ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1416

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner v. ACTION AUTOMOTIVE, INC.

PLACE Washington, D. C.

DATE October 29, 1984

PAGES 1 thru 33

ALDERSON REPORTING

(202) 628-9300
20 F STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- -x

NATIONAL LABOR RELATIONS BOARD, :

Petitioner :

v. : No. 83-1416

ACTION AUTOMOTIVE, INC. :

- -x

Washington, D.C.

Monday, October 29, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C.; on behalf of Petitioner.

STEWART J. KATZ, ESQ., of Detroit, Michigan; on behalf of Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R C C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Come, I think you may proceed when you are ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.

ON BEHALF OF THE PETITIONER

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

The question presented in this case is whether the National Labor Relations Board has authority under Section 9(b) of the Act which gives the Board broad discretion in regard to establishing units appropriate for collective bargaining, to exclude from a bargaining unit employees who are close relatives of the owners of a closely held corporation that employs them without a showing that the employee relatives receive special job-related privilege.

The basic facts are these. Respondent is an automobile parts and gasoline dealer in Michigan. The dealership, a closely held corporation, is owned equally by three brothers, Richard, Robert and James Sabo, who are President, Vice President, and Secretary-Treasurer respectively. The three Sabo brothers are actively involved in Respondent's daily operations; together they make all of its policy decisions and retain ultimate responsibility for the supervision of all of its

partners.

In March of 1981 the Retail Employees Union filed a petition with the Board requesting that a representation election be held among Respondent's employees. Respondent from the union stipulated to an election in two bargaining units, a unit of store and warehouse employees at Respondent's nine retail stores, and a unit of office clerical employees at Respondent's headquarters office.

The union received a plurality of the votes in the election, but the validity of its certification as the bargaining representative for both of these units turns on the validity of the Board's action in sustaining the challenges to the ballots of Diane and Mildre Sabo.

Diane is the wife of Respondent's President Richard Sabo. She is a regular part time general ledger clerk at the headquarters office. She resides with her husband, and both work at the same office. At work she often goes to lunch with her husband, or one or both of his brothers.

Mildred Sabo, the mother of the three Sabo brothers who own and operate Respondent, is a full time cashier at one of the retail stores. She lives with Secretary-Treasurer James Sabo in a house that he owns,

and she sees or has contact with her other sons and their families on a regular basis.

The Board, applying its longstanding policy of excluding close relatives of the owners of a closely held corporation from bargaining units where the family relationship is such as to remove the employee relative from the community of interests shared with other employees, concluded that Diane and Mildred Sabo should be excluded from the bargaining unit because in view of their relationship to Respondent's owners, their interests were more closely allied with management than with the other employees.

QUESTION: Mr. Come?

MR. COME: Yes, sir.

QUESTION: Has the Board ever explained the relationship between Section 152(3) of the Act, where Congress says that the term "employee" shall not include any individual employed by his parent or spouse, and the Board's authority under 159(b) to decide that close relatives shan't be members of a bargaining unit?

I would think there is an argument there that Congress has already spoken to this subject and it has not gone as far as the Board has.

MR. COME: That was the basis on which the Sixth Circuit accused or enforced the Board's order. It

felt constrained by Section 2(3) of the statute which excludes from the definition of employee any individual employed by his parent or spouse, which -- it is the Board's position that this provision which goes back to the Wagner Act days simply defined the relatives of employers of -- who are wholly outside of the Act's protection. It says nothing about how the Board should exercise its discretion in determining appropriate units with respect to relatives who are employees within the Act's coverage.

QUESTION: But Mr. Come, the Board is relying on Section 9(b) authority, and 9(b) speaks in terms of selection of an employer unit, a craft unit, a plant unit, or a subdivision, and it just doesn't address itself to picking out individuals, does it?

MR. COME: No, it does not. However, the Board from its earliest days, in defining units under Section 9(b), has used a community of interest standard. The purpose in defining the unit under that standard is to put together groupings of employees that have a unity of economic interests and try to exclude employees that do not share.

