

Adams Egg Products, Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO. Case 15-RC-4490

May 6, 1971

DECISION ON REVIEW

On November 4, 1970, the Regional Director for Region 15 issued a Decision and Direction of Election in the above-entitled proceeding in which he found appropriate a unit of employees at the Employer's egg-breaking and separating plant in Jackson, Mississippi. Thereafter, the Employer, in accordance with Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, filed with the Board a timely Request for Review of the Regional Director's Decision on the grounds that he committed substantial errors of fact and law in finding the employees involved not to be agricultural laborers, and that in any event a substantial question of law was raised because of the absence of officially reported Board precedent as to the status of the requested employees.

Thereafter, on February 8, 1971, the Board by telegraphic order granted the Employer's Request for Review and stayed the election pending Decision on Review.

The Board has considered the entire record in the case with respect to the issues under review, including the Employer's brief on review, and hereby affirms the Regional Director's Decision for the following reasons:

The Employer is a Mississippi corporation engaged in the breaking and separating of eggs into liquid bulk at its plant in Jackson, Mississippi. The Employer is one of a number of corporations operated by Cal-Maine Foods, Inc., a holding company, hereinafter referred to as Cal-Maine. One of Cal-Maine's wholly owned subsidiaries, Adams Foods, Inc., in turn, wholly owns Adams Egg Farms, Inc., and the Employer is a wholly owned subsidiary of the latter. Recently, the employees at Adams Egg Farms, Inc., who work at its feed mill and egg processing plant in Edwards, Mississippi, were found by the Regional Director for Region 15 to be agricultural employees and hence excluded from the Act's coverage.¹

The Petitioner seeks a unit of employees at the Employer's plant, which is located approximately 24 miles from its parent company's location at Edwards. Eggs from that company and other companies in the Cal-Maine enterprise, which are unmarketable as shell eggs because they have checks or cracks or stains on their shells or for some other reason fall below USDA specifications, are brought to the Employer's Jackson

plant.² On arrival, the eggs are first placed in a cooler. They are then moved through an egg washer where all dirt and any adhering feathers are removed. Next, the eggs are placed in a breaking machine. At this point, the egg liquid yolk and white are taken from the shell and, depending on the need, are either separated or handled as whole eggs. Some of the product is pasteurized. Some product is sold in liquid form, some is frozen for the Employer by another company, and some is sold to egg dryers. The eggs generally are sold in their various forms to food manufacturers for use in such products as mayonnaise and noodles. The record indicates that there are only two other egg-breaking facilities in the State of Mississippi.

Approximately 98.5 percent of all the eggs broken at the Employer's plant are obtained from companies which are part of the Cal-Maine enterprise. The remaining 1.5 percent is bought from others.

The Employer's capital investment is 16 percent of the capital investment of the Cal-Maine companies which supply it with eggs. The percentage was figured on the basis of the cost of all facilities, buildings, and machines. The value of the birds was not included. No dollar figures were supplied for the amount of capital investment.

The complement of 70 employees working for the Employer is 10 percent of the total number of employees working for the Cal-Maine companies which supply it with eggs.

Section 2(3) of the Act excludes from the definition of the term employee, "any individual employed as an agricultural laborer." Annually since July 1946 Congress has added a rider to the Board's appropriations providing that no part of the appropriations shall be "used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers . . ." as defined in section 3(f) of the Fair Labor Standards Act (FLSA). The Board of course must make its own determination as to the status of any group of employees, but as a matter of policy the Board gives great weight to the interpretation of section 3(f) by the Department of Labor, in view of that agency's responsibility and experience in administering the FLSA.³ Section 3(f) of that act reads as follows:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production,

¹ The Employer pays for the eggs by check payable to the supplying corporations. The price the Employer pays is the "going breaking price" for the type of egg concerned. In turn, the "going breaking price" is controlled by what the finished product, in its liquid or frozen state, sells for on the open market.

