**No. 21-2644**

**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Jose Ageo LUNA VANEGAS,

Plaintiff-Appellant,

v.

SIGNET BUILDERS, INC.,

Defendant-Appellee.

---

**Appeal from the United States District Court**

**for the Western District of Wisconsin**

No. 21-CV-54 -- The Honorable James D. Peterson, United States District Judge.

---

# Opening Brief of Plaintiff-Appellant

---


Jennifer J. Zimmermann
(COUNSEL OF RECORD)
Erica L. Sweitzer-Beckman
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
(608)256-3304
jjz@legalaction.org
elb@legalaction.org

Edward J. Tuddenham
42 Ave. Bosquet
75007 Paris
France
+33 6 84 79 89 30
etudden@prismnet.com

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Avenue, Suite 10
Iowa City, IA, 52240
(319)351-6570, Ext. 1512
lgaynor@iowalaw.org

*Counsel for Plaintiff-Appellant Jose Ageo LUNA VANEGAS*

Save As Clear Form

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 21-2644

Short Caption: Luna Vanegas v. Signet Builders, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Jose Ageo LUNA VANEGAS

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Legal Action of Wisconsin, Inc; Iowa Legal Aid; and Law Office of Edward Tuddenham

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: s/Jennifer J. Zimmermann Date: 11/30/2021

Attorney's Printed Name: Jennifer J. Zimmermann

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Legal Action of Wisconsin, 744 Williamson Street, Suite 200

Madison, WI 53703

Phone Number: 608-620-2009 Fax Number: 608-256-0510

E-Mail Address: jjz@legalaction.org

Save As Clear Form

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 21-2644

Short Caption: Luna Vanegas v. Signet Builders, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Jose Ageo LUNA VANEGAS

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Legal Action of Wisconsin, Inc; Iowa Legal Aid; and Law Office of Edward Tuddenham

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: s/Edward J. Tuddenham Date: 11/30/2021

Attorney's Printed Name: Edward J. Tuddenham

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 42 Ave. Bosquet, 75007 Paris, FRANCE

Phone Number: +33 6 84 79 89 30 Fax Number:

E-Mail Address: etudden@prismnet.com

Save As Clear Form

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 21-2644

Short Caption: Luna Vanegas v. Signet Builders, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Jose Ageo LUNA VANEGAS

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Legal Action of Wisconsin, Inc; Iowa Legal Aid; and Law Office of Edward Tuddenham

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: /s/ Lorraine Gaynor Date: 11/30/2021

Attorney's Printed Name: Lorraine Gaynor

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Iowa Legal Aid, 1700 S. 1st Ave., Suite 10

Iowa City, IA 52240

Phone Number: 319-351-6570, Ext. 1512 Fax Number: 319-351-0079

E-Mail Address: lgaynor@iowalaw.org

Save As Clear Form

# APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2644

Short Caption: Luna Vanegas v. Signet Builders, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Jose Ageo LUNA VANEGAS

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Legal Action of Wisconsin, Inc; Iowa Legal Aid; and Law Office of Edward Tuddenham

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

---

Attorney's Signature: s/Erica L. Sweitzer-Beckman Date: 11/30/2021

Attorney's Printed Name: Erica L. Sweitzer-Beckman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: Legal Action of Wisconsin, 744 Williamson Street, Suite 200

Madison, WI 53703

Phone Number: 608-256-3304 Fax Number: 608-256-0510

E-Mail Address: elb@legalaction.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes



Other Authorities

## JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 29 U.S.C. §216 (claims arising under the Fair Labor Standards Act); 29 U.S.C. §1331 (claims arising under the laws of the United States); and 29 U.S.C. §1337 (claims arising under Acts of Congress regulating commerce).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. Final judgment dismissing the complaint was entered on August 12, 2021. DE 53, A-10. The judgment was entered by a district judge, and this is not a direct appeal from any decision of a magistrate judge. DE 52, A-1. Plaintiff Luna Vanegas' notice of appeal from that judgment was timely filed on September 8, 2021. DE 54.

## STATEMENT OF THE ISSUE

Did the district court err in dismissing Plaintiff Luna Vanegas' overtime complaint pursuant to Rule 12(b)(6) based on Defendant Signet's affirmative defense that Luna Vanegas performed exempt agricultural work, where the application of that defense requires an evaluation of all the facts and circumstances surrounding Luna

Vanegas' work, none of which Luna Vanegas was obligated to plead in his complaint?

## STATEMENT OF THE CASE

### I. Factual Background.

Defendant Signet Builders, Inc. ("Defendant" or "Signet") is a construction company, based in Austin, Texas, that builds structures for businesses in Wisconsin, Iowa, Indiana, and other U.S. states, including livestock structures on farms. *Id*. at¶9. Typically, farmers hire a general contractor to secure and coordinate construction labor on their farms and the general contractor then hires Defendant to construct the structures. DE 28, A-21, ¶3.[1]

In 2019 and 2020, Defendant filed more than ninety temporary labor certification applications with the United States Department of Labor (DOL) Employment and Training Administration seeking H-2A visas so that it could employ foreign workers to carry out its construction projects in the various states where it operates. DE 1, A-

[1] DE 28, A21 is a declaration submitted by Signet. Such declarations cannot be considered in support of a 12(b)(6) motion, but Signet's judicial admission that it is a sub-contractor may properly be considered in opposition to its 12(b)(6) motion.

11, ¶¶16, 25. The H-2A visa program permits an employer to import foreign workers on a temporary basis if U.S. workers are not available to perform the work and the wages and working conditions being offered will not adversely affect the wages and working conditions of similarly employed U.S. workers. *Id*. at ¶1. 8 U.S.C. §§1101(a)(15)(H)(ii)(a) and 1184.

Plaintiff Jose Ageo Luna Vanegas is a citizen and resident of Mexico. *Id*. at ¶¶ 2,8. Luna Vanegas was one of the workers Defendant hired in 2019 pursuant to the H-2A visa program. *Id*. at ¶¶2, 8. In 2019, Luna Vanegas worked for the Defendant building livestock structures in Wisconsin and Indiana. *Id*. at ¶2. Many of the job descriptions in Defendant's visa applications, including those applicable to Luna Vanegas' worksites, stated that the workers would work "on farms" and perform the following tasks:

> unload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification.

DE 1, A-11 ¶¶ 8, 16. None of the job descriptions in Defendant's visa applications indicated that workers would have contact with

livestock on the farm property. *Id.* Three of Defendant's temporary labor certifications sought 20 workers to work at a job site in Lake Mills, Wisconsin between (1) March 15, 2019 and May 31, 2019; (2) May 1, 2019 and January 15, 2020; and (3) May 31, 2019 and January 15, 2020. *Id.* at ¶15. Defendant hired Luna Vanegas pursuant to one or more of these temporary labor certifications. *Id.*

Defendant assigned Luna Vanegas and other workers job duties consistent with Defendant's visa applications. *Id.* at ¶19. Luna Vanegas routinely worked more than 40 hours per week and Defendant did not pay him time and a half for overtime hours. *Id.* at ¶¶21, 22.

II. Claim and proceedings before the district court.

In January 2021, Luna Vanegas filed a single count complaint seeking unpaid overtime pursuant to 29 U.S.C. §216(b). *Id.* Luna Vanegas alleged that because his work consisted exclusively of constructing livestock structures, that it did not fall within the agricultural exclusion of 29 U.S.C. §213(b)(12). *Id.* at ¶ 27. Defendant moved to dismiss the complaint pursuant to Rule 12(b)(6) arguing that the work Luna Vanegas performed was excluded from

the overtime provisions of the FLSA pursuant to 29 U.S.C. §213(b)(12), which excludes employees engaged in agriculture as defined by §3(f) of the Act. 29 U.S.C. §203(f) (hereafter "§3(f)"). Defendant argued that,

> Plaintiff's Complaint fails to plead facts legally sufficient to establish that Plaintiff is not exempt from the overtime provisions of the FLSA because his work was in agriculture. To make such a showing, he would have to plead facts to support that he did not meet either prong of the FLSA definition -- primary agriculture and secondary agriculture. By pleading only that he did not have any direct contact with livestock and that the farm on which he worked was not owned by his employer, he has failed to plead an actionable claim, and his claims are subject to dismissal.

DE 29 at 9-10. Defendant conceded that Luna Vanegas' work did not constitute primary agriculture—*i.e.* he was not engaged in farming—but argued that the construction of livestock confinement buildings on farms meets the definition of "secondary agriculture" under §3(f). DE 52, A-1 at 3.

The district court recognized that the agricultural exclusion from overtime is an affirmative defense and that "[d]ismissal for failure to state a claim is ordinarily not appropriate based on an affirmative defense." *Id*. at 2. Nevertheless, the court concluded from the limited

facts set forth in Luna Vanegas' complaint that his work fell within the agricultural exclusion as a matter of law and dismissed the complaint.[2] *Id.* at 9. This appeal followed.

## SUMMARY OF THE ARGUMENT

Because Luna Vanegas was not engaged in primary agriculture, his work can only be exempt if it falls within the definition of secondary agriculture—*i.e.* "practices performed . . . on a farm as an incident to or in conjunction with such farming operations." §3(f). The Supreme Court has recognized that the line between practices that are, and those that are not, performed as an incident to or in conjunction with such farming operations is not susceptible to precise definition. Given the difficulty with precise line-drawing, the Court has held that the question of whether work is secondary agriculture requires consideration of all the facts and circumstances surrounding the work and the "making (of) distinctions that often are bound to be so nice as to appear arbitrary in

[2] Signet also moved to dismiss the claims on behalf of similarly situated workers outside of Wisconsin pursuant to Rule 12(b)(2) arguing that the district court lacked jurisdiction over those workers. Because the court dismissed the entire complaint pursuant to 12(b)(6), the court did not address this jurisdictional question.

relation to each other." *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 770 (1949) (Frankfurter, J., concurring), A-23.

Because the agricultural exclusion is an affirmative defense, Luna Vanegas was under no obligation to plead facts and circumstances to negate the defense. The limited facts in the complaint are simply insufficient to support the district court's conclusion that the exclusion applied to his work as a matter of law. Accordingly, the district court's order of dismissal must be reversed, and the case remanded for further proceedings.

While further factual development of the circumstances of Luna Vanegas' work is necessary, even the limited facts alleged in Luna Vanegas' complaint, if proven at trial, show that Signet is unlikely to succeed on its affirmative defense. Supreme Court decisions and DOL Wage and Hour Division Regulations interpreting §3(f) make clear that simply because a practice performed on a farm is directed toward an agricultural end, is necessary for the success of the farming operations, or resembles a practice that, in the past, was performed by farmers is not sufficient to bring a practice within the agricultural exclusion. Rather the Supreme Court has made clear that whether an activity is

agricultural depends on whether the activity "is carried on as part of the agricultural function or is separately organized as an independent productive activity." *Farmers Reservoir,* 337 U.S. at 760-761, A-26.

Thus, in order for a practice performed by a non-farmer to be "performed . . . as an incident to or in conjunction with such farming operations," the practice must itself be "carried on as part of the agricultural function" of the farm. For example, tilling soil, and planting, watering, and harvesting crops are all agricultural activities subordinate to the primary agricultural function of growing crops and are, as a result, exempt, even when performed by independent contractors; shearing, milking, feeding and caring for animals are also agricultural activities subordinate to the primary agricultural function of raising livestock and therefore exempt.

On the other hand, practices on a farm that are antecedent to or subsequent to the agricultural function of a farm are not, strictly speaking, "part of the agricultural function" of a farm and are generally not exempt. Thus, processing crops after harvest, even when done on a farm, has been held to be non-agricultural. *Maneja v. Waialua Agr. Co.,* 349 U.S. 254 (1955). Catching fattened chickens in a farm's chicken

coops to take them to slaughter has also been held to be non-agricultural (at least when performed by an independent business) as that practice is temporally distinct from the farm's agricultural function of raising chickens. *Holly Farms Corp. v. NLRB*, 517 U.S. 392 (1996). *Holly Farms Corp.* makes clear that the status of a worker's employer as an independent business is a central consideration.

As these cases suggest, the fact that farmers of a given type "ordinarily" rely on independent business operations to carry out a particular kind of work, with no involvement by the farm's agricultural workers, is considered a strong indication that the work is performed incident to and in conjunction with the independent business' operations, not the farm's, even if the work is necessary for the success of the farming operations. See, e.g., *Hodgson v. Idaho Trout Processors Co.*, 497 F.2d 58 (9th Cir. 1974) (employees of an independent company that cleaned, processed, froze, packed, and marketed fish for multiple trout farms were not subject to FLSA's agricultural exclusion—even when the independent company's employees' work was necessary to the farming operations and even when the "independent" business and the land on which work was performed was owned or controlled by the farm

owners. Because the workers' sole employer was an independent business, there was a "formal separation and division of function" between the employees' work and the farming activities of the farm—the farms did not hire, fire, supervise or pay the employees); *Marshall v. Gulf & W. Indus., Inc.*, 552 F.2d 124, 126 (5th Cir. 1977) (citing *Hodgson* and *Farmers Reservoir* and concluding that the FLSA covered employees of an independent company with decision-making independence from any farm). *See also* 29 C.F.R. §780.146.

