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In the

Supreme Court of the United States

Bayside Enterprises, Inc., Penobscot
Poultry Company, And Poultry Processing,
Inc.

Petitioners,

v.

National Labor Relations Board

Respondent.

No. 75-1267

Washington, D. C.
November 10, 1976

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

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 BAYSIDE ENTERPRISES, INC., PENOBSCOT :
 POULTRY COMPANY, AND POULTRY PROCESSING, :
 INC., :
 : No. 75-1267
 Petitioners, :
 v. :
 NATIONAL LABOR RELATIONS BOARD, :
 :
 Respondent. :
 :
 -----X

Washington, D. C.

Wednesday, November 10, 1976

The above-entitled matter came on for argument at
 11:37 a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
 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
 JOHN P. STEVENS, Associate Justice

APPEARANCES:

ALAN JOEL LEVENSON, ESQ., 187 Middle Street,
 Portland, Maine 04111, for the Petitioners.

MRS. HARRIET S. SHAPIRO, Office of the Solicitor
 General, Department of Justice, Washington, D. C.
 20530, for the Respondent.

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Alan J. Levenson, Esq., for the Petitioners

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Mrs. Harriet S. Shapiro, for the Respondent

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Alan J. Levenson, Esq.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-1267, Bayside Enterprises against National Labor Relations Board.

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

ORAL ARGUMENT OF ALAN J. LEVENSON

ON BEHALF OF THE PETITIONERS

MR. LEVENSON: Thank you, Mr. Chief Justice.

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

My name is Alan Levenson. I am from Portland, Maine. I am here today representing Bayside Enterprises, Inc. Bayside is a poultry industry located in Waldo County, up near Belfast, Maine.

The contention of Bayside -- and this involves six feed drivers that drive poultry trucks, which are the specialized trucks that deliver grain. These poultry drivers are exempt from the National Labor Relations Act as agricultural laborers. The National Labor Relations Act on agricultural laborers makes reference to, because of an act of Congress in 1946 in the Appropriations Act, makes reference to 3(f) of the Fair Labor Standards Act. In my brief I have set out 3(f) and all of this discussion today -- it's on page 3 -- revolves around 3(f).

Now, this 3(f) has been discussed many times before

before this Court, particularly in Farmers Agricultural Company, and what it says is that to be exempt, you have to either fall into the primary classification or secondary classification of farming.

Now, in the poultry industry, it makes specific reference to the question of raising poultry. So when I talk about the primary definition of agriculture here, I will be talking about raising poultry.

The secondary definition talks about incidental to or in conjunction with farming when performed by a farmer or on a farm. So I will have to be talking about farmer or on a farm and incidental to or in conjunction with farming.

There is also a phrase "preparation for market," which is in 3(f), which also has some consideration in some courts that hinge the exemption on that point.

The outline of my argument is that Bayside itself, being a vertically integrated poultry organization, comes within the definition of primary agriculture, because it is a producer, and that the feed delivery drivers are within the secondary definition of agriculture because of their work being incidental to and in conjunction with farming.

I will also talk in terms of a possible alternative argument that the feed poultry drivers are "on the farm" within the meaning of those words.

To summarize the arguments, the choice here, the

feed poultry drivers are either (1) directly involved in farming, (2) incidental to or connected with farming, or (3) not connected with farming at all. And I will be talking about the first two choices and leave the third choice to my opponent.

Briefly I would like to talk to you about the facts in the case and just a little bit of sketch about the poultry industry.

Bayside is a single enterprise. It produces and markets poultry up in Waldo County, Maine. Although there are two corporations, there is a central management which makes all the decisions of the poultry company, from, as one could call it, from the cradle to the grave of raising poultry. The company is made up of several components. Besides the main office there is a breeding hatchery with several farms connected to it, a commercial hatchery with 11 farms connected to it, there is a feed mill, there is the feed delivery operation, which we are talking about here, there are 119 contract farms, which I will go into the contract a little later. Bayside itself owns seven farms. There is a processing plant for trucks to pick up the poultry from the farms and deliver it to the processing plant.

Briefly this is how it works out: The company has a geneticist who makes the decisions as to what type of poultry it should grow. They are very successful because they have reduced the time it takes to grow a broiler from 16 weeks

to about 9 weeks. They make such decisions as how to grow a chicken with white meat, or how to speed up its maturity, and things like that. It is a very valuable integral part of the business of raising chickens.

After they decide that, then they breed flocks to produce the eggs. Then they take the eggs and they hatch them until they are one day old. Then they put these one-day-old broilers on these contract farms.

While they are doing that, they have a feed mill and they are making feed for the broilers which changes according to age. They change it at least four times and if the flock is unhealthy, they may change it more times than that.

Then they have this feed delivery system which I will talk about later which delivers the feed from the feed mill to the contract farms. Then while the poultry is on the farms and the poultry stays on the farms for about nine weeks, when they take it off, they have these feed crews that go onto the farm and they vaccinate, blood test, debeak, and all the things that you do to keep up the health and well-being of the poultry.

After the flock leaves, the farm crews go and clean the poultry farms of the contract farmers. While this is all going on, and this is all being directed by a broiler department manager who directs and supervises the farmers, and then there is a farm crew. He decides what age to market the flock and

what size the birds are marketable, and then he sends out the crew from the processing plant who catches, coops, and loads the birds for transport to the processing plant.

The processing plant processes the birds and markets them to a dealer or chain, some intermediate third party.

All of this that Bayside is doing is typical of what is going on in the poultry industry. It's a typical integrated broiler producing, marketing firm.

QUESTION: You say this is typical of this particular industry. Would you distinguish that from large commercial farming operations generally as they have changed from the old, traditional patterns?

MR. LEVENSON: I am going to be very cautious here about talking about any other industry than poultry. I can talk about the poultry industry. All of the evidence in the marketing reports, that are filed with this Court talks about poultry, and they say 95 percent of the chickens that are eaten today are coming from a vertically integrated producer of one kind or another. That is what I say. I can't talk about cattle or anything else.

