

**Austin J. DeCoster d/b/a DeCoster Egg Farms and Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 385 and Truck Drivers, Warehousemen & Helpers Union, Local 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Petitioners. Cases 1-RC-13911 and 1-RC-13948**

April 13, 1976

## DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN MURPHY AND MEMBERS FANNING  
AND JENKINS

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on August 14 and 15, 1975, before Hearing Officer Joel Gardiner of the National Labor Relations Board. The cases had been consolidated by order of the National Labor Relations Board on August 6, 1975. On October 1, 1975, the Regional Director for Region 1 transferred the case to the National Labor Relations Board. Thereafter, the Employer and the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, Local 385 (hereinafter referred to as Meat Cutters) filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding 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.

The Board has considered the entire record in this case, including the briefs, and makes the following findings:

1. The parties stipulated to the fact that 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 Petitioners are labor organizations claiming to represent certain employees of the Employer.

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

The Employer argues that the petitions should be dismissed upon the ground that the Board lacks jurisdiction because the individuals whom the Petitioners seek to represent are "agricultural laborers" and therefore specifically excluded from the definition of "employee" in Section 2(3) of the Act. It has, however, stipulated to the unit requested by the Meat Cutters should the Board decide to assert jurisdiction.

The Employer does dispute the Union's claim of supervisory status with regard to four individuals.

With regard to the unit petitioned for by the Truck Drivers, Warehousemen & Helpers Union, Local 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein Truck Drivers), the Employer asserts that if jurisdiction is found, the unit should contain not only the straight truckdrivers but also the fowl drivers, pullet drivers, farm pickup drivers, feed truckdrivers, and hatchery driver as well.

The Employer, Mr. Austin J. DeCoster, is a sole proprietor doing business as DeCoster Egg Farms engaged in the production and processing of eggs. He is, in fact, the largest egg producer in New England, selling approximately 13.5 million eggs per week. On the Employer's 1,400-acre facility in Turner, Maine, are located 2 egg-processing buildings, linked by a public road, in addition to 44 laying houses and 4 pullet houses. Nearby is another parcel of land, owned by the Employer through a separate corporate structure,<sup>1</sup> on which stands its hatchery. The Employer also controls a feedmill and 12 more laying houses under another corporation, located 7 miles from its main facility.

The Employer's egg-producing operation begins with the purchase of a day old parent breeder chick from an independent breeder egg producer who transports these chicks to the Employer. The Employer then delivers them to the growing farms, some of which he owns. The chicks remain on these farms for 20 weeks until maturation during which time the complete process, including, *inter alia*, the appropriate feed,<sup>2</sup> medication, ventilation, and lighting, is supervised by the Employer's servicemen.

Upon reaching maturity, a fact determined by the Employer's supervisors, the chicks are transported by DeCoster Egg Farms employees to breeder houses or farms. There they are mated with Employer-owned roosters, resulting in a hatching egg. During this period, the same degree of control and supervision is exercised by the Employer over this process as was exerted by him with regard to the chicks on the growing farms.

<sup>1</sup> Austin J. DeCoster is and has always been the sole shareholder of the various corporations which comprise his production and processing operation. These corporations were formed for the single purpose of fulfilling the requirements for obtaining loans to develop his business. We find that the Employer's corporate structure has no effect on the question of the agricultural status of the employees herein.

Member Fanning finds it unnecessary to reach the question of possible impact of corporate structures created by the Employer pursuant to financing designed for industrial advancement in view of the ultimate finding that processing plant employees and the drivers involved are not agricultural laborers.

<sup>2</sup> The Employer's feed truckdrivers deliver the grain from the Employer's mill to the farms which are growing the chickens and taking care of the laying birds. They are also responsible for loading and unloading the feed.

The eggs are then transported by the Employer's hatchery driver to the hatchery. There the eggs are incubated and hatched. The resulting female chicks or pullets (the male chicks are destroyed) are delivered to either the Employer's growing farms or contract growing farms<sup>3</sup> by this same driver. Again, the entire maturation process of approximately 20 weeks is controlled and supervised by DeCoster Egg Farms.

The contract farmer's responsibility is simply to physically care for the birds, i.e., feed and water them, in accordance with the Employer's instructions. These farmers are paid on the basis of how many square feet they have in their facility, with the Employer paying all electrical and heating costs. The loss of chickens does not affect the payment as the risk of such a loss is on DeCoster Egg Farms.

When the Employer's supervisors have determined that the pullets are ready, his pullet drivers transport them from the growing houses to the laying houses. Approximately 2.4 million pullets are housed in the Employer's facilities while 400,000 birds are in contract laying houses. The Employer also has complete control over the birds' treatment at this stage and furthermore owns every egg produced regardless of where it is laid.

