Applicability of the NLRA to Vertically Integrated Agriculture

by

Richard L. Cox

Originally published in the ARKANSAS LAW REVIEW
32 ARK. L. REV. 84 (1978)

CASE NOTES

The Applicability of the NLRA to Vertically Integrated Agriculture

Bayside Enterprises, a large vertically integrated poultry business,[1] was charged with unfair labor practices under the National Labor Relations Act (NLRA)[2] for refusing to bargain collectively with a union representing the drivers of its feed trucks.[3] Bayside obtained independent farmers ("contract growers") to raise the chickens it hatched; the company provided the farmers with feed, medicine, supplies and fuel and paid them for raising the chickens until ready for slaughter and processing. At all times Bayside retained title to the chickens. Truck drivers from Bayside's feed mill were employed specifically to deliver feed to the contract growers. Bayside contended these drivers were exempted from NLRA coverage because they were "agricultural laborers."[4] The National Labor Relations Board (NLRB)[5] rejected this contention and sustained the union's charge of unfair labor practices. The First Circuit, affirming, stated that the drivers were not agricultural laborers because their duties were not

---

1. Bayside's integrated operation includes chicken breeding farms, hatcheries, processing plants, a poultry feed mill and a transportation system for both feed and chickens.

2. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 151 *et seq.* (1964). *See* Comment, *The Unionization of Farm Labor*, 2 U.C.D.L. REV. 1 (1970). "The NLRA constitutes the basic statutory framework for labor relations law in the United States. The Act delineates the mutual rights and obligations of employers and employees to provide a uniform and systematic approach to the peaceful resolution of labor disputes. The important substantive rights of all employees covered by the Act are: (1) the right to organize or to refrain from organizing; (2) the right to bargain collectively through representatives of the employees' own choosing; and (3) the right to engage in other concerted activity for mutual aid and protection. The Act lists five types of employer unfair labor practices which are deemed to interfere with these rights. One of the most important of these protections is found in § 8(a)(5) which declares that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."

3. NLRA, § 8(a)(5), 29 U.S.C.A. § 158 (1973).

4. NLRA, § 2(3), 29 U.S.C. § 152(3) (1964) states that employees covered by the NLRA "shall not include any individual employed as an agricultural laborer . . . ."

The reason for the exclusion of agricultural laborers from the NLRA was political compromise. The legislative history of the exclusion is explored in Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1951 (1966) from just prior to passage of the NLRA to 1966. *See also* Comment, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 385 (1968); Comment, *Current Developments in Farm Labor Law*, 19 HASTINGS L.J. 371 (1968); Comment, *The Unionization of Farm Labor*, 2 U. CALIF. D. L. REV. 1, 3 (1970).

5. The main function of the NLRB is to supervise union elections and investigate and adjudicate charges of unfair labor practices. *See*, R. GORMAN, LABOR LAW § 5 at 32 (1976); Comment, *The Unionization of Farm Labor*, 2 U. CALIF. D. L. REV. 1 (1970).

incidental to Bayside's agricultural activities. The United States Supreme Court agreed, holding that the status of an employee in a vertically integrated agricultural corporation is determined by the character of the work he or she performs; trucking feed to contract farms did not qualify the drivers as agricultural laborers and exempt them from NLRA coverage. *Bayside Enterprises, Inc., v. NLRB*, 429 U.S. 298 (1977).

Bayside is the Supreme Court's most recent attempt to delineate the boundaries of the NLRA's agricultural exclusion. The Act itself does not define the term "agricultural laborer." However, since 1946, NLRB appropriations acts have contained an annual rider[6] mandating the exclusion of "agricultural laborers" as defined by section 3(f) of the Fair Labor Standards Act (FLSA),[7] and beginning in 1948 the NLRB incorporated the FLSA definition into its rules governing the agricultural exclusion.[8] Accordingly, the courts have agreed that the test to determine whether an employee is excluded from NLRA coverage is whether the employer is engaged in either of the two categories of "agricultural" activity under the FLSA:[9] primary agriculture (encompassing activities such as the cultivation and tillage of the soil, growing, and harvesting)[10] or secondary agriculture (consisting

6. Fair Labor Standards Act (FLSA) of 1938, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1964), *as amended*, (Supp. 111, 1967). For an example of the appropriation language see 82 Stat. 992 (1968). "No part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of . . . (the Labor Management Relations Act), and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. § 203).

7. Section 3(f) (1964) states: " 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . *the raising of . . . poultry, and any practices 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 added)

8. Di Giorgio Fruit Corp., 80 N.L.R.B. 853 (1948).

9. Johnston v. Cotton Prod. Ass'n, 244 F.2d 553 (5th Cir. 1957). The nature of the work, however, may be modified by the custom of the industry as to how the work is performed, *i.e.*, whether the activity was traditionally performed by a farmer or on a farm. NLRB v. John Campbell, Inc., 159 F.2d 184 (5th Cir. 1947).

