In the

Supreme Court of the United States

E. E. FALK, INDIVIDUALLY AND AS PARTNER IN DRUCKER & FALK, ET AL.,

Petitioners,

v.

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

No. 72-844

Washington, D.C.
October 11, 1973

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v.	No. 72-844
PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	

Washington, D.C.

Thursday, October 11, 1973

The above-entitled matter came on for argument at 1:23 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, 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:

HERBERT V. KELLY, ESQ., 2600 Washington Avenue, Newport News, Virginia 23607 For the Petitioner

ANDREW L. FREY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530 For the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in docket No. 72-844, E. E. Falk et al versus Peter J. Brennan, Secretary of Labor.

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

ORAL ARGUMENT OF

HERBERT V. KELLY

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

Briefly as to the factual matters, Drucker and Falk is a real estate, insurance and property management firm that operates in Eastern Virginia. It manages one and two-story apartment projects, the smallest of which is probably in the 30 to 40 unit area and they run up to units that are covered under the Act and not a part of this suit.

Each project is separately owned. Each owner has an independent contract with Drucker and Falk as to the management of the premises and as to its services and the contract generally calls for Drucker and Falk to manage through resident -- to manage a property and manage the maintenance by resident maintenamce superintendents.

There are maintenance employees in each project that are on the payrolls of the owner of the project who stay at that project in the main, with some very unusual

exceptions and, in effect, go with the property.

It is the position of Drucker and Falk in this case that the Secretary of Labor has taken an illusory and strained definition of the Fair Labor Standards Act to reach down and include the employees of the apartment project as covered under the Act where they could not reach down to them except through the rental agent and that they are there by bootstrapping themselves into coverage where it does not exist.

Factually, as presented here, unless you include the gross rental income as income of Drucker and Falk, there would be no coverage under the Act. In addition, unless you include the employees who work at the projects and there is no coverage of Drucker and Falk under the Act. It is our position that you have to strain and come up with illusory results in order to include the rental income and include the employees.

It is our position with the first matter of income that income to Drucker and Falk is the gross commission. There are four or six commission on the rentals and that that is the measure of their sales.

It is our position, therefore, that what they are selling is services and that what they get paid for the services is their commission and it is our position that you look at this from three different directions.

One, you can look at the provisions of the statute with regard to what is sales. You can look at the intent of Congress with regard to what is sales or you can look at the legal conclusions that you come to after applying common law principles to the facts involved.

First, with regard to the statute itself, the statute has a definition of sale, of which the Court is well aware, which says that a sale is a sale. It is any sale. It says that"A sale is any sale, exchange, consignment for sale, shipment for sale or other disposition."

The statute goes on further to say that an enterprise is covered and that enterprise is "Any enterprise whose -- whose annual sales" and I emphasise the "whose" -- "volume of sales meets the test," which, in this case, is $500,000.

Petitioner suggests to the Court that, certainly, the definition that I have read to you of sale does not cover what sale in this instance means.

Now, the Fourth Circuit found some comfort in the last three words which were, "Or other disposition." It is our position that "other disposition" can only apply to a disposition of what you are selling and what Drucker and Falk is selling is their services and the measure of that is the income to them, their commissions for the services which they are selling.

The gross volume of sales made or business done is what is sold by the agent, his services. He cannot sell for himself what is not his and what he sells for the owners is the owners' sale. And what the Secretary of Labor has tried to do is call the owners' sales his sales. So under that definition, there is no definition which would include the factual situation presented to the Court in this case.

If we turn to the intent of Congress, I don't think it is even necessary to argue to the Court that it was-- that the Congressional Reports and the Statements of the Secretary of Labor in amending the statute were such that the intent of Congress was to set the monetary limits with regard to what they felt was impact on commerce.

The $500,000 in this instance, they felt, was sufficient to be an impact on commerce and therefore, you had bigness and it was the intent of Congress to include the big and leave out the small. It, by way of example, I could say, it seems apparent that it was their intent to include the owner and his sales from the owner of the World Trade Center in Chicago, but not to include the owner of the Strip Center in Stoney Creek, Virginia and it seems to me you have to strain and reach an illusory conclusion if you conclude that by happenstance the Strip operator in Stoney Creek, Virginia is employing a branch office of the real estate agent in Chicago who runs the World Trade Center and thereby he is

in commerce. That is a strained conclusion which is contrary to the obvious intent of Congress.

Thirdly, if we turn strictly to common law principles, it seems to the Petitioner that the rentals do not fit any definition that would say that that was the gross sales of the agent. The rentals do not belong to Drucker and Falk, they belong to that apartment project owner.