Only one Circuit Court of Appeals has addressed whether the construction of animal enclosures by an independent construction company falls within the secondary definition of agriculture, and it concluded unequivocally that construction is not excluded agricultural work. *NLRB v. Monterey County Building & Construction Trades Council,* 335 F.2d 927 (9th Cir. 1964), A-32. That holding is clearly correct. A construction project is not part of the actual agricultural operation of a farm in the way that plowing, planting, and harvesting are. To the contrary, it is an industrial or manufacturing activity that of necessity *precedes* any agricultural function since no agricultural use can be made of a construction project until it is completed and has been

turned over to the farmer. The fact that the animal enclosure will, once constructed, be used as part of a farm's operations does not make the construction of the enclosure agricultural any more than manufacturing a wheat thresher or a tractor becomes agricultural simply because, once manufactured, such equipment is used to perform agricultural work. Moreover, although the facts still need to be developed, it appears from the size of Signet's operations and the fact that Signet is a sub-contractor hired by a general contractor rather than by farmers (See A-21, ¶ 3) (exactly as the construction companies in *Monterey County* were), that livestock farmers do not ordinarily perform construction projects of the type involved here.

The full extent of the industrialization of Signet's construction activities, whether it builds non-farm as well as farm buildings, what its arrangements are with the general contractors who hire Signet, whether it uses prefabricated parts manufactured off the farm, and whether it competes with other independent construction contractors or with farmers are all questions that may bear on the application of the exclusion that cannot be definitively answered from the limited

allegations in the complaint. For all of these reasons, the district court order of dismissal must be reversed.

The district court's conclusion that the complaint establishes the applicability of the agricultural exclusion as a matter of law reflects a misunderstanding of the relevant DOL Wage and Hour Regulations and Supreme Court decisions, and a failure to appreciate that simply because a farmer needs an animal enclosure to function and, in a prior era, might have constructed an animal enclosure himself, does not mean that the complex construction work now carried out by independent companies like Signet is "incident to or in conjunction with" the actual livestock raising operations of the farm that will eventually make use of the enclosure in question.

## ARGUMENT

### I. Standard of Review.

This Court reviews a motion to dismiss *de novo. Gill v. City of Milwaukee,* 850 F.3d 335, 339 (7th Cir. 2017). A Rule 12(b)(6) motion challenges the sufficiency of the complaint to state a claim upon which relief can be granted. *Hallinan v. Fraternal Order of Police of Chi.*

*Lodge 7,* 570 F.3d 811, 820 (7th Cir. 2009). As the Supreme Court explained in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007), Rule 12(b)(6) dismissal is warranted if the complaint fails to set forth "enough facts to state a claim to relief that is plausible on its face." Even though *Twombly* (and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009)) retooled federal pleading standards, notice pleading remains all that is required in a complaint. "A plaintiff still must provide only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.'" *Tamayo v. Blagojevich,* 526 F.3d 1074, 1083 (7th Cir. 2008) (citations omitted). In making this assessment, the district court accepts as true all well-pled factual allegations and draws all reasonable inferences in the plaintiff's favor. *See Alam v. Miller Brewing Co.*, 709 F.3d 662, 666 (7th Cir. 2013); *Opp v. Office of State's Att'y of Cook County*, 630 F.3d 616, 619 (7th Cir. 2010).

Signet does not argue that Luna Vanegas' FLSA overtime claim failed to meet the *Iqbal/Twombly* standard. Rather Signet sought 12(b)(6) dismissal of Luna Vanegas' complaint on the sole ground that

his work, as described in the complaint, necessarily fell within the agricultural exclusion from the FLSA's overtime requirements. 29 U.S.C. §213(b)(12). DE 29. The district court recognized that the agricultural exclusion is an affirmative defense. DE 52, A-1 at 2. As a general rule, the disposition of an affirmative defense is not appropriate at the motion to dismiss stage because the burden of proving an affirmative defense is on the defendant and the plaintiff is under no obligation to anticipate and include allegations in his complaint negating such a defense. *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Com'n.,* 377 F.3d 682, 688 (7th Cir. 2004); *Service Corp. Int'l. v. Stericycle,* No. 20 C 138, 2021 WL 5232731, at *6 (N.D. Ill. Nov. 10, 2021). It is only when the complaint sets forth all facts necessary to prove the affirmative defense that dismissal on that basis is appropriate. *Chi. Bldg. Design P.C. v. Mongolian House, Inc.,* 770 F.3d 610, 613-14 (7th Cir. 2014); *U.S. v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005) (complaints are subject to dismissal based on an affirmative defense only where "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense).

Thus, the question presented is whether the limited facts alleged in the complaint are sufficient to establish, as a matter of law, that Luna Vanegas' work fell within the agricultural exclusion from overtime, or whether additional material facts must be adduced before the applicability of Signet's affirmative defense can be resolved. That is a question of law that this Court reviews *de novo*.

## II. Whether Luna Vanegas' Construction Work was Exempt Agricultural Work cannot be Resolved from the Face of his Complaint.

The application of the agricultural exclusion presents a fact intensive question. It requires examination of "all the facts surrounding [the construction] operation to determine whether it is incident to or in conjunction with farming." *Maneja v. Waialua Agr. Co. Ltd.,* 349 U.S. 254, 264 (1955). Such a determination cannot be made solely on the limited facts appearing on the face of Luna Vanegas' complaint, particularly where he was under no obligation to plead facts to overcome the defense. *See, e.g., Diaz v. Neff & Sons, Inc.,* 2015 WL 5032665 at *5 (D. Md. 2015)(motion to dismiss overtime claim based on agricultural exemption is "not appropriate" given that the exemption is "one based upon facts and circumstances" and requires a "nuanced

determination called for by the regulations."); *Perez v. Seasonal AG Services, Inc.,* 2015 WL 12834383 at *1 (S.D. Iowa Apr. 3, 2015) (denying motion to dismiss overtime claim based on agricultural exclusion because such a motion "require[s] examination of facts and law beyond those articulated in the Complaint."); *Herman v. Continental Grain*, 80 F.Supp.2d 1290, 1292-1293 (M.D. Ala. 2000) (same).

Rather than establish Luna Vanegas' exempt status, the limited facts set forth in his complaint, if proven at trial, support, and likely compel, the conclusion that Luna Vanegas' work was non-agricultural. Additional facts adduced during discovery could very well demonstrate as a matter of law that the defense is inapplicable to Luna Vanegas' construction work.

The FLSA defines agricultural work as follows:

> "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 (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 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.

FLSA §3(f), 29 U.S.C. §203(f). Courts traditionally speak of this definition as consisting of two parts: "Primary agriculture" which includes farming in all of its branches such as tilling the soil, the production, cultivation and harvesting of agricultural commodities, and the raising of livestock, and "secondary agriculture," which is defined as "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." *Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 762-763 (1949), A-23; *Bayside Enterp. Inc. v. NLRB,* 429 U.S. 298, 300 n. 7 (1977).

The district court recognized that Luna Vanegas was not engaged in 'primary agriculture'—*i.e.* he was not involved in the raising of livestock. DE 52, A-1 at 3. Rather, the question presented is whether Luna Vanegas' construction work, which happened to take place on a farm, constituted "secondary agriculture." Specifically, the question is whether his construction work was performed "as an incident to or in

conjunction with" the "farming operations" of the livestock farmers on whose property he built enclosures. ""The line between practices that are, and those that are not, performed 'as an incident to or in conjunction with' such farming operations is not susceptible to precise definition."' *Holly Farms Corp. v. NLRB,* 517 U.S. 392, 408 (1996) (quoting 29 C.F.R. §780.144). This is due, in part, to the fact that what constitutes "agriculture," both primary and secondary, is not a fixed concept, but one that changes over time as a result of economic development. The Supreme Court emphasized this critical analytical point the first time it addressed the meaning of §3(f):

> [w]hether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society . . . In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers . . . In this way functions which are necessary to the total economic process of supplying an agricultural product become, in the process of

> economic development and specialization, separate and independent productive functions operating in conjunction with the agricultural function but no longer a part of it.

*Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 760-761(1949), A-23. Given the changing nature of agriculture, the Court concluded that "[t]he question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. 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*." *Id.* at 761 (emphasis added).

Only one Circuit Court of Appeals has ever addressed the question whether construction work performed on farm property by an independent construction contractor falls within the agricultural exclusion of §3(f). That case, *NLRB v. Monterey County Building & Construction Trades Council,* 335 F.2d 927 (9th Cir. 1964), A-32 (hereafter "*Monterey County*"), held that such construction work, however necessary for the success of the farm, is <u>not</u> performed "as an incident to or in conjunction with" the farm's agricultural function. It

is, instead, a "separately organized independent productive activity" not covered by the agricultural exemption. *Id.* at 931 (quoting *Farmers Reservoir,* 337 U.S. at 761, A-26).

The facts of *Monterey County* are virtually identical to those here: a chicken farmer engaged Buckeye Incubator Company to construct buildings for raising chickens on the farm's property. Buckeye was a Delaware corporation "primarily engaged in the manufacture of poultry equipment," and it subcontracted the construction work to Whiteside Construction. *Id.* at 929. Once the construction of the building was completed, Buckeye installed the necessary poultry raising equipment. *Id.*

The Ninth Circuit concluded that this construction and installation work was non-agricultural because Whiteside Construction Co. and Buckeye were "organized separately from any farming or poultry operation and [were] engaged in a productive activity which is independent from any farming or poultry operations." *Id.* at 931. "The analysis of the provisions of the Act and the separation of functions recognized in *Farmers Reservoir & Irrigation Co. v. McComb, supra*, impel the conclusion that the 'agricultural laborer' exception is not

applicable and that the employees of Whiteside and Buckeye are covered by the Act." *Id.*

The district court in this case rejected the result in *Monterey County* as "against the weight of authority on the issue," DE 52, A-1 at 8, although neither party cited a case involving construction on a farm other than *Monterey County* and Luna Vanegas is aware of none. The district court also found *Monterey County* to be inconsistent with its reading of U.S. Department of Labor (DOL) Wage and Hour Regulations applying the secondary agriculture exemption. *Id.* However, as explained below, the relevant Supreme Court cases and DOL regulations demonstrate that *Monterey County* was correctly decided and that the district court's conclusion to the contrary was based on a misunderstanding of both the caselaw and DOL's regulations.

The distinction drawn by *Farmers Reservoir* between practices that are "carried out as part of the agricultural function" and those that are "separately organized as an independent productive activity" does not mean that all independent contractors working on a farm are, for that reason alone, engaged in non-agricultural work. The legislative

history of the secondary definition of agriculture makes clear that the work of some independent contractors, such as threshing and other harvest operations, should not be viewed as an "independent productive activity," but "as part of the agricultural function." *Farmers Reservoir,* 337 U.S. at 761, A-26.

> The legislative history makes plain that [the "performed on a farm as an incident or in conjunction with such farming activities"] language was particularly included to make certain that independent contractors such as threshers of wheat, who travel from farm to farm to assist farmers in what is recognized *as a purely agricultural task* and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included in the definition of agriculture.

29 C.F.R. §780.128 (emphasis added). Other regulations published in the wake of *Farmers Reservoir* elaborate on when an activity carried out by an independent contractor is part of the agricultural function of the farm and when it is an independent productive activity:

> Generally, 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. Industrial operations and processes that are more akin to manufacturing than to agriculture are not included. This

> is also true when on-the-farm practices are performed for a farmer.

29 C.F.R. §780.144 (citations omitted).

> The character of a practice as a part of the agricultural activity or as a distinct business activity must be determined by examination and evaluation of all of the facts and circumstances in the light of the pertinent language and intent of the Act. The result will not depend on any mechanical application of isolated factors or tests. Rather the total situation will control.

29 C.F.R. §780.145 (citations omitted).

Among the factors to be considered are: (1) "the nature of the practice and the circumstances under which it is performed . . .in light of the common understanding of what is agricultural and what is not," (2) "whether performance of the practice is in competition with agriculture or with industrial operations," and (3) "the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations." 29 C.F.R. §780.146. With respect to this last consideration, "[t]he fact that farmers raising a commodity on which a given practice is performed do not ordinarily perform such a practice

has been considered a significant indication that the practice is not 'agriculture' within the secondary meaning of 3(f).” ”[3]

29 C.F.R. §780.146.

Because the precise meaning of §3(f) “is not so ‘plain’ as to bear only one permissible interpretation,” courts routinely defer to these regulatory interpretations of §3(f). *See Holly Farms Corp.,* 517 U.S. at 407 (deferring to NLRB interpretation of §3(f) and citing with approval DOL regulations 29 C.F.R. §§780.129, .137, .143, and .144); *Bayside,* 429 U.S. at 302 (deferring to NLRB interpretation of §3(f)); *Ramirez v. Statewide Harvesting & Hauling, LLC,* 997 F.3d 1356 (11th Cir. 2021) (applying DOL regulations); *NLRB v. Design Sciences,* 573 F.2d 1103, 1104-1105 (9th Cir. 1978) (deferring to DOL regulations); *Rodriguez v. Pure Beauty Farms, Inc.,* 503 Fed. Appx. 772 (11th Cir. 2013) (applying DOL regulations); *Rodriguez v. Whiting Farms, Inc.,* 360 F.3d 1180 (10th Cir. 2004) (same); *Donovan v. Frezzo Bros. Inc.,* 678 F.2d 1166 (3d

[3] 29 C.F.R. §§780.145 & .146 set forth a number of considerations aimed at determining the degree of separation between farming operations and other related activities carried out by a farm in order to determine whether the latter are part of the farming operation or an independent business operation. Here there is no question that Signet is an independent business operation distinct from the farms where it performs its construction work.

