In the

Supreme Court of the United States

JAMES D. HODGSON, SECRETARY OF LABOR,

Petitioner,

vs.

ARNHEIM AND NEELY, INC., et al.,

Respondents.

No. 71-1598

Washington, D. C.
January 16, 1973

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Tuesday, January 16, 1973

The above-entitled matter came on for argument at 10:56 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANDREW L. FREY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner

EUGENE B. STRASSBURGER, JR., ESQ., 3101 Grant Building, Pittsburgh, Pennsylvania 15219; for Respondent Arnheim & Neely, Inc.

FRANK L. SEAMANS, ESQ., 1000 Porter Building, Pittsburgh, Pennsylvania 15219; for Intervenor The Institute of Real Estate Management

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1598, Hodgson against Arnheim and Neely.

Mr. Frey, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: Mr. Chief Justice, and may it please the Court:

This case is here on writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, holding that elevator operators, cleaning ladies, and other operating maintenance and personnel at eight office buildings and one apartment complex in the Pittsburgh area managed by respondent Arnheim and Neely are not entitled to the protection of the Fair Labor Standard Act's minimum wage and overtime provisions.

The decision below conflicts with the decision of the Fourth Circuit involving identical issues and holding that the employees were covered.

Arnheim is a real estate firm engaged, among other activities, in the management of office buildings and apartment houses as agents for the owners of such buildings. At the time this suit was brought, they managed a title of nine such buildings for various unrelated owners.

Arnheim's management activities are carried out

under basically identical contracts with each of the building owners under which Arnheim assumes all of the functions of managing and operating the buildings, including the procurement of tenants, the negotiation and enforcement of leases, the collection of rents, arrangement for utilities and other services; in short, all aspects of the operation of the buildings.

Arnheim's business is conducted from its central office and managed by supervisory management personnel operating out of that central office.

With respect to each building, Arnheim collects the rents, deposits them in separate bank accounts, and uses the funds to pay the operating expenses of the buildings to pay its commission and to remit the balance to the owner.

Arnheim has extensive responsibilities in connection with personnel employed at the various buildings, and I am talking about such personnel as elevator operators, cleaning ladies, watchmen, building engineers, and so on. The functions and responsibilities of Arnheim with respect to these personnel are spelled out in detail on a stipulation that was filed in the district court and it is in the appendix and also at pages 5 and 6 of our brief.

Briefly summarized, these functions involved hiring, promotion, and firing of all personnel; supervision of their performance of their employment; making work

assignments and scheduling the time of work; negotiating union contracts; determining rates of pay and benefits; preparing payroll and maintenance of other employee records; and payment of salaries.

In short, every conceivable incident of the employer-employee relationship is encompassed in Arnheim's responsibility, although the owners are consulted and enjoy a veto with respect to certain matters such as the rates of pay and promotions.

Q Are these personnel shifted from one building to another?

MR. FREY: I do not believe that the record reflects that they are shifted. They are employed for a particular building.

Q It is every conceivable relationship except that of employer and employee, is it not?

MR. FREY: Well, I would say that it is a relationship of employer and employee. Our position is--and I think this Court has clearly held, certainly in the context of the Fair Labor Standards Act--that in determining the employer-employee relationship, we do not look solely at the commonlaw concepts, and in any event, even if you did, the right to hire, the right to fire, even if it is a shared responsibility with another person, gives you a status as an employer.

Q As I understand it, for each building there is a separate bank account?

MR. FREY: There is a separate bank--

Q And the employees in that building are paid from that account?

MR. FREY: That is correct.

Q Are those checks drawn by--

MR. FREY: By Arnheim and Neely.

Q They are--

MR. FREY: Yes, it is an Arnheim and Neely account. It would be labeled Arnheim and Neely Clark Building Account.

Q I see. Suppose there are insufficient funds or something to pay the current salary, whatever it is?

MR. FREY: Well--

Q That never arises?

MR. FREY: The record does not indicate that that arises. Our position in such an instance--suppose the building owner went bankrupt, and I will come to this a little later--our position would be that Arnheim would be responsible for payment of minimum wages. But Arnheim is under the act an employer in that sense. And it has every power that an employer has.

Q If that is so, then if it so happened--not because the building was bankrupt but because there simply were not enough funds to pay the current bills--you say that

Arnheim would still be in law obliged to pay the minimum wage?

MR. FREY: That would be our position. I do not think that that is essential to the disposition of this case.

Q Under the Fair Labor Standards Act?

MR. FREY: Under the Fair Labor Standards Act their responsibility to pay the light bill would be a matter of state law and of contract between them and the building owner. But here we have a special situation, which is that they do serve as employers these people under the act, and if these people were entitled to the act's protection, then the employers are liable to see that they get it, and that is both Arnheim in this case and the building owners, and I will expand on this shortly.

Q Mr. Frey, am I correct in my impression the Third Circuit decided the employer issue in the Government's favor?

MR. FREY: That is correct, Your Honor.

Q And there is no cause petition here?

MR. FREY: That is correct, Your Honor.

Again, later I think I will indicate that there is an argument that is made that this is somehow still relevant to the enterprise question which is really before the Court today, but we think that argument is fallacious.

The Secretary of Labor brought suit in district court for the Western District of Pennsylvania to compel Arnheim and Neely to comply with the minimum wage, the overtime, and the record-keeping provisions of the act. Arnheim raised basically four defenses.

First, it contended that it was not the employer of these employees, that the building owner was. The district court rejected that contention and looked both at the relationship that Arnheim actually had to these employees and to the definition in the act and held that it was an employer.

Secondly, Arnheim contended that in determining whether the dollar volume requirements of the act are met, the Court should consider only Arnheim's commissions and not the gross rents from the buildings. This argument too was rejected by the district court.

Thirdly, and this is the key issue in this case today, Arnheim contended that its business was not an enterprise under the act but rather that the employees at these buildings were employed in as many different enterprises as there were separate building owners.