Drucker and Falk does not control the property nor the rentals except as agents. The rent, which is collected, is not theirs. It is put in a trust account, in and out, and they stand in even more of a fiduciary position rather than a debtor and creditor position because they hold those sums in trust for the owner whose income is rentals and not that of Drucker and FAlk and the sums are distributed, we would suggest, under the direction and control of the owner and not of Drucker and Falk.

Q On this issue, the courts of appeals have given that theory hard going, haven't they?

MR. KELLY: Yes, sir, but I don't think there was any basis for giving it hard going. Actually, the court of appeals decided, in the main, based on the Wirtz versus First National Bank in which they say that in that case it was concluded that rental income is sales. I have no problem with that at all. I agree with that. It is a question of whose sales.

Q I don't mean just the Fourth Circuit. I mean all the courts of appeals that have decided it have gone the other way. Am I correct on that?

MR. KELLY: Well, it has only been decided by two on the same principle, yes, sir. The case is that a number of cases, which I would suggest do not apply in this case, have ruled -- and if you look at either one of the cases, you will see that they summarily dispose of it by saying it has already been decided in the such and such case that rental income is sales and I have no argument with that at all. There is no question about that.

The question is, whose sales?

And we are saying that it is the sales of the owner, not the sales of the Petitioners in this case.

Q Well, does the rental agent's activities constitute an enterprise, within the meaning of the Act?

MR. KELLY: I think that you have decided that it did in Arnheim and Neely and I think that --

Q Yes, yes, so the real question is, what the income of the enterprise is, isn't it?

MR. KELLY: Yes, sir and the question is whether the rental income is sales. It is not a question of income. You are covered if your total sales is in excess of $500,000 and the statute says, whose sales and you have got to conclude, for their to be liability, that this is a sale on the part of

Drucker and Falk as ad versus a sale on the part of the owners and where the court of appeals --

Q Well, he made a sale. He earned a commission for making a sale.

MR. KELLY: Yes, sir, and his sale -- what he sells, the owner is selling the premises. He signs the lease. What he gives to the tenant is --

Q The rental agent made a sale and he earned a commission.

MR. KELLY: Yes, sir, and what he sold were his services.

Q He sold the owner's property.

MR. KELLY: Sir?

Q He sold the owner's property. In a sense.

MR. KELLY: Well, he is advisor and assistant to the owner in selling his property, yes, sir.

Q Or did he sell his own services?

MR. KELLY: He sold his services as advisor and assistant, is what he is selling, but you can certainly carry that as far as Mr. Justice White has gone and say, in effect, by advising him, he is helping him to sell. But he is selling his product, which is his services and his sale is service. His advisory help may help the owner to get his sales in, but the courts of appeals went off on these cases saying we have already decided that this is sales and did not

consider the question of whose sales and the statute says, "An enterprise whose sales." And you have got to define those sales and we suggest under common law principles that these sales are selling what you have to offer which, in the case of Drucker and Falk is its services as a managing agency.

Now, the other position that we have taken in the case is that it was improper to consider the employees who were working at the projects as maintenance people maintaining the project, employees of Drucker and Falk.

It is our position that they are employees of the owner. They work for the owner. He is their -- he pays their wages; he keeps their records; he turns in the reports that need be taken and the employee is the employee of owner of project and not the employee of Drucker and Falk and we say this knowing that there is a definition in the statute which says that an employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee. And we do not deny that Drucker and Falk fit that definition. They are an employer under that definition. But you must go further than that under the Act because that is just a definition. What the Act says is, under 6(a) and 6(b), "Every employer shall pay to each of his employees." Under 7(a) "Shall employ any of his employees." And we suggest to you -- we admit that he fits the definition of employer, but we say to you that he is not -- the employee is not his

employee when you are talking about Drucker and Falk. He is his employee with reference to the project where he works and there is nothing so unusual about this argument. Otherwise, we come to a strange conclusion in the law that there are a great multitude of people who would be liable under this Act for compliance with the Act because that definition, anyone who acts directly or indirectly in the interest of the employer, you would include every supervisor that you include under National Labor Relations Act case. A supervisor, under the Act, is one who has the right to effectively hire, fire or vote or otherwise and all those sort of people are acting, fit the definition, "Includes any person who acts directly or indirectly in the interests of an employer in relation to an employee."

Q If each of those were required to pay the employee the sum specified in the statute, the employee would have a pretty high pay, wouldn't he?

