

**Farmers Insurance Group, et al. and Insurance Workers International Union, AFL-CIO, Petitioner.** *Case No. 16-RC-3135.*  
*June 27, 1963*

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Joseph P. Parker, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record<sup>1</sup> in this case, the Board finds:<sup>2</sup>

1. The petition names the Employer as Farmers Insurance Group, consisting of Farmers Underwriters Association, Truck Underwriters Association, Fire Underwriters Association, Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company. The insurance exchanges are so-called reciprocal insurance companies.

Farmers Insurance Group contends it is not an employer within the meaning of the Act, and is therefore not subject to the Board's jurisdiction. It argues that although the five insurance companies and three underwriters associations each individually meet the Board's volume of business standards for jurisdiction, they cannot collectively be termed an "employer," because they are separate, distinct, and unrelated entities, and that, in any event, as the three underwriters associations do not, and are not licensed to, sell insurance, they cannot be considered employers of insurance agents. It also asserts that the Farmers Insurance Group is neither a legal nor a *de facto* entity, but rather a convenient term of reference for the five insurance companies; that it does not have a board of directors, officers, income, or assets, and that, in any event, it does not include the underwriters associations.

The record shows that the Farmers Underwriters Association, Truck Underwriters Association, and Fire Underwriters Association act as attorneys-in-fact for the Farmers Insurance Exchange, Truck

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<sup>1</sup> Because, in our opinion, the record (including the questionnaire-affidavits) and briefs adequately set forth the issues and positions of the parties, the Employer's request for oral argument is hereby denied.

<sup>2</sup> At the hearing the companies, herein found to constitute the Employer, filed a motion to dismiss the petition alleging that they are not employers and their insurance agents are not employees within the meaning of the Act, and, therefore, that the Board is without jurisdiction of either the parties or the subject matter of this case. The hearing officer did not rule on the motion. For the reasons herein set forth, the motion is denied. We also deny the companies' request, made in their brief to the Board, to dismiss the petition for the additional reason that the Petitioner's showing of interest is inadequate. The sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation. *O. D. Jennings & Company*, 68 NLRB 516. We are administratively satisfied that the showing of interest is adequate in the unit herein found appropriate.

Insurance Exchange, and Fire Insurance Exchange, respectively. In this capacity they operate through regional offices where they jointly employ regional and division agency managers. Their duties include such functions as collection of premiums, processing policies, appointment of insurance agents and district managers for the individual exchanges, and the joint operation of an agent training school. Farmers Underwriters controls Farmers New World Life Insurance Company<sup>3</sup> and also performs certain management services for Mid-Century Insurance Company,<sup>4</sup> which company is solely owned by Farmers Insurance Exchange. There are, to a limited extent, interlocking boards of directors or governors and officers of the insurance and underwriting companies. In addition, the underwriters associations derive all their income from their respective companion exchanges (and from investments), have identical boards of directors and a common executive director, general counsel, underwriting staff, and investment department. The executive offices for each of the underwriters, exchanges, and Mid-Century are located in the Farmers Insurance Building, Los Angeles, where they share a common claims staff. Farmers New World Life, while located in Seattle, has its president's office in the Farmers Insurance Building at Los Angeles. The record further shows that the Farmers Insurance Group issues an annual report which, in addition to separately listing the directors, governors, and officers, and financial condition of each of the five insurance companies, lists a Farmers Insurance Group Board of Directors. The report also lists an executive committee and an administrative committee. The cochairmen of the board of Farmers Insurance Group are also listed in the report as members of the executive committee and are on the board of directors of Farmers New World. One of them is chairman of the board of the latter. The executive and administrative committees listed in the report includes as members various officers of the insurance and underwriter entities. Additionally, some members of these committees are designated as vice president, secretary, treasurer, general counsel, and controller without disclosing whether they are affiliated with any particular company of the group. The report also contains a list of 10 regional offices, together with regional managers and general sales managers, under the caption "Farmers Insurance Group, Executive Home Office . . . Los Angeles . . . Regional Offices." Included in the list is the name and Seattle address of Farmers New World Life Insurance Company. Elsewhere in the report is a picture of a large office building bearing the emblem and name of Farmers Insurance Group. The picture is

<sup>3</sup> Farmers New World Life is not represented in a regional office and does all of its business from its Seattle office.