QUESTION: Well, is it the Board's position that it could employ a standard that would exclude individuals simply based on anti-union animus alone?

MR. COME: No, Your Honor, that is --

QUESTION: Why not, under the Board's theory?

MR. COME: Because, the statute certainly, since the Taft-Hartley amendments, as this Court made clear in Savair, is, mandates neutrality with respect to whether employees wish to select a union or not wish to select a union.

So that would not be a permissible criterion. However, I should like to point out that the basis for the Board's exclusion of close relatives from units does not turn on that factor. That may be a consequence of the exclusion, but that is not the basis for the exclusion. One might argue, for example, that if you were to exclude an employee who is highly skilled and makes substantially more an hour from a unit with relatively low paid employees on the ground that they do not share the same unity of economic interest, it may be likely that this high skilled employee might be less disposed to vote for the union than would be the rank and file. But that is not the basis for the exclusion. The basis is whether they share an economic, a community of interest.

Now, the board from its earliest days has excluded close relatives that do not fit the 2(3) definition from bargaining units.

QUESTION: How about a close friend of someone in management?

MR. COME: Well, I think that that might not be sufficient because the Board over the years has refined its lunit exclusion policy and has adopted the factors that were articulated by the Seventh Circuit in the Caravelle case, and in looking at those factors, what the Board looks at is how high a percentage of the stock a parent or spouse owns, how many of the shareholders are related to one another, whether the shareholder is actively engaged in management or holds a supervisory position, how many relatives are employed as compared with the total number of employees, and whether the relative lives in the same household or not.

QUESTION: Well, Mr. Come, is the Board asking just for a rule for relatives and no one else, just a bright line rule for relatives?

MR. COME: It's a bright line rule for some relatives.

QUESTION: Some relatives.

QUESTION: In closely held corporations?

MR. COME: Well, I think, I think, I think that that is what is involved in this case.

QUESTION: Well, what's the Board asking for, though, and what's the Board's position?

MR. COME: Well, the Board, the Board's position is that it is a reasonable and permissible interpretation of its role under the statute to be empowered to find that relatives who would meet the Caravelle criteria, that what we are talking about essentially is close relatives of owners of closely held companies, because the way it is worked out is that unless you have had that situation, the Board has not found that a lack of community interest based solely on the family relationship but has required a showing of a special job state, so that in your example of just a close friend, in that situation the Board has uniformly required more in the way of a showing to warrant exclusion. It would not exclude that sort of a relationship purely on the basis of a relationship, I mean.

Now, we think that the Board's policy as it is implemented at least for the past fifteen years since the Board has embraced the Caravelle policy, does further the basic purpose involved in defining appropriate units because the Board's task in defining these units, as I indicated at the outset, is to try to get a grouping of employees that is going to make for efficient collective bargaining, get a cohesiveness of economic interests and try to minimize conflicting

interests.

And the Caravelle policy does further these objectives. As the Board has pointed out in its decisions, employee relatives, particularly those who reside with owners of the business, have an access to management not shared by other employees. Thus, their perceived need for collective representation to provide such access differs substantially from those of other employees.

Moreover, employee relatives who are financially dependent on the owner are likely to be motivated by other considerations, considerations that are very different from those of employees that do not have this relationship.

Now, this is apt to manifest itself not so -- not only in determining whether to vote for the union or not vote for the election -- union, but even should a union be selected in the plant, in terms of what issues to present for collective bargaining. It is the Board's judgment that you are apt to get many more conflicts in that stage of the negotiation, somewhat analogous to the conflicts that this Court pointed out in Pittsburgh Plate Glass in concluding that retirees were not appropriately placed in the same bargaining unit with active employees.

So in short, the Board's policy of family exclusion furthers the basic purpose of the Act of ensuring effective collective bargaining and avoiding conflicts in bargaining once a bargaining agent is selected.

Secondly, the exclusion of such employee relatives furthers collective bargaining in that the presence of such a close relative in union discussions is likely to be viewed with suspicion and distrust by the other employees and put a damper on union deliberations.