MR. KELLY: Yes, sir, he certainly would and the point I am making is that if you say, just because he fits the definition of an employer, that it is his employee, then you take, for instance, in the gambit with General Motors you've got the president of General is his employer, the head of the stenographic pool, who runs the pool and may have the right to hire and fire --

Q That's the employer.

MR. KELLY: -- the ladies in the stenographic

pool would fit the definition of employer but I don't think that Congress intended that she would be considered as an employer under the definition "his employee" under the Act.

Q So your argument is that in General Motors, a man with every employee would have a thousand employer?

MR. KELLY: Yes, sir, exactly.

Q Why, you are not telling me that anybody goes that far, are you?

MR. KELLY: No, sir, I'm not telling you that anybody goes that far.

Q Are you saying anybody will go that far?

MR. KELLY: Yes, sir, I am saying to you that the court of appeals in considering this matter in Arnheim said that the definition in the statute says an employer is so and so and therefore there is coverage and that the Third Circuit should --

Q But do you think that that court or any other court would go that far as to say that one employee has a thousand employers?

MR. KELLY: No, sir, I am saying to you that they would go that far and stop and find coverage here when they should have kept on going to determine whether it was his employee or not.

I am saying to you, if you please, that the foreman and his employee, in the event of bankruptcy will be looking,

both, to that company that went bankrupt for their wages. They are not employers.

Q A lot of companies I know go bankrupt, but the foremen retire.

MR. KELLY: Yes, sir.

The Fourth Circuit, in deciding a case, Mr. Justice Marshall, took care of this, decided it on the basis that there were some cases which had found liability on the part of the agent and cited one or two and these are the cases which are cited in the Government's brief, where they say this has already been decided. I suggest that in each of those cases, the question of whether the agent is an employer or whether they are his employees has not been decided.

In all of those cases, the parties defendant included the owner of the premises and, secondarily, included the rental agent and in each case, the court disposes of the rental agency after finding liability on the part of the owner by saying, if the owner is liable, the derivity of agency liability applies and the agent is liable just the same as the owner. But in our particular case, there has been no proceedings against the owner and, therefore, we haven't found any liability. As a matter of fact, I assume it is pretty well conceded by the Government that there is no liability on the owner of these projects.

Q That is what proceedings against the owner would entail.

MR. KELLY: Yes, sir, because it didn't meet it so what they have done is used an illusory coverage to reach down in and bootstrap up these people who wouldn't be covered by saying that the people work for Drucker and Falk and by saying that the income of Drucker and Falk or sales of Drucker and Falk is the rental.

And I say to you, if you please, that you just don't have an Act where an owner can control whether he is covered by the Act or not. Because if that be so, this man can go in and out of agents four times a year. He can be in and out of coverage just as often as he wants to get a new agent and we suggest that that was not the intent of Congress nor was it the intent of the statute.

And I would save what time I have, if I may.

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

Mr. Frey.

ORAL ARGUMENT OF

ANDREW L. FREY

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

To begin with, I'd like to point out, in line with what Mr. Justice Blackmun noted earlier, that both of the issues that are here before the Court today have been before

four different courts of appeals and in each instance there have been unanimous decisions in favor of the Government's position.

Obviously, in the case below, on the Fourth Circuit on both issues, on Arnheim and Neely in the Third Circuit on both issues.

With respect to the rent commissions issue, the First National Bank case in the Tenth Circuit and in the Jernigan case in the Fifth Circuit, unanimous decisions holding that you don't look simply at the commissions that are earned, but at the rentals or, in the case of Jernigan, the ticket sales of bus tickets.

In the case of the employment issue, you have the Second Circuit decision in Arsenal Building and you have a rather significant decision of the D.C. Circuit in the Herbert Harvey case which I'll get to when I discuss the employment issue.

I'd also like to point out that we are not dealing here with a small business. Drucker and Falk manages 30 apartment projects and they employ, that is, they hire, supervise and discharge, over 100 persons in connection with this venture.

They procure annual rentals in excess of $8 million. We are not talking about any Mom and Pop operation.

Now, taking up the rent and commissions issue

first, I have no difficulty with --

Q That has significance only when you reach the conclusion that it is one enterprise, doesn't it?

MR. FREY: Well, no. The Court has decided in Arnheim and Neely that the management company conducts a single enterprise which consists of its building management operations.

Q That flows from Arnheim.

MR. FREY: That was decided in Arnheim and Neely . Now, the question on the rent commissions issue, for instance, is how do you determine the size? How do you measure the dollar volume?