10. *See* 29 C.F.R. §§ 780.106-27 (1977) relating to the direct farming operations which come within the "primary" meaning of the definition of "agriculture." The class of exempted employees engaged in farm work includes camp cooks and barracks maintenance workers, Brennan v. Sugar Cane Growers Coop., 486 F.2d 1006 (5th Cir. 1973); clerical and maintenance employees performing such activity on a farm, Hodgson v. Ewing, 451 F.2d 526 (5th Cir. 1971); tractor drivers who moved cane from fields to mill, transported laborers to the fields, Wirtz v. Osceola Farms Co., 372 F.2d 584 (5th Cir. 1967); egg processors and their maintenance workers, McAnally Enterprises, Inc., 152 N.L.R.B. 527 (1965); nursery employees who spend 68-77 percent of the time in open fields, NLRB v. Kelly Bros. Nurseries, Inc., 341 F.2d 433 (2d Cir. 1965); dairy company employees tending herd, raising poultry and handling milk, Pine State Creamery Co., 130 N.L.R.B. 892 (1961); greenhouse employees, William H. Elliott &

of practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations).[11] The actual raising of chickens, which is included in the FLSA's general definition of agriculture,[12] clearly constitutes primary agricultural activity. But the transportation of feed does not and therefore must be assessed under the category of secondary agriculture. To qualify as such, it "must be performed (1) on a farm; (2) either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed; and (3) the practice must be performed as an incident to or in conjunction with the farming operations."[13] Since in Bayside's organization the actual raising of the chickens was performed on contract farms, the question was whether the transportation of feed was incidental to the contract farming instead of being incidental to feed mill operations.[14] Further, the activity at issue is exempt only if it relates to the *employer*'s farming operations.[15] Thus, in *Bayside* the employer also had the burden of

---

Sons, 78 N.L.R.B. 1078 (1948). *See also* Comment, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 385 (1968); Note, 22 MERCER L. REV. 797 (1971).

Activities held not to be agricultural include activities of employees at livestock facility incident to buying and selling of livestock rather than livestock raising, Hodgson v. Wittenburg, 464 F.2d 1219 (5th Cir. 1972); Mitchell v. Hunt, 263 F.2d 913 (5th Cir. 1959); truck drivers of carrier of farm produce grown by others, NLRB v. Kent Bros. Transp. Co., 458 F.2d 480 (9th Cir. 1972); repairmen of farm machinery who performed their work at mill site, Wirtz v. Osceola Farms Co., 372 F.2d 584 (5th Cir. 1967); tobacco house employees where extensive curing operations are conducted, Durkin v. Budd, 114 F. Supp. 865 (N.D. Fla. 1953).

11. Farmers Irrigation Co. v. McComb, 337 U.S. 755, 763 (1948). *See also* 29 C.F.R. §§ 780.128, 129, 134 & 144 (1977). Section 780.128 states " 'agriculture' includes not only the farming activities described in the 'primary' meaning but also includes, in its 'secondary' meaning, 'any practices 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.' " Such incidental practices include crop dusting, Boyls v. Wirtz, 352 F.2d 63 (5th Cir. 1965); Dockery v. Thomas, 226 Ark. 946, 295 S.W.2d 319 (1956); pick-up crews in catching poultry, Drummonds Poultry Transp. Serv. v. Wheeler, 178 F. Supp. 12, 15 (D.Me. 1959); employees of cooperative rural farm supply store engaged in unloading feed, fertilizer, seed and other merchandise, and catching and loading chickens on farms of chicken raisers, Nix v. Farmers Mutual Exchange, 218 F.2d 642 (5th Cir. 1955).

12. The raising of poultry is specifically included in the definition of agriculture in the FLSA. FLSA § 3(f), 29 U.S.C. § 203(f)(1964). The raising of poultry includes "the breeding, hatching, propagating, feeding and general care of poultry." 29 C.F.R. § 780.125(1977).

13. Tipton v. Associated Milk Prod., Inc., 398 F. Supp. 743 (W.D. Tex. 1975).

14. Bayside Enterprises, Inc. v. NLRB, — U.S. —, 97 S. Ct. 576 (1977).

15. Brewer v. Central Greenhouse Corp., 352 S.W.2d 101 (Tex. 1961). *See also* Johnston v. Cotton Prod. Ass'n., 244 F.2d 553 (5th Cir. 1957) and 29 C.F.R. § 780.126 and § 780.137 *et seq.* that "[e]mployees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed in 'secondary' agriculture . . . that work must be performed in connection with the farmer-employer's own farming to qualify as 'secondary' agriculture by a farmer . . . ."

proving the delivery of feed was incidental to its own farming operations and that the activity of the contract farmers was a part of its integrated agricultural operations.

With respect to the characterization of the transportation, many cases have considered the Act's application to employees engaged in the transportation of agricultural products and supplies. Since the inception of the NLRA agricultural exclusion these decisions have generally applied the "nature of the activity" test set down in the 1948 Supreme Court decision of *Farmers Irrigation Co. v. McComb*.[16]

> Agriculture, as an occupation, includes more than the elemental process of planting, growing, and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in large measure, upon the way in which the activity is organized in a particular society . . . . The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.[17]

In answering the question posed in *McComb*, the Court has since considered the following factors: (a) the size of the ordinary farming operations; (b) the employer's dollar investment in processing as opposed to ordinary farming operations; (c) the time spent in processing as opposed to ordinary farming; (d) the extent to which ordinary farmworkers do the processing; (e) the degree of physical separation between processing and farming operations; (f) the degree of industrialization; and (g) normal farming procedures for the type of operation being reviewed.[18] Similar reasoning is found in the rule promulgated by the NLRB that "a practice performed in connection with farming operations is within the statutory language only if it constitutes an established part of agriculture, is subordinate to the farming operations involved, and does not amount to an independent business."[19]

Wirtz v. Tyson's Poultry, Inc.[20] is a good example of how the

16. Farmers Irrigation Co. v. McComb, 337 U.S. 755, 760 (1948).

17. However, the fact that the work in question is comprised of traditional farming tasks is not decisive where it is performed as an incident to industrial rather than agricultural activity. *See* North Whittier Heights Citrus Ass'n v. NLRB, 109 F.2d 76 (9th Cir. 1940). 29 C.F.R. § 780.138 (1977) states "[n]o matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the 'secondary meaning of agriculture.'"