QUESTION: Mr. Come, does this mean if the exclusion, if they are excluded from the unit, that they obviously couldn't be members of the union, I guess they could also not participate in pension plans, collectively bargained pensions programs?

MR. COME: If they are excluded from the unit, they would --

QUESTION: They would be excluded.

MR. COME: But that is true, of course, Your Honor, of any employee who is excluded from a unit on a lack of community of interest grounds, and there would be nothing to prevent the employer from setting up equal pension rights or better for --

QUESTION: Except sometimes you need a large

group of employees to fund the program, I suppose. You can't have a special fund for your nephew I don't think.

MR. COME: But as I say, that is a problem that occurs whenever employees are excluded from a unit on community of interest grounds.

QUESTION: Well, you just exclude them from voting, don't you? I mean, why would it mean that you shouldn't treat them as an employee?

MR. COME: Well, they are treated as an employee, but they would not --

QUESTION: Not for these pension purposes?

MR. COME: But they would not be in the bargaining unit. What we are talking about is the propriety of excluding these people from the bargaining unit on the ground that they do not share the same community of interest with the other people who are in that bargaining unit.

QUESTION: But then, are they to be denied the benefits of the union membership forever?

MR. COME: No, they're not. It may be possible for them to set up a unit, a separate unit.

QUESTION: Employee relations.

MR. COME: Well, they are not like managerial employees in the sense of who would be excluded from all

rights of the group.

QUESTION: But the whole thesis is that they are tainted with the managerial taint, isn't it, really?

MR. COME: Well, their interests are found to be more allied with management than they are with the rank and file workers.

QUESTION: But do they -- I don't think I've got your answer. You say they should be excluded from voting in this first step.

Are they excluded from membership in the union thereafter?

MR. COME: Well, they are excluded from the bargaining unit. That means that not only do they not vote, but the union is not required to represent them in that unit. If the union wants to take them into membership on -- apart from that, that's a matter of the union's membership rules, but it would not be required to bargain for these employees on behalf of the unit for which the union has been certified.

QUESTION: I suppose one of the factors there would be that when they are in negotiations or considering a strike matter, these would in effect be infiltrators whose loyalty would be divided between the -- at least divided between the union and the

management, is that right?

MR. COME: I think that puts it well. It is somewhat analogous to the exclusion of managerial employees which this Court in Bell Aerospace said were not only to be excluded from bargaining units from other employees, which is as far as the Board went, but were excluded from all rights under the Act. The Board has not gone that far with respect to the relatives, but the underlying principle is essentially the same, and the Board's exclusion principle reserves the line between management and labor which this Court in Bell Aerospace and also in Yeshiva indicated that the Congress intended to draw at least in the Taft-Hartley amendments to the Act.

I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Katz?

ORAL ARGUMENT OF STEWART J. KATZ, ESQ.

ON BEHALF OF RESPONDENT

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

In reality, what the Board seeks to do here is they are seeking authority to disenfranchise and exclude from a bargaining unit individuals who fall within the

definition of an employee under the Act. In this case, that is relatives of owner-managers of a closely held corporation. They seek to exclude and to disenfranchise for reasons that have nothing to do with what that employee terms and conditions are at the job place. That is conceded by the Board.

And there was a specific finding in this case throughout and at the Court of Appeals that there is no special job status or job privileges that Diane and Mildred Sabo enjoyed as a result of their family relationship.

The Board is seeking reversal of the Sixth Circuit's finding --

QUESTION: But didn't the Board find otherwise with respect to one of them?

MR. KATZ: I'm sorry, Your Honor.

QUESTION: Didn't the Board find otherwise --

MR. KATZ: I'm sorry, I stand corrected. As to Diane Sabo, two of the three panel members did find special status. The Sixth Circuit and the hearing officer found no special status as to both employees. I stand corrected.

The Board is seeking reversal of the Sixth Circuit standard which in effect does not believe that

employees should be disenfranchised solely on the basis of their pedigree. We urge adoption of the Sixth Circuit standard.

Now, the Sixth Circuit standard is clear. It effectuates the purposes of the Act and congressional intent.