Finally, an issue that is not raised by either side here, there was an issue regarding the nexus to interstate commerce, and the district court held that prior to February 1, 1967, the necessary nexus did not exist and

dismissed the Secretary's suit as to that prior period subsequent to February 1, 1967 when the statute was amended; the court held that the necessary nexus did exist and we do not understand that issue to be contested.

On appeal, the Third Circuit held in agreement with the Government's position and the district court that Arnheim is an employer of these employees, under the act.

It secondly held, also in agreement with the Government and with the district court, that the proper measure of gross revenues for purposes of determining coverage under Section 3(s) of the act is rent and not merely Arnheim's commissions.

However, it agreed with Arnheim that it was not conducting a single enterprise but rather as many different enterprises as there were building owners. Accordingly, it remanded the case to the district court for a hearing whether any of these separate enterprises met the dollar volume requirements of the act to create an enterprise in which the employees would be covered.

Our petition for certiorari raised solely the issue of the correctness of the Court of Appeals' definition of Arnheim's enterprise. No cross petition was filed with respect to the issues won by the Government below, nor were they raised in the brief in opposition to the certiorari petition.

Turning to the merits, the Government's theory is that these employees are employed in Arnheim and Neely's enterprise, the management of office and apartment buildings for others, and that the activities of all the buildings Arnheim manages are part of a single enterprise.

The question presented to this Court is fundamentally one of interpretation of the provisions of the Fair Labor Standards Act. We submit these provisions are susceptible of only one interpretation, and that interpretation provides coverage for these employees.

Let us take John Doe, an elevator operator in one of the buildings that Arnheim manages. In order to determine whether he is protected by the minimum wage provisions which are contained in Section 6 of the act, we begin by looking at Section 6, which says, "Every employer shall pay to each of his employees"--and I am skipping to the relevant part--"employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at certain rates."

The phrase "employed in an enterprise engaged in commerce or the production of goods for commerce" is defined in Section 3(s). It is there defined as an enterprise whose annual gross volume of sales made or business done is not less than $500,000, if we are talking about the period from February, 1967 to January, 1969.

So, the question is, Is John Doe employed in an

enterprise which has the necessary dollar volumes?

Enterprise is defined in Section 3(r) and here we are at the crux of the case. The relevant portion says that an enterprise means the related activities performed either through unified operation or common control by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units.

Arnheim's activities, as a manager of office and apartment buildings for others, clearly constitute a single enterprise under this definition. There are three elements that need to be met.

Are there related activities? And Congress has not defined related activities per se, but the legislative history makes it clear that it considers related activities to be those that are the same or similar. Looking at Arnheim's activities at each of the office buildings and apartment buildings that it manages, it does the same thing under basically the same agreement with the building owner, clearly related activities, we submit.

The second requirement is, Are these activities performed through unified operation or common control? The common control requirement is satisfied if they are performed by a single company. Arnheim and Neely, Incorporated runs the business of Arnheim and Neely, Incorporated, and that is

what we are talking about here. The common control requirement is met.

In addition, although it is not necessary to meet both, Arnheim's business of managing buildings is run through unified operation, that is, out of its central Arnheim and Neely office where its management and supervisory personnel and clerical pesonnel work.

Finally, these related activities must be engaged in for a common business purpose. Again, we think it is clear that the requirement is met. The emphasis of Congress was on the word "business" to distinguish between business and charitable. Here the activities at each of the nine buildings are undertaken by Arnheim for its business purpose of managing buildings and making a profit from that activity.

How, then, did the Court of Appeals reach a different conclusion. It did so by completing ignoring Arnheim's enterprise and by looking instead at Arnheim's clients, the building owners. It found that the building owners did not share common business purpose, that they had nine distinct enterprises.

This finding was absolutely correct. We have no quarrel with it whatsoever. But it is irrelevant as applied to this case, because it is Arnheim's enterprise in which we contend that these individuals are employed.

There is a fact which is perhaps overlooked by the

Court of Appeals and by the respondents herein, which is that under the Fair Labor Standards Act it is possible to be employed in more than one enterprise at the same time. Indeed, that is exactly what appears to have happened here. These persons are employed in the building owners' enterprise, which is to own real estate. They are employed in Arnheim and Neely's enterprise, which is to manage real estate. They are involved in both of those businesses.

Where they are employed by more than one enterprise, if one of the enterprises comes within the coverage requirements of Section 3(s), then the employee is protected, regardless of whether the other enterprise by which he may also be employed comes within Section 3(s) or not.

I think the example that we gave in our reply brief of the warehouses retaining the protective agency will illustrate the fallacy of the reasoning of the Court of Appeals.

Suppose you have nine separate warehouses, each completely independent businesses having no connection with one another. They all require security services, night watchmen. They all retain the same protection agency. And the issue is, Are these night watchmen entitled to the protection of the act?

Of course, if you look at the enterprises of the warehouses in which they may be employed, their station, let

us say, at the same warehouse every night where they work, you might say, "Well, the warehouse does not have an enterprise that fits the statutory requirement. Therefore, they are not covered. But, of course, they are also employed in the protection agency's enterprise, which is to provide night watchmen at various warehouses and other businesses around the city.

Q Your typical protection agency contracts for the services of the people it hires and pays them. The warehouseman is not necessarily responsible for their wages, and the protection agency is generally primarily responsible.

MR. FREY: No. The structure of the act makes it quite clear that coverage does not turn on who is responsible for your wages. The question is, Are you employed in an enterprise which comes within the definition?

How could one say that these elevator operators are not employed in Arnheim's enterprise. Arnheim's enterprise is to operate buildings, and without the elevator operators Arnheim could not conduct its business as managing these buildings. And, therefore, these men are employed in Arnheim's enterprise and it does not matter whose employees they are. It does not matter who pays them.