The other point I would like to make is that nearly all the broilers today are produced by integrated broiler firms, and this development has gradually arisen. What used to happen in the past, they used to be limited to processing plants and individual feed mills and individual delivery

systems. And as the poultry industry gradually developed, each of these firms developed so that gradually they became a concentration, so that each one of these took in all the attributes of one firm. What I am saying is that basically there are four elements, I mean, big substantial components of this type of vertical integrator. They are the feed mill, the processing plant, the hatcheries, and the producers, the contract growers. And gradually they all came together under one management, and basically they are all interdependent on each other. And the management -- it's kind of like a bundle of sticks, and they are all held together, and the thing that holds them together is the management that is making all the decisions as to what is going to happen.

As a result of this development, the fact that is important to me, it seems, is that there is really no significant live broiler market today. You can't go out and raise chickens and sell them to anyone. All these farmers are connected to some type of broiler organization. Now, that becomes critical when I talk about the part of the processing plant to this whole operation. They are all marketed as ready-to-cook broilers by an integrated company.

The argument of Bayside is that because of this type of operation, it is Bayside and vertically integrated operators like Bayside that are in effect the producers within the contemplation of the statutes. They are the farmers. And

basically that argument breaks down into four elements.

First of all, the company is the one that initiates the production process, it's the one that invests in both production and marketing of poultry, it's the one that controls all the marketing and production of poultry, and, fourthly, it's the one that actively participates in the management of the flock and the poultry husbandry.

Now, this position is sustained by two major cases in the poultry industry, and one is Tyson's Poultry and one is N.L.R.B. v. Strain. There are other cases that sustain my position, but the rationale is set out in those two cases. Tyson was an egg producer and Strain was a chicken poultry farmer like this one.

The contrary argument is that it's the contract farmers that are raising the poultry and that they should be considered the farmers. That has a ring of simplicity in it because the chickens are on the contract farms. When the Court in Strain took this under consideration, they framed the issue this way: Does the fact that the integrator uses independent growers destroy his claim to having raised the birds, or is the integrator more akin to the purchaser of the bird? The Court then reviewed the same factual type of situation that I have described and said, even though the raising of the birds were shared with independent growers, Strain's activities were more nearly that of one engaged in

raising poultry than a purchaser or a jobber.

When Tyson took up the same situation, it said, we are here concerned with a single completely integrated farming operation. Tyson is the farmers and they are the ones who initiated the farming operation herein involved. Without the appellees (that's Tyson), the independent growers arguably would never have undertaken the initial and continuing costs of acquiring the birds and producing the eggs. The contract growers merely aid the appellees who are the farmers.

So the issue drawn is: Is a company like Bayside a middle man? Is it somebody that is kind of buying the chickens from the farms? Is it somebody who is a purchaser, a distributor, or something like that? The argument has been made many times, and the rationale in Strain where they talked about a rosebush case, they said no it wasn't -- I mean, the rosebush case that they cited was more of a middle man because they were buying it, they were only buying things that were marketable, or a purchaser, or something like that.

Well, all of this gets down to the core of the question, or what some people feel is the core, is the risk of loss. Who is taking the risk of this type of operation between the farmers on the farm and the vertical integrator that is supervising and all of this? Well, that involves the contract itself. The contract guarantees the farmer a

specific rate per week depending upon the size of the house. He then gives it an additional bonus depending on his production as compared to other Bayside contract farmers. Bear in mind that Bayside owns the flock at all times, and that chickens are a perishable commodity.

The point I would like to make is that the payments to the grower have no relationship to the market price that Bayside eventually gets from it. Whatever happens, the farmer gets a certain guaranteed payment and then he does participate in a bonus depending upon anybody else. Now, this can work out several ways, because bear in mind there are two markets involved. One is the feed market, the grain that you have to buy, and the other is the process market that you have to sell. It is quite conceivable that the man who is the farmer can receive a profit from his operation and then that same chicken can go out and be processed and sent to market, and the vertical integrator can lose money. And the reason for that is because the cost of grain can be more expensive than the cost of selling the bird. It seems to me that is somewhat critical.

Now, in the discussion of this at the trial level we talked a lot about who had the risk of loss. I was trying to prove that we had all the risk of loss. But there is no question, it seems to me, that some of the risk of loss, if a man is employing other people, he would invest some money, so

he would make less money than he would otherwise. But there is a case on this, as has been pointed out to me, about ducks in the Tax Court, and it's called Maple Leaf Farms at 64, 438 Tax Court. And what they say there is that the risk is really unequal. In other words, a man who is a farmer in this type of situation with a contract can really gauge the kind of loss he is going to -- you know, if there is going to be a loss, he can kind of gauge what kind of money he is going to get in advance, while the person who is the vertical integrator has to deal with markets that are unweildy, you never know what you are going to get. And that is a critical fact in talking about who is really running the farm and who isn't running the farm.

QUESTION: That Tax Court decision is not in your brief, is it?

MR. LEVENSON: No, It was decided in 1975.

QUESTION: Could you give us the citation again?

MR. LEVENSON: It's 64 Tax Court 438.

QUESTION: Thank you.

MR. LEVENSON: One of the citations on page 451 of that case says -- this is talking about a duck grower -- "Obviously the grower also bore some risk of loss from the growing process, e.g., nonpayment for condemned ducks and out-of-pocket cost of labor. But on balance, we believe that the petitioner-integrator assumed the risk of loss from the growing

process of sufficient magnitude to satisfy this element of the farmer formula. One need not bear all the risk of loss to be considered "a farmer." They cite also another case of an integrated egg producer called Garth, and that's 56 Tax Court 610.

If you just turn to the appendix of the petition for certiorari, you will find the contract itself, what we are talking about.

Under the pamphlet that the Government was kind enough to provide us, entitled "The Maine Poultry Industry," on page 13 they say that this type of contract is called a straight payment type contract rather than a share-the-profit type. Evidently the Southern growers have a share-the-profit type, and the Maine people have a straight payment type.

I don't rely on that to say that the Southern growers aren't integrated; I am just saying there is a slight difference between the two. It would still be applied the same way.