Now, in its statements to you, the Board indicated that it has a longstanding policy of exclusion of relatives based on family ties. That we tend to differ upon. As a matter of fact, since 1953, throughout, the Board has applied a special status test. From 1955 to 1967, they consistently applied the test. From 1967, when they passed their decision in Foam Rubber, they indicated that they were now going to go back to a family tie only test. However, as the courts indicated in reviewed decisions of the Board, that was not the case. The Board continued to use at various times special status. I think the Caravelle court even said that.

Subsequent to that and the supposed adoption of the adoption of Caravelle, the Board continue at times to use special status cases, and Linn Gear, a Ninth Circuit case, commented on that particular point, so that since 1953 -- and Linn Gear was decided, I believe, in 1979 -- the Board has applied in various

degrees a special status test.

The Sixth Circuit test which relies not to exclude solely on the basis of family ties but is a test in which family ties can be used to demonstrate special status if there are special job privileges and benefits that flow to the employee as a basis of that family relationship, is a neutral test. It takes -- it respects all sides because it is related to the job place.

The Board, through what it indicates, an adoption of Caravelle, which I am going to comment because that is not the entire Board theory, but in terms of Caravelle, adopts what is -- what is called an expanded community of interest test. It looks to things that have no impact or nothing to do with the terms and conditions as they relate to the job place itself. The Sixth Circuit test refuses to do that and remains neutral which is exactly what Savair calls for, as this Court indicated.

The Sixth Circuit test does not look to loyalty or divided loyalty. It does not look to how an employee may or may not vote. It does not look to how an employee -- whether the employee has engaged in any union activity, which is exactly one of the factors the Board looks to. The Board in 1972 and 1974 adopted

Caravelle standards. They haven't applied them uniformly since, but nevertheless, they indicated that that's what they were adopting.

However, and as the Board points out in their brief, in a footnote, they also adopted Linn Gear, which was then also adopted by Pattison of the Eighth -- case in the Eighth Circuit. Linn Gear, one of the fac crsqin Linn Gear is you are supposed to explore and look at what union activity, if any, the relative has engaged in.

Now, that, it seems to me, flies directly in the face of not only Savair, but the congressional amendments of 1947 which talk about, in Section 7, the employee has the absolute right to engage in union activity, collective bargaining, et cetera, et cetera, but also has the absolute right to refrain therefrom.

In addition, 9(b) in 1947 was changed to grant to all employees their fullest freedoms as it relates to all sections of the Act. And again, 9(b) flows from Section 7. As a matter of fact, Section 7, if it could be characterized as such, is the guts of this Act, and that is to protect the rights of employees, whether or not they are engaged in -- or are pro-union or anti-union.

So when the question was asked previously as

to whether or not union animus might be considered, in Linn Gear that is one of the factors that is put down. One activity, if any, has this employee engaged in vis-a-vis the union? Now, that really should have nothing to do with whether or not an employee has a right to vote. In other words, if a union is going to present evidence, or someone presents evidence that an employee passed cards out and happens to be the sister of the owner, well, am I to assume that because that individual passed cards that she could now vote, or if that employee did not pass cards out or sign the cards, that employee cannot vote?

QUESTION: Well, did the union -- did the Board apply a test using the factor you have just described in this particular case?

MR. KATZ: The Board did not cite any case. It doesn't cite -- as I recall the Board decision, it is in a footnote, okay? The Board itself, the hearing officer did not cite Caravelle, okay? The hearing officer did not cite Linn Gear, as I recall his decision. The Board did not cite any case in footnote 2, which was their decision in this case.

The Sixth Circuit, in this case prior to coming up here, indicated in its footnote that it rejects the expanded community of interest test that

some other circuits have applied. I don't recall offhand whether or not they cited Linn Gear along with Caravelle.

QUESTION: I didn't understand Mr. Come to defend a test which would have incorporated as one factor how much union activity the particular person had engaged in.

MR. KATZ: I'm -- I don't -- I think he indicated that -- I think the question was asked by Justice O'Connor, well, could you consider antiunion animus? And he said no, the Board was neutral --

QUESTION: Yes.