<sup>4</sup> Mid-Century was formed to do business in States which do not permit reciprocal insurance companies to operate. In the States where it operates, Mid-Century functions from the joint regional offices.

captioned "ONE OF 10 REGIONAL OFFICES . . . to provide maximum service to *our* more than two and one-third million *policyholders*."<sup>5</sup> The report also contains a statement of the "progress of the Farmers Insurance Group," "combined invested assets of the Farmers Insurance Group, excluding Farmers New World Life," and the number of "Farmers Insurance Group Policies in force."

Although agents' and district managers' appointment agreements, which are processed by the regional offices, do not bear the name of the Farmers Insurance Group, they are signed by one individual on behalf of all the companies, and appointment applications bear only the name of the Farmers Insurance Group. Furthermore, it appears that all agencies selling insurance for any of the companies within the Group are required to have an office phone listed in the name of Farmers Insurance Group, and there is a Farmers Insurance Group emblem which is displayed at all agencies. Agency stationery, various bulletins and manuals issued to agents and district managers bear the name, and often the emblem, of Farmers Insurance Group.

We find that because of their interrelationship and the integrated nature of their operations, the companies and associations within the Farmers Insurance Group constitute a single Employer within the meaning of Section 2(2) of the Act.<sup>6</sup> As its annual gross income exceeds \$500,000 and as at least \$50,000 worth of the claims that are paid and the premiums that are received cross State lines, we find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.<sup>7</sup>

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

3. The Employer contends that its Oklahoma insurance agents are independent contractors and therefore not employees within the meaning of the Act. The Petitioner argues otherwise.

The determination of whether an individual is an independent contractor or an employee under the Act is dependent upon the nature and the amount of control reserved by the person for whom the work is done.<sup>8</sup> When such person reserves the right to control and direct both the result and the manner and means of doing the work, an employer-employee relationship exists. This question must be resolved upon con-

<sup>5</sup> Emphasis supplied.

<sup>6</sup> *Educational Supply Service of California*, 134 NLRB 1505, 1508. At the very least, Farmers Insurance Group and the companies and associations therein are joint employers engaged in a common enterprise. Cf. *Spartan Department Stores*, 140 NLRB 608.

<sup>7</sup> *Siemons Mailing Service*, 122 NLRB 81.

<sup>8</sup> The mere assertion of independent status or the wording of a contract to that effect does not establish an independent contractor under the Act. Rather, it is the actual relationship and practice of the parties that is controlling. See *Servette, Inc.*, 133 NLRB 132, 137-139, 148-149.

sideration of all the facts of each case, and no one factor is determinative.<sup>9</sup>

The Employer's agents have a certain latitude in performing their services. Except for career trainees,<sup>10</sup> the agents are permitted to have other employment and may work out of district managers' offices, and/or their own homes, and/or their own offices. Except for career trainees and agents, located in district managers' offices, who may be required by the district managers to keep office hours and attend meetings, all agents independently decide their own hours of work and are not required to keep time records, decide what calls they will make and when they will make them, are paid on a commission basis, pay their own automobile, office and other business expenses, except that they are reimbursed for certain types of advertising. They may hire clerical assistants without the Employer's approval.

While the foregoing factors are indicia of an independent status, an employer-employee relationship is indicated by other and more controlling factors. The Employer prepares and issues to agents various instructional memoranda and manuals regarding working procedures which, although not rigidly followed in all respects, do prohibit the agent from accepting certain risks, require him to write policy applications in a certain manner, and prescribe conditions under which he can bind the Employer. The agents' appointment contracts are unilaterally drawn by the Employer. Although either party may terminate on 30 days' notice, the Employer reserves the right to terminate unilaterally at any time for violation of underwriting rules, for poor underwriting, or for nonproduction. Termination forecloses the agents' rights to commissions, service fees, or policy renewals. An agent may sell these interests to another agent subject, however, to the Employer's approval. Although agents may have other employment, they are not permitted to write competing lines of insurance, and must have the Employer's prior approval to handle noncompeting lines. The Employer assigns agents to a particular district office. District managers, who train and assist the agents, are in charge of district offices. Agents are required to submit to the district manager all policies written and premiums received. The agent is not permitted to retain his commission or transfer policies to other agents. Commissions and other moneys are paid to agents by the district managers, the amount of which is unilaterally determined by, and may be unilaterally changed by, the Employer. Agents are prohibited from active sollicita-

<sup>9</sup> *United Insurance Company*, 108 NLRB 843, 846; *N.L.R.B. v. Phoenix Life Insurance Company*, 167 F. 2d 983, 986 (C.A. 7), cert denied 335 U.S. 845.

