NLRB 546; *Siemons Mailing Service*, 122 NLRB 81.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Prefatory statement*

Respondent is a wholly owned subsidiary of Dairy Fresh Foods, Inc., herein called Dairy Fresh, a Colorado corporation having the same officers and occupying the same offices and place of business. Respondent purchases fresh milk from various sources, and operates a plant at which it bottles milk and cream, and manufactures and packages various dairy industry byproducts including ice cream mix, condensed milk, ice cream, sherbets, and cheese. Employees of Respondent perform the plant processing work and sell products to various wholesale customers who call for them at the plant. Drivers, carried on the payroll of Dairy Fresh, deliver to other wholesale customers. Respondent's retail or home delivery distribution is performed by drivers who are either employees of the Respondent or, as is alleged by the Respondent in this proceeding, independent contractors. Glen C. Freeby is the general manager of both the Respondent and Dairy Fresh. Dale Mohn is the manager in charge of the retail operations, employed by the Respondent, while Earl Hacker is the manager in charge of the wholesale distribution, employed by Dairy Fresh. Both are directly under General Manager Freeby.

Dairy Investment Company, herein called Dairy Investment, is another wholly owned subsidiary of Dairy Fresh which has the same officers as both Respondent and Dairy Fresh. Insofar as the record shows its principal, if not its sole, function is to act as a financing agent to enable persons to purchase retail routes, thereby becoming so-called independent distributors. The manner in which it functions in this regard will be described below.

Prior to March of 1962, no employees of either the Respondent or Dairy Fresh were represented by labor organizations. Between March and the end of May the Union was certified for a unit of the plant employees of Respondent, and was voluntarily recognized as the statutory representative of the Dairy Fresh wholesale employees.³

The incidents which give rise to the charge herein commence with the filing by the Union of a petition with the Board seeking representation of drivers engaged in the retail home delivery of the Respondent's milk products. This petition was filed on February 12, 1962, in a proceeding known as Case No. 27-RC-2185, and it resulted in a consent-election agreement signed by the Union and the Respondent in which the agreed-upon unit is described as follows:

All truckdrivers, including all commission route drivers, relief route drivers, leadmen and/or working foremen route drivers, distributors and/or owner-operator drivers, special delivery drivers, straight truckdrivers and semi-truck drivers, employed at Denver and Evergreen, Colorado; excluding office clerical employees, guards, watchmen, and professional and supervisory employees as defined in the Act, and all other employees.

At the subsequent election conducted on February 26, 1962, the Union received a majority of the ballots cast and thereafter on March 6, 1962, it was certified as the statutory representative of employees in the aforesaid unit.

Thereafter the Union sought to bargain for employees in the certified unit. It presented a contract which purported to cover, among others, "independent distributors and/or owner operators." At the outset of the negotiations Respondent asserted that members of the group so described were parties to so-called distributorship agreements which conferred upon them the status of independent contractors for whom Respondent had no duty to bargain under the Act. The Union insisted that such drivers were employees covered by the certification. In order to get a contract signed, the Union agreed to delete the disputed group from coverage, with the understanding that further negotiations on the subject would continue. On May 31, 1962, a collective-bargaining agreement, purporting to cover all other employees in the certified unit, was signed.⁴

³ The charge and complaint in the instant case do not purport to run against Dairy Fresh or to be concerned with any of the plant employees.

⁴ In addition to covering the retail route drivers in the unit above described, this agreement also purports to cover the plant employees of Respondent who comprise a unit certified in another representation proceeding, and the wholesale route drivers on the payroll of Dairy Fresh, to whom voluntary recognition had been accorded. The agreement was executed by Respondent, Dairy Fresh, and the Union. In this proceeding we are not concerned with any of the employees in these other units and none of the findings herein are applicable thereto.

The principal issue in this proceeding centers around the status of drivers, who either at the time of the certification were, or later became, parties to so-called distributorship agreements, which will be described and discussed below. For purposes of convenience such drivers will be referred to hereinafter as the distributors.

B. The status of distributors as employees or independent contractors

The key to a resolution of the issues in this case turns on the question of whether the distributors are properly found to be employees or independent contractors.