MR. KATZ: -- on Savair, and he cited Savair, that based upon its neutrality, that would not be permissible, and I don't disagree with that.

What I am saying is is that -- and the Board concedes in its brief to this Court -- that Caravelle isn't the test. Caravelle plus Linn Gear is the test the Board relies on because the Board has adopted Linn Gear and indicates so in its brief.

And one of the Linn Gear factors is what activity, if any, has that employee engaged in?

Now, additionally, the Sixth Circuit case protects all rights under Savair. It is a test that has been uniformly applied by the Sixth Circuit for 30

years, since 1953, and as a matter of fact, it was the Sixth Circuit's decision in Sexton in 1953 which triggered Board re-evaluation or evaluation of its position when in 1953 they then decided to follow the Sixth Circuit lead when it decided International Metal.

As indicated previously, the Board, although it indicates in 1967 it switched back to a family only tie, based upon Foam Rubber City, the fact of the matter is in all the courts that have reviewed Board conduct since then have indicated that it has engaged in at best a checkered course, and even since Foam Rubber and even since Caravelle, has at various times applies a special status test as to relatives. I'm not talking about only managers, relatives of a manger, I'm talking about relatives of owners, and cases are cited in our brief to this Court.

Basically I understand the Board has broad authority as it relates to unit determinations, but they do not have the unlimited discretion to interpret statutory language in a manner that is inconsistent with the Act. 2(3) specifically designates what an employee is, and it indicates what relatives are to be out on a per se basis. That's the test. All the courts, including Caravelle, in Caravelle 1, I believe, indicated that what -- that the Board's intent through

9(b) was in effect a modification, an impermissible modification of Section 2.3. All courts have said that, even Caravelle 1. I think Caravelle 1 made the comment, we cannot allow you to accomplish something under one provision that you cannot accomplish under the other.

Caravelle then went on, for whatever reason, to draft an expanded community of interest test which allowed the Board or gave the Board some guideline as to whether or not they wanted to follow factors that again had nothing to do with their ability or their factors on the job. And as a matter of fact, the Board, the Court in Caravelle 2, I believe, specifically indicated that the factors they set up have nothing to do with the terms and conditions of the employee at the job.

QUESTION: Well, certainly application of a special job-related privileges or benefits test such as that approved by the Sixth Circuit, could exclude individuals from a bargaining unit who are not excludable under Section 2.

MR. KATZ: Yes, that's correct, that's correct.

QUESTION: And you are not arguing that that's improper, are you?

MR. KATZ: No, no. I think that -- the Sixth Circuit has indicated that, properly used, 9(b) will

determine community of interest, but I believe what the Sixth Circuit is saying is that you are going to do that by looking at what that person does at the job. If that person has the same terms and conditions of employee, make the same amount of money, reports to the same job location, is subject to the same work rules, is under the same supervision, then we will take into account the fact that there's a family tie, but we are not going to exclude solely on that family tie. We are not going to exclude an employee from a bargaining unit simply because of this family relationship. Don't forget, the employee cannot vote. The employee is also excluded from the bargaining unit. The employee, however, is still an employee under the Act, now, which raises an interesting sort of a situation because unlike the cases that have come before the Court with the confidential employee in Hendricks or in Bell Aerospace when we are talking about managerial employees, in those cases, not only was the employee out of the unit, regardless of whether they still remained an employee under the act, but the work they did left the unit.

In other words, it was the work, the work that triggered the exclusion. In this particular case, the work remains in the unit. That employee is a ledger clerk. Mildred Sabo is a register, a cashier. That

work is bargaining unit work. That is what the union has been certified to represent.

Now we are faced with a practical situation of here is an employee that can't vote, is not supposedly in the unit, but her work is in the unit. Now, is that person supposed to be -- are we supposed to create a job for that person? Are we supposed to terminate that person? Are we -- now, whether or not a non-unit employee, which Mildred Sabo in this case would be, is able to perform bargaining unit work is a mandatory subject of bargaining. We cannot take that work and move it out of the bargaining unit on our own unilaterally. That means we have got to sit down at the table with the union, assuming the union wins, and we have got to bargain that out.