<sup>10</sup> The Employer's 6-month, career-training program is open to all agents, new and old, who are not engaged in other employment. During this period, they are paid a fixed salary and work full time. However, at the end of their training program they are, in all respects, treated as any other agent. About 10 percent of all new agents participate in the program.

tion outside the assigned territory, and they are not permitted to bind the Employer or to receive renewal commissions on any insurance sold outside the district assigned to them. Agents may not change districts without the Employer's approval and, if the policyholder moves out of the agent's district, the agent automatically loses his commission rights thereto, because the Employer reallocates the policy to an agent in the district into which the policyholder has moved.

We believe that the foregoing circumstances establish that the Employer has reserved to itself the right to control and direct the manner and means by which the agents perform their work.<sup>11</sup> In view thereof, and as agents' functions constitute an integral part of the Employer's business, we find that the career trainees and other Oklahoma agents of the Employer are not independent contractors, but are employees within the meaning of Section 2(3) of the Act.<sup>12</sup> Accordingly, we find that 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.

4. The Petitioner seeks to represent a unit of all the Employer's full-time insurance agents in the State of Oklahoma.<sup>13</sup> The Employer contends that if the agents are employees, the only appropriate unit is one consisting of all agents, whether full or part time. There is no history of collective bargaining covering these agents.

The Board generally has included part-time employees in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages,

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<sup>11</sup> That the Employer may not exercise the right of control to the fullest extent possible is immaterial. It is the right to control, rather than the exercise thereof, that determines the nature of the relationship. *United Insurance Company, supra*, p. 847.

<sup>12</sup> *Allstate Insurance Company*, 109 NLRB 578, 579-580; *United Insurance Company of America v. N.L.R.B.*, 304 F. 2d 86 (C.A. 7), cited by our dissenting colleague, is distinguishable with respect to several material factors. The United agents, unlike the agents herein, retained their own commissions, personally collected premiums, and, if the policyholder moved out of an agent's district, the agent could, at his own discretion, transfer the policy to any other agent, but he was not required to do so. If he did not, he did not lose his commission rights thereto. The United agents were permitted to make their own arrangements with policyholders respecting frequency of premium payments. Although the agents herein, like the United agents, may sell policies anywhere in the State, the former, unlike the latter, are prohibited from active solicitation outside their own district, and may not bind the Farmers Group on any insurance so sold.

<sup>13</sup> The Petitioner would exclude district managers, apparently on the theory that they are supervisors, and the Employer does not contend they should be included. While the district manager does not have the authority to either appoint or terminate an agent, he has the authority to recruit agents, accept employment applications, and make recommendations concerning appointment and termination, which recommendations are generally followed. In addition, the district managers train and responsibly direct the work of the agents; they pay their commissions, receive their policies and premiums, and channel all other transactions between the agents and the Employer. Furthermore, district managers have the authority to reject all policies written by agents, including those policies where the agent has bound the Employer. In these circumstances, it is clear that district managers are the sole conduit through which management authority is funneled. We find, therefore, that district managers are supervisors within the meaning of the Act.

hours, and working conditions of the full-time employees in the unit. Such employees are customarily denoted as regular part-time employees. Other part-time employees whose work periods are sporadic are termed "casual" or "irregular part-time employees" and are generally excluded.<sup>14</sup>

The Employer contends that it has no separate classifications of, nor does it differentiate between, full- and part-time agents, and that, except for the career trainees, it maintains no records which disclose the amount of time an agent devotes to the sale of its insurance or to some other line of endeavor. The Employer further contends that, apart from career trainees, the terms and conditions of employment of all agents are identical; and, that, except for career trainees, all its agents may at their discretion engage in other occupations and determine their office location within their assigned district, sell the same types of insurance for the Employer, are hired, terminated, and compensated in the same manner, and are assigned to a particular district manager who supervises their work. By its very nature, the sale of the Employer's insurance requires some irregularity in time spent therein, and, although the Employer makes no minimum time requirement, it does not follow, as a matter of course, that there cannot be regularity of employment in the sale of this insurance. The record shows that because all the Employer's agents engage in their employment as regularly and consistently as they choose, there are marked differences in the time they devote to their work. Thus, the career trainees and agents who work exclusively for the Employer and who regularly and continuously devote full time to the sale of the Employer's insurance are fairly to be regarded as full-time agents. Agents who sell the Employer's insurance an average of at least 20 hours a week during the calendar quarter immediately preceding the eligibility date hereinafter adopted are regular part-time agents. We, therefore, will include career trainees and these full-time and regular part-time agents in the unit.<sup>15</sup> On the other hand, the few agents who have worked for the Employer an average of less than 20 hours a week during the calendar quarter immediately preceding the eligibility date, have thereby demonstrated an insubstantial and only sporadic interest in their employment by the Employer. Such agents, it appears to us, merely sell the Employer's insurance on a casual basis. Therefore, that mutuality and community of interest in working conditions essential for inclusion in the unit is lacking, and we exclude them.