Respondent's home delivery service is conducted by drivers who are assigned to separate routes, each of which covers a geographically defined area of Denver and vicinity. The drivers pick up the milk and milk products in trucks at the Respondent's plant and proceed to make deliveries to the homes of customers in their respective areas. They are required to solicit customers and to make collections for the services rendered. At the time the Union filed its representation petition, all but 12 of these routes were handled by route drivers who are concededly employees of the Respondent, and later were admittedly covered by the collective-bargaining agreement. The general direction of all retail distribution is in the hands of Retail Manager Dale Mohn.

The route drivers are directly under the supervision of Mohn and his assistants. They use company owned or leased trucks, are paid wages directly by the Respondent, and are responsible for accounting to the Respondent for all moneys collected.

The status of the distributors is controlled by individual contracts, known as distributorship agreements, which each has executed with the Respondent. Each distributor executes an identical contract, one differing from another only in the description of the particular route.⁵ The substance of these distributorship agreements is as follows: (1) The distributor will be given the exclusive right to distribute Respondent's product in a specified area, the boundaries of which are defined in the agreement; (2) Respondent will transfer to the distributor a list of customers and accounts receivable together with certain equipment such as milk boxes, ice cream boxes, and the like, which pertain to the area described, and for which the distributor will pay a specified sum, the amount of which is substantially controlled by the number of customers on the transferred lists; (3) the distributor will sell and distribute Respondent's products and "none other" within the specified area as "an independent contract distributor"; (4) Respondent will sell its products to the distributor at prices listed on a posted price schedule which Respondent may change from time to time after giving 3 days' notice, and the distributor will pay for these products in cash when he picks them up at the dock; (5) the distributor will carry adequate property and personal injury liability insurance to protect Respondent from claims and will carry workmen's compensation insurance and unemployment insurance in the event he has employees; (6) the agreement may be terminated by either party on 30 days' written notice but that "in the case of the death, incapacitating illness or inability to act of the Distributor, or if for any reason the Distributor's area or route is not fully operated, United Dairies shall have the immediate right to operate the Distributor's area or route to protect the distribution of its products until the cause of failure is corrected"; (7) in event of termination by either party Respondent will purchase back the list of customers at a specified sum per unit plus the value of the equipment, and upon such termination the distributor promises to keep his knowledge of the list confidential, and not to engage in the distribution of dairy products within 3 miles of his territory for a period of 3 years.

A prospective distributor may put up his own money for the purchase of his route upon the terms outlined. However, insofar as the record shows, the transactions have been uniformly accomplished by the prospective distributor executing a note for the required amount payable to Dairy Investment, the wholly owned subsidiary described above. As security for the note the distributor executes simultaneously an assignment to Dairy Investment of the entire interest in the route that he has acquired by signing the distributorship agreement.

Distributors serve the customers on their routes in a similar fashion to the route drivers. However, differences in their overall mode of operation exist. The most significant one relates to the method of compensation. Route drivers are paid directly by the Respondent but distributors are compensated by the difference between the posted purchase price the contract requires them to pay, and the selling price of the products to their customers. Thus both the distributor and the route driver will come to the dock daily and each will load his truck with the products needed for

⁵ The distributorship agreements executed subsequent to the certification and the collective-bargaining agreement are identical with those in existence before the petition.