QUESTION: How in this case are the farmers compensated? They are given a straight payment and in addition a bonus if, what, the chickens are of a certain quality and size and so on?

MR. LEVENSON: If you will turn to the next page, A-24.

QUESTION: A-24 of what?

MR. LEVENSON: A-24 of the petition for certiorari, Appendix 24.

QUESTION: Thank you.

MR. LEVENSON: Here under Section B -- To Guarantee the Broiler Grower, basically what happens is they pay a certain rate per square foot of their house. The bigger a house they have, the more money they get per week. It comes out to about a cent or a cent and a quarter a week they get paid. The payment sometimes is after the flock is processed, but that's the guarantee they give them.

The bonus is made up of the -- they take all the flocks that are processed over a certain time and they compare one flock with the other and see how the farmers did as against each other. They give a bonus to the farmers who did the best. That is basically what is going on. It's a somewhat complicated structure of how they do it, but that's basically what is happening.

QUESTION: Does the bonus depend in any way on the price obtained?

MR. LEVENSON: No, absolutely not. The bonus depends upon how these people did.

QUESTION: Costwise.

MR. LEVENSON: No, not costwise; on the weight.

QUESTION: In terms of quality and/or weight.

Weight reflects quality.

QUESTION: The non-bonus payment doesn't depend in any way on what was obtained in the market for the bird?

MR. LEVENSON: No, not at all. It depends on how big a poultry house you have.

QUESTION: What if the chickens die? Who takes the risk on that?

MR. LEVENSON: If the chicken dies, the risk of loss is on the company, because the company owns the chickens.

QUESTION: What if they die as a result of the negligence of the farmer?

MR. LEVENSON: You just don't use him next time.

QUESTION: You get another contractor next time.

MR. LEVENSON: Talking about this contract that I have before you, I would like to point out to you that the integrator provides the chicks, the feed, the medication, the fuel, and the litter.

Now, the significance of providing the chicks in this case, it seems to me, is very important because you can easily see it if you had an egg business because then the product would be the egg and you are giving the farmer a chicken and out you come with an egg. But what you are getting here is you are getting the meat itself. So that the product really isn't the chicken; it's the meat. The significance of that is it's equivalent to giving a corn farmer 40 acres of land and say go raise corn, because the product

will ultimately become corn. Here we are giving them a chicken and saying go raise meat, and you will get ultimately processed meat.

What I am saying is it isn't just the ownership of the bird that's important in this relationship. I think it's very important the fact that the product is the meat itself.

As part of this contract, on A-26 of this, the grower under 1.) agrees to follow the instructions of the Bayside supervisor in the case and the maintenance of the flocks.

QUESTION: What are you reading from now?

MR. LEVENSON: It's on page A-26 - 10.) --

QUESTION: Thank you.

MR. LEVENSON: -- of the same contract. In other words, when we talk about the grower's obligation, that grower obligates himself by contract to follow the instruction of the Bayside supervisor in the care and management of the flocks.

On A-27, he also agrees to allow Bayside to move the flocks from the farm at any time. That is No. 11.).

Back to A-26 on 4.), that contract farmer agrees to have no poultry other than Bayside's on the farm during the period of this contract. So he is restricted; he can't have anybody else's poultry except Bayside's. And he guarantees to use only those materials supplied by Bayside for the purpose of feeding and maintenance of birds under this contract.

My point is that this is another disability when a

grower enters into this contract with the integrator that he undertakes. Now, the point is that the grower himself, if you look at the grower's position in this, he isn't the type of typical independent producer. He does not own the feed, he does not purchase or own the chicks, he does not decide what type of birds he wants to grow or what type of feed he wants to feed them, he does not decide when to market the flocks, he does not receive a market price when the flock is taken, he has no obligation to transport the feed to the farm nor catch, coop, and deliver the mature birds to the processing plant. He must follow the directions of the Bayside Broiler Department manager, field supervisors and farm crews, and he does not vaccinate, blood test, debeak, and he bears only a secondary responsibility for the health of the flock and treatment if it's sick.

QUESTION: Would there be any question about the exemption if there was full integration in the sense that the company didn't make arrangements with growers but did it themselves?

MR. LEVENSON: I don't think -- the .. at present doesn't think there is any question --

QUESTION: I know. I understand that. Let me ask the question another way. Maybe you won't have time to answer it before lunch, but what -- perhaps you have explained it and I missed it -- why does the company arrange its affairs

this way? Is there some obvious tax advantage or some liability advantage? It just wasn't an accident. This way of doing business has evolved for a reason, I suppose.

MR. LEVENSON: I suppose the whole thing has evolved because of the fact that instead of doing it from --

MR. CHIEF JUSTICE BURGER: You can start with that at 1 o'clock.

MR. LEVENSON: Thank you.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: You have about six minutes remaining.

MR. LEVENSON: Thank you. I will try to use them wisely.

The last thing this morning you asked me the question as to how this all happened.

QUESTION: What is the business reason for it?

MR. LEVENSON: This book I supplied you, "Dynamic Factors in Vertical Commodity Systems" --

QUESTION: That would be very informative.

MR. LEVENSON: On page 5 there is this sentence: "The change forces and the final decisions which have brought the broiler system to its present position represent a fascinating example of an evolving energetic formative price system. To a large extent changes occurred through a series of decisions, each of which created small incremental changes but whose cumulative effect has been substantial."

QUESTION: I agree with you. That's just saying what is is, but why do you suppose -- they still would have the choice of doing it themselves or doing it this way.

MR. LEVENSON: The problem of this business is the risk. The risk is terrible. Probably three out of four years you lose money.

QUESTION: So part of it is a risk-shifting matter to the grower?

MR. LEVENSON: The risk is on both of them. The poor farmer who tries to buy the grain and raise chicks is taking a terrible risk. It gives him the advantage of a guaranteed type of --

QUESTION: Also, I suppose, for no purpose are these farmers employees of your client, are they?

MR. LEVENSON: I don't think they are employees.

QUESTION: For any of the purposes for which it might be important, they are not employees.