The red-cap cases which we cited in our brief are an illustration of a situation in which the Court has held that even though the railway company is not paying the red-caps

their salary. They are totally dependent upon tips from the passengers, that it is not the payment of salary, who bears the ultimate salary burden, that is the critical issue. The issue is who has control over the day-to-day conduct of these employees. Are they involved in the enterprise?

Q Would you say a plant manager was himself an employer because he has control over the day-to-day conduct of the employees as well as the owner who hires the plant manager?

MR. FREY: One of the cases cited by the respondents or perhaps by the amicus--I think it is the Royal Crown case--involves a situation where the president of a company was held personally liable under the act, because of the extent of his involvement. But here I do not think that is the point. The plant manager would not be considered to have an enterprise. We are talking about whose enterprise do these people work in. Are they working in an enterprise which is covered under the act?

It would be possible that they could work in an enterprise and the operator of that enterprise would not be liable for their wages, and the example of that would be the beauty salon operating as leasing space in a department store. The employees of that beauty salon, if the department store's enterprise qualified under the act, the revenues of the beauty salon would be included within the department store's

enterprise to determine whether it was subject to the act. And the employees in the beauty salon would be entitled to protection of the act even though the department store exercised no control whatsoever over them. The department store might have no liability to pay them minimum wages. The beauty salon operator who does not have an enterprise with $500,000 would be liable to pay because these persons are employed in an enterprise which meets the act's requirements. And this is a very important point that is overlooked in the brief of the respondents and the amicus.

I was just getting to this point actually, and I think perhaps I have adequately covered it. So, in closing let me say this. It seems clear that the underpinnings of the Third Circuit's decision was a concern for the impact of the minimum wage laws on the business of the building owners.

It is of course an inevitable feature of such laws that they raise the cost of certain goods and services and thereby adversely affect the consumers of those goods and services, many of whom may be small businesses. This has never in the past in any way discouraged Congress from adopting and from expanding the coverage of the Fair Labor Standards Act.

In any event, the concern of the Court of Appeals for these building owners seems to us misplaced in this

instance. It is by retaining a firm, such as Arnheim and Neely, to manage its buildings that the building owners realize important benefits of an economic nature for themselves. These benefits derive from the scale of Arnheim's operation, from the fact that it manages many buildings, that it is able to hire, for instance, experienced top management personnel to manage office buildings which would not be justified if only a single office building were being managed. So that substantial benefits are being conferred upon the building owners when they retain Arnheim. And this notion that if they have to pay them minimum wages, they will all stop retaining real estate management firms, is totally without foundation in the record and we believe contrary to normal experience.

Q Mr. Frey, let us go back to this bank account for a moment. The bank accounts are separate for each building, you indicated. Does the record show who is the owner of that bank account?

MR. FREY: I am not certain who is the owner. I believe that it is in Arnheim's name. I assume that it is a trust at least.

Q What goes into that bank account is the property of the building owner, is it not?

MR. FREY: Yes, that is right.

Q And Arnheim, in whatever form that takes, is

holding it in trust and in agency.

MR. FREY: That is right. But that has nothing to do with the statutory issue with which we are involved here.

Q Perhaps not. It is probably all bits and pieces of these things that answer that question.

MR. FREY: I think that if you look at the structure of the statute, it is quite clear that the question is, Are they employed in an enterprise? And in looking at Arnheim and Neely, are their activities at each of these nine buildings part of one single enterprise?

Q What about the Workmen's Compensation liability, where does that rest?

MR. FREY: I am not certain, Your Honor, where that would rest.

Q The stipulation makes reference to payment of all insurance. I was looking for the same thing the Chief Justice was. I do not see any express reference to Workmen's Compensation. But there is here a reference to payment out of those accounts of all insurance premiums, et cetera, for each building.

MR. FREY: I think that the question of the Workmen's Compensation law would be governed in part by the state law. We are talking here about the Fair Labor Standards Act, and the question is, What does that act mean?

Q To determine what that act means, we have to

analyze a great many elements, do we not, of the relationship. You have analyzed some of them yourself.

MR. FREY: I believe that it is possible to totally ignore the relationship between the building owners and Arnheim. The relationship with which we are concerned is between Arnheim and the business that Arnheim is conducting and, secondly, between Arnheim and these personnel.

Q You are drawing an analogy of someone like Burns Detective Agency that would furnish security service for 15 or 20 buildings or warehouses.

MR. FREY: Yes, that is right.

Q Where Burns would hire them all, they would be on the payroll of Burns, they would be interchangeable. The Workmen's Compensation would be Burns. The public liability, which they undoubtedly would carry, since these men are armed, that sort of thing. Is that not quite a different situation from this one?

MR. FREY: I do not mean to suggest that in the Burns situation--I did not mean necessarily that the protective agency would hire these people. They could be joint employers. And I think it is very important that in this case the agreement between Arnheim and the building owner could be set up in such a way that Arnheim would not be liable under the act. Arnheim could simply get out of the business of running these buildings with these personnel and

leave that to the building owner. It could stick to collection of rents and procurement of tenants in handling the bank account for the building, let us say. If it did that, then these employees would no longer be employed in Arnheim's enterprise, and we would not be seeking to establish Arnheim's liability.

By the same token, the building owners can get out of liability under the act by withdrawing any of their employment control. That is, they could leave it up to Arnheim to pay whatever salary Arnheim wants and just reimburse Arnheim on cost-plus basis for doing that.

In such a case, which would be a relatively minor change in the existing agreement, the building owners would be off the hook as far as liability for payment of minimum wages and for making sure that the necessary records are kept and so on. That would all be Arnheim's. In this case, they have chosen to set up their relationship in a manner that makes them both liable because these persons are employed in both of their enterprises and they are both employers under the definition of the act, which both courts below have held.