18. Maneja v. Waialua Agricultural Co., 349 U.S. 254, 264-65 (1954).

19. 29 C.F.R. § 780.144.

20. Wirtz v. Tyson's Poultry, Inc., 355 F.2d 255, 257 (8th Cir. 1966). The Court applied the nature of the activity test set forth in Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1955), and deemed egg producing an activity ordinarily done by a farmer. *Maneja* discussed the "processing exemption" of § 13(a)(10) which exempted employees "within the area of production . . . engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their natural state, or canning of agricultural or horticultural commodities for market." *Id.* at 268.

"nature of the activity" test applies to the contract grower system in determining the existence of an agricultural exemption under the NLRA. Tyson's is an egg producer which contracted with independent farmers to raise its hens. The district court found Tyson's "qualified to claim the agricultural exemption under the Act as to their employees, engaged in the 'handling, cooling, grading, candling and packing' of eggs."[21] Tyson's was found to be "the farmer," having initiated the farming operations involved and "undertaken the initial and continuing cost of acquiring the birds and producing the eggs."[22] The Eighth Circuit accepted this conclusion and the district court's finding that the contract system constituted an "integrated farming unit."[23] The court noted that egg handling and processing should not be "segregated from the entire enterprise,"[24] emphasizing that Tyson's "owned the eggs from the beginning as well as the hens that produced them."[25] Indeed, had it not been for the investment and assistance of Tyson's, the contract growers might never have started raising egg-producing birds.[26] The court characterized Tyson's egg-producing operation as "part of a self-sustained and operated entire 'agricultural function' ";[27] because of the close relationship of processing to the ordinary farming operations, processing activities were deemed to be agricultural labor excluded from coverage of the NLRA as an activity ordinarily done by a farmer.[28]

The fact situation in *Bayside* strongly resembles that in *Tyson's*. Both contract grower systems were operationally integrated. Title to the chickens was always in the producer/processor who provided initial capital, chicks, feed, supplies and medication to facilitate the contract farming. However, in *Bayside* the question is application of the agricultural exclusion to a different operation within this system—the transportation of feed rather than the processing of eggs.

Two conflicting lines of precedent have evolved in judicial attempts to apply the nature of the activity test to resolve this narrow question. The Fifth and Ninth Circuits have repeatedly held that drivers transporting feed to contract growers are agricultural laborers. This conflicts with the First Circuit and the NLRB which deny the exemption. The first line of cases is illustrated by *NLRB v. Strain Poultry Farms, Inc.*,[29] in which the Fifth Circuit held "the company's

21. *Id.*
22. *Id.*
23. Wirtz v. Tyson's Poultry, Inc., 355 F.2d 255, 257 (8th Cir. 1966).
24. *Id.*
25. *Id.* at 258.
26. *Id.* at 259.
27. "The egg producing business was completely integrated with appellees' activities in providing birds and necessary supplies in marketing eggs." *Id.* at 261.
28. Maneja v. Waialua Agricultural Co., 349 U.S. 254 (1954).
29. NLRB v. Strain Poultry Farms, Inc., 405 F.2d 1025 (5th Cir. 1969).

arrangement of the independent growers did not change its primary function from one of raising poultry, therefore the truck drivers were exempt . . . ."[30] The court rejected the NLRB's argument, later accepted by the First Circuit in *Bayside*, that the trucking operations were incidental to the feed mill operations rather than to the poultry raising venture.[31] Subsequently, the Ninth Circuit in *NLRB v. Victor Ryckebosch, Inc.*,[32] also held that drivers who shuttled poultry from a feed lot to a processing plant were not covered under the NLRA because their work was incidental to the employer's raising of poultry:

> The social and economic problems related to large-scale corporate farming are more appropriately resolved by debate and committee study in Congress than by adversary proceedings in court. If Congress is troubled by the reasoning in *Strain*, it is free to translate its intent into clearer legislation. The NLRB has not demonstrated that we need create a conflict between the circuits on this point.[33]

In *NLRB v. Abbott Farms, Inc.*,[34] another Fifth Circuit decision, the employer maintained a feed mill on one of its farms. All of the products of the mill were consumed by the employer's farms and its contract growers. The NLRB asserted coverage of: "in-haul" truck drivers who brought feed stuffs, vitamins and other ingredients to the feed mill; employees who operated the mill; and "out-haul" drivers who took feed to the employer's breeding operations, hatchery, broiler houses and contract growers. The court, relying on *Strain*, found all the above employees exempt: "there as here, the question was whether the poultry raiser was conducting a feed mill trucking operation on the side or whether the mill operation was part of the poultry raising venture."[35] The court found that the feed operation was "incident to or in conjunction with the poultry raising venture as preparation of the birds for market."[36]

---

30. *Id.*

31. *Id. But see* NLRB v. John Campbell, Inc., 159 F.2d 184 (5th Cir. 1947) where the court held employees engaged in the transportation of sugar cane on the employer's farm and on the farm of an independent grower to employer's sugar mill were covered by the NLRA because the transportation was "incident to milling and not incident to farming." The transportation was not incidental to farming even though the employing farmer owned the mill and the facilities for transportation. *Cf.* NLRB v. OLAA Sugar Co., 242 F.2d 714 (9th Cir. 1957). However, *Campbell* involved the transportation of an agricultural commodity to a processor which is generally held to be non-agricultural labor. The question in *Bayside* involves transportation to a farmer from a processor of agricultural supplies.