customers on his respective route. These will be checked out to the route driver who can return what he does not use, while they will be sold directly to the distributor at the posted prices and he can only return products which have been damaged through no fault of his own. Thereafter, each departs to service his route. Hours and scheduling of delivery are generally left to the distributor to set without supervision by Respondent, so long as it appears that he is properly servicing his route. Respondent pays no social security or withholding taxes on distributors. The initial training of distributors usually has come as a route driver, but after such training neither route drivers nor distributors require much supervision. The distributorship agreement does not specify a sales price for the products but Respondent posts a retail price list to be followed by its route drivers, and except in special and rare situations the Respondent's retail prices are followed. Distributors in some cases own their own trucks; in others they may lease them. In most instances the trucks they own or lease will be painted like company trucks and will carry the insignia and name of the Company. This is not required, however, and some deviate from it. The name of the distributor may or may not appear on his truck. Some employ helpers whose wages they pay and for whom they make social security and income tax withholdings. While distributors are restricted to selling only the Respondent's dairy products, they may, and in some instances do, sell noncompetitive products to route customers. In various ways Respondent provides assistance to distributors in the performance of their functions. Thus Respondent's route supervisors stand ready to, and sometimes do, fill in on relief if illness, vacation, or some other reason makes it impossible for the distributor to serve his customers. Respondent screens complaints from customers of the distributor and will assist him in collections and solicitations if he needs it. The Respondent conducts sales meetings which distributors may, and often do, attend together with the route drivers. It furnishes the distributors, at no cost, with route sheets and bill forms needed to carry on the operation. It requires that the distributor fill out a special card for each new customer and return it to Respondent for filing. For those distributors wishing it, Respondent pays half the cost of trading stamps which distributors may then pass out to their customers. Respondent advertises its product at no cost to the distributor and gives him handbills regarding new products which he may distribute to his customers.⁶

It is now well established that the status of persons alleged to be independent contractors turns primarily upon the application of the "right of control" test. Generally, where the employer retains control of the manner and means in which the tasks are carried out, the relationship is held to be that of employer and employee, while if the employer only retains control of the result sought, the relationship is held to be that of independent contractor.⁷ As Judge Learned Hand stated in *Radio City Music Hall v U.S.*, 135 F. 2d 715, 717: "The test lies in the degree to which the principal may intervene in the details of the agent's performance; and that in the end is all that can be said."

The resolution of the question in any particular case is often difficult and no one factor is determinative. Clearly the relationship here shows some factors that are characteristic of the relationship of independent contractor. Thus the method of compensation; the ownership or individual leasing of the trucks; the setting of his own hours; the right to sell for any price; the payment of taxes and the obtaining of licenses; and the freedom to hire his own employees, are all factors which point toward the independent-contractor relationship. These factors might be determinative if they stood alone, but other considerations indicate that the independence of the driver to act on his own as to the manner and means of his performance is

⁶ In support of its contention that distributors are independent contractors Respondent stresses the fact that there is a lack of uniformity in the operations of the distributors and that there is no such thing as a typical independent distributor. The record does show differences among them. Thus, as indicated above, some have helpers, some do not; some sell noncompetitive items to route customers, some do not; some have their names on the trucks, some do not. Each, however, operates in substantially the same manner in servicing his route, and avails himself of the various forms of assistance that Respondent offers. The differences to which Respondent refers, while they exist, are not of a nature, or of a degree, that would justify a conclusion that there is no such thing as a "typical independent distributor" when it comes to his primary function of serving the route customers, and I so find.

⁷ *Servette, Inc.*, 133 NLRB 132; *Squirt-Nesbitt Bottling Corp.*, 130 NLRB 24; *Smith's Van & Transport Company, Inc.*, 126 NLRB 1059; *Albert Lea Cooperative Creamery Association*, 119 NLRB 817; *Golden Age Dayton Corporation*, 124 NLRB 916; *Bob, Inc.*, 116 NLRB 1931; *Oklahoma Trailer Conwoy, Inc.*, 99 NLRB 1019.