Accordingly, we find in the circumstances of this case and on the record as a whole that the following employees of the Employer con-

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<sup>14</sup> *Jat Transportation Corp., et al.*, 128 NLRB 780, 786; *Motor Transport Labor Relations, Inc.*, 139 NLRB 70.

<sup>15</sup> See *Motor Transport Labor Relations, Inc.*, *supra*.

stitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All career trainees, and all full- and regular part-time agents, as defined herein, licensed to sell the Employer's insurance in the State of Oklahoma, excluding all other agents, clerical employees, district managers, and all other supervisors as defined in the Act.<sup>16</sup>

[Text of Direction of Election omitted from publication.]

MEMBER RODGERS, dissenting:

Contrary to my colleagues, I would not find the insurance agents employees of Farmers Insurance Group; in my view, these agents are independent contractors.

At the outset, I would note that the contracts between Farmers and each agent provide:

Nothing contained herein is intended or shall be construed to create the relationship of employer and employee. The time to be expended by the agent is solely within his discretion, and the persons to be solicited and the area within the district involved wherein solicitation shall be conducted is at the election of the agent. No control is to be exercised by the companies over the time when, the place where, or the manner in which the agent shall operate in carrying out the objectives of this agreement, provided only that they conform to normal good business practice, and to the state and Federal laws governing the conduct of the companies and their agents.

My colleagues say that the determination of whether the agents are employees of Farmers is dependent upon the nature and the amount of control reserved by Farmers over the agents. To me, the wording of the contract itself demonstrates that Farmers does not possess or exercise that degree of control necessary to impart the status of employees to their agents. But even apart from the contract language, there are other factors in this case which clearly establish independent contractor status of their agents. Thus, the record shows that the agents are not required to devote their full time to or work exclusively for Farmers. A number are employed in other occupations and many sell other lines of insurance. The agent sets his own hours of work and his workdays. In the conduct of his business, he can operate from the district manager's office, his own home, or from an office of his own. The decision here is made solely by him. Further, he can, without Farmers' approval, hire his own solicitors and clerical help. The salaries of these employees of his are paid by the agent as are all expenses incurred by him in the sale of insurance such as travel, telephone, and rent. With the exception of certain advertising costs, the

<sup>16</sup> *Allstate Insurance Company*, 109 NLRB 578.

agent receives no reimbursement for these expenses. He is paid on a commission basis, and whether he makes a profit is dependent upon the amount of business he produces. It is clear from the record that when the commissions are paid to the agent there is no withholding of taxes or social security. In the sale of insurance, the agent is not required to follow suggestions of Farmers but is free to devise his own techniques. Similarly, the agent is free to attend or not attend sales meetings Farmers might have. Finally, the agent is not required to submit any report of any kind to Farmers either accounting for his time spent in selling insurance or explaining any lack of sales.

I think what the Court of Appeals for the Seventh Circuit stated in *United Insurance Company of America v. N.L.R.B.*, 304 F. 2d 86, 90-91, in finding agents of United Insurance to be independent contractors, apropos here. The court said:

There are many businesses, and the sale of insurance is one of them, where management may make a choice as to the manner in which the business will be conducted. Very often, perhaps traditionally, insurance has been sold through insurance salesmen whose "tools" are their own initiative and personality and who work on their own time and at their own expense. However, some insurance companies have established an employer-employee relationship such as the company in *N.L.R.B. v. Phoenix Mutual Life Insurance Company, supra*. In the instant case, United has chosen to operate its business on the basis that its agents are independent contractors and, of course, it had the complete legal right so to do.

I think it clear both from the agent contract and from the manner in which the parties conducted themselves that Farmers "has chosen to operate its business on the basis that its agents are independent contractors" and I would so find.

Because I would find the agents to be independent contractors, I would dismiss the instant petition seeking an election among the agents.

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**X-Ray Manufacturing Corporation of America and Amalgamated Union Local 55, Mechanics, Novelty, Retail and Maintenance Employees, affiliated with District 5, Petitioner. Case No. 2-RC-12125. June 27, 1963**

#### DECISION ON REVIEW

Pursuant to a Decision and Direction of Election issued by the Regional Director for the Second Region dated July 24, 1962, an election by secret ballot was held on August 8, 1962, among the em-

143 NLRB No. 35.