Q Let's assume, Mr. Frey, that you had a gross sales tax of some kind in a state which was 3 per cent of the gross income of an enterprise. On what would that 3 per cent tax rest in this circumstance?

MR. FREY: Well, it would rest on income and, of course, that is a very significant distinction because this case does not turn in any way on the enterpriser's income. The Congressional test was not put on the basis of income or on the basis of income, Penn Central or Lockheed or people like that would not have to pay the minimum wage.

Q It would be, to answer the question, I suppose you would have to say it would rest on the commission, not --

MR. FREY: The income would, of course, be the

commission.

Q --on the total rentals.

MR. FREY: No question about that, but that is not the statutory standard for coverage.

Q And then the gross income, the gross sales tax would rest on the --

MR. FREY: Would rest on the sales.

Q -- owners in terms of what they received, I suppose, if the tax problem were reached here.

MR. FREY: Not at all. If you had -- suppose you had a consignment store which sold goods on consignment or suppose you had a a jeweler, which usually does not own the jewelry that they are selling, but has it on -- it is called "on memorandum" from some larger jeweler. When he sells that, he collects the full sales tax and he is responsible for paying that full sales tax to the taxing party.

Q And he also collects the full purchase price.

MR. FREY: He collects the full purchase price. And he must remit --

Q Sure.

MR. FREY: -- the portion that belongs to the original owner of the jewelry or of the consigned merchandise.

Q Mr. Frey, in trying to understand your response to the Chief Justice's question, in terms of, if the gross income were the case, then Penn Central and Lockheed wouldn't

have to pay the minimum wage because, certainly, they have gross income that would bring them within the standards, don't they?

Q You are talking about net income, aren't you?

MR. FREY: Well, I suppose that is true but, in any event, income is not the standard.

Q It's gross sales.

Q But it is gross sales.

MR. FREY: Yes, it is sales made or business done.

Q And in many businesses, gross sales and gross income are pretty close together.

MR. FREY: That could be, yes.

Q But in some businesses, however, gross income may be far greater than gross sales.

MR. FREY: Well, that could be, also. I'll retract. I don't think it matters in the context of the statute with which we are dealing here, which is the context in which we must take the case.

Now, nobody disputes that the rental of property is a sale. I think that is conceded. The question, then, is who is it who makes the sales? Is there some sense in which we can say, well, this is not Drucker and Falk's sale. This is the building owner's sale. Well, we submit that -- first of all, we submit that you don't have to say either it is Drucker and Falk's sale or it is the building owner's sale

because there are many situations, as with the consignment sale situation, where both parties may have made a sale.

Now, in this case, the building owners might as well be on the moon or on the bottom of the ocean for all that they have to do with selling this rental property. It is Petitioners who advertise vacant apartments, who interview prospective tenants, who negotiate leases, who evict people for nonpayment of rent, who handle every aspect of the transaction between the building and the tenant.

Q Well, isn't the rental agent the agent of the owner?

MR. FREY: Well, there is a sense in which he is the agent of the owner.

Q Well, isn't he acting on his behalf, and doesn't he have authority to sign a binding lease on behalf of the owner?

MR. FREY: Oh, yes.

Q Don't you usually talk about the agent's acts as acts of the principal?

MR. FREY: Well, I don't think -- I think it is --

Q The sales are the acts of whatever principal he happens to be acting for.

MR. FREY: Well, if we were asking ourselves the more difficult question of whether we could reach the building owner and attach these sales to him, even though he

has nothing to do with it, we could say, yes, he has retained these people as an agent. But, of course, they have an independent business. They are not purely an agent in the sense --

Q Their only business is to earn their commission. I mean, that is their business.

MR. FREY: Well, their business is to rent property.

Q Their business is management. It is management selling services. That is their business.

MR. FREY: No, they have two --

Q Thst is the only business they have.

MR. FREY: They sell services.

No, I think we have to make a basic distinction because there are two kinds of sales involved here. It is true that they sell their services to the building owner. And the proper --

Q Yes, and they act on his behalf in renting the property.

MR. FREY: Well, but the proper measure of their sale of services to the building owner is unquestionably their commission. We don't dispute that. The point is that they also sell the property. It is true they do it on behalf of the building owner but, nevertheless, they sell it.

Q They are not selling their property. They are

selling somebody else's property.

MR. FREY: That is true but that makes no difference under the statute.

Q That is the issue.

Q That is the issue, isn't it?

MR. FREY: Our contention --

Q That is the issue, yes.

MR. FREY: Well, our contention is that it makes no difference under the statute. In the 1966 -- in the --

Q Well, why doesn't it?