32. NLRB v. Victor Ryckebosch, Inc., 471 F.2d 20 (9th Cir. 1972).

33. *Id.* at 21.

34. Abbott Farms, Inc. v. NLRB, 487 F.2d 904 (5th Cir. 1973).

35. *Id.* at 905.

36. *Id. See also* Mitchell v. Georgia Broiler Supply, Inc., 186 F. Supp. 341 (N.D. Ga. 1960) which had facts even closer to *Abbott* than those in *Strain*, holding "that the raising of poultry was within the primary definition of agriculture set forth in 29 U.S.C. § 203(f) and that the feed production and hauling performed . . . was incident to or in conjunction with the poultry raising venture as preparation of the birds for market."

In direct conflict with the Fifth and Ninth Circuits, the NLRB has consistently denied the agricultural exemption to workers engaged in transporting feed to contract growers, holding that contracting with independent growers to raise the employer's chickens ends the employer's status as a farmer with respect to the raising and selling of those chickens.[37] This is especially true where the activity in question is a separate and distinct business activity such as shipping, marketing or transporting feed.[38] The Board has also held that, where the employee performs an activity on the farm of a contract grower with whom he has no business relationship, the employee's activity is not incidental to the poultry raising operation of the contract grower.[39] The NLRB thereby distinguished a truck driver who hauls for an independent contract grower (who is covered by the NLRA) from one who hauls for an employer engaged directly in farming (who is not).[40] The driver engaged in hauling under both situations is covered by the NLRA to the extent that he hauls for the independent grower.[41]

The First Circuit has supported the Board's position. In *Calaf v. Gonzales*,[42] the employer owned several sugar cane farms, a sugar mill and a railroad system used to transport the cane from the farms to the mill. Employees engaged in transportation and in repair and maintenance of transportation facilities were employed by the mill and did no agricultural work. The court held the transportation was "incident to milling" and not "incident to farming" so that those employees were not exempt from the NLRA, noting "[w]e would be presented with a very different problem if the evidence disclosed that the heart of the transportation system and the situs of the employment of the workers were located at the farm."[43] That there was common ownership of the mill and farms was no basis for finding employees engaged in an activity separate and distinct from agriculture to be exempt from the Act's provisions.[44]

37. Imco Poultry, 202 N.L.R.B. 259, 260 (1973). *See* note 15 *supra*.
38. *Id.* at 261.
39. *Id.*
40. Norton & McElroy Produce, Inc., 133 N.L.R.B. 104, 107 (1961).
41. *Id.*
42. Calaf v. Gonzalez, 127 F.2d 934 (1st Cir. 1942).
43. *Id.* at 937-38. *See* Wirtz v. Osceola Farms Co., 372 F.2d 584 (5th Cir. 1967) emphasizing the importance of the location of the worker. *Osceola Farms* involved three groups of employees: (1) tractor drivers transporting products from field to mill; (2) tractor drivers transporting laborers from mill to fields and meals to them in the fields; (3) repairmen located at mill who worked on agricultural equipment used in the fields. The court held the repairmen covered because the labor they performed was not "on a farm." The drivers were exempt, since their function was "necessary to the farming operation and terminated on the physical property constituting 'the farm.'" *See also* Brennan v. Sugar Cane Growers Coop., 486 F.2d 1006 (5th Cir. 1973) holding workers who prepared meals for field laborers and maintained labor barracks at location in close proximity to the fields, performed work "on a farm."
44. *Id.* at 938.

More recently, the First Circuit decided *NLRB v. Gass*,[45] involving seven corporations engaged in the poultry business which were found to constitute a single integrated "enterprise." Truck drivers delivering poultry feed to this enterprise were held not to be agricultural laborers even though the enterprise was their employer's only customer. The employer did not contend the drivers' work was farming but claimed "that the delivery of the poultry feed is in large part work performed on farms and is incidental to the raising of poultry."[46] The court found the transportation of feed incidental to the operation of the feed mill and not of the farms, stressing that the drivers were neither paid or employed by the farms nor under the control of the farmers. In dicta the court noted that "even if these deliveries were incidental to farming we doubt that the physical presence of the drivers on the farm premises, while such deliveries are being made, is the kind of activity that Congress intended would qualify them for this exemption."[47]

In *Bayside*, the First Circuit again approved the NLRB policy of extending NLRA coverage to truck drivers transporting feed to contract growers. The NLRB had emphasized the integrated nature of Bayside's operations in denying the agricultural exclusion to its truck drivers. While recognizing that the six breeder farms and the hatcheries constituted farming, the Board found "the overall operations of Bayside . . . and more specifically the feed mill and feed delivery operations, may not be removed from coverage by the Act by utilizing these aspects . . . to characterize Bayside's entire operation as farming."[48] The Board found further support in the holding in *NLRB v. Gass* that the duties of the feed-truck drivers were not incidental to the farming activities but rather to the feed mill operation.