more illusory than real. Thus at the outset drivers purchase routes that have already been established by Respondent, and the distributor is limited to selling in a certain territory defined by the Respondent alone. In most of the cases the driver takes over the identical route that he has serviced as a route driver and in the handling of which he has been trained by Respondent. He must buy at prices set by Respondent which can be changed upon a minimal notice. Many continue to use the same truck used as a route driver, although the lease now becomes his individual responsibility rather than that of the Company. Distributors are not required to, and indeed insofar as the record shows, none has risked his own capital in the "purchase" of the route. The "purchase" has been made with money obtained by a loan from a wholly owned subsidiary of Respondent's parent corporation, which has protected itself fully by taking an assignment back of the route purchased. The capital risk to the distributor is further minimized by the contractual assurance that if for any reason things do not work out, the Respondent stands ready to purchase back the route for exactly what the distributor has paid for it, upon his giving 30 days' notice. Assistance by the Respondent in the form of trading stamps, billing forms, collections, solicitations, relief drivers, and sales meetings all manifest a concern by the Respondent in a uniform functioning of the routes and the manner in which his products are distributed by the various drivers. While these things alone might evidence an interest in more than just the result, perhaps the most significant element of control over the manner and means is to be found in the reservation by the Respondent of "the immediate right to operate the distributor's area" if for "any reason the distributor's area or route is not fully operated" in order that Respondent can "protect the distribution of its products until the cause of failure is corrected." [Emphasis supplied.] The quoted provisions make it clear that the Respondent wants at all times to be certain that the routes function to its satisfaction. If they do not, it is not content just to terminate the contract but will step in and take over without notice and stay in "until the cause of the failure is corrected." This provision gives Respondent a right of control over a distributor's performance that is more consistent with an employer-employee relationship than with that of an independent contractor.

Finally, the conduct of the Respondent itself is not without significance. With full knowledge of all the facts concerning the distributorship relationship, it agreed to the inclusion of distributors in the bargaining unit, and at no time during the entire course of the representation proceeding even suggested that they might have nonemployee status. Respondent has offered no explanation of its subsequent change of position, except flatly to assert that they are, in fact, independent contractors. The absence of any explanation at least suggests that Respondent itself may have regarded distributors as employees initially, but that for reasons which may or may not reflect upon its good faith, changed its position when confronted with the duty to bargain for them.

Under all the circumstances, as set forth above, I am convinced that however much Respondent may have sought to create the indicia of independence, it has in reality retained to itself sufficient right to intervene in the details of the distributor's performance so that it can be said that it is more concerned with manner and means of performance than with the end result. I therefore find that at all material times persons functioning as drivers pursuant to the distributorship agreements have been, and now are, employees within the meaning of the Act.

C. The appropriate unit and the Union's majority

I have found that the distributors are employees within the meaning of the Act. With the route drivers they share the entire function of the retail distribution of the Respondent's products. The parties originally agreed upon their grouping in a single unit, and other than the Respondent's present contention that distributors are independent contractors who cannot be grouped with any employees for bargaining purposes, no reason has been advanced why the two together should not constitute an appropriate unit if the distributors are found to be employees. Accordingly, I find that the unit certified as set forth in subsection A above, including, as it does, both route drivers and the distributors, is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The Union was certified as the exclusive representative of the employees in the above unit on March 6, 1962. Upon the basis of that certification and the record herein I find that at all times since March 6, 1962, the Union has been, and now is, the exclusive representative of all the employees in the unit heretofore found appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

D. *The refusal to bargain*

The Union and the Respondent first met for bargaining purposes on April 2, 1962. At this meeting, and at all subsequent meetings prior to the signing of the above-mentioned collective-bargaining agreement on May 31, 1962, the Respondent admittedly failed and refused to bargain with the Union for the 12 distributors then servicing retail routes, claiming the distributors to be independent contractors for whom it was not required to bargain. Its position, consistently adhered to at all times, is set forth in a letter addressed to the Union dated May 15, 1962, as follows:

We have had some discussion concerning independent distributors. Our position can be briefly stated as follows: If the distributors qualify as employees, they will conform to the agreement. If they do not qualify as employees but in fact independent distributors, then, of course, they would not qualify under the agreement. This apparently is a subject similar to that you have arbitrated with two other companies. This reservation does not, however, affect any changes in the contract.

The Union during all of the negotiating meetings adhered to a position that distributors were employees and that as a part of the agreed-upon unit were covered by the certification.⁸

As noted above in the agreement signed on May 31, 1962, the Union voluntarily agreed to the deletion of the term "independent distributors and/or owner operators" from coverage. The record is clear, however, that neither at this nor any other time did it abandon its claim that the Respondent should bargain with it for the distributors. On the contrary the undisputed evidence is that the Union deleted this group only for the purpose of getting a contract covering all the others, and at the same time it was expressly understood by all parties that the coverage of distributors would be a matter for further negotiations. Moreover, following the execution of the contract subsequent attempts were made by the Union to bargain for distributors, and on each occasion the Respondent reiterated the position previously taken. At the most, Respondent expressed its willingness to let the issue of the employee status of distributors be resolved by arbitration. The Union was unwilling to accept arbitration, claiming that the issue had been resolved in the representation proceeding.