Cir. 1982) (same); *NLRB v. C & D Foods, Inc.*, 626 F.2d 578, 582 (7th Cir. 1980) (deferring to NLRB interpretation of §3(f)). Luna Vanegas has found no cases rejecting DOL's regulations interpreting the definition of secondary agriculture.

Supreme Court decisions issued after *Farmers Reservoir* support the factors set forth in DOL's regulations and identify additional factors to be considered. For example, in *Maneja v. Waialua Agricultural Company Ltd.,* 349 U.S. 254 (1955), the Court addressed whether four kinds of workers employed by a sugar cane farm were exempt agricultural workers: (1) workers who operated the farm's railroad, (2) workers who repaired the railroad, (3) workers employed in the farm's mill, and (4) maintenance workers who managed the upkeep of the village where the farm's employees were housed.

As for the railroad operators, the Court concluded that their work was "incident to and in conjunction with" the farm's sugarcane growing operation because the railroad was owned by the farm and was only used to haul farm equipment and workers to the fields and harvested cane from the fields to the farm's mill. *Id.* at 261-362. Moving equipment and workers to fields so they can cultivate a crop and

moving harvested crops from the field to a processing location are both purely agricultural activities—*i.e.* "established parts of agriculture" 29 C.F.R. §780.144—subsidiary to "the agricultural function" of cultivating cane. *Farmers Reservoir,* 337 U.S. at 761, A-26. Simply because the farmer in *Maneja* was large enough to use a railroad to accomplish these purely agricultural functions, instead of relying on the traditional farm wagon, did not change the fact that hauling farm equipment and crops to and from the fields was part of the agricultural function of growing sugarcane. *Maneja*, 349 U.S. at 261-263.

For the same reason, the repairmen who kept the railroad operational were also performing a subordinate task incident to Waialua's farming operations. "Indeed, the very necessity of integrating these tasks with Waialua's main operation—without which the harvest would soon become hopelessly stalled—is strong reason to consider the repairmen within the exception." *Id.* at 263-264. Just as the railroad workers were legally indistinguishable from farmhands driving wagons filled with cane, the repair workers were no different in kind from farmhands repairing the wagon's leather harnesses.

The Court reached the opposite conclusion with respect to the farm's employees who maintained the farmworker village and who worked in the mill. Even though the upkeep of the farmworker village was necessary to securing an available workforce to carry out the farm's agricultural operations, the Court concluded that maintenance work in the village was too removed from the actual growing of sugar cane to be considered incident to or in conjunction with the cane farm's agricultural operations. *Id.* at 271-272.

The mill workers presented a closer question that required consideration of "all the facts surrounding [the milling] operation to determine whether it is incident to or in conjunction with farming." [4] *Id.* at 264. Upon examination of those facts, including the "external characteristics of the milling operation," the Court concluded that the milling operation was more akin to an industrial venture than an agricultural function because it processed the cane into a different

[4] The facts the Court considered were (1) whether the milling transformed the agricultural crop in a process more akin to manufacturing, (2) the relative investment in the processing and farming operations, (3) whether farmworkers did the processing or a separate workforce; (4) the degree of separation between the management of the farming operations and the milling operations; and, (5) the degree of industrialization of the milling operation. *Id.* at 264.

product after the farm's agricultural function of cultivating and harvesting the cane had concluded. *Id.* at 265. In addition, although the mill was owned by the farmer and staffed by farm employees, it operated like an independent productive activity in the sense that it was managed as a separate department from the farming operations, had its own workforce separate from the farming workforce, and competed with other independent cane mills. *Id.* Finally, the Court considered whether other cane farmers in the region "ordinarily" operated their own mills or whether they relied on independent mills. *Id.* In the Court's view, this inquiry "has a very direct bearing in determining whether the milling operation is really incident to farming." *Id.* at 266. The facts revealed that few cane farmers operated their own mills, leading the Court to conclude that "it is very doubtful that these milling operations can be considered a normal incident to the cultivation of sugar cane." *Id.* at 267. For all of these reasons the Court held that the mill workers did not fall within the agricultural exclusion.

The Court reached a similar conclusion in *Mitchell v. Budd,* 350 U.S. 473 (1956), which held that workers engaged in "bulking" tobacco

in barns after harvest, even those who only "bulked" tobacco grown by the farm that employed them, were engaged in an independent non-agricultural operation because (1) tobacco farmers do not ordinarily engage in their own bulking operations, and (2) bulking is a separate processing stage, involving handling cured tobacco to ensure air and moisture diffusion, that occurs after the primary agricultural function of cultivating and harvesting the tobacco have concluded.

Finally, in *Holly Farms Corp.,* 517 U.S. at 407-409, the Court considered whether the work of "live-haul crews" employed by Holly Farms was exempt. Holly was a vertically integrated chicken producer, whose activities included hatcheries, a feed mill, an equipment maintenance center, and a processing plant. After chicks were hatched, Holly delivered them to contract farmers who raised them until they were of sufficient size to be processed. At that point Holly's processing unit (which the Court considered a non-agricultural operation like the mill in *Maneja*) sent a live-haul crew of nine chicken catchers to the contract farm. The catchers entered the coops, manually caught the chickens, and put them in cages for transport to the processing plant.

The question presented was whether these live haul workers fell

within the secondary definition of agriculture—*i.e.* whether their work was incident to or in conjunction with the raising of the chickens they caught. The live-haul crew members clearly worked on farm property and their work was a necessary part of transporting the chickens from the farm to market, an enumerated example of secondary agriculture in §3(f). Nevertheless, the Court upheld the NLRB's conclusion that the chicken catchers were performing non-agricultural work. It noted that the catchers "have no business relationship with the independent farmers," that there was "minimal overlap between the work of the live-haul crew and the independent growers' raising activities," and that the "growers do not assist the live-haul crews in catching and loading the chickens." 517 U.S. at 403. Finally, the Court noted that "[w]e think it sensible, too, that the Board homed in on the status of the live-haul crews' *employer." Id.* at 404 (emphasis in original). Their employer was not the farmer who raised the chickens, but the processing plant where the chickens were slaughtered. Accordingly, their work was "tied to 'a separate and distinct business activity,' the business of processing

poultry for retail sale, not the anterior work of agriculture."[5] *Id.* at 407. *See, e.g., NLRB v. Gass,* 377 F.2d 438, 444 (1st Cir. 1967) (delivery of poultry feed which involves work 'on the farm' is not incidental to the farm's chicken raising operations, but to the operations of the feed mill that employs the drivers); *Jimenez v. Duran,* 287 F.Supp.2d 979, 989 (N.D. Iowa 2003) ("[T]he status of the claimants' employer with respect to the particular activity at issue is relevant to the [secondary agriculture] inquiry.").

The Court also noted that the Board's decision was consistent with DOL regulations emphasizing that "[t]he fact that a practice performed on a farm is not performed by or for the farmer is a strong indication that it is not performed in connection with the farming operations there conducted." *Holly Farms Corp.,* 517 U.S. at 408, quoting §780.143. The Court noted that "[t]he same regulation, §780.143, further states that in determining whether a practice is performed 'for' a farmer, it is 'highly significant' whether the practice involves property to which the farmer

[5] In reaching this conclusion the Court specifically rejected Holly Farms' argument that the chicken catchers were analogous to wheat threshers because their work was not incident to or in conjunction with the contract farmer's operations. 517 U.S. at 402, n.8.

has title or for which the farmer otherwise has responsibility. Holly Farms retains title to the chicks and, once the live-haul crew undertakes its catch and remove operation, the independent grower "divest[s] himself of further responsibility with respect to the product." *Id.*

Taken together, these cases and DOL's Wage and Hour Regulations establish that, in order for a practice to be "incident to or in conjunction with such farming operations," it is not enough that the practice occurs on a farm nor is it sufficient that the practice is necessary to the success of the farming operation. *Farmers Reservoir,* 377 U.S. at 761, A-26. Rather the practice must be "part of the agricultural function" of the farm itself. *See id.* at 762, A-26. *See also* 29 C.F.R. §780.144 (to be exempt a practice must be "an established part of agriculture and subordinate to the farming operations involved"). Watering a crop, hauling farmworkers and equipment to the field for cultivation, and harvesting a crop with a threshing machine are all subordinate, temporally integrated parts of the agricultural operations of the farms on which they occur. On the other hand, chicken catching while performed on a farm and necessary to the success of poultry

farming is not an activity that is, strictly speaking, "part of the agricultural function" of raising chickens. Nor is milling cane part of the agricultural function of cultivating and harvesting cane. Neither of these activities is temporally integrated with the actual farming operations at issue but, instead, occurs after the farm's agricultural function has been completed.

*Maneja* and *Holly Farms Corp.* make clear that practices on a farm that are not temporally integrated with the agricultural function itself, like milling harvested cane or catching fattened chickens for processing, may still fall within the secondary definition of agriculture if similar kinds of farms "ordinarily" engage in those activities, such that the activity can be said to be "incident to" that type of farming. *Maneja,* 349 U.S. at 265-267; *Holly Farms Corp.,* 517 U.S. 404-408 & n.8; 29 C.F.R. §780.146 ("the extent to which such a practice is ordinarily performed by farmers incidentally to their farming operations" is a factor to consider in determining whether a practice is incidental to or in conjunction with farming operations). However, if as a result of economic development, the activity is no longer carried out by farmers themselves, but is ordinarily carried out by independent

business operations with their own workforce and equipment, businesses that compete with other similar businesses rather than with farming operations, then the activity can no longer be said to be "incident to or in conjunction with" the farming operations where the work is done. Rather, it is performed "as an incident to and in conjunction with" the activity of the independent business. *Holly Farms Corp.,* 517 U.S. at 407. *See also* 29 C.F.R. §780.146 ("The fact that farmers raising a commodity on which a given practice is performed do not ordinarily perform such a practice has been considered a significant indication that the practice is not "agriculture" within the secondary meaning of section 3(f)").

Other considerations that may bear on whether a practice is carried out as part of an independent business operation, as opposed to the actual farming operations on the farm, include whether the workers performing the practice have a business relationship with the farmers, whether they are working with materials owned by the farm or by the independent business and whether the farm's laborers participate in the work. *Holly Farms Corp.,* 517 U.S. at 408; 29 C.F.R. §780.143.

Applying the principles set forth above, it is clear that *Monterey County* was properly decided and that, for the same reasons, Signet is likely to have a difficult time proving that Luna Vanegas' work was performed "as an incident to or in conjunction with" the actual livestock raising activities of the farms on which he worked.

*First*, construction work is not a "recognized part of agriculture." 29 C.F.R. §780.128. Like the mill in *Maneja,* the "external characteristics" of Signet's operations show it to be an industrial venture, wholly independent from the farm's agricultural operations. *Maneja,* 349 U.S. at 265. By definition, construction work must be performed and completed *before* any agricultural activity can possibly occur since it is only after construction workers have finished their work that a barn or other enclosure can be put to some use, whether agricultural or otherwise.

In this sense, Luna Vanegas' construction work was a step removed from the agricultural operations on the livestock farm where he worked, just as the milling operations in *Maneja,* and the chicken catching operations in *Holly Farms Corp.* were removed from the actual agricultural functions of the farms involved in those cases. To be

sure, milling and chicken catching occurred *after* agricultural functions were complete, whereas Luna Vanegas' construction work occurred *before* agricultural functions could begin, but in either case the work was temporally removed and distinct from the actual agricultural operations of the farm in a way that recognized secondary agricultural practices like irrigating, transporting crops, and fueling and repairing harvest equipment are not. Construction is actually further removed from farming than milling or chicken catching as those latter activities at least operate on the farms' agricultural products, while construction projects operate on manufactured materials that have no link whatsoever with a farm.

*Second*, Luna Vanegas' construction work was in no way subordinate to the farming operations on the farm where he worked. Signet, like Whiteside Construction Co. in *Monterey County* and the milling operations in *Maneja,* is organized as an independent productive activity with its own workforce and equipment separate from the livestock raising operations occurring on the farms where Signet performs its work. It had no business relations with the farms and instead worked for the general contractor that hired Signet. *See*

DE 28, A 21. Discovery will likely reveal that the farmers had no involvement in the actual construction work performed by Signet's employees, as opposed to the way a farmer might direct a wheat thresher which wheat to thresh and when. Rather, the evidence is likely to show that Luna Vanegas was supervised by, and received all of his assignments and directions from Signet, such that his work, like that of the chicken catchers in *Holly Farms Corp.,* is carried out as an incident to and in conjunction with his employer's independent construction business, not with the farming operations of the farm where he worked.