I think when we are talking about the policy that informs and underlies the Fair Labor Standards Act, there are numerous references in the legislative history of this policy, and I want to refer to one in the House report in connection with the 1966 amendments to the act.

The committee said: "In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a liberal intepretation consonant with the definitions, with the purposes of the act, and with its character as remedial and humanitarian legislation. However, despite the act's broad coverage terms and the courts' liberal interpretations regarding coverage and restrictive interpretations regarding exemptions, there is great need for expanding the present coverage of the act to large groups of workers whose earnings today are unjustifiably and disproportionately low."

It is that policy and not any concern for small businessmen that is the basic policy that underlies the Fair Labor Standards Act. And given that policy, there is no reason to ignore or distort the clear statutory language for the purpose of preventing these employees from obtaining the benefits of the act.

If there are no further questions, I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Frey.

Mr. Strassburger.

ORAL ARGUMENT OF EUGENE B. STRASSBURGER, JR. ESQ.,

ON BEHALF OF THE RESPONDENT

MR. STRASSBURGER: Mr. Chief Justice, may it please

the Court:

I first would like to answer the Court's question with respect to who owns the bank account involved in this case. On the bottom of page 23 of the stipulation it says specifically that funds deposited in these accounts are the property of the owner and not of Arnheim and Neely. And Arnheim and Neely is not liable, in the event of bankruptcy or failure of the depositor.

There is no question, Your Honors, that these are agency accounts and that Arnheim and Neely would not be liable for any of the wages personally if these buildings could not meet the payroll itself.

The history of this case started in 1965, at which time one of the Labor Department representatives came into Arnheim and Neely's quarters, examined the operation, decided that Arnheim and Neely was an enterprise, and we have been on the road ever since.

When we reached the litigation stage in 1967, we knew that we were a guinea pig and that we were the first to be hit with a suit by an agent which would have no ownership in any of the buildings which it managed.

Because of the importance to the industry, the Institute of Real Estate Management asked leave to intervene as a party defendant and was given that permission.

We lost the first round in the federal court in

Pennsylvania. Shortly after our case came down, a similar case was started by the Federal Government in the District Court of Virginia. And despite the holding against us, the District Court of Virginia decided in favor of the real estate manager. In that case, they made a threshold question as to whether or not the measure should be gross receipts or gross commissions, and they held it should be gross commissions, because the real estate manager did not own any of the gross receipts himself.

So, we went into the circuit court in the Third Circuit feeling pretty good that at least we had one case in our favor, namely, the Virginia case.

Q That was the district court.

MR. STRASSBURGER: That was the district court, right.

Prior to the argument in the Third Circuit, the Fourth Circuit got ahead of us and reversed the lower court in Virginia. So then the Government came into the argument and said, "We have got a pretty good case also."

Despite the Fourth Circuit case and the lower court case in its own district, the Third Circuit decided that Arnheim and Neely was not an enterprise. A very well reasoned opinion, concise, logical--I may be a little prejudiced, but I still say it is that.

I do not have to go into detail as to the nature of

Arnheim and Neely's activities. It has already been discussed. There are not any unusual types of activities. The usual type of management activities.

But there is one point that I have to make clear and emphasize. Arnheim and Neely does not own any of the buildings in which it manages. There is just no ownership present, that is all. Every case of enterprise must have some type of ownership going with it, and they do not have any ownership here. Also in discussing--

Q Is that really true? You could have this service organization and clearly be an enterprise, could you not?

MR. STRASSBURGER: I am coming to that, Your Honor, as to whether or not--

Q It is not literally true that in order to be an enterprise you have to own something.

MR. STRASSBURGER: I think almost it is, Your Honor. I really think that in order to show an enterprise that you have to show some ownership.

Q Security guards.

MR. STRASSBURGER: Sir?

Q How about the security guards?

MR. STARSSBURGER: The security guards may or may not be an enterprise, depending upon whom they work for.

Q Do they have to own something?

MR. STRASSBURGER: Not the security guards, Your Honor.

Q What is the difference? You said they had to own something to be an enterprise.

MR. STRASSBURGER: I may have been misunderstood, but I say that the enterprise doctrine itself must show some--and I think I will be able to point it out to Your Honors a little more clearly--that the enterprise doctrine must contain some type of ownership in order to--

Q They own paper and pencils and typewriters and what not. But you mean they have to own real estate?

MR. STRASSBURGER: I am talking about title to the receipts which they received, for example, the gross rentals that they receive. Well, let me continue and I think I will be able to explain it.

This Court decided back in 1945 the case of Ten East 40th Street Building v. Callus. That case involved a local building operation and because of that decision, the Court held that the employees were not within the interstate commerce rule and it was simply a local operation. We have here nine separate buildings, all of which can be considered to be Callus cases.

The Government says, "Well, since that case we have gone into the enterprise doctrine, and therefore that case does not hold water."

Of course, the case is still being cited every day for the proposition for which it stands, and the crux of the real issue here is, Does the enterprise doctrine nullify the holding of the Callus case?

So, we are back again to a definition situation as to what is an enterprise. And Mr. Justice Douglas and Mr. Justice Stewart deplored the exercise in semantics in the Maryland v. Wirtz case, but we are going to have to do a little exercise in semantics nevertheless.

The definition states, "Related activities performed either through unified operation or common control by any person or persons for a common business purpose." The word "common" appears in this definition twice in three lines. So, I must assume that the word is rather important. But let us take each of the definition words as it goes down.

First it says "related." What are related activities? The Government would have us believe that they are the internal activities of Arnheim and Neely which are related. Of course, any building has internal activities which are related to each other. This is not what Congress meant, Your Honors. The related activities are those which concern more than one business, not just Arnheim and Neely business but more than one business, with common ownership. Lacking the common ownership, there can be no related activities.

Unified operation or common control. That could only refer to those activities where there is more than one business. Naturally a single business has unified operation and common control, and not as the Government contends to a single operation.