MR. FREY: The Senate Report accompanying the 1966 Amendments, which is set forth at pages 16 and 17 of our brief, the Committee explained the dollar volume test and they said that it was intended to measure the size of an enterprise in terms of the business transactions which result from the activities of the enterprise as measured by the purchase price paid by the purchaser.

Now, I find it very hard to dispute the empirical conclusion that these leases of property are business transactions that arise from the activities of petitioner's enterprise and that is the standard and if you look behind it in terms of the Congressional policy that underlay setting a dollar volume cut-off point, Congress was concerned with the impact on commerce and whether the building owner himself -- if someone owned all 30 of these buildings and conducted this

sales operation of rental space or if he was acting as an agent for different owners and conducted this sales operation of rental space, in both cases you would have the same impact on the flow of goods and men across state lines, the same impact on commerce.

Congress chose an objective, external standard.

Yes, Mr. Chief Justice?

Q Would a real estate sales organization come within the reach of this Act if it had over $500,000 and so forth?

MR. FREY: Yes. Well, the position of the Administrator would be -- and it has been held by --

Q I'll put this question to you, then. Suppose you have a real estate agency of, as many of them do, a hundred agents in their operation, selling houses. Would it be your view that you would measure the enterprise by the gross sales of houses?

MR. FREY: Yes, by the dollar amount of the sales. Yes, certainly.

Now, let me point out that we do make a distinction which I think is relevant here between rental collection agents and people such as Petitioner's, or businesses such as Petitioner's. The rental collection agent who goes around and collects rent is only selling his services in collecting rent and the Department of Labor would measure his enterprise size by the commission that he earns and that

is because he does not sell the rental property.

Q What about the insurance agent selling policies and that over a period of time, the premiums are going to be a certain amount of money? But all he does is earn a commission?

MR. FREY: Well, it would be the amount of the premiums, I would believe, by which you would measure. Even though some of the premiums are --

Q Well, any agent, any insurance agent who sells insurance policies where the premiums are not more than $500,000 although his commission may be $20,000, is covered?

MR. FREY: Yes, that is right.

Q Now, has that been the law?

MR. FREY: I believe that is consistently the law. The closest case that I know to it is slightly different. It is the Montalvo case in which --

Q Well, isn't that the same question as is involved here?

MR. FREY: Well, yes, that would be the same question. It would be the same -- let's take gasoline service stations, which are a common example. Many gasoline stations do not own the gasoline that they sell. It belongs to the oil company. It is consigned to them. When they sell it, they earn a certain number of cents per gallon on the

sale. The rest of the proceeds belong to the oil company.

Now, under Petitioner's rationale, you would measure the sales of this gas company by the amount of commission it earned and you would ignore what the purchaser paid, despite the fact that the Senate report says that it is what the purchaser paid.

Q Isn't there a difference when something is placed in the exclusive possession of the dealer on consignment and management?

MR. FREY: These buildings are placed in the exclusive possession of Drucker and Falk for purposes of --

Q I'm talking for purposes of possession of the tenants, by the very definition of the tenancy. They are the second owners.

MR. FREY: Oh, yes, well, so is the gasoline in the possession of the person who buys it, once he buys it.

Q Well, I don't see how the buyer gets into this.

MR. FREY: Well, because --

Q We are talking about the -- you were making an analogy between the operator of the filling station and the manager of this management company.

MR. FREY: That is correct.

Q Now, the management company does not have the ownership and the exclusive possession or the exclusive possession of the building.

MR. FREY: Well, with respect to unrented premises,

and we'll start off with a vacant premise or a new building which is turned over to them and which is empty, they have the exclusive possession of that building for purposes of selling it to tenants, just like the gas station has the gasoline.

Now, when it is sold, that is, when a tenant signs a lease and moves in, they and the building owners both lose their possession of the premises for the term of the lease.

Q Now, going back to the real estate analogy, if there is any analogy to it, your theory would bring a very small real estate agency under the -- within reach of the Act. Two good men, sometimes one man, will sell a million dollars worth of dwellings in one year and, certainly, two men, if they are good at their trade, will sell a million dollars worth a year. So you would have a two-man organization with a telephone operator answering the phone who would be under the Act. Is that -- do you think that is the reach of the Act?

MR. FREY: Yes, I think that is correct and so would, let's say, a relatively small car dealership might or a grocery store. Anything where there is a small profit margin, a two-man business where, let's say, both individuals are making $30 or $40,000 a year is likely to generate gross sales in excess of $500,000 and Congress, that is what Congress provided. We are simply attempting to carry out

what we --

Q But you are saying flatly -- because I simply don't know and want to know -- that a one-man real estate office with a secretary having a million dollars sales a year is under the Act?

