

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 26

In the Matter of

EQUITY GROUP – KENTUCKY DIVISION LLC

Employer

And

Case 26-RC-072802

GENERAL DRIVERS, WAREHOUSEMEN AND  
HELPERS LOCAL UNION 89, AFFILIATED WITH  
THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Petitioner

REQUEST FOR REVIEW BY GENERAL DRIVERS, WAREHOUSEMEN, AND  
HELPERS LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

Now comes the Petitioner, GENERAL DRIVERS, WAREHOUSEMEN, AND HELPERS LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS (“Local 89” or “Petitioner”), following the evidentiary hearing conducted Tuesday, January 31, 2012, and the Regional Director’s Decision and Order dated February 16, 2012, and files its Request for Review of said Decision and Order. In support of said Request, Petitioner states the following:

## FACTS

The Employer operates a business where it is engaged in the distribution of chicken feed, eggs, and chicks from its Franklin, Kentucky location to independent farmers who raise poultry for processing at its Albany, Kentucky location. In accordance with the petition filed, Equity Group employs five drivers as hatchery drivers who maintain the sole responsibility of delivering chicks to independent farms and eggs from independent farms back to the hatchery. Other occupational duties also include cleaning trucks, loading and unloading of chick baskets, and loading and unloading of egg buggies.

The Employer contracts 118 independent broiler farms with a total of 544 chicken houses for the purpose of raising of poultry, 23 independent breeder farms with a total of 54 houses for the purpose of raising eggs, and 7 independent pullet farms with a total of 35 houses for the purpose of raising mature hens for the breeder farms. The Petitioner currently represents all live haul drivers who pick up mature chickens from the breeder farms and deliver to the Albany plant for processing. The Petitioner also currently represents all feed haul drivers who deliver feed to all independent farms contracted by the Employer and drivers who deliver mature hens from the pullet farms to the Breeder farms. Additionally, the Petitioner represents all maintenance employees at the Franklin and Albany, Kentucky facilities; the load out employees at the Franklin, Kentucky Feed mill; and the truck wash employees at the Franklin, Kentucky facility.

This case specifically applies to the assumptions created by the Employer (and ultimate conclusion by the Regional Director) that the five hatchery drivers are agriculturally exempt. In support of that case the Employer rested all assumptions on

testimony provided by witness Robert M. Williams, General Manager. The Employer spent ample time and discussion on the hatchery plant employees during the questioning of this witness. The Employer distinguished clear obligation of the duties of hatchery plant employees compared to those duties of the hatchery drivers. In accordance with Employer Exhibit #12 a clear designation is made between the job functions of the Hatchery Plant employees and those duties maintained by the hatchery drivers. Employer Exhibits #5, #6, #9, #10, and #11 are photographs of current processes conducted by the hatchery drivers. These exhibits along with testimony from Williams only provides proof that the hatchery drivers are not involved in activities as they relate to the farming operation of the independent farmers nor the daily operations of the Hatchery employees. The exhibits (along with testimony from Williams) further provide evidence that the five hatchery drivers are truck drivers who perform normal job functions typically associated with the profession of a truck driver and, therefore should be classified as "employees" as defined by the Act. Furthermore, the Employer recognizes the five Hatchery drivers are employees in Employer Exhibit 12 as well as testimony supplied by Williams.

#### ARGUMENT

The issue in this case centers around a determination as to whether the truck drivers who transport eggs and chicks to/from the processing plant are "employees" within the meaning of Section 2(3) of the Act or "agricultural laborers" within the meaning of Section 3(f) of the Fair Labor Standards Act (hereinafter F.L.S.A.). The Board has addressed this issue previously in Jack Frost, 201 NLRB 659 (1973), whereby it held contractual relationship between an employer and independent contract farmers

does not necessarily operate to transform the truck drivers of the employer into agricultural laborers for purposes of the F.L.S.A. According to the Decision and Order in Jack Frost,

*“Annually, since July 1946, Congress has added a rider to the Board's annual appropriation measure which, in effect, directs the Board to be guided by the definition of ‘agriculture’ provided in Section 3(f) of F.L.S.A. in determining whether individuals are agricultural laborers within the meaning of Section 2(3) of the National Labor Relations Act. The Board has frequently stated that it was its policy to consider the interpretation of Section 3(f) adopted by the Department of Labor in view of that agency's responsibility and experience in administering the F.L.S.A. n6 Section 3(f) of the F.L.S.A. reads, in pertinent part, as follows:*

*. . . agriculture includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operation, including preparation for market or to carriers for transportation to market.”*

Jack Frost, 201 NLRB 659, 660 (1973).