As a matter of fact, common control may not even be enough. A recent case in the Tenth Circuit decided since our case, called University Club case, involved a situation where one corporation controlled both an apartment building and a hotel. And the court said, "The business purpose of a hotel is not the same as the business purpose of an apartment building; therefore, no enterprise."

So, I submit to Your Honors, if a hotel and an apartment building which are commonly owned and controlled are not an enterprise, how can there be an enterprise where you have a number of unrelated buildings merely because they have a common agent?

The use of the word "common," as I said before, is a very important word. When you talk about common, you talk about more than one. Even the definition of "common" in the dictionary says, "Belonging to or equally shared by two or more individuals."

I know that Learned Hand once said, "We are not going to make a fortress out of a dictionary," and I am not saying that we should in this case. But, nevertheless, this

Court, talking through Mr. Justice Vinson, once said, "We have consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts."

"Refused to pervert"--those are strong words in those days but they have a different connotation today and I am not going to accuse the Government of any type of perversion, but they certainly are distorting the words of this definition of enterprise.

Common: If I use my driveway with my wife and family, have I created a common driveway? Of course not. But if I use my driveway with somebody on the other side who has got a property on the other side, then I have created something in common. The Government, however, says because Arnheim and Neely is operating more than one building, it is in common. It is operating with itself. And I say that this does not mean anything as far as definition of words is concerned.

Now that I have taken the definition apart. Let us put it back together again. What is an enterprise? I think an enterprise is demonstrated mainly by the so-called bank and insurance cases. A bank owns an office building. It uses part of the office building itself and it rents out to the general public the balance of the building.

Prior to the institution of the enterprise doctrine,

the bank guard was subject to the act and the office building guard who worked along side of him was not subject to the act. And to correct that, Congress said that if you are an enterprise, then this is where both people should be under the same act. And I quite agree. But that is not the situation that we have.

In that case again, the ownership was the bank who owned the office building. And that, I say to Your Honors, is what a true enterprise really is.

There was some discussion when the Honorable Solicitor was talking about some of the economic realities of the situation. And this Court has said that when we are dealing with social legislation such as this, we must look at the economic realities. What are the economic realities with respect to the employees of these separate buildings?

In the first place, the employees go with the building; they do not go with Arnheim and Neely. Since the case was instituted, Arnheim and Neely has lost the management of some of these buildings that are mentioned here. They have gained other ones, and there is a continuous shifting over because some buildings are sold, some buildings are tired of the manager, they want a new manager; for one reason or another the buildings are no longer managed by Arnheim and Neely. The employees stay with the building. They do not go with Arnheim and Neely.

The rates of pay, the fringe benefits, other wage and salary matters, all are subject to the approval of the owner, without exception.

Q I did not find that Workmen's Compensation, for example, is specifically set forth in the stipulation.

MR. STRASSBURGER: I do not think it is in the stipulation, Your Honor. It probably just was not thought about with respect to talking about the minimum wage. We were not talking about Workmen's Compensation. But I think there is enough in the stipulation itself to show, especially at the bottom of page 23, that the funds deposited in these accounts are the property of the owner and that the owner himself would have to stand all those--as a matter of actual fact and in actual practice, I know of my own knowledge that each account is kept separate. And if the question of Workmen's Compensation came up, it would be paid out of that particular account and no other.

Q What about the stipulation at page 24 that expenses, including a number of things, one of which is insurance?

MR. STRASSBURGER: They are paid out of the account; that is right, Your Honor.

Q I mean, could insurance--

MR. STRASSBURGER: That could be Workmen's Compensation, any type of insurance; that is right. All

paid by the owner.

Q I suppose you would have public liability also?

MR. STRASSBURGER: Absolutely.

Q Do you think it is clear from this record as a whole that if an employee is injured on the job, he is injured on the account of the building owner and not of Arnheim?

MR. STRASSBURGER: I think it is perfectly clear, Your Honor, quite clear.

Q If an elevator operator gets into a quarrel with one passenger and there is a lawsuit, they sue Arnheim in your view or the owner?

MR. STRASSBURGER: They sue the owner. There is no question.

Q He is the employee of the owner?

MR. STRASSBURGER: That is correct, Your Honor. Any economic loss suffered on the part of any of the buildings is suffered by the owner and not by Arnheim and Neely. Arnheim and Neely is compensated through its commissions.

Q You would not suggest that Arnheim would not be a proper defendant in a negligence suit, would you?

MR. STRASSBURGER: No, I would not.

Q If all this is still true, why do you have them? Because I gather from what you say they do not do

anything.

MR. STRASSBURGER: It is not a question they do not do anything, Your Honor.

Q Am I correct; as of this day you said they do not do anything?

MR. STRASSBURGER: Who does not do anything? Arnheim and Neely does not do anything?

Q That is right.

MR. STRASSBURGER: Oh, no. If I said that, I certainly did not mean to say it.

Q No, you did not say it, but you say that the owners of the building do everything.

MR. STRASSBURGER: The owners of the building do everything with respect to paying the freight, let us put it that way. The owners of the building pay the wages, they pay the salaries, the overtime, everything that is paid, the expenses, the real estate taxes, everything else.

Q On your idea of what is an enterprise, would a conglomerate be an enterprise?

MR. STRASSUBRGER: Not if they do not have a common business purpose. If they do, it could be an enterprise, because a conglomerate would be a common ownership type of situation.

Q That is right. Would that be an enterprise?

MR. STRASSBURGER: Yes, sir.

Q A conglomerate that dealt in everything from toothpaste to locomotives?

MR. STRASSBURGER: Well, I say, unless there is a common business--

Q That would be an enterprise?

MR. STRASSBURGER: That would be an enterprise.

Q You admit that?

MR. STRASSBURGER: If it has a common business purpose, that is correct, Your Honor.

Q That does not give you any trouble with this case?