*Third,* it seems likely given the size and scope of Signet's operations set forth in the complaint, that livestock farmers in Wisconsin "do not ordinarily perform the functions of a construction project of the type involved here," any more than the chicken farmers did in *Monterey County*, 335 F.2d at 931, A-36. If Luna Vanegas can establish that fact at trial, "it is very doubtful that [Signet's construction] operations can be considered a normal incident to the [raising of livestock]" *Maneja,* 349 U.S. at 267. In past eras, construction of a livestock enclosure likely was performed by livestock

farmers as an ordinary incident to raising livestock, just as milling of cane was once performed by cane farmers, and catching chickens to transport them to market was the job of a chicken farmer. But as the Court in *Farmers Reservoir* recognized, "[e]conomic progress . . . is characterized by a progressive . . . separation of function" such that what was once part of the agricultural function is now separately organized as an independent activity. 337 U.S. at 761, A-26.

Construction work that might have been incident to farm operations in the 19th or early 20th century has, over time, become an independent, non-agricultural activity performed by non-farm operations like Signet.[6] For this same reason, it is likely that Signet construction work competes with other sub-contracting construction companies, not with farmers.

Discovery may show additional facts to support a finding that

---

[6] [B]y the 50s and 60s, farmers were beginning to specialize in one crop or type of livestock. There was less diversification, and so, farm buildings became more specialized structures. Most of these structures no longer looked like barns. New building materials replaced the traditional post and beam construction. And new manufacturers grew to meet the new needs of agriculture."
https://livinghistoryfarm.org/farminginthe50s/machines_16.html

Luna Vanegas' work was not agricultural including that Signet constructs non-farm buildings as well as farm buildings, that its operations are highly industrialized involving the assembly of prefabricated parts manufactured by Signet or others away from the farm, and that it uses industrial construction equipment as opposed to regular farm equipment. It may show that Luna Vanegas and other Signet construction workers work out of a construction yard off the farm where they check in each day just as the chicken catchers in *Holly Farms Corp.* did. 517 U.S. at 404. It may also show that Signet, or the general contractors for whom it worked, maintained title over the materials on which Luna Vanegas worked and that the farmer had no responsibility for those materials or equipment until the construction project was completed. *Holly Farms Corp.,* 517 U.S. at 408; 29 C.F.R. §780.143.

As noted above, the agricultural exemption is an affirmative defense and Luna Vanegas was under no obligation to plead any of these facts. Nevertheless, as these facts may be relevant to the resolution of Signet's affirmative defense, Luna Vanegas should be given an opportunity to obtain discovery so that he can defend against

the defense if Signet continues to pursue it.

## III. The District Court's Analysis Misapplies the Relevant Regulations and Case Law.

The district court's analysis of the secondary agriculture question was flawed in a number of respects. First, the court simply pronounced, without analysis, that Luna Vanegas' "work building livestock confinement structures was in conjunction 'with the raising of livestock', one of the core farming operations specified in §203(f)." A-1, DE 52 at 4. The court apparently reached this conclusion based on its assumption that "what matters is whether the *worker's* activities are directed toward an agricultural or non-agricultural end." A-1, DE 52 at 6. No doubt Luna Vanegas' activities were directed toward an agricultural end in some highly generic sense but so are any number of activities that are too removed from a farm's actual farming operations to fall within secondary agriculture.

The manufacture of fertilizer and the delivery of feed to a chicken farm are both directed toward an agricultural end, even necessary for that end, but that does not make them agricultural activities. *Farmers Reservoir* makes clear that the exclusion for agricultural practices "is

not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations." 337 U.S. at 761, A-26. Rather, the "question is whether the activity . . . is carried on *as part of* the agricultural function or is separately organized as an independent productive activity." *Id.* at 762, A-26 (emphasis added).

A worker who uses a combine to harvest a farmer's wheat is performing work *as part of* the agricultural function of growing and harvesting wheat. *See* 29 C.F.R. §780.118(b); *Farmers Reservoir,* 337 U.S. at 767, A-29 (wheat thresher's work is incidental to farming). But surely the company that manufactures the combine is not engaged in an agricultural function even though such manufacturing is directed toward an agricultural end and is a necessary step in ensuring that wheat can be harvested. It is only the *use* of the combine, once manufactured, that constitutes work in conjunction with wheat farming. §780.118(b). So too with an animal enclosure large and complex enough to require a contractor and a sub-contractor construction company to build it. The construction of such a building by an independent business has nothing to do with farming; it is

construction work no different from construction work off a farm. It is also antecedent to actual agricultural operations in that it is only when the building is completed, and farmhands *use* the structure to confine or care for livestock that work incident to or in conjunction with the raising of livestock can occur.[7]

Second, the court misapplied *Maneja,* 349 U.S. 254 and *Sariol v. Fla. Crystals Corp.,* 490 F.3d 1277, 1280 (11th Cir. 2007). The district court reasoned that Luna Vanegas' work constructing an animal enclosure is agricultural in the same way that the work of repairing and maintaining the sugar cane farm's railroad was considered agricultural work in *Maneja* and fueling tractors was in *Sariol.* But there are key distinctions. Repairing, maintaining, and fueling agricultural equipment, at least when done on a farm, are not only necessary to *using* such equipment; but occur simultaneously with and as an integral part of ongoing cultivation and harvesting operations ensuring that they can proceed smoothly. *See Maneja,* 349 U.S. at 263-264 (without

[7] "The term 'raising' employed with reference to livestock in section 3(f) includes such operations as the breeding, fattening, feeding, and general care of livestock." §780.121. It does not include construction work by an independent construction contractor.

integrating repair workers in the operation "the entire harvesting operation would soon become hopelessly stalled."); *Sariol,* 490 F.3d at 1280 ("without these services" the harvest would "grind to a halt"). Repair work done on a farm is also ordinarily done by farmers. *Maneja,* 349 U.S. at 263 ("Every farmer, big or little, must keep his farming equipment in proper repair").[8] By contrast the act of constructing a livestock enclosure is not an integral part of farming operations; it is a distinct non-agricultural activity that antecedes any agricultural activity.[9]

---

[8] More complex repair work done at the local Tractor Service Center is not work done "on a farm" and is not exempt.

[9] In a case addressing whether workers who constructed a dam were performing work essential to the production of goods for commerce, the Supreme Court noted that the law must not be indifferent to the distinction between maintenance or repair and construction, which is more remote in time and more steps removed from the end result of the process. *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 319 (1960) ("Assuming arguendo that maintenance and repair of the completed dam would be covered employment, it does not follow that construction of the dam therefore is. The activities are undoubtedly equally 'directly essential' to the producers of goods who depend upon the water supply; but they are not equally remote from production or from the 'commerce' for which production is intended. The distinction between maintenance and repair on the one hand, and replacement or new construction on the other, may often be difficult to delineate but is a practical distinction to which law must not be indifferent. It's relevance here, where our purpose must be to isolate primarily local activities from the flow of commerce to which they invariably relate, lies in the close relation of

In addition, Luna Vanegas and his fellow workers were not farmhands, they were construction workers employed by an independent building contractor. The district court completely discounted this distinction stating that it was only the *practice* that Luna Vanegas was engaged in, not the status of his employer as an independent business, that mattered. A-1, DE 52 at 7-8. But that is a serious misreading of Supreme Court precedent. *Holly Farms Corp.* explicitly holds that the nature of a worker's employer *is* relevant to whether his work is incident to or in conjunction with farming operations. *Holly Farms Corp.*, 517 U.S. at 400-402. Indeed, the result in *Holly Farms Corp.* turned on the nature of the worker's employer. *Id.* at 402 n. 8 (noting that chicken catchers would more closely resemble wheat threshers if they were employed by the independent chicken growers on whose farm they worked). Similarly, the *Maneja* court's inquiry into the degree of separation between the farm's farming operations and its milling operations would have been irrelevant if the

---

maintenance and repair to operation, *as opposed to replacement or new construction which is a separate undertaking necessarily prior to operation and therefore more remote from the end result of the process."*)

independent nature of the mill workers' employer were not relevant to the inquiry. *Maneja,* 349 U.S. at 265.

Third, the district court erred in its reading of DOL regulations. It quoted 29 C.F.R. §780.136 repeatedly as confirming that Luna Vanegas performed secondary agriculture. A-1, DE 52 at 3-6. In fact, that regulation merely states the uncontroversial fact that workers who are employed by independent contractors to erect silos and granaries "may be considered employed in practices performed 'on a farm.'" 29 C.F.R. §780.136. The regulation goes on to state, however, that "[w]hether such employees are engaged in 'agriculture' depends, of course, on whether the practices are performed as an incident to or in conjunction with the farming operations on the particular farm as discussed in §§780.141 through 780.147, that is whether they are carried on as a part of the agricultural function or as a separately organized productive activity (§§780.104 through 780.144)." 29 C.F.R. §780.136. Thus, far from confirming that Luna Vanegas performed secondary agriculture as the district court found, §780.136 merely states the obvious fact that construction work performed on a farm is work "on a farm."

The critical question remains whether that work was "incident to or in conjunction with the farm's operations," a question that is addressed in a separate regulation, 29 C.F.R. §780.144. That regulation states, consistent with *Farmers Reservoir* and *Maneja,* that "[g]enerally, 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." 29 C.F.R. §780.144.

Fourth, the district court's opinion dismissed the passage in *Farmers Reservoir* analyzing the effects of economic development on the meaning of agriculture based on its view that the effects of economic development are captured by the language of §3(f) "which simply asks whether the work is 'performed by a farmer or on a farm as an incident to or in conjunction with . . .farming operations.'" A-1, DE 52 at 6. But the point of *Farmers Reservoir* is that, in order for work to fall within that definition, it must, at a minimum, be "carried out as part of the agricultural function" and not be "separately organized as an independent productive activity." *Id.*

The district court attempts to buttress its dismissal of *Farmers Reservoir* by citing *Sariol,* 490 F.3d 1277 (11th Cir. 2007). But *Sariol* addressed an entirely different point. In that case, the worker tried to argue that he was working for multiple farmers (which defeats the agricultural exclusion) because the independent contractors whose harvest equipment he fueled (along with his employer's equipment) were "their own separate farming operations" distinct from the Sugar Farms Coop farm that used their services. *Id.* at 1380. The court properly dismissed that argument out-of-hand noting that the passage in *Farmers Reservoir* about the effect of economic specialization on the definition of agriculture in no way suggested that independent harvesters working for a farm should, themselves, be considered distinct farming operations. *Id.* at 1280-1281. To the contrary they are "part of the agricultural function" of the farm where they work.

Finally, the district court rejected the Ninth Circuit's decision in *Monterey County* as "against the weight of authority on the issue" citing *Bayside Enterp. Inc. v. NLRB,* 429 U.S. 298 (1977); *Sariol,* 490 F.3d at 12809-1281, and *Holtville v. Alfalfa Mills v. Wyatt,* 230 F.2d 398 (9th Cir. 1955). A-1, DE 52 at 8 & fn 2. But, as noted above, *Sariol,* like

*Maneja,* involved work subordinate to and temporally integrated with the farm's actual farming operations—*i.e.* fueling tractors and other equipment used in planting, fertilizing and harvesting crops—as opposed to the non-agricultural task of construction in *Monterey County,* that was antecedent to any agricultural activity. The issue in *Bayside* was whether drivers delivering feed to contract farmers were subject to the exclusion based on the assertion that the feed mill that employed them was, itself, a farmer. The Court concluded that the feed mill was not a farmer—an entirely different issue from the one presented here and in *Monterey County*. As for *Holtville,* the issue there was whether truck drivers who picked up chopped alfalfa in the field and hauled it to a processing mill were engaged in agriculture or processing. That question in turn depended upon whether the chopped alfalfa was a harvested crop, in which case transporting it from the field to a processing plant would be agriculture, or whether chopping alfalfa in the field was the first step in processing, in which case the transportation would be part of processing (non-agricultural). The Court remanded that question to the district court for further findings. Again, the issue in that case -when farming ends and processing begins—has

nothing to do with this case. Plainly the Ninth Circuit panel that decided *Monterey County* did not think its decision was in conflict with its earlier decision in *Holtville* (which it did not even mention). It is not at all clear what the district court thought the conflict was.

In sum, none of the cases or regulations cited by the district court in support of its conclusion that *Monterey County* was wrongly decided actually support that conclusion. It was not *Monterey County*, but the district court that strayed from the proper meaning of §3(f).

## CONCLUSION

For all of the foregoing reasons, the judgment of the district court should be reversed and this matter remanded for further proceedings.

## CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure and Circuit Rule 32(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 9,794 words.

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14pt. size Century Schoolbook font.

Dated this 30th day of November, 2021.

*/s/ Jennifer J. Zimmermann*


Edward Tuddenham
42 Ave. Bosquet
75007 Paris
France

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Avenue, Suite 10
Iowa City, IA 52240
lgaynor@iowalaw.org

Jennifer J. Zimmermann (*Counsel of Record*)
Erica L. Sweitzer-Beckman
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
(608)256-3304
jjz@legalaction.org
elb@legalaction.org

COUNSEL FOR PLAINTIFF-APPELLANT, JOSE AGEO LUNA VANEGAS

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on November 30, 2021, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered users of CM/ECF and that service will be accomplished by the CM/ECF system.

Dated this 30th day of November, 2021.