As above noted, at the time of the petition 12 drivers were parties to distributorship agreements. When G. C. Freeby took over as general manager in December 1961, he forthwith posted a notice to employees which read as follows:

It is our desire to get the remainder of our retail routes on a distributor basis. We wish to give all our present drivers first opportunity to acquire these routes. If you are interested please contact Dale Mohn or G. C. Freeby.

⁸ Respondent in its brief makes two assertions: (1) that the term "distributor and/or owner operator" as it appears in the consent agreement and certification refers to some group of conceded employee drivers and not to the drivers operating subject to the distributorship agreements; and (2) that the term "independent distributor and/or owner operator" appearing in the contract as presented by the Union is not referring to the same group as in the certification. Its claim must be rejected on both counts. First, Respondent submitted no evidence that the terminology in the certification was meant to, or could reasonably be construed to, refer to any but the 12 drivers then functioning under distributorship agreements. On the contrary, during the course of the representation proceeding, it submitted a list to the Board apparently comprised of employees, which included, among others, the 12 distributors. The eligibility list used in the election was not received in evidence because insufficiently identified. However, the official tally of ballots used in the representation case shows the number eligible, and the number that voted. From a comparison of these figures with the original list submitted to the Board, it can be inferred, not only that the eligibility list must have included the distributors, among others, but also that some of them must have voted without challenge. In any event, Respondent adduced no evidence that would rebut such an inference and I find that the term "distributors and/or owner operators," as used in the consent-election agreement and certification, refers to drivers who were parties to the distributorship agreements. Second, there is nothing whatsoever that would indicate that the insertion of the word "independent" before the word "distributors" in the contract presented was meant, or intended, to refer to any different group. The record will reasonably support no other conclusion but that at all times the parties knew and understood that certain drivers were parties to distributorship agreements, that they agreed to the inclusion of this group in the unit in the representation proceeding, and that from the outset of the bargaining thereafter, the Respondent took the position that these distributors were not employees but independent contractors for whom it had no duty to bargain under the Act.

Prior to October 1962 nothing was done to further this policy. However, the announced policy was never abandoned and according to Freeby he had instructed Retail Manager Mohn to take further steps to effectuate it. Freeby testified that he regarded it as improper for Respondent to solicit route drivers to become distributors because he regarded it as wrong "to solicit union members or any one connected with another contract" to become distributors, and that he so advised Mohn. Nevertheless, to implement the policy he directed that Mohn apprise the route drivers that Respondent planned to put the policy into effect so that they might have "an opportunity to resign what they were doing and become distributors." Two of the route drivers, William A. Bourbeau and Charles Potter, testified, without contradiction, that in October each was approached by Mohn and told that Respondent wanted to get the routes on a distributorship basis and felt that the men on the routes should be offered the first chance to buy them.⁹ After some discussion between the drivers and Mohn, each signed a prepared distributorship agreement and executed the notes and assignments to Dairy Investment. On various dates between October 1, 1962, and February 1, 1963, a total of 11 route drivers, including Bourbeau and Potter, were similarly approached and signed similar distributorship agreements. The record establishes that each route driver resigned before signing the distributorship agreement. There is no evidence pertaining to the exact dates that any of them resigned. Bourbeau and Potter testified that each had worked as route drivers right up to the time of the changeover, so it is reasonable to assume that each resigned either simultaneously with, or immediately preceding, the signing of the distributorship agreements, and I so find.¹⁰

The Union first learned that Respondent was planning to change the status of existing route drivers to distributors sometime in October. It advised the Respondent that it did not object to the sale of the routes as such, but it called Respondent's attention to section 20 of the collective-bargaining agreement, asserting that this section was controlling in case of such a sale. Section 20 provides as follows:

Sale of Route: The employer agrees that in the event any of the presently established routes or routes established in the future are sold to any one, the route driver who services the said route will come under the provisions of this agreement and must adhere to all the conditions with regard to days off, days the route operates, etc.