As was established at the January 31, 2012 hearing, the truck drivers herein are not engaged in direct farming operations, of the type enumerated in the "primary" definition of "agriculture" consistent with the facts of Jack Frost. It also appears that the

truck drivers are NOT engaged in activities included in the "secondary" definition of that term again consistent with Jack Frost.

*“In order to come within [the secondary] definition, the operation must be performed either by a farmer or on a farm as an incident to or in conjunction with the farming operation. The determination requires that the character of the particular function be evaluated to determine whether it is part of the agricultural activity or a distinct business activity. The totality of the situation controls, and not the character application of isolated factors or tests.”*

Jack Frost, 201 NLRB 659, 660 (1973).

Petitioner believes the substantive facts in *Jack Frost* are almost directly on point with the present case. Jack Frost is good case law (as provided by the NLRB) and has not received any negative treatment by the Board, the Appellate Court, or Supreme Court, and has not been overturned in 39 years. Therefore, as it relates to the Board’s interpretation of the Code of Federal Regulations for “contract arrangements for raising poultry”, the same application should be employed in the present case. According to the Board, “when processors enter into contractual arrangements with independent farmers whereby the farmers agree to raise poultry to marketable size and the processor supplies the baby chicks, furnishes the required feed, and retains title to the chickens until they are sold, the activities of the independent farmers and their employees in raising the poultry are clearly exempt, but the activities of the processor are not ‘raising of poultry’ and their employees cannot be exempt on that ground.” Jack Frost, 201 NLRB 659, 660 (1973).

In the *Jack Frost* case it was established that Jack Frost was engaged in the processing and marketing of eggs and poultry on an 800-acre farm located near St. Cloud,

Minnesota. Jack Frost had farming activities which included hatchery operations, breeder operations, feed mill operations, the actual raising of birds, and egg farming and processing, consistent with the present case where the Employer has hatchery operations, breeder operations, feed mill operations, the actual raising of birds, and processing. A key note in this comparison is the Employer's claim that *Jack Frost* does not apply because it did not have hatchery operations. Contrary to the Employer's claim *Jack Frost* did in fact have a hatchery operation and lines up directly with the present case. The egg processing plant was located on a farm of which only 5 percent was used in Jack Frost's operations. In addition, there was a feed mill which was utilized to produce the feed distributed to the contract farmers, two poultry barns on the farm at which chickens are raised, and a laying barn adjacent to the egg processing plant. The bulk of the 800-acre farm was leased by Jack Frost to area farmers. Jack Frost exercised no control over what the farmers did with the land. Jack Frost, 201 NLRB 659, 659 (1973).

In order to insure a supply of eggs and poultry for processing and/or marketing, Jack Frost has entered into contractual relationships with independent farmers in the St. Cloud area to engage in the production of eggs and chickens. The actual agricultural work of feeding and caring for the birds, collecting the eggs, and preparing the eggs for shipment to the egg processing plant was performed by the contract farmers. The personnel working as truck drivers for Jack Frost pick up the eggs at the contract farmers' farms and transport them to the egg processing plant.

In the present case, Equity Group employs five drivers as hatchery drivers who maintain the sole responsibility of delivering chicks to independent farms and eggs from independent farms back to the hatchery. Other occupational duties also include cleaning

trucks, loading and unloading of chick baskets, and loading and unloading of egg buggies. Therefore, it is clear the drivers' activities at *Jack Frost* and Equity Group are substantially similar and should be afforded the same non-exempt status as set forth by Jack Frost, 201 NLRB 659.