*/s/Jennifer J. Zimmermann*


Jennifer J. Zimmermann (*Counsel of Record)*
Erica L. Sweitzer-Beckman
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
(608)256-3304
jjz@legalaction.org
elb@legalaction.org

Edward Tuddenham
42 Ave. Bosquet
75007 Paris
France

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Avenue, Suite 10
Iowa City, IA 52240
lgaynor@iowalaw.org


COUNSEL FOR PLAINTIFF APPELLANT, JOSE AGEO LUNA VANEGAS

## CIRCUIT RULE 30(D) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a)-(b) are included within the required Short Appendix A that is attached to this brief.

Dated this 30th day of November, 2021.

*/s/ Jennifer J. Zimmermann*


Edward Tuddenham
42 Ave. Bosquet
75007 Paris
France

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Avenue, Suite 10
Iowa City, IA 52240
lgaynor@iowalaw.org

Jennifer J. Zimmermann
(*Counsel of Record*)
Erica L. Sweitzer-Beckman
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
(608)256-3304
jjz@legalaction.org
elb@legalaction.org

COUNSEL FOR PLAINTIFF-APPELLANT, JOSE AGEO LUNA VANEGAS

**No. 21-2644**
**UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

Jose Ageo LUNA VANEGAS,
Plaintiff-Appellant,
v.
SIGNET BUILDERS, INC.,
Defendant-Appellee.

---

**On Appeal from the United States District Court for the Western District of Wisconsin**
No. 21-CV-54—The Honorable James D. Peterson, United States District Judge.

---

# Required Short Appendix of Plaintiff-Appellant

---


Jennifer J. Zimmermann
(COUNSEL OF RECORD)
Erica L. Sweitzer-Beckman
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
(608)256-3304
jjz@legalaction.org
elb@legalaction.org

Edward J. Tuddenham
42 Ave. Bosquet
75007 Paris
France
etudden@prismnet.com

Lorraine Gaynor
IOWA LEGAL AID
1700 S. 1st Avenue, Suite 10
Iowa City, IA, 52240
lgaynor@iowalaw.org

*Counsel for Plaintiff-Appellant Jose Ageo LUNA VANEGAS*

No. 21-2644

TABLE OF CONTENTS FOR REQUIRED SHORT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

---

JOSE AGEO LUNA VANEGAS,
on behalf of himself and all others similarly situated,

Plaintiff,

v.

SIGNET BUILDERS, INC.,

Defendant.

OPINION and ORDER

21-cv-54-jdp

---

Plaintiff Jose Ageo Luna Vanegas worked for defendant Signet Builders, Inc. under a guestworker visa to build "livestock confinement structures" on farms in several states. Dkt. 1, ¶ 28. Although he frequently worked more than 40 hours per week, Signet did not pay him overtime. Luna Vanegas contends that Signet violated his rights under the Fair Labor Standards Act (FLSA). He moves for conditional certification of a collective of all Signet workers who worked under a guestworker visa. Dkt. 15. Signet moves to dismiss Luna Vanegas's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Dkt. 25.

The court agrees with Signet that Luna Vanegas was not entitled to overtime because his work, as described in his complaint, fell within the FLSA's agricultural-work exemption. So the court does not need to consider the parties' arguments regarding conditional certification or personal jurisdiction over claims of members of the proposed collective. The court will grant Signet's motion to dismiss, deny as moot Luna Vanegas's motion for conditional certification, and close this case.

ANALYSIS

On Signet's motion to dismiss, the court takes all well-pleaded allegations in Luna Vanegas's complaint as true and draws all reasonable inferences in Luna Vanegas's favor. *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007). Signet bases its motion on the affirmative defense that Luna Vanegas's work fell within a provision of the FLSA that exempts agricultural workers from its overtime requirements. Dismissal for failure to state a claim is ordinarily not appropriate based on an affirmative defense. *Bland v. Edward D. Jones & Co., L.P.*, 375 F. Supp. 3d 962, 982 (N.D. Ill. 2019). But "a party may plead itself out of court by pleading facts that establish an impenetrable defense to its claims." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); *see also Hecker v. Deere & Co.*, 556 F.3d 575, 588 (7th Cir. 2009) (dismissal under Rule 12(b)(6) appropriate when allegations in complaint "so thoroughly anticipated the [affirmative] defense that [the court] could reach the issue" on the complaint alone). So the court may consider whether Luna Vanegas's description of his work in his complaint falls within the FLSA's agricultural exemption and therefore bars his claim.

According to the complaint, Dkt. 1, Luna Vanegas is a Mexican citizen. Between 2004 and 2019, he worked for Signet under an H-2A guestworker visa, which allows citizens of other countries to perform agricultural work in the United States on a temporary basis. Signet is a construction company that contracted to build "livestock confinement structures" on farms in Wisconsin, Iowa, Indiana, and other states. Dkt. 1, ¶ 16. On its visa application forms, Signet described the job duties of Luna Vanegas and the other guestworkers as follows:

> On farms, unload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification.

*Id.* The Department of Labor approved the visa application forms for Luna Vanegas and the other guestworkers. Luna Vanegas says that Signet's description of his work on the visa application forms is accurate. *Id.*, ¶ 28. He says that although he and the other guestworkers routinely worked more than 40 hours per week, Signet did not pay them overtime when they did so.

The FLSA requires employers to pay workers at a rate of at least one and one-half times their regular rate of pay for each hour they work beyond 40 in a workweek. 29 U.S.C. § 207(a)(1). But the FLSA exempts "any employee employed in agriculture" from this requirement. 29 U.S.C. § 213(b)(12). The FLSA defines "agriculture" in this way:

> "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 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.

29 U.S.C. § 203(f). In other words, the agricultural exemption applies to two categories of workers: (1) workers directly engaged in "farming in all its branches"; and (2) workers engaged in "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." The first category of work is often called "primary agriculture," and the second "secondary agriculture." *See, e.g.*, *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 400 (1996).

The parties agree that the work Luna Vanegas performed was not primary agriculture under § 203(f); the question is whether it was secondary agriculture. A regulation implementing the secondary agriculture exception states that employees of independent contractors who build structures such as silos and granaries on a farm are engaged in secondary agriculture so

long as the work is "performed as an incident to or in conjunction with the farming operations on the particular farm." 29 C.F.R. § 780.136. The regulation makes it clear that whether Luna Vanegas performed secondary agriculture by building livestock confinement structures turns on the same considerations as it would for any other worker—was his work performed on a farm, and was it incidental to or in conjunction with the farm's farming operations? The parties agree that he worked "on a farm," so to determine whether he performed secondary agriculture, the court must determine whether his work was incidental to or in conjunction with farming operations.

Luna Vanegas's complaint shows that it was. Although Luna Vanegas "had no contact" with livestock in his work, Dkt. 1, ¶ 19, his work building livestock confinement structures was in conjunction with "the raising of livestock," one of the core farming operations specified in § 203(f). *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955), illustrates why. *Maneja* involved workers at a large plantation where sugarcane was grown, then processed into raw sugar and molasses on the farm. *Id.* at 256. The Court considered whether several categories of plantation workers fell into the secondary agriculture exemption. The Court concluded that workers on a plantation-owned railroad who transported workers, farm equipment, and sugarcane around the plantation performed secondary agriculture because the railroad was used exclusively for agricultural functions; without the railroad, "the land could not be cultivated and the cane, after harvest, would spoil in the fields and be lost." *Id.* at 725.

But the *Maneja* Court concluded that workers at the plantation's sugarcane-processing plant did not perform secondary agriculture because processing the sugarcane was not incidental to or in conjunction with farming the sugarcane. The primary reason the Court gave for its conclusion was that available data regarding sugarcane farmers showed that most did

not process their own sugarcane, particularly smaller farmers, which supported the conclusion that processing the sugarcane was a separate endeavor from farming it. *Id.* at 266–67.

The Court also considered a third group of employees: the plantation's repair workers, who included "mechanics, electricians, welders, carpenters, plumbers and painters." *Id.* at 257. The Court held that repair workers who serviced "equipment used in performing agricultural functions: tractors, cane loaders, cane cars, and so forth" performed secondary agriculture, but those who serviced the plantation's sugarcane-processing equipment did not. *Id.* at 263.

Luna Vanegas's work is comparable to the work of *Maneja*'s railroad employees and exempted repair workers, not that of the processing-plant employees and the nonexempted repair workers. Like the exempted workers in *Maneja*, Luna Vanegas worked with materials used directly for an agricultural purpose: confining livestock. His allegations do not support the conclusion that he was involved in what § 780.136 calls "a separately organized productive activity," like the workers in *Maneja* who processed the sugarcane for shipment.

Luna Vanegas contends that *Maneja* is distinguishable because the workers in that case worked directly for the plantation, not for an independent contractor. He says that two further elements are required for an independent contractor's employees to perform secondary agriculture: (1) the contractor's business must "be exclusively dedicated to agricultural practices"; and (2) the contractor's activities must "be carried on as part of the agricultural function of the farm on which [they are] performed." Dkt. 39, at 7. He argues that his work for Signet met neither of these requirements because (1) Signet is a general construction company rather than a specialized agricultural construction company; and (2) farmers do not typically build large livestock confinement structures themselves.

These elements are found nowhere in § 203(f). Luna Vanegas's argument is based on a misunderstanding of the distinction drawn in § 780.136 between workers engaged in activity

that is "incident[al] to or in conjunction with . . . farming operations," and workers engaged in "a separately organized productive activity." Luna Vanegas contends that the question is whether the worker's *employer* is engaged in a separately organized productive activity from farming. But as *Maneja* shows, what matters is whether the *worker's* activities are directed toward an agricultural or nonagricultural end. This conclusion is supported by § 780.136, which speaks in terms of the "practices performed" by the employee; it says nothing about the employer's overall business. And this conclusion is consistent with the reasoning of *Maneja*, which considered whether processing sugarcane was incidental to farming it, not whether the processing workers' employer engaged in any nonagricultural business.

Luna Vanegas relies on *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), but the case does not support his position. His first proposed requirement, that the business "be exclusively dedicated to agricultural practices," is drawn from the Court's discussion of the legislative history of the secondary agriculture exemption. The Court noted that the initially proposed version of the exemption applied only to work performed "by a farmer"; it did not include work performed "on a farm." *Id.* at 767. During debate, a senator "objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job." *Id.* The exemption was amended to include work performed "on a farm" to address the senator's concern. *Id.*

Luna Vanegas assumes that the exemption for secondary agriculture performed "on a farm" must be precisely limited to the senator's hypothetical. But he doesn't cite any authority to support that conclusion, and it's not supported by the case, either. As the Court noted, the "on a farm" amendment would apply to the hypothetical wheat threshing companies "because their work was incidental to farming and was done on the farm"—which simply restates

§ 203(f)'s test for secondary agriculture without any additional requirements. *Id.* The Court said nothing to suggest that the "on a farm" amendment was limited to precisely the type of "separate companies" described in the senator's hypothetical, as Luna Vanegas contends, and neither the statutory language nor the legislative debate supports Luna Vanegas's position.

Luna Vanegas's second proposed requirement, that the contractor's activities must "be carried on as part of the agricultural function of the farm on which [they are] performed," fares no better. He draws this language from a passage of *Farmers Reservoir* in which the Court described how work that was previously agricultural in nature could become nonagricultural work over time. *Id.* at 761. The Court noted that several types of work had once been performed by farmers but were now "separately organized as . . . independent productive activit[ies]" performed off of farms, including tool manufacturing, fertilizer production, power generation, and wheat grinding. *Id.* But the Court then explicitly said that this development was captured by the FLSA's "carefully considered definition" of secondary agriculture, which simply asks whether the work is "performed by a farmer or on a farm as an incident to or in conjunction with . . . farming operations." *Id.* at 762. Again, Luna Vanegas hasn't shown that § 203(f) requires anything more than what it says.

The Court of Appeals for the Eleventh Circuit considered and rejected a similar argument in *Sariol v. Florida Crystals Corp.*, 490 F.3d 1277 (11th Cir. 2007). In that case, the plaintiff worked on a farm, delivering fuel for various machinery around the farm and repairing equipment around the farm. *Id.* at 1278. He argued that at least some of his work was not secondary agriculture because some of the machinery for which he delivered fuel was owned by independent contractors. *Id.* at 1280. Like Luna Vanegas, he seized on language from *Farmers Reservoir* to contend that those independent contractors were "separately organized as an independent productive activity." *Id.* (quoting *Farmers Reservoir*, 337 U.S. at 761). The court

rejected the argument, noting that the language from *Farmers Reservoir* "deals only with the problem of distinguishing agricultural from nonagricultural *activities*." *Id.* (emphasis added). The court said that "*Farmers Reservoir* simply does not speak to the issue of whether the work of independent contractors can be considered separate farming operations." *Id.*

Luna Vanegas's position does find support in *N.L.R.B. v. Monterey County Building & Construction Trades Council*, 335 F.2d 927 (9th Cir. 1964). In that case, the court held that construction workers employed by an independent contractor to construct buildings on poultry farms were not engaged in agriculture because the construction companies "are organized separately from any farming or poultry operations and are engaged in a productive activity which is independent from any farming or poultry operations." *Id.* at 931. Luna Vanegas also cites a decision by a Department of Labor administrative law judge who reached a similar conclusion in a brief opinion. *In re: MRL Fencing & Construction*, No. 2012-TLN-00042 (Aug. 8, 2012).[1] But these cases are inconsistent with the reasoning of *Maneja* and with the regulations applying the secondary agriculture exemption, and they are against the weight of authority on the issue.[2] Indeed, only one other court has cited *Monterey County* with approval for this holding, doing so in a footnote without extended discussion. *N.L.R.B. v. Scott Paper*

[1] The decision is available at https://www.dol.gov/agencies/oalj/public/ina/references/caselists/tln_decisions.