The Respondent acknowledges that the route drivers prior to becoming distributors were covered by the collective-bargaining agreement and received all the benefits available under the contract. Respondent does not contend that it bargained in any respect with the Union about the changeover to distributorship status, or that subsequent to the changeover it still considered the new distributors to be covered by the contract. On the contrary, it notified the Union of the resignation of the route drivers who became distributors, advising it that they were no longer employees and thus no longer subject to the checkoff provisions of the contract. Consistent with its earlier position regarding the precontract distributors, it now argues that since the new distributors are independent contractors and not employees, they are no

⁹ Freeby testified that he did not regard this as solicitation of employees in violation of his instruction, but that it was "notification, notice to any employee if they wanted to become an independent businessman, they could." There is no evidence that Respondent specifically threatened the drivers that they would be let go if they did not purchase the routes, or that it couched its approach in terms specifically aimed at undermining the Union. However, the "notification" admittedly was an implementation of an announced policy of converting the routes to distributorships, and the drivers were concededly offered "first chance to buy the route." The only reasonable inference the driver could draw from such an approach was that if he did not avail himself of the offer someone else would get it, and he would no longer be operating his route.

¹⁰ None of the drivers, other than Bourbeau and Potter testified. Mohn, however, acknowledges that each of them executed distributorship agreements together with the notes and assignments substantially as follows: Donald Edmond, October 1, 1962; Ronald D. Ackerman, November 1, 1962; Ray Ethridge, November 1, 1962; Adam Sack, November 1, 1962; William A. Bourbeau, November 20, 1962; Charles Potter, December 10, 1962; Lloyd Brownell, December 1962; Larry Folkert, December 1962; Roland Jeffries, February 1, 1963; and James Dotson, February 1, 1963. Respondent makes no claim that the circumstances of the approach to each, or the manner in which the changeovers took place, differed as to any one of them. Accordingly, I find that each of the others was approached by Mohn, apprised of Respondent's policy, and after some discussion each submitted his resignation at, or immediately preceding, the execution of the documents required to make him a distributor.

longer covered by the contract and that it has no responsibility to the Union to bargain on their behalf.

E. Concluding findings

Upon the basis of the foregoing it is clear that Respondent has at all times refused to bargain with the Union concerning the distributors. Despite the consent-election agreement and the certification, it has continued to insist that distributors are independent contractors for whom it has no duty to bargain under the Act. Nevertheless the Respondent argues that it cannot be charged with failure to bargain because it has signed a contract which purports to cover all "employees" and has indicated a willingness to bring even distributors under the contract if they be found to be employees, an issue which it is willing to resolve by arbitration. This contention does not meet the issue. An employer's duty to bargain extends to all the employees in the appropriate unit. The Board alone has the function of determining the unit, and an employer cannot avoid the duty by willingness to arbitrate the composition of the unit. The machinery of Section 9 of the Act is specifically designed to accomplish this purpose. In the instant case the Union resorted to the Section 9 processes, and the parties agreed upon a unit which included both distributors and route drivers. The issue was thereafter resolved by a standard Board representation proceeding during the course of which the nonemployee status of distributors was never raised.¹¹ It is the certification that establishes the duty to bargain upon the part of the Respondent. Since I have found that the distributors are employees and not independent contractors and that they are a part of the certified unit, it follows that the Respondent has not fulfilled its duty to bargain by its continued insistence that they were not employees.

Respondent further asserts that even if distributors are found to be employees, no order to bargain is required because it has already bargained for all employees by executing the contract. This position is without merit. It is not for the Board to tell an employer what to bargain to make, but where, as here, an employer has failed in its obligation to bargain, the Board must assure that the obligation be fulfilled by requiring the employer to meet and bargain with the Union in the manner required by Section 8(d) of the Act.