The overwhelming majority of the eggs laid by these pullets are either hauled by the farm pickup drivers to the egg buildings or transported there by means of a conveyer belt which connects 12 of the DeCoster Egg Farms laying houses with one of the egg buildings. Each week the DeCoster Egg Farms laying houses produce approximately 11.5 million eggs which are all processed in the egg building prior to sale. The weekly yield of the contract farms is approximately 2 million eggs of which 1.8 million are shipped unprocessed to Agway, the Employer's customer. The remaining 200,000 eggs are processed in the Employer's plant. Thus, less than 2 percent of the eggs processed by the Employer are from its contract farms. Furthermore, the Employer does not process any eggs from other producers.

It should be noted that the hens laying these eggs become unproductive after a certain period of time. At this point these "spent hens," also designated as fowl, are sold to plants in Massachusetts, Vermont, and Maine. The Employer's fowl drivers are responsible for hauling the birds to these plants.

The Employer's processing operation begins with the cooling of the eggs. They are then transferred to the processing machines where they are washed, candled, graded, and packed for shipping. The end result of this operation is then transported by DeCoster

Farm employees to the Employer's customers.

The Employer does not have a sales organization to solicit customers. Mr. DeCoster engages in some selling as do some of his top managerial personnel. Only one person, however, has a full-time sales position. Furthermore, the extent of DeCoster Egg Farm's advertising is limited to the display of its name on its trucks and invoices.

The Petitioner contends that the processing plant employees and the straight truck and trailer drivers are not agricultural laborers. Specifically, the Meat Cutters<sup>4</sup> argues that the Employer's processing of eggs is a separate commercial activity adding value to the product and therefore it is not an integral part of the Employer's farming operations. The Meat Cutters also claims that while egg processing may be agricultural, in this case it is not, as it is not farming performed by a farmer on a farm. On the other hand, as stated previously, the Employer contends that the employees petitioned for are agricultural workers.

Section 2(3) of the Act excludes any individual employed as an "agricultural laborer" from the definition of "employees" covered by the Act. Annually, since 1946, Congress has added a rider to the Board's appropriation bill which provides that the term "agricultural laborer" shall be defined in accordance with section 3(f) of the Fair Labor Standards Act. While the Board makes its own determination as to the status of any group of employees, as a matter of policy it gives great weight to the interpretation of section 3(f) by the Department of Labor, in view of that agency's responsibility and experience in administering the FLSA.

Section 3(f) of the FLSA defines agriculture in the following manner:

"Agriculture" includes farming in all its branches and among other things includes . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market.

The Supreme Court has stated that this definition has two distinct branches.<sup>5</sup> The primary meaning refers to actual farming operations, such as the raising of poultry. The secondary definition refers to "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." The employees located in the egg-processing plants and the truckdrivers are not engaged in direct

<sup>3</sup> Although the independent growing farms were referred to throughout as contract growing farms, there apparently exists no formal written contract between the Employer and these farmers.

<sup>4</sup> The Truck Drivers did not file a brief herein.

<sup>5</sup> See *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-763 (1949), for the distinction between primary and secondary agriculture.

farming operations such as are included in section 3(f)'s primary definition of agriculture. The question then arises as to whether they are engaged in activities included in the "secondary definition." We find for the reasons which follow that the employees in question do not fall within the agricultural laborer exemption.

The Department of Labor Regulation section 780.141<sup>6</sup> interpreting the phrase "such farming operations" from the section 3(f) definition of agriculture states that:

No practice performed with respect to farm commodities is within the language under discussion by reason of its performance on a farm unless *all* such commodities are the products of *that* farm. [Emphasis supplied.]

We are of the view that this regulation must be read as limiting the exemption to those processors who deal exclusively with their own goods.

The Fifth Circuit has indicated its approval of a rule such as that set out above. In *Mitchell v. Hunt, d/b/a Gatesville Commission Company*,<sup>7</sup> the court held that the employees working in the employer's cattle auction barn were not agricultural laborers in view of the fact that only one-third of the cattle sold belonged to the employer-farmer. The court also found in *Mitchell v. Huntsville Wholesale Nurseries, Inc.*,<sup>8</sup> that the employer's warehouse employees were nonagricultural since approximately one-third of the employer's nursery stock was acquired from independent contract growers. The court stated that, "processing on a farm of commodities produced by other farmers is incidental to, or in conjunction with, the farming operation of the other farmers and not incidental to, or in conjunction with, farming operations of the farmers on whose premises the processing is done."<sup>9</sup>

In the present case, although 11.5 of the 11.7 million eggs processed by the Employer are laid in DeCoster Egg Farms laying houses, the remaining 200,000 eggs are received from the contract farmers. The Board has consistently held that an employer is not a "farmer" as to products which have been raised or produced under contract by independent contract farmers.<sup>10</sup> The yield of the contract farms cannot then be viewed as being the product of DeCoster Egg Farms. Given our reading of the above regulation,

since "all" of the eggs processed by the Employer are not the products of his own farm, his employees are not engaged in activities falling within the secondary definition of agriculture. Therefore, the agricultural exemption does not apply in this case.