In affirming the Board's decision, the First Circuit stressed that the bulk of Bayside's capital and personnel was devoted to feed mill and processing plant operations rather than farming. The company's chick hatcheries and breeding farms,[49] which did constitute farming, were unrelated to the drivers' work. The court was unpersuaded by Bayside's argument that the delivery of feed was crucial to the development of the poultry. This fact could not justify the classification of these activities as agricultural since the feed delivery system[50] was

45. NLRB v. Gass, 377 F.2d 438 (1st Cir. 1967).
46. *Id.* at 444.
47. *Id.*
48. Bayside Enterprises, Inc., 216 N.L.R.B. 502, 505 (1975).
49. Bayside's operations included two hatcheries and six breeding farms for the development and raising of breeder stock "as the source of eggs which are hatched to provide chicks for poultry production." *Id.* at 503.
50. Bayside's operations included 119 independent farms with which it had

"supportive of agriculture but not directly engaged in farming." It was thus part of a separate organization.[51] The court found the Fifth and Ninth Circuit decisions in *Strain* and *Ryckebosch* "distinguishable and unpersuasive"[52] because they involved enterprises primarily engaged in traditional agriculture. In contrast, Bayside's activities, i.e., processing, were not predominately agricultural.[53] While the Fifth and Ninth Circuit cases did find the employees' activities incidental to the employer's farming operations, this distinction is tenuous since their transportation activities also involved, respectively, the owner's feed mill and an independent processing plant. Moreover in *Strain*, the drivers' activities involved both a feed mill and contract farms as in *Bayside*.

Thus, when the Supreme Court was presented with *Bayside*, the picture was one of conflict. The NLRB and the First Circuit had repeatedly held that transporting feed to poultry contract growers was not an agricultural activity since it was incidental to the operation of the feed mills involved. Thus, the drivers were not exempt from the NLRA. The Fifth and Ninth Circuits, however, had found the trucking operations incidental to the raising of poultry and, consequently, that the drivers were agricultural laborers exempt from NLRA coverage. The Supreme Court granted certiorari, explicitly acknowledging a split of authority among the circuits and implicitly rejecting the First Circuit's attempt to distinguish *Strain* and *Abbott*.

The Supreme Court in *Bayside* began by stating that the Board's conclusion was reasonable and consistent with prior NLRB rulings, rejecting Bayside's arguments that all contract farm activities should be regarded as "agricultural activity of an integrated farmer."[54] Furthermore, the Board's conclusion was viewed as in accord with the construction given section 3(f) of the FLSA by the Secretary of Labor.[55] The Court stated "since the status of the drivers is deter-

---

contracted for the raising of chickens. Feed deliveries were made by Penobscot Feeds, a subsidiary of Bayside. *Id.*

51. NLRB v. Bayside Enterprises, Inc., 527 F.2d 436, 438 (1st Cir. 1975).

52. *Id.* at 439.

53. *Id.*

54. Bayside Enterprises, Inc., v. NLRB, 429 U.S. 298 (1977).

55. *Id.*, n.13.

> Contract arrangements for raising poultry . . . feed dealers and processors sometimes enter into contractual arrangements with farmers under which the latter agree to raise to marketable size baby chicks supplied by the farmers who also undertake to furnish all the required feed and possibly additional items. Typically, the feed dealer or processor retains title to the chickens until they are sold. Under such an arrangement, the activities of the farmers and their employees in raising the poultry are clearly within section 3(f). The activities of the feed dealer or processor, on the other hand, are not 'raising of poultry,' and employees engaged in them cannot be considered agricultural employees on that ground. *Employees of the feed dealer or processor who perform work on a farm as an incident to or in conjunction with the raising of poultry on the farm are employed*

mined by the character of the work which they perform for their own employer, the work of the contract farmer cannot make the drivers agricultural laborers. And their employer's operation of the feedmill is a nonagricultural activity."[56] Thus, the Board was found to have correctly held that the truck drivers' work on their employer's behalf is not performed "by a farmer whether attention is focused on the origin or the destination of the feed delivery."[57]

The Court conceded the facts could be viewed as supporting Bayside's argument "that the activity on the independent farms is part of Bayside's farming operation."[58] However, it accepted the Board's holding "that the owners of the farms are independent contractors rather than employees of Bayside and therefore the farming activity at these locations is attributable to them rather than to Bayside."[59] A definite factor influencing the Court's decision was that the work of storing and utilizing the feed was performed by the contract growers.

In summary, because the nature of the *employer*'s activity determines NLRA coverage, the Court's determination that the transportation was incidental to the feed mill operation (which was non-agricultural) foreclosed exclusion of the employees under the primary definition of agriculture. This determination also rejected Bayside's secondary agriculture argument that the contract growers were a part of Bayside's integrated agricultural operations. Since Bayside failed to show that the employees met either the primary or secondary agriculture exception, they were therefore subject to NLRA coverage.

To appreciate the Court's support for the Board's position it is necessary to understand the procedure for judicial review of Board orders under the NLRA and the Administrative Procedure Act (APA).[60] Since its inception, the NLRB has adjudicated the rights of parties involved in labor disputes by issuing orders on the basis of evidence submitted by the parties in an agency hearing.[61] These Board orders are subject to judicial review, whose scope is governed by section 706 of the APA[62] which provides that courts can decide all

in 'secondary' agriculture (*see* §§ 780.137 *et. seq.*, [explaining that work must be performed in connection with the farmer-employer's own farming to qualify as 'secondary' agriculture by a farmer] and *Johnston v. Cotton Producers Ass'n*, 244 F.2d 553).

29 C.F.R. § 780.126 (1975) (emphasis added).

56. *Id.* at 303.

57. *Id.*

58. *Id.* at 302. Bayside owns the chicks, controls the raising of the chicks, assumes the risks of casualty loss and market fluctuations" and controls "both the source and the destination of the poultry."

59. *Id.*

60. Administrative Procedure Act of 1946, 5 U.S.C. § 551 *et seq.* (1970).

61. *Id.* at § 554.