On a final note: the Regional Director relies heavily on Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd., 517 U.S. 392, and Arkansas Valley Industries, Inc., 167 NLRB 391 (1967) for the proposition the five truck drivers at Equity Group are agriculturally exempt laborers. However, it appears that the Regional Director's reliance is misguided. *Arkansas Valley* is similar to the present case save the differentiating factors of the hatchery plant employees and the five hatchery drivers in both cases. In comparison these differentiating factors are the primary issues in the present case. In *Arkansas Valley* the petitioner sought representation for 34 hatchery plant employees and 5 hatchery drivers. Only the five hatchery drivers apply in the present case. Most of the facts in *Arkansas Valley* case pertain directly to the hatchery plant employees. Of those facts pertaining to the hatchery drivers a key inconsistency exist between the present case and the facts of *Arkansas Valley*. "*These five employees transport the eggs from the breeder farms to the hatcheries and the chicks from the hatcheries to the broiler farms. These duties are in addition to work performed at the hatcheries proper, which in no way differs from that work performed by the other hatchery employees.*" Arkansas Valley Industries, Inc., 167 NLRB 391. The five drivers are distinctly different in the two cases because the employees in the present case do not perform any of the hatchery duties clearly stated in Employer Exhibit 12. Contrary to what the Regional Director opined in the Decision and Order, the record clearly establishes that the egg and chick drivers do not necessarily

report to work at the hatchery. The drivers may pick up the vehicles at the hatchery, but they can “clock-in” at any number of locations/facilities. Furthermore, the evidence fails to establish that the drivers perform work at the hatchery. Therefore, the driver’s duties are in no way identical to those duties performed by the hatchery employees. Thus, *Arkansas Valley* is not as determinative as the Regional Director would have us believe.

*Holly Farms* is a frail comparison to the present case because the Supreme Court did not draw upon its own conclusions, but instead relied upon a Board decision that the drivers in question were agriculturally exempt. However, the Board indicates it also did not draw upon its own conclusions, but instead relied upon the Regional Director’s decision to dismiss. The subject of the hatchery operations was given negligible attention in 6 of the 94 page summary, those pages being 292, 294, 308, 356, 357, and 358. Furthermore, nowhere in the case summary is a true conclusion given as to why the Regional Director provided such a decision. In addition, *Jack Frost* is not mentioned once in *Holly Farms*, positively or from a negative aspect. Provided it has already been proven that *Jack Frost* has no negative treatment, it does not stand to reason that such precedential case law be excluded from the record.

In *Holly Farms*, the employer delivered newly hatched broiler chickens to independent contractors to be raised, then later sent its live-haul workers to the contractors' farms to catch, cage, and transport the grown birds to its processing plant. The Board held that the workers were "employees" under the NLRA. On appeal, the Court applied the standard of review that in construing ambiguous statutes the decision of the Board would not be disturbed so long as it had a reasonable basis, even if the statute was capable of other reasonable constructions. Although the NLRA did not define

"agricultural laborer," the Board relied on federal legislation in order to reach a determination that the workers were not agricultural workers because the employer ceased to be a farmer as to the chicks when it shipped them to the independent contractors.

The Board (and subsequently the U.S. Supreme Court) held that "when an integrated poultry producer 'contracts with independent growers for the care and feeding of [its] chicks, [its] status as a farmer engaged in raising poultry ends with respect to those chicks.' Holly Farms Corp. v. Nat'l Labor Rels. Labor Bd., 517 U.S. 392, 401 (citing, Imco Poultry, 202 N.L.R.B. at 260). Petitioner contends that the application of this principal (i.e. status as a farmer engaged in raising poultry ends with respect to the chicks) for the purpose of establishing non-exempt employee truck drivers should be extended to the present case. Specifically, three of the five Equity Group truck drivers haul chicks from the facility. If the Employer's status as a farmer ends with those chicks, then, at a minimum, three of the Employer's drivers should be designated as employees and not agricultural laborers.

#### CONCLUSION

In summation, Petitioner believes that for the aforementioned reasons, the truck drivers who transport eggs and chicks to/from the Equity Group Hatchery are "employees" within the meaning of Section 2(3) of the Act and are not "agricultural laborers" within the meaning of Section 3(f) of the Fair Labor Standards Act. Furthermore, the Regional Director's Decision and Order in this matter should be vacated.

Respectfully submitted,

/s/ Robert M. Colone  
Robert M. Colone

Date: March 8, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this Request for Review was sent by U.S. Mail, postage prepaid, return receipt requested this 8<sup>th</sup> day of March, 2012, to:

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Robert M. Colone