A further issue concerns the responsibility of the Respondent for changing the status of the route drivers after the contract came into effect. Respondent claims that it only notified the route drivers of the opportunity to become independent businessmen, and that only after they had made a free election to terminate their employee status did it sign the agreements purporting to make them independent contractors. Respondent claims that such conduct is not inconsistent with its duty to bargain under the Act. Upon the undisputed facts there may be some question that the route drivers were actually given a free choice. However, it is not necessary to resolve this issue, in view of my finding that distributors are in fact employees. It is conceded that Respondent has unilaterally executed an agreement with each which has had the admitted effect of changing their working conditions and taking them outside the coverage of the contract. Respondent makes no claim that it bargained with the Union concerning these changeovers.¹² It is well established that an employer who unilaterally, before an impasse has been reached, changes the working conditions of employees for whom it has a statutory duty to bargain engages in a refusal to bargain within the meaning of the Act.¹³

¹¹ The Charging Party in its brief urges that Respondent is precluded from raising the issue of the nonemployee status of the distributors because this issue was, in effect, "adjudicated" against it in the representation proceeding. The Charging Party cites in support of its contention *Sumner Sand & Gravel Company*, 128 NLRB 1368, and *Parkhurst Manufacturing Company, Inc.*, 136 NLRB 872. Although neither case presents an identical situation, the contention might merit serious consideration were it necessary to reach it. However, since the parties fully litigated the status of distributors, and since I have found them to be employees within the meaning of the Act, no useful purpose will be served by considering the legal issue raised by the contention, and accordingly I find it unnecessary to pass upon it.

¹² Even if it were to be found that distributors were independent contractors, it would appear that the Respondent may have acted in disregard of its duty to bargain by changing the status of employee route drivers to that of distributors without bargaining with the Union. *Town & Country Manufacturing Company, Inc.*, 136 NLRB 1022; *Fibreboard Paper Products Corporation*, 138 NLRB 550. However, in view of my finding that the distributors are employees, I find it unnecessary to reach this issue and make no finding of a violation of the Act premised upon the rationale of these cases.

¹³ *N.L.R.B. v. Benne Katz, d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736; *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217.

Upon the basis of the foregoing I find that the Respondent, commencing on or about May 15, 1962, and at all times thereafter, failed or refused to bargain with the Union for its distributors and that by such failure or refusal and by unilaterally changing the status of its route drivers, it has violated Section 8(a)(5) of the Act and has thereby interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thus violating Section 8(a)(1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent as set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(5) and (1) of the Act, I shall recommend below that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Although Respondent has bargained for all others in the unit, it has failed to bargain at any time for distributors and it must be ordered to do so. It must also be ordered to cease and desist from individual bargaining with route drivers or any others in the unit. With the establishment of the duty to bargain the continued existence, or creation, of individual distributorship agreements represents a mutually inconsistent concept, and to effectuate the purposes of the Act the individual agreements must be ordered set aside. The status quo must be restored without prejudice to any distributor's seniority or other rights and privileges or to the assertion by each of any legal rights he may have acquired under an individual agreement. Finally, each distributor must be made whole for loss of pay, if any, suffered by his employment as a distributor under the individual agreements. Respondent interfered with the rights of the 12 precontract distributors when it unlawfully refused to bargain on their behalf thereby subjecting them to continued employment under the distributorship agreements. Therefore any make-whole provision as to them should commence with the date of such refusal. Although Respondent's refusal to bargain may have been manifest at an earlier date, it had no specific impact on the distributors, as such, until May 16, 1962, the effective date of the collective-bargaining agreement, since from that time on they were deprived of contract benefits. I find, therefore, that May 16, 1962 is the appropriate date for commencing computations for purposes of the make-whole order. The postcontract distributors came into existence as a result of Respondent's unlawful unilateral bargaining. Having found that these latter distributorships did not result from the demand of the route drivers, but from Respondent's implementation of a policy to convert all routes to distributorships, these distributors should be made whole from the date they executed the distributorship agreements. *Servette, Inc.*, 133 NLRB 132; *Smith's Van & Transport Company, Inc.*, 126 NLRB 1059. Commencing as set forth above, the backpay periods shall continue until the dates the individual distributorships are set aside, and the losses, if any, shall include interest at the rate of 6 percent per annum with the loss and interest computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, to which the parties hereto are expressly referred.