[2] *See, e.g.*, *Bayside Enters., Inc. v. N.L.R.B.*, 429 U.S. 298, 303 n.13 (1977) (citing with approval Department of Labor interpretative bulletin stating that independent contractor's employees who worked on a farm incidental to or in conjunction with poultry raising were employed in secondary agriculture, even though independent contractor was not exclusively an agricultural business); *Sariol*, 490 F.3d at 1280–81; *Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398 (9th Cir. 1955) (employees of industrial alfalfa processing operation who worked on a farm were employed in secondary agriculture, even though alfalfa processing operation was industrial work, not agriculture).

*Co.*, 440 F.2d 625, 626 n.3 (1st Cir. 1971). The court is not persuaded that the cases cited by Luna Vanegas require anything more of independent contractors than § 203(f) explicitly states.

In sum, Luna Vanegas performed his work on farms, and the work he performed—constructing livestock containment structures—was incidental to farming, not related to a separately organized activity from farming operations. So his work fell within the FLSA's exemption for secondary agriculture. The court will grant Signet's motion and dismiss this case.

ORDER

IT IS ORDERED that:

1. Defendant Signet Builders, Inc.'s motion to dismiss, Dkt. 25, is GRANTED. This case is DISMISSED under Federal Rule of Civil Procedure 12(b)(6).
2. Plaintiff Jose Ageo Luna Vanegas's motion for conditional certification, Dkt. 15, is DENIED as moot.
3. The clerk of court is directed to enter judgment in favor of Signet and close this case.

Entered August 12, 2021.

BY THE COURT:

/s/

_____
JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSE AGEO LUNA VANEGAS, on behalf of himself and all other similarly situated,

Plaintiff,

Case No. 21-cv-54-jdp

v.

SIGNET BUILDERS, INC.,

Defendant.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that judgment is entered on behalf of defendant Signet Builders, Inc. against plaintiff Jose Ageo Luna Vanegas, on behalf of himself and all other similarly situation, dismissing this case.

s/ J. Smith, Deputy Clerk
Peter Oppeneer, Clerk of Court

8/12/2021
Date

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

---

JOSE AGEO LUNA VANEGAS,
on behalf of himself and all
others similarly situated,

Plaintiff,

v.

SIGNET BUILDERS, INC.

Defendant.

Case No. 21-cv-54

**COLLECTIVE ACTION COMPLAINT PURSUANT TO 29 U.S.C. §216(b)**

---

## COMPLAINT

---

## PRELIMINARY STATEMENT

1. This is an action for damages and declaratory relief by a Mexican H-2A guest worker against the employer for which he worked for a number of years between 2004 and 2019. Plaintiff alleges that Defendant Signet Builders, Inc. violated his rights and the rights of other similarly situated workers under the Fair Labor Standards Act, 29 U.S.C. §§ 201, et seq. ("FLSA").

2. Plaintiff Jose Ageo Luna Vanegas is a citizen of Mexico who was legally admitted to the United States on a temporary basis pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(a) to work for Defendant building livestock confinement structures in several U.S. states for various years between 2004 and 2019. In 2019, Plaintiff worked for Defendant in Wisconsin for approximately three months and Indiana for approximately five months.

3. Defendant violated its obligations to Plaintiff, and all others similarly situated, under federal law by failing to pay them overtime wages as required by the FLSA. Plaintiff, on behalf of himself and all others similarly situated ("Prospective Class Members"), seeks recovery of unpaid wages, liquidated damages, costs of litigation, and attorney's fees.

## JURISDICTION

4. This Court has jurisdiction over this action pursuant to 29 U.S.C. § 216, as this action arises under the FLSA.

5. This Court has personal jurisdiction over Defendant Signet Builders, Inc. ("Signet") because Signet maintains continuous and systematic contacts with the state of Wisconsin. In 2019, Signet employed Plaintiff at work sites near Lake Mills, Wisconsin and housed Plaintiff in Whitewater, Wisconsin. During 2020, Signet conducted business and employed agricultural guestworkers near Lake Mills.

6. This Court is empowered to grant declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

## VENUE

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(2)-(3) and (c)(2) because many of the acts or omissions that give rise to Plaintiff's claims occurred within this District, and because Defendant is subject to the Court's personal jurisdiction.

## PARTIES

8. Plaintiff, Jose Ageo Luna Vanegas is a citizen and resident of Mexico. During the periods of time relevant to this action, Plaintiff was admitted to the United States under the H-2A temporary foreign worker visa program administered by the U.S. Department of Labor pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(a) to perform labor for Defendant. Workers admitted into the United States on H-2A visas are commonly known as "H-2A workers." In

this case, the labor was to be performed "[o]n farms," with the workers employed to "unload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification." Prospective Class Members are other H-2A workers who worked for the Defendant during 2019 and 2020 constructing livestock buildings who were not paid at one and one-half times their regular rate for hours worked in excess of 40 during a workweek. Plaintiff's signed Consent Form is attached to this Complaint as Exhibit A and is incorporated herein by reference.

9. Defendant, Signet Builders, Inc. is a construction company in interstate commerce, providing services to businesses in Wisconsin, Iowa, Indiana, and other U.S. states. Signet Builders, Inc. conducts business in this District. Plaintiff and the other Prospective Class Members worked with and handled materials that had moved in interstate commerce, including tin sheets, lumber, and supplies. During both 2019 and 2020, Defendant's enterprise had annual gross volume of business done in excess of $500,000.

10. At all times relevant to this action, Defendant employed Plaintiff and Prospective Class Members within the meaning of the FLSA, 29 U.S.C. § 203(d), and was their "employer" within the meaning of 20 C.F.R. § 655.103(b).

## FACTS

### Defendant's Participation in the H-2A Visa Program

11. An employer in the United States may import H-2A workers to perform agricultural labor or services on a seasonal or temporary basis if the U.S. Department of Labor ("DOL") certifies that: (1) there are insufficient available workers within the United States to perform the job;

and (2) the employment of aliens will not adversely affect the wages and working conditions of similarly situated U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(a)(1).

12. Employers seeking the admission of H-2A workers must first file an application for temporary employment certification with the DOL. 20 C.F.R. § 655.130.

13. The temporary employment certification application must include a job offer, commonly referred to as a "clearance order" or "job order," that complies with applicable regulations and is used in the recruitment of both U.S. and H-2A workers. 20 C.F.R. § 655.121(a)-(c). The DOL's regulations establish the minimum benefits, wages, and working conditions that must be offered in order to avoid adversely affecting U.S. workers. 20 C.F.R. §§ 655.0(a)(2), 655.122 and 655.135. The temporary employment certification application and the clearance order serve as the employment contract between the employer and the H-2A workers. 20 C.F.R. § 655.122(q).

14. During 2019 and 2020, Defendant, Signet filed various applications to employ temporary foreign workers through the H-2A program to perform labor in a number of different U.S. states.

15. Three of Signet's employment certification applications sought admission of 20 workers to provide labor at N5344 Crossman Road in Lake Mills, Wisconsin and County Road South C, County Road A also in Lake Mills, Wisconsin from 1) March 15, 2019 to May 31, 2019; 2) May 1, 2019 to January 15, 2020; and 3) May 31, 2019 to January 15, 2020. Plaintiff was hired and employed pursuant to at least one of these temporary employment certifications.

16. Between 2019 and 2020, Defendants obtained over ninety separate employment certifications, many with identical job descriptions, seeking admission of workers to construct livestock confinement buildings at sites in various U.S. States including Wisconsin,

Iowa, Indiana, and other U.S. states. None of Defendant's employment certification applications involved activities to be performed on properties owned or controlled by Signet, and none of the job descriptions involved having any contact with livestock on the farms. Many of Defendant's temporary employment certification applications and accompanying clearance orders contained identical job descriptions and requirements: "[o]n farms, unload materials, lay out lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification." The remaining temporary employment certifications and accompanying clearance orders contained substantially similar job descriptions.

17. Each of the clearance orders included with the temporary employment certification applications described in Paragraphs 15 and 16 each contained a certification signed by Defendant that the orders described the actual terms and conditions of employment and contained all material terms and conditions of the job. These certifications are required by 20 C.F.R. § 653.501(c)(3)(viii).

18. After Defendant's temporary employment certification applications described in Paragraphs 15 and 16 were approved by the DOL, the Defendant submitted Petitions for Non-immigrant Workers (Form I-129) to U.S. Citizenship and Immigration Services of the Department of Homeland Security, and once these were approved, the U.S. Consulate in Monterrey, Mexico issued H-2A visas to fill the manpower needs described in the temporary employment certification applications and the accompanying clearance orders.

## Plaintiff's Employment with Defendant

### *a. Plaintiff and Prospective Class Members Performed Non-Agricultural Work in All Workweeks*

19. Plaintiff and the Prospective Class Members were assigned job duties as described in Signet's temporary employment certifications and accompanying job orders. Consistent with those job descriptions, Plaintiff and Prospective Class Members never had any contact with the livestock being raised on the various farms where their construction work was performed.

20. During each workweek they worked for Defendant in 2019 or 2020, Plaintiff and Prospective Class Members were employed exclusively in non-agricultural work within the meaning of the FLSA, 29 U.S.C. §203(f). The work performed by Plaintiff and Prospective Class Members, as described in Defendant's clearance orders, was neither performed in the employment of a farmer nor was it performed incidentally to--or in conjunction--with the farming operations of any farmer.

### *b. Defendant Failed to Pay Overtime Wages*

21. While employed by Defendant in 2019 or 2020, Plaintiff and Prospective Class Members routinely worked more than 40 hours per week.

22. Although Plaintiff and Prospective Class Members performed exclusively non-agricultural work, Defendant failed to pay Plaintiff and Prospective Class Members for their work hours in excess of 40 per week at a rate not less than one and one-half times their regular rate, in violation of the FLSA, 29 U.S.C. § 207 and 29 C.F.R. § 780. 11.

## Collective Action Allegations

23. Plaintiff brings these claims on behalf of himself and all other similarly situated persons pursuant to 29 U.S.C. § 216(b). The class of similarly situated individuals consists of all H-

2A workers employed by Defendant during 2019 or 2020 who were not paid at one and one-half times their regular rate for hours worked in excess of 40 during a workweek.

24. Plaintiff and Prospective Class members all performed the same or substantially similar construction job duties. These job duties were those set out in Signet's numerous temporary labor certifications, as described in Paragraphs 15 through 19.

25. During 2019, Defendant employed hundreds of H-2A workers, including Plaintiff, and assigned them exclusively non-agricultural construction work at job sites in at least ten different U.S. states. In 2020, Defendant also employed hundreds of H-2A workers to perform non-agricultural construction labor. Defendant failed to pay Plaintiff and other Prospective Class Members for their work hours in excess of 40 per week at a rate not less than one and one-half times their regular rate, in violation of the FLSA, 29 U.S.C. § 207 and 29 C.F.R. § 780.11.

26. Pursuant to Section 216(b) of the FLSA, 29 U.S.C. § 216(b), Plaintiff seeks to prosecute his FLSA claim as a collective action on behalf of all H-2A workers employed by Defendant during 2019 or 2020 who were not paid at one and one-half times their regular rate for hours worked in excess of 40 during a workweek. Notice of the pendency and any resolution of this action can be provided to the members of the class by mail, print publication, radio, internet publication, social media postings in H-2A Facebook groups, direct messages to individuals via Facebook Messenger, Instagram and WhatsApp, and/or through nongovernmental organizations based in the employees' sending communities in Mexico.

**CLAIM FOR RELIEF**
FAILURE TO PAY OVERTIME WAGES
FAIR LABOR STANDARDS ACT (FLSA)

27. Defendant's failure to pay overtime wages to Plaintiff and the Prospective Class Members appears to be based on its belief that these workers' labor was exempt from the FLSA's overtime requirements because of the so-called agricultural exemption, 29 U.S.C. §213(b)(12). To qualify for the agricultural exemption, an employer must demonstrate that the worker's employment falls within the definition of agriculture in Section 203(f): "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."

28. The work of Plaintiff and Prospective Class Members consisted exclusively of constructing livestock confinement buildings as described in Defendant, Signet's temporary employment certification applications and accompanying clearance orders. Plaintiff and Potential Class Members had no contact with the livestock at the farms on which those buildings were constructed, none of which were owned or operated by Signet. As such, their work did not fall within the agricultural exemption to the FLSA's overtime requirements, 29 U.S.C. §213(b)(12)

29. In 2019 and 2020, the work performed by Plaintiff and Prospective Class Members in each and every workweek was comprised of non-agricultural work that was not exempt from the overtime hours provisions of the FLSA.

30. Defendant violated the FLSA overtime hours provisions, 29 U.S.C. § 207, by failing to pay Plaintiff and Prospective Class Members at one- and- one- half times their regular rate of pay for their hours worked in excess of 40 in all workweeks in 2019 and 2020, as described in Paragraphs 20 through 22.