MR. LEVENSON: They don't pay social security or things like that.

QUESTION: And they don't withhold.

MR. LEVENSON: No. But what I do say is they --

QUESTION: How about tort liability?

MR. LEVENSON: What's that?

QUESTION: How about tort liability?

MR. LEVENSON: Tort liability --

QUESTION: Is your client liable for any torts that might be committed by these farmers?

MR. LEVENSON: I think in the contract it says something about the fact that they will be liable if anybody gets hurt on their own farm. So to that extent, I think -- there is no question about it, they have an independence.

The question is do they have enough independence to be considered the producer. Who is the producer? Who is the middle man here? That's the issue.

There is one other point that I would like to refer you to, and that's the administrative regulations that the Department of Labor puts out, the Wage and Hour Division. In 780.125(b) they take up the business about the words "raising of poultry" and say, "The raising of poultry includes the breeder, hatchery, propagating, feeding, and general care of poultry," all those things that Bayside is doing.

The other part of this argument that the First Circuit was particularly attracted to was the processing plant. They seem to take the position that because so many people are in processing, thereby the whole thing takes on a commercial coloration.

Now, the answer to that argument, it seems to me, is in Maneja. They make the distinction about processing. There is an agricultural processing and there is a manufacturing processing. And they say that the distinction is if the product actually changes its composition. In Maneja, page 268, agricultural function as a manufacturing function so there must be a change in the product. Well, this very issue about poultry has been clarified in the case here, East Texas Motor Freight Lines v. Frozen Food Express, and that's at 351 U.S. 49.

There we had a frozen piece of poultry and then they said that a frozen and fresh dressed piece of poultry retains a continuing substantial identity.

So the point I am making is that --

QUESTION: A live chicken and a dead chicken, they are not too much alike, are they? When you go in the processing plant you lose three things, your head, your insides, and your feathers.

MR. LEVENSON: True.

QUESTION: We know that, don't we?

MR. LEVENSON: What I am saying to you is --

QUESTION: And he has stopped growing, hasn't he?

MR. LEVENSON: That's true.

QUESTION: Once he gets to the processing plant, that's it.

MR. LEVENSON: What I am saying is that for the purposes of this type of classification, they regard it not as a cooked chicken or as a string bean that is cooked in a dish, in a can, or something like that. For this type of purpose, evidently this Court has made the finding, at least in the Freight Lines case that it retains substantial identity.

What I am saying is these days because everybody is vertically integrated, in order to market the thing, you have got to market it dressed and frozen.

QUESTION: These independent contractors are the

ones that grow the chickens.

MR. LEVENSON: You must understand --

QUESTION: Is that right?

MR. LEVENSON: No, that isn't right.

QUESTION: What does your client do to grow them?

MR. LEVENSON: A great many things. First of all, part of the growing practice is to figure out what kind of bird you are going to grow. Second of all, is to breed the eggs. Then you have got to take them out to the farm; then you have got to have your farm crews that go on and vaccinate, and actually you are getting into the type of growing procedure.

QUESTION: This growing occurs on the independent contractor's farm.

MR. LEVENSON: The only thing that happens in the independent contractors --

QUESTION: The chicken grows.

MR. LEVENSON: The only thing that happens is that from 9 days old he goes from 1 day old to 9 weeks old. But in the process, the decisions for that chicken are being made by the man who is the head of the Poultry Division of the company -- what to feed it, you know.

When you are talking about these truck drivers and you are talking about the grower, you know what he does, he pushes a lever and out comes the feed and that's his total contribution to the growing of a chicken.

QUESTION: He doesn't clean up the pen?

MR. LEVENSON: No. Under the contract, Bayside --

QUESTION: How does it get clean?

MR. LEVENSON: Bayside has a farm crew it sends right into the pens and cleans them up.

QUESTION: Every day?

MR. LEVENSON: No, when you take them out.

QUESTION: I am talking about during the 9-week period.

MR. LEVENSON: Oh, during the 9-week period --

QUESTION: During the growing period.

MR. LEVENSON: The Strain case --

QUESTION: I like the word "grow" and you don't.

MR. LEVENSON: I am not averse to any word here. The question is the substance of the situation. Evidently -- even Strain says the participating in the growing process.

Could I --

MR. CHIEF JUSTICE BURGER: Do you want to save anything for rebuttal? I think we have cross-examined you a good bit. We will add 3 minutes to your time and 3 minutes to Mrs. Shapiro's time.

MR. LEVENSON: Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Shapiro.

ORAL ARGUMENT OF MRS. HARRIET S. SHAPIRO

ON BEHALF OF THE RESPONDENT

MRS. SHAPIRO: Mr. Chief Justice, and may it please the Court: This case requires this Court to interpret the agricultural exemption to the National Labor Relations Act. That exemption is set out on page 2 of our brief, and it involves three separate categories.

First, it exempts actual farming operations, including the raising of poultry.

Second, it also exempts other activities by a farmer that are incidental to his farm operation.

And third it exempts activities which are on a farm and incidental to that farm's operations.

QUESTION: If a chicken farmer owned a truck and sent a truck over to a feed mill owned by somebody else and hauled feed back, that would be incidental to farming, I suppose, wouldn't it?

MRS. SHAPIRO: Yes, it probably would.

Petitioner's claim is that the truck drivers here that take the feed from petitioner's feed mill to the grow-out farms are exempt under the second part of the definition. That is that they are activities by a farmer which are incidental to the operation of that farm.

So to support his claim, petitioner must show first that Bayside is a farmer, and, second, that the work of the feed truck drivers is incidental to Bayside's farm operation. So in response to Mr. Justice White's question, it wouldn't be

enough for this Court to decide, contrary to our position, that Bayside as a whole is a farmer in relation to its growers. It also would have to decide whether the feed mill operation was an incident to that farming, and we would still have another question if you decided the feed mill operation was not incident to the farming, the question would be whether the truck driver's work was incident to the feed mill or to the farm.

QUESTION: I don't suppose there would be any question if Bayside owned the farms and raised the chickens themselves.