62. *Id.* at § 706.

relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of an agency action. The courts in reviewing Board orders, however, give substantial weight to the Board's determinations. The standard of review is set forth in *O'Leary v. Brown-Pacific-Maxon, Inc.*[63] where the Supreme Court determined that "the [Board's] findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."[64] The requirement of review of the entire record "to ascertain substantiality" was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect."[65] Even in matters not requiring the expertise of the Board, courts may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*."[66] Such judicial deference was apparently the basis of the Court's opinion in *Bayside*. While the Court implied that, had the question been one of first impression, it might have decided in favor of Bayside, its review of the entire record apparently yielded substantial evidence to support the Board's decision.

Broadly speaking, the Court generally considers several factors in determining whether the Board's order is supported by substantial evidence on the record considered as a whole: (1) whether the issue involves determinations of law or fact; (2) the social and economic policies behind the Board's decision and the probable effects of that decision; (3) the relevance of the Board's industrial experience and expertise to the decision; and (4) legislative acquiescence in similar Board holdings in the past. One commentator has proposed a rule of thumb which takes into consideration most of these factors: the degree of deference which a court will accord agency findings is greater when the findings are based upon legislative, policy-making facts rather than purely adjudicative facts.[67]

Since the Court in *Bayside* gave only superficial consideration to these factors in its opinion, the reasons for its decision to defer to the Board's position are unclear. It did not discuss whether the issue of NLRA coverage was one of fact or law. Because the nature, purpose, and location of the driver's activities were not disputed, the critical

63. O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1950).
64. *Id.* at 508.
65. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1950).
66. *Id.*
67. K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE 413 (1958).

determination was what *legal* effects to give rise to these facts, *i.e.*, whether these employees were excluded from NLRA coverage. It is clear that the district and circuit courts were justified in reviewing the Board's finding on this legal issue; however, it is also clear that the Board's determination of NLRA coverage, even though this is a question of law, is conclusive if supported by the evidence.[68] Implicit in the *Bayside* holding is a finding of such evidentiary support.

The Court was somewhat more explicit in its discussion of the social and economic policy factors behind the Board's decision, noting that Congress has delegated to the Board the duty of determining whether the "conditions of the relation require protection" under the NLRA in light of congressional intent as to social and economic policy.[69] However, it does not appear from the Court's opinion that the Court actually reviewed the Board's findings in this regard under the substantial evidence test. The requirement of judicial deference on this issue thus amounted to judicial abdication.

The Supreme Court gave primary emphasis to the role of the NLRB's industrial experience and expertise in choosing to defer to the Board's decision. The issue of NLRA coverage was related to the Board's expertise in that it encounters "myriad forms of service relationships with infinite and subtle variations in the terms of employment, (which) blanket the nation's economy."[70] Furthermore, the Court has interpreted section 10(c) of the NLRA to require special deference when the Board's industrial experience and expertise give it special competence.[71]

Finally, the Court stressed that the NLRB had taken a consistent stand in refusing to exclude the feed truck drivers from NLRA coverage.[72] It is unclear whether this emphasis implies that the Court considered that Congress had acquiesced in the Board's previous

68. Labor Board v. Hearst Publications, 322 U.S. 111, 130 (1943). *See* R. GORMAN, LABOR LAW 11 (1976). *See also* NLRB v. OLAA Sugar Co., 242 F.2d 714 (9th Cir. 1957), where the Court stated "[t]he Labor Board exercises a wide discretion in determining what employees are within the Act which discretion is not available to a court where it is called on to enforce the provisions of the Labor Standards Act." FLSA § 3(f), 29 U.S.C.A. § 203(f).

69. *Id.*

70. Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 304 (1977), *citing* Labor Board v. Hearst Publications, 322 U.S. 111, 134 (1943).

71. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

72. McElrath Poultry Co., Inc., 206 N.L.R.B. 354 (1973), *enf. denied*, 494 F.2d 518 (5th Cir. 1974); Imco Poultry, Div. of Int'l Multifoods Corp., 202 N.L.R.B. 259 (1973); Abbott Farms, Inc., 199 N.L.R.B. 472 (1972), *enf. denied*, 487 F. 2d 904 (5th Cir. 1973); Victor Ryckebosch, Inc., 189 N.L.R.B. 40 (1971), *enf. denied*, 471 F. 2d 20 (9th Cir. 1972); Strain Poultry Farms, Inc., 160 N.L.R.B. 236 (1966); 163 N.L.R.B. 972 (1967), *enf. denied*, 405 F. 2d 1025 (5th Cir. 1969); Samuel B. Gass, 154 N.L.R.B. 728 (1965), *enf'd*, 377 F.2d 438 (1st Cir. 1967).

holdings. This conclusion is likely, however, since it is well known that the NLRB works closely with legislative committees.

Thus, in *Bayside* it appears that the Court merely followed the routine scope and standard of judicial review of administrative decisions. Whether the Court found "substantial evidence" to support the Board, so as to defend any charge of "judicial abdication," is questionable. The Court supplied little in its opinion as to the facts supporting the Board's position and noted that on the record the facts equally supported the position of the employer. Granted that the routine practice is to find for the agency when the case presents facts by which the position of both sides may be sustained, the Court does little for the concept of judicial review to merely cite the principle and hold for the agency. Especially where there are significant countervailing arguments as to the social and economic impact of the decision (such as the effects and desirability of contracting the agricultural exemption), the Court should address the issues presented and state the factual and legal bases for its decision.