MR. FREY: If it is an enterprise engaged in commerce, yes. I mean, there has to be the commerce connection also. It has to have employees engaged in commerce, which is a somewhat different problem.

Now, in 1961 when Congress adopted the enterprise concept, they referred to real estate firms as one of the businesses that would come within the coverage of the Act and it is a little hard for me to imagine that they were thinking that commissions would be the measure since there were relatively few who would have met the one million dollar standard at that time, but many real estate firms that would have met the one million dollars as measured by the volume of sales or rentals.

The key is that this is approached on an empirical basis. You look at who makes the sale, who physically does the selling operation. Now, the district court and Petitioners in their brief have attempted to analogize this situation to bank deposits or to loans that may be closed by lawyers. Those are completely different. The banks' volume of business is not in any way measured by deposits. That is not

considered a sale by the bank. What the bank sells is the use of money when it loans money and when the bank makes a loan, we don't measure, even there, the size of its enterprise by the face amount of the loan but, rather, what they are selling, which is the use of the money, which is measured by the interest.

Similarly with the loan law firm, they are not selling the loan. All they are selling are their services in connection with the loan and, therefore, you measure it by their fee.

Now, the fact that a big and a small business are associated together in an enterprise as here, Petitioners in their business of managing and renting real property and the building owners in their business of investing money in real estate, it is true that the building owner standing alone would be exempt but there it is not uncommon to have an exempt and a nonexempt person in a joint enterprise in a joint relationship with an employee and, therefore, the employee is covered.

The purpose of the Act is to protect employees who happen to be employed in enterprises that are large enough to come within the coverage. The fact that they may also be employed at the same time in a smaller enterprise is no basis for exemption. That is established by the Herbert Harvey case, for instance, which is a Labor Board case but involved

the same issue.

Herbert Harvey managed -- I think it was the World Bank and international organizations are exempt from the bargaining requirements of the Labor Relations Act and the theory of the case was that these individuals, janitors and so on, were employees of the management agent, which was exactly a management agent just like Petitioners are here and the D.C. Circuit held that, indeed, these persons were employees of the management agent for purposes of the Labor Relations Act and that the fact that they were also employees of an exempt organization did not deprive them of the benefits of the Act and the right to engage in collective bargaining.

Q Well, technically, I suppose, even if you say this is an enterprise that has an income or has sales above $500,000, you could say that building employees aren't covered. I mean, that is the argument.

MR. FREY: Well, because -- we are turning to the employment argument now?

Q Yes.

MR. FREY: Yes, it could be that you would say that it is true that Drucker and Falk is a covered enterprise, but these are not their employees and I'll turn to that issue now.

Q Which would mean that their own employees in their office would be.

MR. FREY: Would be covered?

Q Right.

MR. FREY: Yes, and they have treated them as covered and there has been no dispute about the coverage of the central office personnel.

Q There has not? Why not?

MR. FREY: Well, as far as I know, they are paid above the minimum wage.

Q Oh, well, they haven't treated them as covered, then?

MR. FREY: Well--

Q If it's a question if they were covered, they wouldn't be covered if it was not an enterprise, (a) and, (b) if it was an enterprise but its income was not over $500,000.

MR. FREY: Well, you'd have to look to where they were employed to determine if they were employed in an enterprise engaged in commerce.

Q I understand that. Well, what if the measure here of sales was commissions, not rents?

MR. FREY: Well, you'd have to look at the rest of their business, as, we submit, you would have to do anyway. If we lost the rent commissions issue and won the employment issue, you would still have to go back to the district court to look at the other aspect of Drucker and Falk's

business to see whether they --

Q Yes, well, let's just assume that is the only income they had, were their sales.

MR. FREY: Then they would be exempted in the central office and the central office personnel would be exempted also.

Q Mr. Frey, before you move on to the other issue, you have intimated and your brief argues that the intent of Congress, among other things, was to reach enterprises that had a significant impact on commerce and as I read your brief, page 18 and that which follows, your general discussion suggests to me that you may think that if this rental agent didn't handle these 30 apartment units that the impact on commerce would be less. Is that correct?

MR. FREY: Well, it is the question of the impact of an enterprise on commerce, Justice Powell, and --

Q The substance really is the effect on commerce and these rental units, presumably, would be rented by the owners whether or not there were a rental agent.