MRS. SHAPIRO: No. As a matter of fact, Bayside does own certain -- they do own the hatcheries and the breeder farms, and the people that are working on those farms are within the primary --

QUESTION: And if they had some truck drivers running back and forth between their plant and those particular farms --

MRS. SHAPIRO: No, then in that situation you would have to decide whether the truck drivers were incidental to the feed mill operation or to the farm operation.

QUESTION: I thought you had already said that he is a farmer that owns the truck that goes to the feed mill.

MRS. SHAPIRO: Yes. But your hypothetical, I thought, was that if the feed mill truck was --

QUESTION: You mean, if a farmer sends his truck to an independent feed mill, his truck drivers are exempt, but if he happens to own the feed mill --

MRS. SHAPIRO: You have to get back to the statute.

QUESTION: Mrs. Shapiro, let me add a question along with this. What is it in the statute that requires or permits even a compartmentalization that you insist on, that you have to say in its capacity as a feed mill operator and then in its capacity as a breeder farmer, and that sort of thing.

MRS. SHAPIRO: I think it's a necessary implication in the statute because the statute sets up these various categories. This first is primary farming, and second the statute recognizes that a farmer has incidental operations and also may have non-incidental operations. That is why it says incidental farm operations are within the agricultural exemption, but non-incidental farm operations are not. So you have got to compartmentalize.

QUESTION: Your analysis has the ring of a set of regulations. Are there any regulations that comport these compartments that you have made?

MRS. SHAPIRO: Yes. What we are talking about is an exemption that is brought into the National Labor Relations Act but by the Appropriations Acts which say that this definition in the Fair Labor Standards Act is to be used in the National Labor Relations Act.

QUESTION: Mrs. Shapiro, the wording of the 1938 Act, Fair Labor Standards Act, hasn't changed, has it? Isn't it the same as it was originally?

MRS. SHAPIRO: Yes.

QUESTION: But the Appropriations Acts reincorporated in the National Labor Relations Act the fair labor standards, don't they?

MRS. SHAPIRO: Yes.

QUESTION: And do the regulations take into account at all these differences in methods of farming?

MRS. SHAPIRO: Well, the Fair Labor Standards Act, the regulations that I am referring to are under the Fair Labor Standards Act.

QUESTION: I appreciate that. Are they carried into the words "agricultural employees" for the purposes of the National Labor Relations Act?

MRS. SHAPIRO: That is certainly the way the National Labor Relations Board interprets it.

QUESTION: And have the regulations been revised much in 30 years?

MRS. SHAPIRO: I guess they have been. I don't think that the regulation that we rely on in our --

QUESTION: Do the regulations address themselves to this form of farming operations?

MRS. SHAPIRO: They certainly do.

QUESTION: Directly.

MRS. SHAPIRO: Yes. We refer to them in our brief. And the Labor Department feels that companies like Bayside are not to be considered farmers for the purposes of the Fair Labor Standards Act.

QUESTION: And the Board follows that?

MRS. SHAPIRO: The Board follows that interpretation. The only other point about the question that Mr. Justice White raised before lunch is that if this Court should agree that Bayside's relationships with its grow-out farmers make it a farmer, then neither the Board nor the court below saw the case that way. So that they didn't reach the question that you would have to reach then about whether the operations of the truck drivers were incidental to the farm operation as thus defined, and it would probably be appropriate to send the case back for consideration of that question.

Our primary argument is that Bayside as a whole is not a farmer. Instead, it is a complex, integrated company that contracts with farmers. It does run a limited farming operation itself, the hatcheries and the breeder farms, and it does have some purely industrial operations.

QUESTION: Insofar as it does run that limited farming operation itself, you concede that the employees engaged in that activity are exempt.

MRS. SHAPIRO: I certainly do.

QUESTION: As agricultural workers.

MRS. SHAPIRO: Yes.

The feed mill is, in our view, one of the industrial operations, and the work of the feed mill truck drivers is incidental to that operation. That is why we believe they are not within the agricultural exemption.

QUESTION: Does the feed mill sell to anybody except Bayside people?

MRS. SHAPIRO: Yes.

QUESTION: It sells commercially to people with no connection with --

MRS. SHAPIRO: It sells to a group of farmers who are connected with another integrated poultry company that doesn't have its own processing plant.

QUESTION: But is independent of Bayside.

MRS. SHAPIRO: Independent of Bayside.

QUESTION: Even today.

MRS. SHAPIRO: That was at the time of the Board decision. I think that Bayside's brief says that they no longer do.

QUESTION: It seems to me I recall something in the papers to the effect that that has been done away with now.

MRS. SHAPIRO: I think that's correct.

QUESTION: Mrs. Shapiro, if your opponent is right

on what is a farm, and if you are right on the point that the drivers are incidental to the feed mill operation, what employees would we be fighting about?

MRS. SHAPIRO: You would still have to decide in that case whether the feed mill operation is incidental to Bayside's farm operation. We would still be fighting about the truck drivers.

QUESTION: Oh, I see. But if the feed mill operation is incidental to a farm, would it then follow the driver's were engaged in work incidental to farming?

MRS. SHAPIRO: If you felt that Bayside was a farmer.

The second part of the definition, which is what we really are arguing about here, says, to get into that exemption you have to both work -- the activity has to be by a farmer and also it has to be incidental to that farmer's farm operation.

QUESTION: May I ask the question just a little differently. If we concluded that the feed mill was an industrial operation and not incidental to farming, but if the growing was farming by Bayside, would there be any employees we would be fighting about other than these drivers? Is the whole point just over these drivers or are other employees involved in any way?

MRS. SHAPIRO: This particular fight is over these

drivers. I suppose if you took Bayside's argument that they are as a whole an agricultural enterprise, the next case you would have would be the feed mill employees, the processing plant employees, and then you would have to decide whether the processing plant was incidental. If you accept their argument, you do have to decide whether the feed mill is incidental in relation to them.

QUESTION: Mrs. Shapiro, the regulation to which you referred at page 18 of your brief, 780.126, that description goes back to 1961, I gather, doesn't it, that interpretive bulletin? That's the Wage and Hour Division. Does that description precisely fit the facts of this case?