31. As a consequence of Defendant's violations of the FLSA, Plaintiff and Prospective Class Members are entitled to recover their unpaid overtime wages; an equal amount in liquidated damages; costs of suit and reasonable attorney's fees pursuant to 29 U.S.C. § 216(b).

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

(a) Allow this action to proceed as a collective action pursuant to 29 U.S.C. §216(b) for all H-2A workers employed by Defendant in 2019 or 2020;

(b) Order that notice of the lawsuit be issued in an effective manner to the members of the putative class described in Paragraph 23 so that similarly-situated employees may promptly file consent forms and join this action;

(c) Declare that Defendant has violated the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 207, as set forth in Paragraphs 22 and 30;

(d) Enter judgment in favor of Plaintiff and against Defendant on his FLSA overtime wage claims;

(e) Award Plaintiff his unpaid overtime wages, an equal amount in liquidated damages, costs of court, and attorney's fees;

(f) Grant judgment in favor of those similarly situated who consent to join this action on their FLSA claims and award each of them the amount of his unpaid overtime wages, along with an equal amount as liquidated damages;

(g) Award Plaintiff his costs incurred in this action;

(h) Award reasonable attorney's fees; and

(i) Grant such further relief as this Court deems just and appropriate.

Dated this 26th day of January 2021.

Respectfully submitted,

By: *s/Jennifer J. Zimmermann*
Jennifer J. Zimmermann
*One of Plaintiff's Attorneys*

Jennifer J. Zimmermann, WI Bar No. 1067828
jjz@legalaction.org
Erica Sweitzer-Beckman, WI Bar No. 1071961
elb@legalaction.org
LEGAL ACTION OF WISCONSIN
744 Williamson Street, Suite 200
Madison, WI 53703
Tel: 608-256-3304
Fax: 608-256-0510
*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

| | | |
|---|---|---|
| JOSE AGEO LUNA VANEGAS,<br>On behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>SIGNET BUILDERS, INC.<br><br>Defendant. | ) | CASE NO.: 3:21-CV-00054<br><br>COLLECTIVE ACTION COMPLAINT PURSUANT TO 29 U.S.C. §216(b) |

**DECLARATION OF NATALIE FARMER**

I, Natalie Farmer, declare that the following is true and correct to the best of my personal knowledge:

1. I am an owner of Signet Builders, Inc. ("Signet").

2. Signet is a Texas corporation with a principal place of business in Austin, Texas. Signet was founded in 2013.

3. Signet provides labor to farm owners to assist them in running their farms. Typically, the farm owner hires a general contractor to secure and coordinate farm construction labor on their farms for agricultural confinements. The general contractor then hires Signet to do the framing work for these agricultural livestock confinements. The construction projects are primarily poultry, swine, dairy, and cattle confinement structures which are built directly on the

farm. Signet has utilized the H-2A visa program to find seasonal, legal, reliable labor in rural parts of America.

4. Between January 26, 2019 and January 26, 2021, Signet employed 529 H-2A guest workers. These employees worked in the following states: Wisconsin, Indiana, Utah, South Dakota, Nebraska, Iowa, Minnesota, Missouri, Illinois, and Maryland.

5. Of the 529 H-2A guest workers that Signet employed during this time period, 465 worked outside of Wisconsin.

6. I understand that I am not required to provide the testimony in this declaration.

7. Prior to signing this declaration, I was provided with a full opportunity to carefully review this declaration and freely make any corrections and additions of any kind. I verify that the information I have provided in this declaration is true and accurate.

**PURSUANT TO 28 U.S.C. § 1746, I VERIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.**

Executed on: April 7, 2021

Natalie Farmer

doing of interstate commerce, with or without fair apportionment even if not discriminatory.

Maine v. Grand Trunk R. Co., commented upon in note 18, is inapposite to the taxation here attempted by Mississippi. Interstate did a wholly interstate business. Grand Trunk, concerning a tax on the privilege of exercising

681

a franchise in Maine, can only be reconciled with the later cases commented upon at note 15 if Grand Trunk did an intrastate as well as an interstate business. A state franchise tax for that is permissible. See notes 16 and 17, supra. The method of apportionment employed in the Grand Trunk case has had approval as recently as the Greyhound case, 334 U.S. at page 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633. There was no approval of Grand Trunk in Greyhound as a precedent for a tax on the privilege of doing an interstate business. See 334 U.S. at p. 658, 68 S.Ct. at page 1263, 92 L.Ed. 1633.

Control of interstate commerce passed into the hands of Congress and thus welded the Federation into a Nation. So long as states are forbidden to impose taxes upon interstate commerce or for the privilege of carrying it on, a toll cannot be exacted from interstate commerce even if a similar tax is borne by local commerce. So, interstate commerce is not susceptible to taxation, as such, and thus has been protected against exactions aimed at it, no matter how nondiscriminatory. It may be taxed only under enactments which likewise tax intrastate commerce for like intrastate activities. It gets no advantage over intrastate commerce from anything furnished by the state and pays the state nothing for what the state doesn't possess, that is, the power to allow interstate business within its borders.

All interstate commerce thus has free access to local markets subject only to nondiscriminatory taxes such as the tax on apportioned gross receipts from intrastate mileage as in Central Greyhound Lines v. Mealey, supra, or the tax on disconnected local incidents as discussed in the opinions in Memphis Natural Gas Co. v. Stone, supra, or in International Harvester Co. v. Evatt, supra, or American Manufacturing Co. v. City of St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084. So long as a tax on the privilege of doing interstate business or a tax on the doing of that business is prohibited, interstate commerce remains free from state exactions levied

682

on

that commerce. Yet that commerce must bear like intrastate commerce the cost of those facilities or protections apart from the interstate commerce itself which the state furnishes or allows within its borders. Such has been and is the freedom that the commerce clause grants to those engaged in commerce between the states.

The judgment should be reversed.


337 U.S. 755

## FARMERS RESERVOIR & IRRIGATION CO. v. McCOMB, Administrator of Wage and Hour Division, U. S. Dept. of Labor.

## McCOMB, Administrator of Wage and Hour Division, U. S. Dept. of Labor, v. FARMERS RESERVOIR & IRRIGATION CO.

Nos. 128 and 196.

Argued Dec. 16, 1948.

Decided June 27, 1949.

Rehearing Denied Oct. 10, 1949.
See 70 S.Ct. 31.

**1. Commerce ⇐16**
**Master and servant ⇐69(36)**

Where a farmers' mutual irrigation company distributed water only to its own stockholders whose agricultural products moved in interstate commerce, the field employees of the company were engaged in the "production of goods for commerce", but were not engaged in the "production of agricultural commodities" or in any "practices performed by a farmer" or on a farm as an incident to or in conjunction with such farming operations so as to be exempt from the Fair Labor Standards Act as persons "employed in agriculture". Fair

Labor Standards Act of 1938, §§ 1–19, as amended, 29 U.S.C.A. §§ 201–219.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Employed in Agriculture", "Practices Performed by a Farmer", "Production of Agricultural Commodities", and "Production of Goods for Commerce".

**2. Master and servant ⇐69(36)**

Whether a particular type of activity is agricultural, so as to be exempt from the Fair Labor Standards Act, is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that of farmers in other situations, but on 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. Fair Labor Standards Act of 1938, §§ 1–19, as amended, 29 U.S.C.A. §§ 201–219.

**3. Commerce ⇐16**
**Master and servant ⇐69(36)**

"Production", as used in section of Fair Labor Standards Act providing that employee shall be deemed to have been engaged in production of goods for commerce if he was employed in any process or occupation necessary to the production thereof, was used in a special, expanded, and artificial sense, whereas "production", as used in the section defining agriculture as the production, etc., of agricultural commodities etc., was used in the more limited normal sense. Fair Labor Standards Act of 1938, §§ 3(f, j), 29 U.S.C.A. §§ 203(f, j).

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Production".

**4. Commerce ⇐16**
**Master and servant ⇐69(36)**

Where a farmers' mutual irrigation company distributed water only to its own stockholders whose agricultural products moved in interstate commerce, a bookkeeper of the company, as to whom no claim of administrative exemption was made, was engaged in the "production of goods for commerce" but was not engaged in the "production of agricultural commodities" or in any "practices performed by a farmer" or on a farm as an incident to or in conjunction with such farming operations so as to be exempt from the Fair Labor Standards Act as a person "employed in agriculture". Fair Labor Standards Act of 1938, §§ 1–19, as amended, 29 U.S.C.A. §§ 201–219.

Mr. Justice JACKSON dissenting.

---

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Action by William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, against the Farmers Reservoir & Irrigation Company to enjoin violations of the Fair Labor Standards Act. The Court of Appeals reversed the judgment of the district court in favor of the defendant, 167 F.2d 911, and each party brings certiorari.

Judgment modified, and as modified affirmed.

756

Messrs. John P. Akolt, Frank N. Bancroft, Denver, Colo., for Farmers Reservoir & Irrigation Co.

Mr. Jeter S. Ray, Washington, D. C., for McComb.

Mr. Chief Justice VINSON delivered the opinion of the Court.

The principal question to be decided in this case is whether the employees of a mutual ditch company are exempt from the provisions of the Fair Labor Standards Act[1] as persons employed in agriculture. The company is the Farmers Reservoir & Irrigation Company, a Colorado corporation having an authorized capital stock of $1,050,000 and an authorized bonded indebtedness of

757

$850,000, $450,000 of which is presently outstanding in the hands of the public. The company has central offices in Denver. It owns four large and several

[1] 52 Stat. 1060, 29 U.S.C. §§ 201–219, 29 U.S.C.A. §§ 201–219.

small reservoirs and a system of canals from 200 to 300 miles long, all in Colorado. The sole activity of the corporation is the collection, storage and distribution of water for irrigation purposes. The water is diverted from the public streams of Colorado, stored in the company's reservoirs and distributed to farmers through the company's canals.

The company is a mutual one. It does not sell water. It distributes it only to its own stockholders, who are each entitled to a limited quantity for each share of stock held. The income of the company is derived largely from assessments levied on the stockholders annually to pay for the costs of operating the system. There are no profits and no dividends.

The company did not comply with either the record keeping or the wages and hours provisions of the Fair Labor Standards Act, and the Administrator sought an injunction directed against continuation of these alleged violations. The company claimed that its employees were not subject to the Act. These employees fall into two categories. First, there are the field employees—ditch riders, lake tenders and maintenance men. Their activity, in general, consists of the physical operation, control and maintenance of the company's canals, reservoirs, and headgates. The second category comprises the company's office force in Denver. For purposes of this case it contains only one occupant—the company's bookkeeper.

The District Court held that the field employees were engaged in the production of goods for commerce, as those terms are defined in § 3 of the Act, but that the bookkeeper was not. It held, however, that all of the company's employees were exempt under § 13(a) (6) as persons "employed in agriculture." This second holding

758

was reversed, as to the field employees, by the Court of Appeals for the Tenth Circuit,[2] one judge dissenting, and, in No. 128, we granted the company's petition for certiorari on the exemption issue. The Court of Appeals did not pass on the bookkeeper's status. It regarded his case as moot because his salary was said by the company, in its brief, to have been raised to $210 per month while the appeal was pending. The court regarded this as sufficient to establish his exemption as an administrative employee under § 13(a) (1) of the Act and therefore limited its consideration and its reversal of the District Court to the field employees. In No. 196, we granted the Administrator's cross-petition with respect to the bookkeeper.

It is conceded here that the courts below were correct in holding that the field employees are engaged in the production of goods for commerce. The company, however, argues that this requires the conclusion that they are employed in agriculture. This argument rests on the fact that the activities of the company and its employees are entirely confined within the State of Colorado. The company diverts water in Colorado, stores it in Colorado, distributes it in Colorado to farmers who, finally, consume it in Colorado. The only products moving in interstate commerce are the agricultural commodities produced by the farmers who consume the company's water. Hence, it is said that we can hold that the company's employees are engaged in the production of goods for interstate commerce only if we say that their work in supplying water to the farmers is an integral part of the production of the farm products which are shipped in interstate commerce. But that production is, of course agriculture. Hence, the company's employees, if they are engaged in the production of goods for commerce, must be exempt as persons employed in agriculture.

759

[1] The argument rests on a misconstruction of § 3(j) of the Fair Labor Standards Act[3]—the section which the courts below relied on in concluding that the field employees of the company are engaged in the production of goods for commerce. Section 3(j) provides that "for purposes of this Act an employee shall be

[2] 1948, 167 F.2d 911.