NLRA coverage has significant effects on the rights and obligations of employers and employees. Under the preemption doctrine, state courts lose jurisdiction over covered employees as to issues arising under the NLRA.[73] The covered employee gains express rights under the NLRA "to form, join, and assist labor organizations, to participate in collective bargaining and other concerted activities for mutual aid and protection."[74] Furthermore, if the employer interferes with these rights he is guilty of an unfair labor practice.[75] Some commentators have concluded that extension of NLRA coverage is to the employers' disadvantage because "[a]s a rule, the state courts provide employers with much better protection against both violent and economic coercion than the federal courts and the NLRB do under the NLRA."[76] Another employer disadvantage is that the subject matter of compulsory collective bargaining is virtually unlimited under the NLRA; if an aspect of the business affects employment it is subject to negotiation.[77] On the other hand, employers may benefit from coverage because the NLRA protects them against certain forms of the traditional weapons of labor organization efforts—picketing and economic coercion, i.e. the boycott.[78]

---

73. Petro, *Agriculture and Labor Policy*, 24 LAB. L.J. 24, 33 (1973).

74. NLRA § 7, 29 U.S.C.A. § 157 (1973). Under NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), "it is illegal to coerce or to discriminate against employees concerning their union membership or activities." R. GORMAN, LABOR LAW 210.

75. NLRA § 8, 29 U.S.C.A. § 158 (1973).

76. Petro, *supra* note 73, at 33.

77. *Id.* at 35. Furthermore "almost everything the employer possesses is 'mandatorily' negotiable; nothing the union has is mandatorily negotiable." *Id.* at 36.

78. Such protection is limited to secondary picketing and the secondary boycott.

It has been said that "[t]he agricultural industry, with its continued exclusion from the NLRA, today faces the same type of labor problems that the industrial sector of our economy faced thirty years ago."[79] Today agricultural laborers may try to unionize but employers may retaliate for this activity and, in any event, are under no duty to bargain with them. However, farmworkers are highly susceptible to organization: They are class-conscious, do not identify with management, are generally isolated from populous areas, and work in an industry which is especially vulnerable to the economic boycott.[80] Thus, it is reasonable to project that the unionization of farm labor will continue.

There are presently two major movements underway which seek increased protection for farm labor: one advocates the passage of state labor relations acts while the other seeks to amend the NLRA to include agricultural laborers.[81] If union efforts to organize agricultural labor become more successful and state legislation proves to be variegated and inconsistent, it is likely that national regulation in the area of farm labor-management relations will increase, moving closer to primary agriculture and narrowing the definition of secondary agriculture. *Bayside* is an illustration of the NLRB's efforts to extend NLRA coverage to workers engaged in the support functions of agriculture.

The effects of *Bayside* on Arkansas agriculture may not be great at the present time, but as efforts are made to organize workers engaged in agricultural support functions, Arkansas employers will be forced to face the issue of expanded NLRA coverage. Major agricultural activity in Arkansas is pursued predominately through one of two structures, either the private corporation[82] or the farmers'

This protection is granted by section (8)(b) of the NLRA where the purpose of the strike or boycott is to (1) force the employer to join a labor organization, (2) force any employer to bargain with a non-certified representative of his employees, or (3) force the assignment of particular work to members of a particular labor organization. The provision does not limit primary picketing or boycotting. *See* R. GORMAN, LABOR LAW 210-13 (1976).

79. Comment, *The Unionization of Farm Labor*, 2 U. CALIF. D. L. REV. 1, 6 (1970).

80. Petro, *supra* note 73.

81. *See* Comment, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 375, 379 (1968) as to state labor relations acts. *See* Comment, *The Unionization of Farm Labor*, 2 U. CALIF. D. L. REV. 1, 28 (1970) as to "legislative Proposals to Include Farmworkers within the Scope of the NLRA." Recent legislative efforts to include agricultural labor within the scope of the NLRA include: S. REP. NO. 1866, 89TH CONG., 2D SESS. (1965); S. REP. NO. 8, 90TH CONG., 1ST SESS. (1967); H.R. NO. 4769, 90TH CONG., 1ST SESS. (1967); H.R. NO. 16014, 90TH CONG., 2D SESS. (1968); S. REP. 8, 91ST CONG., 1ST SESS. (1969). A Presidential Commission recommended inclusion, S. REP. NO. 1006, 90TH CONG., 2D SESS. 39 (1968).

82. "Corporation" as used here refers to a corporation that is not a cooperative, since a cooperative may be organized in the corporate form. The corporate enterprise dominates the poultry, fruit, vegetable and canning industries, *e.g.*, Tyson's Foods,

cooperative.[83] Since both structures contain instances of vertical integration,[84] *Bayside* applies to both. That otherwise exempt farmers join together in forming a cooperative does not prevent NLRA coverage from being extended to its functions which do not qualify as primary or secondary agricultural activity. In the landmark case of *Farmers Reservoir & Irrigation Co. v. McComb*, field employees and bookkeepers of a mutual irrigation company owned entirely by farmers for the purpose of collection, storage and distribution of water were found to be covered by the FLSA.[85] The determinative issues

---

Gerber, Atkins, and Steele Canning Co. The cooperative structure dominates the milk, rice, and soybean industries, *e.g.*, the Associated Milk Producers, Inc. (AMPI), Central Arkansas Milk Producers Ass'n (CAMPA), Mid-American Dairymen; Arkansas Rice Growers Ass'n; Riceland Foods; Arkansas Grain Corporation.

83. A cooperative is an association of producers of agricultural products authorized by the Capper-Volstead Act of 1922, 42 Stat. 388 (1922); 7 U.S.C.A. §§ 291, 292 (1975), to act together "in collectively processing, preparing for market, handling and marketing . . ." their products. *See generally* L. Lemon, *Antitrust and Agricultural Cooperatives Collective Bargaining in the Sale of Agricultural Products*, 44 N.D. L. REV. 505 (1968); R. Mischler, *Agricultural Cooperative Law*, 30 ROCKY MTN. L. REV. 381, 395 (1958); Note, *Agricultural Cooperatives and the Search for Parity*, 44 N.D. L. REV. 525 (1968); Note, *Agricultural Cooperatives and the Antitrust Laws*, 44 VA. L. REV. 63 (1958); U.S. DEPT. OF AGRICULTURE, FARM COOPERATIVE SERVICE BULL. 70, LEGAL PHASES OF FARMER COOPERATIVES 29 (1970); 97 CAPPER-VOLSTEAD IMPACT ON COOPERATIVE STRUCTURE (1975).