MRS. SHAPIRO: Yes, I think it does. Bayside's claim is that they are not a feed dealer and processor and that the first statement limits the description. They certainly do produce feed and they do process, and the description of the typical kind of an operation that's in the body of this regulation fits exactly what Bayside has done.

QUESTION: This, of course, is the Wage and Hour Division interpretive bulletin. Has it been followed and adopted by the National Labor Relations Board in any cases?

MRS. SHAPIRO: Yes. The National Labor Relations Board --

QUESTION: In addition to this one, I mean.

MRS. SHAPIRO: This case is the result of a fairly

long-term --

QUESTION: Really, what I am trying to get at is -- remember we didn't get these briefs until just the other day so I haven't had a chance to study them thoroughly as I would like. What I am trying to find out is has that actual regulation been applied by the National Labor Relations Board? Because you make an argument that this is entitled to great weight in interpreting the statute since this is the agency charged with administering the statute. What is unique about this is that this interpretive bulletin is not a National Labor Relations Board bulletin. It's the Wage and Hour Division bulletin. So my question is has the Board applied this regulation in any other cases?

MRS. SHAPIRO: They have done so consistently.

QUESTION: Are they cited in your brief?

MRS. SHAPIRO: Yes, at footnote 11.

Our argument basically is that the growers are the farmers and Bayside is not. Our brief examines the terms of Bayside's agreements with the growers to show why in our view the growers are independent farmers in terms of the risks they bear and the capital investments required and the type of supervision they receive.

Again, I think the practical answer to Mr. Justice White's question is that one of the reasons for this arrangement is that it does permit Bayside to share the risk. It also

avoids Bayside having to have the capital investments, which are very substantial.

QUESTION: And it avoids having to treat them as employees.

MRS. SHAPIRO: And it's that point that I want to emphasize here.

QUESTION: Let me go back. Suppose a farmer is growing chickens, and he is sending his own truck out to get feed to bring it back. Now, the statute exempts things that are part of farming. Now, why wouldn't getting feed -- what could be more integral to the operation of growing chickens than feeding them? You aren't going to grow many chickens unless you feed them. So why wouldn't you say that hauling your feed to your chickens is part of farming, not incidental, just part of farming?

MRS. SHAPIRO: The answer to that -- in the Farmers Irrigation Co. case that interpreted this same language, the situation there was that there was an association of farmers that provided water to irrigate the individual farmers' crops. And the argument there was made, as you say, water is essential to growing crops. You can't grow crops unless you have water. The same way here. But the Court said, no, the statute talks about actual farming, and the actual farming means the growing of the crops. Actual farming means the growing of the chickens.

QUESTION: Let's suppose that you are a chicken grower and you hire 30 people to unload the feed trucks and actually go out and feed the chickens. Is that part of farming?

MRS. SHAPIRO: Yes.

QUESTION: Now, suppose the farmer who instead of hiring his own employees to feed the chickens for him contracts with a chicken feeder and they say they are employees then and they do exactly the same thing as his employee used to do. That is also part of farming, isn't it?

MRS. SHAPIRO: That's in the third part of the exemption, which --

QUESTION: Well, no, I am just suggesting why isn't that part of farming? If it was yesterday, why isn't it today? It's exactly the same activity.

MRS. SHAPIRO: When this statute was enacted, the argument was made that threshers who -- at one point farmers did their own --

QUESTION: If you take farming apart, nothing is farming. It's all incidental.

QUESTION: In .. Mrs. Shapiro, or '60 perhaps, were all these things done by what they called the hired hands and he used a team of horses and a wagon instead of a modern truck and maybe a uniform. What's the fundamental difference in his function from the hired man of that day to this person that Mr. Justice White was describing?

MRS. SHAPIRO: As long as the operation is the basic part of farming, the growing of the chickens, the raising of the crops, then it doesn't make any difference what the scale of the operation is or --

QUESTION: The Court said that in several cases.

MRS. SHAPIRO: Yes. But when the statute was enacted, the Congress was concerned that the basic definition of agriculture would not include people who were not farmers and were not working for farmers but were doing essential farm operations.

QUESTION: A big commercial farm might have, and undoubtedly does have today a lot of this very sophisticated equipment to the point where they might have their own machine shop to repair them, whereas again 50 years ago the man who ran the steam rig also repaired it off season. Now, are these men who maintain this machinery on the modern commercial farm, -- which category do you say they are in?

MRS. SHAPIRO: They are working for a farmer on operations that are incidental to his farm operations. They are not growing the crops. They are not raising the livestock, but they are performing necessary incidental operations by the farmer --

QUESTION: How do you distinguish them from the gentleman that Mr. Justice White was describing?

MRS. SHAPIRO: The man who is not working for the

farmer but is sent into the farm working for someone else? Well, he is not working for the farmer. And as I say, the third exemption covers people who are not working for the farmer but are working on the farm, so that Mr. Justice White's man who is working for an independent company but working on the farm is within the third exemption.

QUESTION: Not necessarily a company.

QUESTION: ... buys a truck; one big one that brings 20 tons and sits there, and then little trucks would deliver it around within the farm. Would those little ones be all right?

MRS. SHAPIRO: Who is driving them? Are they people --

QUESTION: No. One .. ton trucks owned by the farmer.

MRS. SHAPIRO: And the little truck drivers are ..

QUESTION: Are they engaged in farming?

MRS. SHAPIRO: They are in the secondary part. They are not engaged in the primary part. They are engaged in the secondary part.

QUESTION: There is a difference between the big truck and the little truck, is that right?

MRS. SHAPIRO: The person who drove the little truck onto the farm, was he employed by the farmer?

QUESTION: Yes, the little truck driver was employed

by the farmer, the big truck driver is employed by Bayside.

MRS. SHAPIRO: OK. The big truck driver is not employed by a farmer.

QUESTION: Is it employment that decides it?

MRS. SHAPIRO: That is part of what decides it.

If he is employed by a farmer, in order to be within -- the little truck driver, whether they are employed by Bayside or by anybody, if they are working entirely on the farm, then they are within the third exemption.