MR. STRASSBURGER: That does not give me any trouble with this case.

Q And it would not make any difference to you if Arnheim's commissions exceeded the statutory amount?

MR. STRASSBURGER: If Arnheim's commissions exceeded the statutory amount, you mean for coverage? Arnheim and Neely's real employees might be covered, but Arnheim and Neely has no--

Q So, your answer is no, it would not make any difference because these employees are not Arnheim's employees?

MR. STRASSBURGER: That is correct. The Government equates who is an employer with coverage, as opposed to enforcement. It is possible that Arnheim and Neely as an

employer because it has the right to hire and fire is responsible for the enforcement of the act, the same as it would be possible for Arnheim and Neely to be subject to the zoning laws governing that particular building and also the safety regulations of the building.

But to say that Arnheim and Neely is subject to the enforcement provisions of the act is not the same as saying that they are covered under the act. I do not think that they are the same thing, and that is what the Third Circuit was saying when it said we are going to look at each individual building, and that the vicarious responsibility, as cited in the Third Circuit, is what they are referring to there.

Q Are you in a position to argue here that these people were not employees of Arnheim? The Court of Appeals held that they were, did it not?

MR. STRASSBURGER: You mean, am I in a position--

Q And you did not petition for certiorari. The Court of Appeals simply held that they were employees and simply its order remanded the case to the district court for the sole purpose of finding out whether each building's gross rentals during the relevant years exceeded the statutory exemption.

MR. STRASSBURGER: We are not asking the Court to expand on that at all and, therefore, if we are not asking the

Court to expand on the order of the Third Circuit, I think we have a right to argue anything which might be--

Q No, that would expand on the order of the Third Circuit because if they are not employees, there is no point in remanding the case to find out anything.

MR. STRASSBURGER: They can be employees. If we are not an employer, you are saying that there is no sense in going on any further with the case.

Q Correct. And you are not in a position, therefore, to make that argument because that would lead to us revising the judgment of the Court of Appeals. You are asking us, I thought, to affirm the judgment of the Court of Appeals.

MR. STRASSBURGER: Your Honor, that is correct. And because we were satisfied--

Q And since you did not petition for certiorari you cannot--

MR. STRASSBURGER: We were satisfied with what the Third Circuit said. We did not feel it was encumbent upon us to file a cross petition in order to protect something which may or may not be important after it gets back to the local court. After it gets back to the local court, the local court can then again pick up the question of whether or not we are an employer for purposes of coverage.

Q Can it? Has that not now been decided? That

is the law of the case, is it not? And you did not cross petition for certiorari.

MR. STRASSBURGER: That is true, Your Honor.

Q Had you prevailed on the issue, would you not be entitled to an outright reversal?

MR. STRASSBURGER: That is correct, Your Honor. But I submit that it is possible that if you take the question of who is an employer with respect to coverage as opposed to enforcement, that there might be a difference, and the Third Circuit does not make this distinction. They just said it was the employer.

Q That is because the contrary finding would have been dispositive of the case, a finding of no employer. Can you not support the argument, the position of the Court of Appeals, on any group up here? You started to say something about that.

MR. STRASSBURGER: I submit, Your Honor, that the most important part of the case is the enterprise doctrine, and the Third Circuit said it cannot be an enterprise; it would have to look at each individual building separately. An anomaly would be created if Arnheim and Neely were to be considered an enterprise.

Q But the Chief Justice is suggesting that you as a respondent are entitled to support the judgment of the Court of Appeals on any ground that will support the judgment,

even if the point you are urging here is decided to the contrary by the Court of Appeals.

MR. STRASSBURGER: That is essentially correct. I can understand the Chief Justice's remark, but I thought he wanted me to give other easons for sustaining the judgment.

Q But the lack of an employee relationship would not sustain the judgment of the Court of Appeals.

MR. STRASSBURGER: I understand that, Your Honor, yes.

Q It would go further.

MR. STRASSBURGER: It would go further, that is right. But I repeat we still do not know whether we are talking about employer for coverage or employer for purposes of enforcement.

The Third Circuit has pointed out the anomaly that iss created if the Arnheim and Neely business is considered an enterprise. It would be anomalous, said the Court, to treat the owners of commercial buildings as proprietors of individual businesses when they managed the buildings themselves and as participating in a common business purpose with other building owners merely because they hire a rental agent who manages other buildings.

Now, Your Honors, I can point this up with an illustration from Arnheim and Neely's own situation. At the time this suit was instituted, Arnheim and Neely managed a

building called University Square No. 1, a ten-story apartment building. Next to it is University Square No. 2, not managed by Arnheim and Neely, a similar ten-story building, separated only by a putty wall.

If the Government's theory is correct, the janitor in University Square No. 1 is covered by the act. The janitor in University Square No. 2 is not covered by the act. This is a situation where the Government is creating disparity between employees' coverage, whereas the Congress was trying to avoid this when they passed the enterprise doctrine where two employees side by side were not covered by the same act. Now the Government comes in and says, "We are going to cover some of these and not cover others," and the very question of the coverage of each of these employees depends on who the management agent might be.

So, I say, Your Honors, that if Arnheim and Neely is an agent, which it is, and if Arnheim and Neely manages buildings, which it does, and if Arnheim and Neely manages buildings which are all local in character, which they are, how can the agent rise higher than its principal?

How can the Government do indirectly what it cannot do directly because of the Callus case?

Congress never intended such a result, Your Honors. The law does not provide for it. And the logic and reasoning that is shown in the Third Circuit opinion should be sustained.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Strassburger.

Mr. Seamans.

ORAL ARGUMENT OF FRANK L. SEAMANS, ESQ.,

ON BEHALF OF THE INTERVENOR

MR. SEAMANS: Mr. Chief Justice, and if the Court please:

I think it is apparent why the Institute of Real Estate Management is concerned about this case. With your permission, I will just make one brief argument concerning the construction of the statute, and that is we do not believe that Congress intended the result that the Government position would achieve in this case.