If the union says no, I am faced as a pratical matter with either firing Mildred Sabo or taking a strike.

Now, here is an employee that did nothing, has gotten no special privileges in eleven years of work, and all of a sudden her job is in jeopardy, and she never had the right to vote about it either. I think that's wrong, and I think the Sixth Circuit is saying that is exactly what is wrong.

Now, if somebody is getting special privileges

on the job and there is this great differentiation, then, yeah, I don't have any problem with that, and the Sixth Circuit doesn't have any problem with it.

And I might indicate as a --

QUESTION: Well, what if there were one that was getting special privileges and she was excluded from the unit? What would happen to her work then?

MR. KATZ: Well, at that particular point in time --

QUESTION: Wouldn't you -- you would face your very same problems.

MR. KATZ: No, but there's a differentiation, just like I think in this court there was a differentiation with confidential employees in that not all confidential employees were excluded from the unit. What you have got here is -- and I see a distinction and a difference between an employee -- if the employer grants special privileges because of that relationship and the employee accepts those special privileges because of the relationship, then wherever the ships fall, the chips fall.

QUESTION: Well, but her job would still end up in jeopardy.

MR. KATZ: Yes, it would, but now, but you see, the point I am making in response to that --

QUESTION: And it would still be a mandatory bargaining matter if the employer wanted to keep her on that job, or move the job out of the unit.

MR. KATZ: That would be true in that regard, but what I am coming to, though, is that what we are looking for really is a -- not a large grouping of employees that are under review here. No family starts a family run business and says to itself, well, look, I am going to make sure that I don't grant any special privileges to my niece, nephew, sister, because eleven years from now or ten years from now I am going to get a union petition. Generally what happens is the family business is run, and it is quite easy to show special status.

In virtually, in the vast majority of these cases the parties stipulate that these people are ineligible to vote because it is glaringly obvious that there are special privileges. It is only those unique situations where you have in this particular case two eleven year employees who have no special status, and that's what this whole thing is coming down to, a grouping of employees that are causing --

QUESTION: Is living in the house with the employer a special status?

MR. KATZ: No, she -- in this particular case

she maintains the house, she has certain financial responsibilities relative to that house.

The Sixth Circuit --

QUESTION: Well, how many other employees live in that house?

MR. KATZ: Well, none.

QUESTION: That's what I thought.

MR. KATZ: None.

QUESTION: But that's not a special status.

MR. KATZ: As it relates to the job.

QUESTION: Okay.

MR. KATZ: In that regard, yes.

In conclusion, I believe that the Sixth Circuit test is the fair test. I think what the Board has done in terms of seeking to reverse, or in its position, is in effect to amend the Act, amend 2(3). It is -- its conduct is not in furtherance of congressional intent but is contrary to the congressional intent of the '47 amendments which made specific changes in Section 7 and Section 9(b) to assure all employees the fullest rights under the entire Act, and especially Section 7 rights.

I believe firmly that the Sixth Circuit test should be adopted. That is the test which ensures all of those rights.

Thank you.

CHIEF JUSTICE BURGER: Do you have something further, Mr. Come?

ORAL ARGUMENT OF NORTON J. COME, ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. COME: I just have --

CHIEF JUSTICE BURGER: You have eight minutes remaining.

MR. COME: Two small points.

The first point that I want to make is that there's actually a very narrow difference between the Board and the Court of Appeals. The Court of Appeals agrees that if you had special job status, you could exclude these employees. However, the Court requires at least two instances because there was one instance in -- of special status, and they said, in connection with Diane Sabo, and they said that was not enough.

The only difference is whether or not the Board can reasonably conclude that there are certain circumstances, of which this case is one, where the nature of the relationship is such that even though it has not manifested itself in special job privileges, the relationship is such as to warrant the conclusion that the employees still do not have the same community of interest with the other employees.