MR. FREY: Well, but of course, there are differences still, even in terms of the impact on commerce because the Petitioners, for instance, purchase all supplies. They do all the hiring on a unit basis. That is, their enterprise cares for all 30 of these separate projects. It has all the efficiencies of scale that are inherent in that.

Q That might make the impact less, rather than having 30 separate people purchase the supplies.

MR. FREY: Well -- but that goes to the underlying purpose of Congress was to distinguish on the basis of the impact of an enterprise on commerce, not the impact of unrelated business activities. What they said was, if you have related business activities which, taken together, have a sufficient impact on commerce to meet our dollar volume test, then the employees in those activities will be protected.

If you split it up, fragment it into a series of separate enterprises, then you do not have an enterprise which, itself, has a sufficient impact on commerce to meet the test.

Q But in terms of economic reality, the impact on commerce is likely to be pretty much the same, certainly in the rental of apartment houses.

MR. FREY: Well, I suppose that if General Motors were divided into ten companies, each of which had a share of the market equivalent to one-tenth of General Motors share, you might suppose that in some senses the impact on commerce would be the same, but they are also senses in which the fact that it is General Motors altogether in one piece makes a difference in terms of the impact on commerce. But I don't think Congress was suggesting that the level of national

business activity has to be changed but, rather, that it was picking out for coverage employees who were in enterprises which, in themselves, have a sufficient impact on Congress.

Now, on the employment issue, it is conceded that these people -- that Petitioners are employers of these employees. What Mr. Kelly did not point to but which we also attach considerable weight to is the definition of "employ"in Section 3(g) which is "To suffer or to permit to work."

Now, who is it who suffers or permits these employees to work? It is perfectly clear that it is Petitioners. Again, the building owners are off at the bottom of the ocean. They have nothing to do with these people. The only connection that they have with these people is approval of an overall labor budget but as far as the record discloses and from the contract, it appears that they don't even have the right to exercise a veto over the hiring and firing and so on, as was the case in Arnheim and Neely.

Q But don't you think that the fact that they pay them has some connection?

MR. FREY: It has some connection. Again, if we were here with the difficult case of whether these were employees of the building owners, which we would contend they are, but in a secondary sense, we would rely on the fact that

the services they perform benefit the building owners and payment comes out of the building owners' funds. So when you say, who pays them?, the arrangement that the building owners have with the management company happens to provide for their payment by the building owner. We do not in any sense suggest or concede, though, that as a common law matter as between the employees and the Petitioners, the Petitioners are not responsible for their salaries.

Q But if, in fact, the money that is used to pay their salaries is that of the owners, it is not of the Petitioners.

MR. FREY: That is right, but it has never been viewed, either in the social legislation cases before this Court or in common law cases that payment of money alone is the governing indicia of an employment relationship, although it may be sufficient.

Q Well, I quite agree. I just questioned your statement that the owners had virtually no connection with the employees and you are not mentioning the fact that it was their money which paid them, which may not be overwhelming, but it seems to me this is a factor.

MR. FREY: I am not sure that it would be a materially different case if the employees were paid by the management company which, in turn, took a cost-plus kind of a fee to do it. In our view, that would make no significant

difference in the case.

Now -- well, I have averted to the reality of the economic relationship between the management company and the employees. I'd like to point out, which is very important, that these people are not simply employed in the building owner's enterprise, which is real estate investment. They are also employed in a very real sense in Petitioner's enterprise, which is the management of buildings for others. Petitioners could not conduct their enterprise if they didn't have these janitors, these elevator operators, these maintenance personnel. So to say that they are not employed in a meaningful sense in Petitioner's enterprise I think is completely incorrect.

Now, I think the Court was troubled, or, perhaps, at least, Petitioner's counsel was troubled by the notion that, you know, you might have all these different employers under the definition of employer in the Act.

Now, I think that a case could be made out that Congress intended to permit multiple liability, not in the sense, Justice Stewart, that you could recover more than once for a statutory liability, but in the sense that there might be several jointly liable individuals.

However, the McKay case carved out -- which was the Eighth Circuit case which was discussed in both briefs-- carved out what, in effect is a fellow servant exception. It

says that, well, if the person who you are looking to does not have his own independent business enterprise but is simply an employee, that is, a supervisor, the head of a personnel office or somebody like that, you can't hold him independently liable. We are not dealing with that case at all here. We are dealing with an independent business enterprise to which these employees are vital.

Now, there was a question as to the owner's liability. The owners in this case would be considered unquestionably liable derivitively because they also employ these individuals who are employed in Petitioner's enterprise.