³ The Employer has never sought an exemption from the wage and hour division of the Department of Labor. There has therefore been no determination made by that agency whether the employees in the unit sought are agricultural employees under section 3(f) of the Fair Labor Standards Act.

¹ *Adams Egg Farms, Inc.*, Case 15-RC-4379, issues on July 9, 1970.

cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) *performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.* (Emphasis supplied.)

As the workers employed in the egg-breaking plant here are not engaged in direct farming operations such as are included in section 3(f)'s primary definition of agriculture, the question arises whether they are engaged in activities included in the "secondary" definition.⁴ In determining this, the character of the practice must be evaluated to see if it is part of farming operations or a distinct business activity. As the Regional Director noted, it is the totality of the situation which is controlling and not a mechanical application of isolated factors or tests.⁵

In order for a practice other than actual farming operations to constitute "agriculture" within the meaning of section 3(f) of the FLSA, it must be performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.⁶ Assuming *arguendo* that the Employer is a farmer because it is a subsidiary of Adams Egg Farms, Inc., we find for reasons which follow that its practices of egg breaking and separating are not agricultural activities.

We find no merit in the Employer's contention that sections 780.742 and 780.754 of the Labor Department's Interpretative Bulletin, 1963 (on which the Regional Director relied in this Decision), have been repealed by the 1966 amendments to the FLSA. These two sections, which, as indicated, are still to be found in the most recent edition of the Code of Federal Regulations, were, prior to 1966, interpretive of section 13(a)(10) of the FLSA. That section exempted from the minimum wage requirements of section 6 and from the overtime provisions of section 7 of the FLSA

[a]ny individual employed within the area of production (as defined by the Secretary), engaged in handling, packing, storing, compressing, pasteurizing, drying, *preparing in their raw or natural*

state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products. [Emphasis supplied.]

Although section 13(a)(10) was repealed in 1966, its substance was made part of a new section, section 7(d), which defined the exemption for those engaged in the processing of agricultural products. Moreover, we are informed administratively that the aforementioned sections of the Interpretative Bulletin are still applicable.

In pertinent part, section 780.742 states that employees who are engaged in "preparing in their raw or natural state" agricultural commodities for market are exempt and section 780.754 states that the processes of breaking and separating of eggs are excused from that term. Hence, the Regional Director's use of these two sections in his decision was justified and demonstrates that the processes engaged in by the Employer can not be said to involve preparing eggs in their raw or natural state for market. The fact that the raw and natural state of the agricultural commodity has been changed is a strong indication that the practice is not within the secondary definition of agriculture.

In addition, the fact that farmers who raise a commodity on which a given practice is performed do not ordinarily perform this practice has been considered by the Supreme Court a significant indication that the practice is not agriculture.⁷ Here, as stated above, the record reveals that there are only three egg-breaking plants which operate facilities in the State of Mississippi.⁸ This demonstrates the uniqueness of the egg-breaking operation among farmers in Mississippi. Finally, the record indicates that there is no interchange between the employees of the Employer and the employees of Adams Egg Farms who were found to be agricultural.

In all the circumstances, we find the employees who work at the Employer's egg-breaking plant are not agricultural employees. Accordingly the case is remanded to the Regional Director for Region 15 for the purpose of holding an election pursuant to his Decision and Direction of Election, except that the payroll period for determining eligibility shall be that immediately preceding the date below.⁹

⁷ *Mitchell v Budd*, 350 U.S. 473, 481(1956).

⁸ The companies which operate these three facilities account for 60 percent of the total egg production in the State of Mississippi.

⁹ An amended election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within 7 days after the date of this Decision on Review. No extension of time to file this list may be granted except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

⁴ The Supreme Court noted the distinction in *Farmers Reservoir & Irrigation Co v McComb*, 337 U.S. 755, 762(1949).

⁵ 29 CFR 780.154 (January 1, 1970)

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