QUESTION: Suppose that Bayside was delivering tanks of water. Any difference?

MRS. SHAPIRO: No. If Bayside --

QUESTION: It's hard to raise chickens without water.

MRS. SHAPIRO: It is. That's exactly what the Farmers Irrigation Company said. It is hard to raise crops without water; it is hard to raise chickens without water. But the exemption, the primary exemption is for actual farming operations, and delivering water or delivering feed is not part of the primary exemption. It's an incidental, necessary operation.

QUESTION: But in the Farmers Ditch Company, the ditch company that was claiming under the exemption did absolutely no farming itself, did it?

MRS. SHAPIRO: All it did was provide an essential

service, and Bayside does no farming itself. They contract for other people to do the farming.

QUESTION: Well, you concede that they do some farming in the growing of breeders.

MRS. SHAPIRO: That's right. But certainly these feed truck drivers don't deliver feed to the farms that --

QUESTION: The water company didn't control the farming operation either. The farming wasn't done in accordance with their specifications and under their direction.

MRS. SHAPIRO: That's true. But our claim, as we explain in the brief, is that the kind of control --

QUESTION: I know you say that isn't enough.

MRS. SHAPIRO: Well, the kind of control that Bayside exercises are not enough. One of the reasons for that, which we didn't emphasize in our brief, but I think is really quite important, is that if you look at the terms of the agreement between Bayside and its farmers, Bayside has set up very specific specifications about the product. It provides the product, and it indicates how they want the product grown. But it says nothing about the labor side of it. It doesn't say anything about wages; it doesn't say anything about hours, it doesn't say anything about fringe benefits. It doesn't say anything about the types of unsatisfactory performance that are going to lead to a termination of the relationship, although it apparently contemplates that the farmers are going

to hire employees, it doesn't say anything about the conditions --

QUESTION: Doesn't that suggest almost a lessor-lessee relationship that you are asking for a certain property and certain conditions from the lessor, and you don't care how he goes about providing it?

MRS. SHAPIRO: That is precisely what it suggests, and the reason I think that's important is because what the National Labor Relations Act exemptions are concerned with is that the farmer should be free to set the conditions of employment of his workers without complying with the National Labor Relations Act. And that's just what Bayside is not doing.

QUESTION: But if it is a lessor-lessee relationship, doesn't that strengthen Bayside's claim that it rather than the contract farmers is doing the farming. If Bayside had simply leased land from these same contract farmers and agreed to pay them at the same way for their land, clearly Bayside would be doing that farming, wouldn't it?

MRS. SHAPIRO: If they had employees that were doing the farming, but they don't. What they have is basically a requirements contract. They have set fairly specific specifications for the product; they have supplied raw materials; they say this is the way we want those raw materials put together, and we will pay you for the results of your efforts. But how you put the product together, whether you

hire people to do it, and if you do, under what terms you hire people to do it, that's of no concern to us. And it's on the basis of that kind of an agreement that they are seeking to avoid the requirements of the National Labor Relations Act as regards the employees that they have where they do set the terms and conditions of their employment. Part of the essence of their arrangement with their contract farmers is that they are out of the very area that the National Labor Relations Act is concerned with.

Bayside's argument that the statutory exemption covers those who contract for others to do the actual farming asks the Court to expand the statutory definition beyond its plain meaning and beyond the decisions of the Court interpreting the statute. This statute is not required, either for practical business reasons or to treat employers and employees fairly. The statutory definition is quite precise. Congress didn't simply exempt agricultural laborers and leave it to the courts to define agriculture; it spelled out what it meant. It included farming in all its branches, but only those incidental non-farming operations performed by the farmer. That is, by someone engaged in actual farming.

As I pointed out, the Court held in Farmers Irrigation Co. that an association of farmers that supplies irrigation water to its member farmers is not itself a farmer for purposes of the exemption. The supplying of necessary services to farmers

does not make you a farmer. So even though Bayside supplies necessary materials to the farmer and pays him for the results of his efforts, Bayside is not the farmer.

QUESTION: I get a feeling, Mrs. Shapiro, that the Government's position as you articulate it is that when the total farming operation becomes subdivided and compartmentized resembling the methods of modern business in order to achieve greater efficiency, that somehow or other the more efficient function loses its character as farming.

MRS. SHAPIRO: No. Certainly, we are not arguing that integration makes it lose its character. All we are saying is that when you have got a complex company, what you have to do is look at what it is doing and look at the nature of, here, the contract with the growers. We are not certainly arguing that as a whole it's not a farm. We agree that there are parts of it that are farming. All we are saying is that in its relationships with the growers, it's contracting with farmers. Certainly you can imagine situations in which Bayside would have its own farms, like the sugar companies do. It's not the modernization of it that is the problem; it's the form that that has taken.

QUESTION: Mrs. Shapiro, suppose they had owned all of these farms and operated them. They would still be under the same legislative decision, wouldn't they?

MRS. SHAPIRO: If they owned and operated all these

farms, then, as I said before, you would have to decide whether the feed mill was incidental to the operation of the farm.

QUESTION: I am asking you. Would it be?

MRS. SHAPIRO: The record here I don't think is complete enough. Then you go to the questions in --

QUESTION: My record is that Bayside has 100 farms which they run, operate, finance, own, pay taxes on, et cetera.

MRS. SHAPIRO: Right.

QUESTION: And the feed mill and everything else is just the same. Would those trucks be in the farming business or the processing business?

MRS. SHAPIRO: In order to answer that question, you would have to look at the relationship between Bayside's farming operation and the feed mill. And the Waialua case lays out certain questions that you ask in order to determine whether the feed mill is incidental to Bayside's farming operation.

QUESTION: The only difference in my hypothetical is that Bayside owns the farms and operates them. That is the only difference. Everything else is the same.

MRS. SHAPIRO: Right.

QUESTION: Whether those trucks be process or farm.

MRS. SHAPIRO: Our position is that they would be incidental to the feed mill. That's, I think, quite clear. Then the next question is is the feed mill incidental to Bayside's

farm operations?