That is, if the Court were to conclude that these individuals are covered under the Act by virtue of their employment in Petitioner's enterprise, which is of sufficient size, then the building owners would be liable not for all of Petitioner's employees but for those who are employed at the owner's own building.

Q For those whose pay checks they actually pay, you see?

MR. FREY: That would be our position, although I could see a case here where the building owner would argue that, well, the management company may be liable but our connection is so remote because we are not involved in -- we don't actually employ these people. We don't suffer or permit them to work except in an indirect sense.

I am not arguing that point of view, but I think

we would have a harder case.

Q Well, certainly, it is so commonplace now, I suppose, that under this Act and under its language that there can be more than one employer of the same person.

MR. FREY: It is no doubt that has been recognized.

Q There is no question of that, is there?

MR. FREY: No question. That has been recognized by this Court in the Labor Board context in the Greyhound case and it has been recognized by numerous courts of appeals in cases that we have cited and the amicus brief treats it as though there can only be one employer and they spend all of their time establishing the proposition that the building owner is an employer of these employees and our view is that that gets them nowhere because it is just not mutually exclusive with Petitioners also being an employer.

Q Would each owner be covered even though he did not himself meet the dollar volume test by virtue of the fact that Petitioner met the dollar volume test?

MR. FREY: He would be derivatively responsible with respect to those persons employed at his building. If they are employed in an enterprise engaged in commerce by him, then the fact that his enterprise is not big enough, if you remember in the Arnheim argument we had the example of the

hairdressing salon in the department store where the hairdresser himself may not have a big enough enterprise but if he puts a unit in Woodward and Lothrop and they have a big enough enterprise, then those persons employed in the Woodward and Lothrop enterprise hairdresser section would be covered and the hairdresser would be liable for the payment of their wages and Woodward and Lothrop would not, unless -- whether Woodward and Lothrop would be would depend on whether it would be part of Woodward and Lothrop's sales also.

But, in other words, you do not have to, yourself, be an enterprise that is subject to the Act under the dollar volume test in order to have some of your employees for some other reason responsible.

Accordingly, we submit that the judgment of the court of appeals should be affirmed. Thank you.

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

Mr. Kelly, do you have anything further?

REBUTTAL ARGUMENT OF

HERBERT V. KELLY

MR. KELLY: Yes, sir, if I may take a moment.

The Court understands that we do not agree that the First National Bank case or the Jernigan case, either one, are applicable, though Counsel asserts that they are. The First National Bank case, the defendant bank owned the building and rented it to a management company that was the

wholly-owned subsidiary of that company and as a matter of fact, as I recall the facts, the president of the company drew $15,000 a year from the bank as salary and $1,800 a year from the management firm. That was strictly an ownership case where they proceeded against the owners of the property and the Jernigan case is, again, a proceedings against the owner. There the operator of the restaurant-service station facilities of the bus depot owned it and the court concluded that he spent the greatest portion of his time operating the bus station and that is where you are with the gasoline cases that Counsel refers to. There you have sued the owner who is operating and in the business of selling the gasoline.

The problem that I find with Counsel's argument is that he talks about sales of apartment space like you sell them every day, like you move in a new tenant every Monday. Suppose you have an apartment project where there is no turnover during the entire year of the contract of management? What has he sold? The rent is coming in each month. Has he sold any space? The same persons were there when he was employed and there when he left. As managing agent what he has sold them is his services in managing the project, in supervising the --

Q It may happen to be the rent which was reserved in the lease for a period of time.

MR. KELLY: Yes, sir, the rent then existing is

what I say to you. When they come on as managing agent, there is an existing lease that may run for two years. They won't sell a thing so far as space. They sell their services and you could have a project where you would never sell anything but services if there was no turnover.

The other problem I have -- and will sit down -- is that it seems to me that if you take all these theories of Counsel as to who is covered, that the judge's example on the district court level where you had the lawyer who was managing the large estate, that bought and sold stocks, bonds, assets, real estate in the estate and distributed the money and had a total gross income, that he would be covered. Now, that's not what the Act says and I don't think it is the intent of Congress that that be true.

I don't think it is the intent of Congress that I think it is illusory, I submit to you to say that the impact of the 40-unit apartment project on Ward Boulevard in the City of Newport News has one whit more impact on commerce sitting there with Drucker and Falk managing it than with me managing it.

The impact of those 40 units sitting on Ward Boulevard is -- whatever it is and it does not impact it a bit more if I manage it or Drucker and Falk. It would be just managed not quite as well and we submit that the decision in the Court of Appeals should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:15 o'clock p.m., the case was submitted.)