We have been arguing about what is an enterprise and what is an employer and what is an employee. What we believe, when the statute does not define itself and you apply it to a set of facts, if you are convinced that Congress did not intend that result, that that should bear on your interpretation. I base that on two premises.

It is my understanding that it is acknowledged that Congress did not go as far as they might go under the Interstate Commerce Act with the Fair Labor Standards Act. Something is held back. And Congress itself adopted a monetary limit, a financial limit, in its application. So, I argue

that there is a congressional intent that there are still to be some local buildings that do not have to meet the minimum wage, the overtime requirements. It is purely economic. I argue that Congress intended that somebody is still left out. Whether they should be or not, I suggest that that is what Congress intended.

The consequence here is, in the opinion of the clients that I represent--and there are some 2500--pardon me, these realtors in the Institute represent some 2500 small office buildings and some 5000 small apartment buildings across the country, and that is why the district court permitted the intervention.

It is our concern that if this rule applies and a building owner considers the employment of a rental agent, he would be well advised to ask that rental agent two questions. First, are you, Mr. Rental Agent, in interstate commerce? Secondly, do you have any other client who is? Because if the answer is yes to either of those questions, then automatically I go in and automatically my elevator operator, my maintenance people, are paid time and a half. I cannot afford it. It will affect my maintenance--pardon me, my financial operation.

This, as we see it, is coverage by association. With whom do you associate yourself? Not: Who are you and what do you do?

So, that is the position, if Your Honors please, of the Institute, that we can get lost in a morass of semantics and using manufactured words and statutory words like "enterprise," "employer" and "employee," and we find ourselves chasing our tails.

But if we are convinced that Congress never intended the result that this would achieve, we submit that that is the place to find the answer to the pure construction of this statute. We are quite convinced--and I think if Your Honors will reflect on it--the idea that you get coverage by association and not by your own status or activity would lead to the conclusion that however you do it, whether by an interpretation of enterprise, whether by an interpretation of employer, the achievement here of a result not intended by Congress should not be sustained.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Seamans.

Mr. Frey, you have about four minutes left.

REBUTTAL ARGUMENT OF ANDREW L. FREY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FREY: First, with respect to Mr. Seamans' comments, I think he misses a fundamental point. It is not the building owners that are subject to the act or covered by the act; it is the employees that are covered by the act. The issue is, Are these employees in an enterprise? Not: Are

these building owners covered by the act?

Q I assumed his argument was directed to the proposition of the small apartment owner who economically could not meet these standards and why, by the very exclusion of the small category by Congress, was not intended to be covered.

MR. FREY: Congress intended that employees who were employed in an enterprise, who were not employed in an enterprise of a certain size, would not be covered--

Q They might be alongside the large building where the person doing the same work would be covered; is that not true?

MR. FREY: It is entirely possible that you could have two buildings, one small and independently operated, where the only enterprise is under $500,000, and one alongside that is larger where the enterprise--where either the office building itself has enough revenues to come within the act.

Q So that all discrimination, all disparity, could not be eliminated under the act. Is that not true?

MR. FREY: I think no matter how you structured it, unless you just made it applicable across the board to all employees, there would be some discrimination in that sense.

Q Only Congress.

MR. FREY: Unless Congress. Yes, Congress.

Q Is that not a practical matter of the enforcement? Is that at least one of the considerations?

MR. FREY: I think that Congress felt that where you were dealing, let us say, with the mom and pop grocery store, that the impact on commerce was relatively limited from such an enterprise and that Congress would give them a break, these very small businesses.

Arnheim and Neely is not such a business. This is not a mom and pop store. Of course, they keep trying to talk about the building owners as though Arnheim and Neely had no business. For instance, they say an enterprise must have ownership. Well, there is ownership here. Arnheim and Neely own Arnheim and Neely, and it conducts the enterprise of Arnheim and Neely. That is the only sense in which ownership is required.

Q And it was held that these employees are their employees.

MR. FREY: And it was held that these are their employees; that is correct.

Q What about Mr. Seamans argument, as I understood it, that if a real estate agent represented one office building that would come within the interstate commerce clause, and they had the representation of a hundred other very small buildings, some of which were office buildings, others were small apartments, none of which independently

perhaps would meet the standards of interstate commerce; would you regard that that agent had a single enterprise embracing the 101 people whom he represented?

MR. FREY: We would not make any distinction on the basis of whether any particular ones of the buildings that were managed happened to meet the dollar limit. What we would say is, Is he conducting an enterprise?

For instance, the doctor-patient example used in the respondent's brief I think highlights this point clearly. They say, well, the patients each come to the doctor and the patients are unrelated to one another. The patients are not engaging in related activities. They have no common health purpose when they come to the doctor. Therefore, how could you say that there would be an enterprise?

The doctor is engaged in a common business purpose. He has an enterprise.

Q He is an agent, in the example I put; he is engaged in a common enterprise.

MR. FREY: I would look at the activities that he undertakes and I would look to see whether they are related activities, whether they are conducted through unified operation and common control and whether they are conducted for a common business purpose. If I found all those things, then I would say yes, he is an enterprise under the act, regardless of whether the individual pieces of his business,

the individual customers of the grocery store or the department store have any connection.

Q That is what worries me.

Q And the employees of these hundred very small operations, say the part-time janitor, which might be the only employee, would be brought under the act in the example I have put.

MR. FREY: Because under the act they are not merely the employee of these small businesses.

Q I understand, but the answer to my question is yes?

MR. FREY: Yes.

Q And they are paid not by the agent but by the owner of this two-apartment building or this four-office office building?

MR. FREY: Even if we were to agree arguendo that Arnheim was not the employer, the act does not speak about being employed by an enterprise but says being employed in an enterprise. Arnheim has an enterprise. I do not see how anybody can deny Arnheim has a business, which is managing office and apartment buildings for others. I do not see how anybody can deny that these persons are employed in Arnheim's business.