84. There is considerable vertical integration in Arkansas agriculture, the extent depending upon the managerial philosophy of the enterprise and the economic circumstances. The poultry industry is the most extensively integrated, while the fruit and vegetable industries are integrated to a much lesser degree. The contract grower system utilized by the poultry industry extends also to fruits and vegetables. There, corporate canning enterprises may be actively involved in management decisions affecting the farmer, including the vegetables grown, the type of seed and pesticide used, and the timing of planting and harvesting. Furthermore, the canner may furnish the seed at planting time and transport the product at harvest. Although an enterprise producing pickles from cucumbers does not require as extensive supportive activities as the poultry industry, the similarities between the two contract grower systems is apparent.

85. 377 U.S. 755 (1949). The Court found the employees were employed in an occupation necessary to the production of goods for interstate commerce, within the meaning of § 3(j); and not exempt under § 13(a) as "employed in agriculture." The fact that a particular activity is necessary to agricultural production does not require the conclusion that it is agricultural production. The test of whether a particular activity is agricultural is whether the activity is carried on as part of the agricultural function or is separately organized as an independent activity. *Id.* at 761. The Court ruled that the irrigation company was not engaged in "agriculture," within the meaning of § 3(f) of the FLSA, since it owned no farms, raised no crops, and was not engaged in the cultivation or tillage of the soil or in growing any agricultural commodity. The Court further stated that, assuming that the agricultural exemption includes the work of persons who do no farming but are employed by farmers, the employees here in question are nonetheless not exempt, since they are employed not by farmers but by the company, and the fact that the company is owned by farmers and is nonprofit is immaterial. *Id.* at 768-69.

In Hodgson v. Idaho Trout Processors Co., 497 F.2d 58 (9th Cir. 1974) the court held employees of a cooperative corporation set up as an independent entity to clean, process, freeze, pack and market trout from three member trout farms and others, were within FLSA coverage. The court held that the activities were not primary

were whether the cooperative was actively engaged in primary agriculture, and if so, whether the specific activities were incidental to its primary agricultural activities. As a recent federal district court opinion noted: "[i]t is possible that some farmer cooperatives may themselves engage in sufficient farming operations to an extent and under such circumstances sufficient to qualify as a farmer."[86] But most courts have held that "in the absence of special circumstances, farmers' cooperative associations are distinct from the farmers who own or compose them and the work performed by an association is not work performed by a farmer or for farmers."[87] Even if the cooperative is not engaged in primary agricultural activities, however, its employees engaged in secondary agricultural activities may be exempt from NLRA coverage. If the employee meets the three tests of secondary agriculture, discussed *supra*, he may be "employed in agriculture even though his employer is a commercial industry . . . and even though he may work on several farms during a work week if his work on each farm pertains solely to the farming operations on the farm."[88] Thus Arkansas' cooperatives are subject to the complexities of NLRA coverage to the same extent as its corporations.

In sum, *Bayside* upholds the authority of the NLRB to decide the question of appropriate NLRA coverage under a broad standard of deference to the industrial experience and expertise of the Board. The decision holds that feed truck drivers for vertically integrated agricultural enterprises are considered industrial laborers protected by the NLRA and FLSA. But it will obviously have important implications for other classes of employees. In determining whether employees performing different functions are covered under the NLRA, the following questions should be asked: (1) Is the employer engaged in primary or secondary agriculture? (2) Is the employee's labor incidental to farming or to industry? (3) Does the employee perform his work on a farm or at a non-farm location? If the employer is engaged in primary agricultural activity and the employee supports that activity,

---

agriculture because they were limited to processing. Nor were they secondary agriculture, since the employees were employed by Trout Processors, not the farms, and their work was performed entirely at the cooperative plant. *Id.* at 60. In Tipton v. Associated Milk Producers, Inc., 398 F. Supp. 743 (N.D. Tex. 1975) the court held a cooperative which sold dairy farmers equipment, installed and repaired it, but did not own cows or suffer loss if production decreased was not a farmer and not exempt from FLSA. AMPI argued that Wirtz v. Tyson's Poultry, Inc., 355 F.2d 255 (8th Cir. 1966) provided ample support to find it a farmer. *Id.* at 745. However, the court distinguished *Tyson's* in that there the defendant owned the chickens and suffered the loss if production decreased. *Id.* at 746.

86. Tipton v. Associated Milk Producers, Inc., 398 F. Supp. 743, 746 (N.D. Tex. 1975). *See also* 29 C.F.R. § 780.133b (1977).

87. *Id.*

88. *Id.*; 29 C.F.R. § 780.136 (1977).

there is no NLRA coverage. If the employer's activity is secondarily agricultural, the employee's activity must be incidental to farming (performed on a farm as an incident to or in conjunction with farming). Whether the employer is a corporation or a cooperative is immaterial. If the employer is a vertically integrated agricultural enterprise, *Bayside* clearly shows that the mere assertion of involvement in agricultural activity is insufficient to exclude the employees from NLRA coverage. The employee's activity will be scrutinized and the agricultural exemption will be narrowly construed.

RICHARD L. COX