We submit that this is an allowable choice of the Board to make in the exercise of its Section 9(b) unit determination authority, that the history of the 2(3) exclusion which is set forth at page 26 of our brief, which is a Wagner Act exclusion, gives no indication whatsoever that Congress, in putting in that exclusion, intended in any way to restrict the Board's ability to define, to exclude other relatives from bargaining units.

The Senate report says that the exclusion was put in for administrative reasons. The Committee deemed it wise not to include under the bill agricultural laborers, persons in domestic service of any family or person in his home, or any individual employed by his parent or spouse.

It seems evident that what Congress was concerned about was excluding very, very localized situations that they thought were not even subject to the Board's jurisdiction at all and were not at all focusing on the problem of the Board's ability to exclude from bargaining units employees who were subject to the Board's jurisdiction.

QUESTION: Mr. Come, could I ask just one question?

MR. COME: Yes, Your Honor.

QUESTION: In your brief on page 14, in footnote 7, you do quote from the Linn Gear case.

MR. COME: Yes.

QUESTION: The first of the factors quoted is the activity, if any, of the employee in the union.

MR. COME: Yes.

QUESTION: And would you address the question whether you think that's an appropriate factor or not?

MR. COME: Yes, yes.

Well, the Board has never accepted that factor of Linn Gear.

QUESTION: Well, I think your brief says that it is added as a factor.

Is that -- what your brief is saying now is --

MR. COME: Well, some parts have. The Ninth Circuit and the Fifth have added it, but the Board in applying the factors has used the Caravelle articulation of the test which does not include this factor, and the Board has never applied that factor.

Normally, the -- so based upon the Board decisions that I am aware of, the Board does not regard that as an appropriate factor.

QUESTION: How about the second factor there, the total number of employees as compared with the blood-related number? Does this mean that it depends on

whether the family people are apt to influence the outcome of the election? Is that what is critical?

MR. COME: No, I don't think that it, that it is confined to that situation. I think that it could be a factor in terms of the potentiality for conflicts in the bargaining process that ensues. I mean, if you have one relative in a unit of 50 employees, the potential for conflict disrupting the bargaining process might be less than if it was a much smaller number.

Well, that factor was not applied in this case.

QUESTION: Mr. Come --

MR. COME: Yes, Your Honor.

QUESTION: Both your brief and argument have spoken in terms of close relatives.

What about people who are very close together but who are not blood relatives in any way, shape or form? Does the Caravelle test fit those people? For example, it often happens these days that you have a man and a woman living together who are not married, or you may have two brothers who are totally at odds with each other, for whatever reason, they may live in the same house.

Does relationship extend beyond blood relationship that you are arguing about?

Your brief would not indicate that it does.

MR. COME: Yes.

The cases that I know of that the Board has had have been blood relative situations, but I wouldn't say that it could not extend beyond that. I think the most important thing is not only the relationship but the role that the relative plays in the ownership and management of the business. As the Caravelle criteria have been applied, special status has been required where you have had relatives who either had no ownership interest in the company or a relatively minor one.

QUESTION: But I didn't understand Caravelle to apply the special status rule, and what you just said suggests that the Board would consider the special status or special relationship.

MR. COME: I perhaps may not understand --

QUESTION: Well, there are two general standards. One is a special status standard applied by the Sixth Circuit, and the other is the Caravelle standard applied by the Seventh, and they are quite different in the way they are framed.

MR. COME: Well, special status means that you'd have to have, have some difference in job benefits and privileges. That would be a basis for excluding individuals from bargaining units even without any

family relationship at all.

QUESTION: But did the Court of Appeals in this case find any special privilege?

MR. COME: It did not. The Board found special privilege in respect to Diane Sabo, and that was an alternative basis for the Board's exclusion. But the Court of Appeals found that one instance was not enough, and we are not raising that evidentiary determination here. What we are going on is the propriety of the exclusion based upon the family relationship.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Come.

Thank you, gentlemen.

The case is submitted.

We will hear arguents next in Paulsen v. the Commissioner of Internal Revenue.

(Whereupon, at 11:53 a.m. o'clock, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1416 - NATIONAL LABOR RELATIONS BOARD, Petitioner v. ACTION AUTOMOTIVE, INC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)