Now, the court below, and in our brief we discuss the question of whether the feed mill is incidental to the very limited farm operations that we agree that Bayside is involved in. That is one question. Your question would be whether the feed mill is incidental to the much larger farm operation that Bayside would be involved in in your case, and that is you are having it incidental to a different unit and it's a different question.

QUESTION: Does it make any difference in this case that the feed mill was owned by a subsidiary?

MRS. SHAPIRO: No. The Board found and the Court agreed that it was one unit.

QUESTION: Does it make any difference that a small percentage of the feed mill's product was sold to outsiders?

MRS. SHAPIRO: No, it really doesn't.

QUESTION: So it would be the same if the feed mill were owned directly and located on property owned by Bayside and its entire output went for this chicken farming operations?

MRS. SHAPIRO: Yes.

QUESTION: You would still have the issue in your view as to whether or not the work of the truck drivers was incidental to a farming function.

MRS. SHAPIRO: And whether Bayside's relationship with the contract growers really makes them a farmer.

The only two points I wanted to emphasize in addition are that there are no practical business reasons which require treating Bayside as a unit. In fact, some of Bayside's truck drivers are unionized, represented by the union, so they clearly are under the National Labor Relations Act. Bayside doesn't contend otherwise.

QUESTION: What function do they perform?

MRS. SHAPIRO: Those are the truck drivers that go onto the farms and get the chickens and take them to the processing plant. They belong to the same bargaining unit as the members of the processing plant.

QUESTION: And there has never been a claim that they are agricultural workers.

MRS. SHAPIRO: No.

QUESTION: And they are employees; they are not independent contractors.

MRS. SHAPIRO: Oh, yes, they are employees.

And the other point I wanted to make was that there is no considerations of fairness that require you to find these truck drivers agricultural workers. Our point is that people that are performing similar work, the workers on Bayside's own farms and any employees of the growers, clearly they are doing the same kind of work, they are both agricultural workers. They are both within the exemption. Bayside also has a -- the truck driver that delivers the feed to the

independent farms, he is not an agricultural worker. He is doing the same kind of work as these truck drivers here are. So in fairness considerations, they should be treated the same way as people doing similar work.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mrs. Shapiro.

You have a few minutes left.

REBUTTAL ARGUMENT OF ALAN J. LEVENSON

ON BEHALF OF THE PETITIONERS

MR. LEVENSON: Thank you, your Honor.

In my presentation in chief I never got to the question about incidental to or in conjunction with farming, and I would like to do it right now.

In the regulations of the Fair Labor Standards Act, I would like to make reference for your future research/780.157(a), and that says, "In the case of transportation to farms of materials and supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment would be incidental to the farmer's actual farming operation.

In Maneja, which they quoted, that's 349 U.S. 262, "Similarly the exemption clearly covers the transportation of farm implements, supplies, and field workers to and from the fields." In Farmers Reservoir, which Mrs. Shapiro quotes as

saying that it isn't incidental to or in conjunction with farming, I dispute that entirely. At 337 U.S. 766, it is speaking about the delivery of water to the headgates of farms by irrigation company workers. "It is equally clear that it does constitute a practice performed as an incident to or in conjunction with farming. The irrigation company workers were not exempt, however, because the delivery was not by a farmer or on a farm."

Abbott Farms, 487, 904 holds that production and hauling incidental to and in conjunction with poultry is farming. Wirtz v. Osceola Farms, 372, 584-589, footnote 4, "Movement of food and workers to the fields has significance and purpose only in making it possible for the harvesting activity to take place."

What I am saying, if you own an individual feed mill and you have truck drivers from it, those truck drivers are incidental to and in conjunction with the mill. It makes sense. But if you own 3 million chickens all over the farm, you are trying to raise chickens, you are not trying to deliver feed.

With regard to how the feed mill works, one-third of the production went to an independent feed company at the time they bought the thing. It doesn't go to it now. But the feed that goes to the farms only is driven by Bayside drivers to Bayside farms. They connect it up at the feed mill,

they pour it into the truck, they drive to it, they may unload it at the farms. These days what's feeding the chicken? The guy who is deciding what to feed that chicken is extremely important because he is deciding how to change the feed every minute of the time.

One more thing. I have left out this business "on the farms." In modern day farming, you have got at least four separate elements. You have got the hatcheries, you have got the poultry processing plant, you have got the feed mill, and you have got the poultry growers. What is the farm? I contend the farm is everything. Every element of that thing is on the farm. What does the driver do? He is driving from the feed mill to the contract farms. That leaves open the question what about the highways, driving back and forth on that highway? That is the weakness in the argument. That is addressed by the case of N.L.R.B. v. Olaa Sugar, 242 F.2d at page 717, "It is common knowledge that even small farms are frequently bisected by public roads. Even small farm operators frequently own or operate noncontiguous fields reached only by public roads. If a citrus farmer sent his truck driver to haul hay baled in a distant field to be stacked near the farm building, the operation would not cease to be an agricultural one even if the employee made some use of the public road on his trip." If this be true in the case of the small farmer, the case should also be true here.

?

We have also got this case of Brennan v. Sugar Growers 486 F. 2d 1011. Those were cooks. They were cooking in a labor camp, and the court there held that they are on a farm as much as you could be on a farm, given the fact they were in a labor camp.

We are saying that the primary purpose of this statute is if you are in agriculture. Nowadays, that's agriculture. And they will recognize this when they take and combine all of these elements into one, that you are back to the original farmer doing everything. Now we have got the whole thing doing everything.

Now, the question that Maneja raises -- and the reason I am not saying this is primary farming is the same reason Maneja says this transportation of a truck from a field is secondary farming. Olaa Sugar questions that. They can't understand why that isn't part of the harvesting operation. I think, to be quite frank, and I have never understood why it isn't part of raising poultry. It's not incidental to, it's direct poultry. And that's the issue to me. I would exempt either one or the other, but I never considered that it wasn't exempt.

My time has run out. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 1:47 p.m., oral argument in the above-entitled matter was concluded.]