4. In Case 1-RC-13911, the Meat Cutters seeks to represent a unit of production and maintenance employees including cleanup employees, plant clerical employees, and shipping and receiving employees employed at the Employer's two egg-processing buildings. In Case 1-RC-13948, the Truck Drivers, Warehousemen & Helpers Union, Local 340, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, has petitioned for a unit composed of straight truckdrivers and trailer drivers excluding all other drivers.

In Case 1-RC-13911, the parties are in disagreement as to the placement of four processing employees, Punch, Dickey, Carver, and Durgin; the Meat Cutters contending that these individuals are supervisors and should be excluded from the unit, and the Employer contending that they should be included in the unit as employees. The record establishes that these individuals spend all of their working time performing basically the same task as unit employees, work alongside unit employees, wear the same or similar work attire as unit employees, and enjoy the same fringe benefits as unit employees. In addition, the record establishes that these individuals do not possess any authority to hire, fire, transfer, lay off or grant time off to unit employees or effectively recommend same. All recommendations made by them are subject to an independent investigation. Punch, Dickey, and Durgin are hourly paid as are unit employees; Carver is salaried because he lives in a company trailer. While these individuals receive higher rates of pay than other employees, the differentials are related solely to their better skills. Accordingly, based on the above evidence, we find that Punch, Dickey, Carver, and Durgin are not supervisors within the meaning of Section 2(11) of the Act and we shall include them in the unit.

In Case 1-RC-13948, the Truck Drivers seeks to limit the unit to approximately 30 over-the-road and straight truckdrivers. The Employer, on the other hand, would include in the unit approximately 13 local drivers and 6-7 feed truckdrivers. The record indicates that all of these drivers make deliveries and/or pickups at farms or buildings which are not part of the Employer's immediate operations and, accordingly, they are not agricultural employees.<sup>11</sup> Howev-

<sup>6</sup> 29 CFR § 780.141 (1974).

<sup>7</sup> 263 F.2d 913 (1959).

<sup>8</sup> 267 F.2d 286 (1959).

<sup>9</sup> *Id.* at 290.

<sup>10</sup> See, e.g., *Imco Poultry, Division of International Multifoods Corporation*, 202 NLRB 259 (1973); *Bayside Enterprises, Inc.*, 216 NLRB 502 (1975), enf. 527 F.2d 436 (C.A. 1, 1975).

<sup>11</sup> See, e.g., *N.L.R.B. v. Bayside Enterprises, Inc.*, 527 F.2d 436 (C.A. 1, 1975), enf. 216 NLRB 502; *Colchester Egg Farms, Inc.*, 214 NLRB 327 (1974).

er, we conclude that the unit of over-the-road drivers sought by Petitioner is appropriate.<sup>12</sup>

Although the record does not discuss with great specificity the duties and functions of each of the various categories of local drivers, it is apparent that their interests are different from those of the over-the-road drivers. Fowl drivers deliver spent hens to Massachusetts, Vermont, and parts of Maine; pullet drivers haul pullets from the growing houses to the laying houses; farm pickup drivers haul eggs from the laying houses to the processing buildings; the hatchery driver hauls hatching eggs to the hatchery and delivers the chicks to the Employer's growing farms or to contract farms; and the feed truckdrivers deliver feed to the various growing farms and laying houses.

While the local and the over-the-road drivers spend virtually all their working time on the road, the feed truckdrivers spend only half of their time driving. In addition, the feed truckdrivers are under separate immediate supervision.

However, notwithstanding the fact that all of these drivers share some conditions of employment such as fringe benefits and hourly rates of pay, the over-the-road drivers are paid by the trip as well as by the

hour and receive advances for necessary out-of-town expenditures. They are required to keep logs and take mandatory rest periods. We therefore find that the over-the-road drivers have separate interests and constitute a separate unit.

Accordingly, upon the entire record and for the aforementioned reasons, we find that the following groups of employees of the Employer constitute units appropriate for purposes of collective bargaining within the meaning of Section 9(c) of the Act:

#### UNIT A (Case 1-RC-13911)

All production and maintenance employees, including cleanup employees, plant clerical employees, and shipping and receiving employees employed at the Employer's two egg-processing buildings on Plains Road, Turner, Maine, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

#### UNIT B (Case 1-RC-13948)

All over-the-road drivers (straight truckdrivers and trailer drivers) employed by the Employer, excluding all inside processing employees, all other drivers, clerical employees, guards, and supervisors as defined in the Act.

[Direction of Elections and *Excelsior* footnote omitted from publication.]

<sup>12</sup> Member Fanning agrees that this unit, as sought, which is a traditional unit of over-the-road truckdrivers, is supported by the record. He finds it unnecessary to make a nonagricultural finding as to the local drivers who are not sought by the Petitioner and who are not being included in the unit.