Q Do you have to go this far as saying that if Arnheim had the management of the management of the new World

Trade Market two buildings in New York and one mom and pop grocery store--that is all--that the mom and pop grocery store janitor would be covered? Do you have to go that far?

MR. FREY: No, it would depend--

Q In case you do--I mean, do you not?

MR. FREY: No, you might find that these were not related activities. The question would be: Is their management of the small grocery store a related activity to their management of the World Trade Center. And the point in the legislative history Congress said--suppose you have a one company which is engaged in the retail apparel business and also the lumbering business. Congress said, "This is what we mean by activities that are not related. You would not consider the revenues of the lumbering business in determining the enterprise of the apparel business nor would the lumbering business employees be covered.

This concept that you have to have more than one owner, that the word "common" requires more than one, leads to the result that General Motors is not covered under the act because it is--

Q What is the reason here--if you are going to separate out Arnheim, which you do, as the enterprise, as the separate company, and make it liable, which you are--what is the reason for saying that the measure of coverage is the total receipts of all the buildings, the total rentals of all

the buildings, rather than Arnheim's commissions?

MR. FREY: That we would submit, to begin with, is clearly an issue that is not before this Court, because it would have required a completely different kind of hearing on remand from the kind that the Court of Appeals ordered. But to the extent that the Court wants to reach it, the situation is no different.

Q Can you not reach it: Is the issue here or not?

MR. FREY: We do not believe that the issue is here.

Q Again, no cross-petition.

MR. FREY: There is no cross-petition. In the Mills v. Electric Auto Light case--

Q Was it urged in the Court of Appeals by your opponents that in any event the measure should be commissions rather than total rentals?

MR. FREY: Absolutely. It was urged--

Q And it was rejected by the Court of Appeals.

MR. FREY: It was rejected by the Court of Appeals and it was rejected by the Fourth Circuit and--

Q Why cannot, without a cross-petition, your opponents urge that point here?

MR. FREY: Because it does not support the judgment below, which is a remand for a particular type of hearing.

Q The judgment is on page 24 of your certiorari

petition, and it is a remand to introduce evidence regarding each building's gross rentals. That is the reason it does not.

Q The Court of Appeals decided against you?

MR. FREY: No, the Court of Appeals decided in our favor on this issue.

Q On this issue, yes, but you are the petitioner here.

MR. FREY: Well, the overall result was they decided in our favor on two of the three issues they considered and against us on the third. The actual effect of that, putting it into practice, is that many of the employees for whom we seek to obtain the benefits of the act would not get that protection.

Q None of them would in the Arnheim and Neely, I take it?

MR. FREY: None of them--that would depend upon the revenues of each of the--under the Third Circuit theory, you would go back to the district court; you would look for years subsequent to 1967 at the revenues of each individual building.

Q Do you not give the rentals in your--

MR. FREY: Only for 1964.

Q Mr. Frey, how do you answer Mr. Seamans' comment about coverage by association, only by saying this is the way the act provides?

MR. FREY: There is an association between these employees and Arnheim and Neely's enterprise. It is certainly what the act provides. That is, if the building owners chose to run their own buildings and not have the benefit of retaining an expert large real estate management company to do it, then they would possibly not have to pay the minimum wage, although the stipulation at page 21 indicates that one of these buildings, the Clark Building, had $800,000 in rentals in 1964.

Q But it is an unusual situation, is it not, where the basic employer is brought under the act only because of his hiring a specified rental agent.

MR. FREY: That is not the only context in which that comes up. That is the lease department example. If I operate a beauty parlor, and I may have a very small business, but if I want to go and put that beauty parlor in Woodward & Lothrop as part of the Woodward & Lothrop Department store and lease space from them to do that, I then have to pay my people the minimum wage, because they are then employed in Woodward & Lothrop's enterprise. That just is the way Congress structured this act, and I think there is no way to escape the clear provisions of the act.

Q That is a much closer and much more intimate associational basis than buildings spotted all around a different city where they have no contact with each other at

all as distinguished from the beauty parlor operator who is mingling constantly with the other employees regarded by the public as the same kind of person.

MR. FREY: Our case in no way depends on establishing any relationship between the building owners. When they go and hire Arnheim and Neely and Arnheim and Neely go about and hires John Doe to operate the elevator at the building, subject to whatever approval or role the building owner may play in setting his salary and so on, it is Arnheim who he comes to, it is Arnheim who he submits his reference to and checks them out; it is Arnheim with whom he deals on a day-to-day basis. It is Arnheim who supervises his work.

He is working in Arnheim's enterprise, and that is what Congress said was determinative of whether he is entitled to be paid the minimum wage.

Q When you say he is working in Arnheim's enterprise, that is what this case is all about; that is what we have to decide, is it not?

MR. FREY: Perhaps so, but I think I am not just bootstrapping myself, because I think that Arnheim's enterprise is the management of these buildings, and they cannot manage these buildings without these employees. And it is for that reason that I say that these employees are necessarily involved in Arnheim's enterprise.

Q You have one fact that the beauty parlor situation does not have, and that is that Arnheim hires and fires these employees themselves, whereas the beauty parlor operator, as I understood it, took a whole staff over that she had originally had.

MR. FREY: No, what I am saying in the beauty parlor example, Mr. Justice Blackmun, is that the beauty parlor operator may not have an enterprise, and Woodward & Lothrop, on the other hand, may not be the employer of these people who work in the beauty parlor at all. And Woodward & Lothrop may have no liability to pay the minimum wage. But they are protected by the minimum wage laws because they are in Woodward & Lothrop's enterprise, and the beauty parlor operator, small business though he be, has to pay them the minimum wage.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 12:00 o'clock noon the case was submitted.]

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