Upon the basis of the foregoing findings of fact and upon the entire record in this proceeding, I make the following:

CONCLUSIONS OF LAW

1. United Dairies, Inc., is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local No. 537, is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

3. All truckdrivers, including all commission route drivers, relief route drivers, leadmen and/or working foreman route drivers, distributors and/or owner-operator drivers, special delivery drivers, straight-truck drivers and semitruck drivers, employed at Denver and Evergreen, Colorado; excluding office clerical employees, guards,

watchmen, professional and supervisory employees as defined in the Act, and all other employees constitute, and have at all material times constituted, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. The Union has been at all times since March 6, 1962, and now is, the exclusive representative of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

5. By failing and refusing to bargain collectively with the Union as the representative of the distributors and/or owner-operator drivers named in the unit set forth in paragraph 3, above, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By unilaterally changing the wages, hours, and working conditions of certain of its route drivers subsequent to the designation of the Union as their statutory representative, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

7. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that the Respondent, United Dairies, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local No. 537, as the statutory representative of the distributors and/or owner-operator drivers in the unit found appropriate.

(b) Bargaining individually with, or unilaterally changing the wages, hours, and working conditions of, route drivers or any other employees in the bargaining unit.

(c) Continuing to give effect to any existing individual agreements it has with the distributors and/or owner operators.

(d) In any other like manner interfering with, restraining, or coercing employees in their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local No. 537, with regard to the wages, hours, and working conditions of the distributors and/or owner-operator drivers in the unit found appropriate herein.

(b) Set aside all existing individual agreements with each distributor and/or owner-operator without prejudice to his seniority or other rights and privileges, or to his assertion of any legal rights he may have acquired under such individual agreement, and may each whole for loss of pay, if any, he may have suffered by reason of employment under the individual agreement in a manner set forth in the section entitled "The Remedy."

(c) Post in conspicuous places at its usual place of business, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix A."¹⁴ Copies of said notice, to be furnished by the Regional Director for the Twenty-seventh Region of the National Labor Relations Board, shall, after being signed by Respondent, be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in such conspicuous places.

¹⁴In the event that this Recommended Order be adopted by the Board, the words "A Decision and Order" shall be substituted for the words "The Recommended Order of a Trial Examiner" in the notice. In the additional event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "A Decision and Order."

Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for the Twenty-seventh Region, in writing, within 20 days from the receipt by the Respondent of a copy of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply therewith.¹⁵

It is further recommended that unless on or before 20 days from the date of its receipt of this Intermediate Report and Recommended Order the Respondent notify the Regional Director that he will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondent to take the action aforesaid.

¹⁵ In the event that this Recommended Order be adopted by the Board, paragraph 2(d) thereof shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply therewith."

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees, Local 537, as the exclusive representative of distributors and/or owner-operator drivers among others in the bargaining unit.

WE WILL NOT bargain individually with or unilaterally change the wages, hours, or working conditions of our route drivers or any others in the bargaining unit.

WE WILL set aside all existing agreements with our distributors and/or owner-operator drivers without prejudice to the seniority or other rights and privileges of each, and we will make each whole for loss of pay, if any, he may have suffered by reason of employment under the individual agreement.

WE WILL NOT, by refusing to bargain collectively or in any other like or related manner, interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the Act.

UNITED DAIRIES, INC.,
Employer.

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 609 Railway Exchange Building, Denver, Colorado, Telephone No. Keystone 4-4151, Extension 513, if they have any questions concerning this notice or compliance with its provisions.

Moore Drop Forging Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO, Local No. 192. Case No. 9-CA-2743. August 22, 1963

DECISION AND ORDER

On May 17, 1963, Trial Examiner C. W. Whittemore issued his Intermediate Report in the above-entitled proceeding, finding that
144 NLRB No. 23.