[3] 52 Stat. 1061, 29 U.S.C. § 203 (j), 29 U.S.C.A. § 203 (j).

deemed to have been engaged in the production of goods if such employee was employed * * * in *any process or occupation necessary* to the production thereof." [4] From the beginning, this Court has refused either to read this provision out of the Act by limiting the coverage of the Act to those actually engaged in production or, on the other hand, to expand it so as to include every process or occupation affecting production for commerce. We have held that if an occupation, not itself production for commerce, has "a close and immediate tie" with the process of production, it comes within the provisions of § 3(j).[5] Applying this standard, the Court of Appeals quite properly held that the field employees here are engaged in an occupation necessary, in the statutory sense, for the production of agricultural commodities shipped in commerce.[6]

But the conclusion that the work *is necessary* to agricultural production does not require us to say that it *is* agricultural production. This distinction between necessity

760

and identity, or, differently phrased, between production in the normal sense and production in the special sense defined in § 3(j) disposes of the company's contention. The question here is whether the occupation of the field employees of the ditch company can itself be termed agriculture. The answer to that question is not predetermined by the fact that the occupation is within the scope of the Act because it has a necessary connection, in commerce, with agricultural production.[7]

[2] 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

761

the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. The

[4] Emphasis added.

[5] Kirschbaum Co. v. Walling, 1942, 316 U.S. 517, 525, 62 S.Ct. 1116, 1120, 1121, 86 L.Ed. 1638; Armour & Co. v. Wantock, 1944, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118; Roland Electric Co. v. Walling, 1946, 326 U.S. 657, 663, 66 S. Ct. 413, 415, 416, 90 L.Ed. 383.

[6] "Necessary" understates the case, The water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production. Cultivation began only with irrigation and it will end if the irrigation ceases. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the petitioner's field employees in providing water for irrigation.

[7] The fallacy of the notion that an exemption carries with it all occupations whose nexus with interstate commerce is the exempted occupation is demonstrated by authority as well as by logic. In Boutell v. Walling, 1946, 327 U.S. 463, 66 S.Ct. 631, 90 L.Ed. 786; for example, the question was whether men who were employed by a service company to service trucks carrying goods in interstate commerce were exempt, under § 13 (b) (1), as the employees of an interstate carrier subject to regulation by the Interstate Commerce Commission. Their only connection with commerce was their work on the trucks of the interstate carrier. The Court divided as to whether the employees were themselves employed by the carrier within the meaning of the Motor Carrier Act, 49 U.S.C.A. § 301 et seq., and, therefore, exempt. But there was no suggestion in either of the opinions in the case that, if not employed by the carrier, they were nevertheless exempt because their only connection with interstate commerce was through an enterprise which was itself exempt.

In only one case brought to our attention was a contention presented similar to that made here. In Dize v. Maddrix, 4 Cir., 1944, 144 F.2d 584, affirmed, 1945, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296; the local manufacture of boxes was held to be within the Act because the boxes were used by fishermen to ship their fish in interstate commerce. The fishermen were exempt under a specific exemption in the Act covering fishing, and it was argued that the manufacturer of the boxes should therefore be exempt as "fishing" because its only connection with commerce was through fishing. The argument was rejected summarily.

fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine. Economic progress, however, is characterized by a progressive division of labor and separation of function. Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill. In this way functions which are necessary to the total economic process of supplying an agricultural product, become, in the process of economic development and specialization, separate and independent productive functions operated in conjunction with the agricultural function but no longer a part of it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. 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. The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant [8] and the packer in a fertilizer factory [9] are not employed in agriculture, even

762

if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture.

In the absence of a detailed definition of agriculture we should be compelled to determine whether the activity concerned in the present case—the diversion, storage and distribution of water for irrigation purposes—is carried on as part of the agricultural function or is so separately organized and conducted as to be treated as an independent, nonagricultural productive function. Fortunately, however, the Fair Labor Standards Act provides a carefully considered definition which is of substantial aid in helping us to make that determination.

The definition is contained in § 3(f) of the Fair Labor Standards Act. It says:

"Sec. 3(f). '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 (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing 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."

As can be readily seen this definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader meaning.

763

Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with "such" farming operations.

Dealing with these two branches of the definition in order it is clear, first, that the occupation in which the company's employees are engaged is not farming. The company owns no farms and raises no crops. Irrigation, strictly defined—that

[8] Meeker Cooperative Light & Power Ass'n v. Phillips, 8 Cir., 1946, 158 F.2d 698.

[9] McComb v. Super-A Fertilizer Works, 1 Cir., 1948, 165 F.2d 824.

is the actual watering of the soil—may no doubt be called farming. And the work of the farmers in seeing to it that the water released from the company's ditches is properly distributed to the growing plants undoubtedly is included in farming as being part of the process of cultivating and tilling the soil. But the significant fact in this case is that this work is not done by the company's employees. There is a clear and definite division of function. The ditch company carries the water in its own canals to the lands of the farmers. When a farmer desires water so that he can irrigate his fields he notifies the company. Its employees then operate the headgates, which are located on the company's canals and which the farmers are forbidden to operate,[10] so that the appropriate quantity of water can pass out of the company's canals and off the company's land into the farmer's irrigation ditches. The responsibility of the company's employees ceases when they so release the water. The water is supplied to the farmer at the headgates and he takes it over there and uses it, in his own laterals, as he sees fit, to irrigate his crops.

764

The ditch company, then, is not engaged in cultivating or tilling the soil or in growing any agricultural commodity. It is contended, however, that it is nevertheless engaged in farming because of the use, in the definition, of the words "production * * * of any agricultural * * * commodities" in addition to the words cultivation, tillage, harvesting, etc. Since produce is defined in § 3(j) of the Act so as to include, "for the purposes of this Act," any occupation necessary to production, it is argued that production of agricultural commodities includes any occupation necessary to the production of agricultural commodities. It is thus argued that in the case of agriculture, as distinguished from other exemptions, Congress did provide that the exemption should include not only the occupation named but also all of those other occupations whose work is necessary to it.

[3] If Congress intended to convey that meaning by using the word production in the definition of agriculture we should, of course, give the definition its intended scope. But we do not "make a fortress out of the dictionary."[11] And we have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts. Lawson v. Suwanee Fruit & S. S. Co., 1949, 336 U.S. 198, 69 S.Ct. 503; Atlantic Cleaners & Dyers v. United States, 1932, 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204. In the present case, the legislative history confirms what a natural reading of the language of the agricultural exemption would indicate—the word production was not there used in the artificial and special sense in which it was defined in § 3(j). Certainly, if it were meant in that sense, it would make surplusage of the remainder of the carefully wrought definition. And it would hardly have been innocuously placed among such specific terms as "cultivation," "tillage," "growing," and "harvesting."

765

But we need not speculate on the congressional meaning. The history of the use of the word production is crystal clear. It was added to the definition of agriculture in order to take care of a special situation—the production of turpentine and gum rosins by a process involving the tapping of living trees. There had been indications that such activity would not be considered agriculture, since turpentine is neither cultivated nor grown.[12] And a special amendment, § 15(g), had been added to the Agricultural Marketing Act specifying that

[10] Article VII, § 5 of the Company's By-Laws provides as follows:

"All headgates in the Company's canals shall be operated and maintained by and under the exclusive control of this company and no stockholder or any other person shall have the right to interfere with, reconstruct, repair, change, or alter, open or close said headgates or any of them in any manner whatsoever."

[11] L. Hand, J., in Cabell v. Markham, 2 Cir., 1945, 148 F.2d 737, 739, affirmed Markham v. Cabell, 326 U.S. 404, 66 S. Ct. 193, 90 L.Ed. 165.

[12] See S.Rep.No.230, 71st Cong., 2d Sess. (1930).

commodities so produced were to be considered agricultural commodities for the purposes of that Act.[13] To insure the inclusion of the process within the agricultural exemption of the Fair Labor Standards Act, the word production was added to § 3(f) in conjunction with the words "including commodities defined as agricultural commodities in § 15(g) of the Agricultural Marketing Act as amended."[14]

766

It is unnecessary to decide whether, in view of this history, the word production in the agricultural exemption should be limited to those specific products defined in § 15(g) of the Agricultural Marketing Act or should be given its normal meaning. The only question here is whether the word was used in the special expanded meaning defined in § 3(j) of the present Act. It is clear that it was not used in this special sense. And it follows that it does not encompass the work of the company's employees who cannot be said, in any normal use of the term, to be engaged in the production of agricultural commodities. Their work is necessary to agricultural production, but it is not production.

The work of the company's employees is not, then, farming. But, coming to the second branch of the definition of agriculture, it is equally clear that it does constitute a practice performed as an incident to or in conjunction with farming. If the Act exempted all such practices the company would be exempt. But the exemption is limited. Such practices are exempt only if they are performed by a farmer or on a farm.[15]

767

This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. On the floor of the Senate it was objected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely

[13] 46 Stat. 1550, 12 U.S.C. § 1141j (g), 12 U.S.C.A. § 1141j (g). This language originated in S. 2354, 71st Congress. That bill was reported to the Senate (S. Rep.No.230) and passed. 72 Cong.Rec. 7016 (1930). It did not come to a vote in the House. Its substance was added by the Senate to H.R. 16836, an amendment to the oleomargarine tax laws, and in this form became law. See 74 Cong. Rec. 6688, 7196 (1931).

[14] The word "production" was not actually contained in either the House or Senate bills as originally passed. The Senate bill, S. 2475, 75th Cong., 1st Sess., as passed, contained the reference to § 15 (g) of the Agricultural Marketing Act in the following way: ". . . 'agriculture' * * * further includes the definition contained in subdivision (g) of Section 15 of the Agricultural Marketing Act. * * *" See 81 Cong.Rec. 7659 (1937). This language was faulty, since the section referred to was not a definition of agriculture but of an agricultural commodity. The language was retained in this form when the bill was first debated in the House. See 82 Cong. Rec. 1580, 1690 (1937). The House voted to recommit the bill. Id. at 1835. In committee, the definition of agriculture was completely redrafted and the reference to the Agricultural Marketing Act omitted. See H.R.Rep.No.2182, 75th Cong., 3d Sess. (1938). The bill passed the House in this form. In conference, it was agreed that the House version of the definition of agriculture should be adopted, with three stated exceptions. Only one of the three is relevant here—the reinsertion of the reference to the Agricultural Marketing Act. The word "production" was added in conjunction with that reference and was obviously used only to make the reference grammatically correct. The committee report states the change in this way: "The production of commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act is included within the definition of agriculture. * * *" H.R.Rep.No.2738, 75th Cong., 3d Sess., p. 29 (1938).

[15] Although not relevant here, there is the additional requirement that the practices be incidental to "such" farming. Thus processing, on a farm, of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. Bowie v. Gonzalez, 1 Cir., 1941, 117 F.2d 11.

to that particular job.[16] To take care of that situation the words "or on a farm" were added to the definition. Thus, the wheat threshing companies, even though they were separate enterprises, were included in the exemption because their work was incidental to farming and was done on the farm.[17] In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the company's employees is done neither on a farm or by farmers.

Clearly, it is not done on a farm. Nor, we think, is it done "by a farmer." Since we have already said that

768

the company's employees are not engaged in farming, it is perhaps too obvious that the work that they do is not done by farmers. But an argument to the contrary is made. It is based on the fact that the company is a mutual one, owned by the farmers whom it serves. It is argued that the company is therefore merely a formal conduit or agent, by which the farmers cooperatively operate their common water supply system and cooperatively employ the men. The men are, therefore, said to be farmers because they are said to be employed by farmers.

Even if it were conceded that the exemption includes the work of persons who do no farming but are employed by farmers, it still does include the company's employees because they are not, in fact, so employed. There is a difference between the hiring of mutual servants by a group of employers and the creation by them of a separate business organization, with its own officers, property, and bonded indebtedness, which in turn hires working men. Those working men are in no real sense employees of the shareholders of the organization. They are hired by the organization, fired by the organization, controlled and directed by the organization, and paid by it. The fact that the organization is a corporate one adds to the picture but is not controlling. The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere.[18] Those employed in that activity are employed by the company, not by the farmers who own the company. The fact that the company is not operated for profit is immaterial.

769

It is nonetheless the employer. Of course, if Congress had intended the absence of profit to be material and had provided that the employees of agricultural cooperatives should be exempted because their work is done for the benefit of the farmers who own the cooperatives we should honor that provision. But the legislative history of the existing definition clearly shows that no such result was intended.[19]

---

16 "Mr. Tydings. * * * In the case I vizualize * * * the farmer is not performing the service. The man to whom I refer makes a business of doing nothing but threshing. He owns his own machine, and hauls it from farm to farm, and enters into contracts with farmers to thresh their crops; the point being that while he is dealing with an agricultural commodity, he is not necessarily a farmer, and he is not doing work ordinarily done by a farmer.

"Mr. Borah. He is doing the exact work which the farmer did before he took it up.

"Mr. Tydings. That is true; but I do not think the bill is drawn in sufficient detail to bring the man to whom I refer under its provisions of exemption." 81 Cong.Rec. 7653 (1937). See also the comments of Senator Bone, id. at 7659.

17 81 Cong.Rec. 7888 (1937).

18 See n. 10, supra.

19 The debate in both Houses shows a clear awareness that the employees of farmers cooperative associations would not be exempted as employees of farmers. At various times amendments were offered, and adopted, exempting the employees of certain types of cooperatives. See 81 Cong.Rec. 7947 (1937), 82 Cong. Rec. 1783 (1937). All such special exemptions were, however, omitted from the bill as it finally became law. See also Interpretative Bulletin No. 10, issued by

[4] We conclude therefore that the Court of Appeals correctly determined that the field employees of the company are not exempt from the provisions of the Fair Labor Standards Act as persons employed in agriculture.[20] There remains for consideration the bookkeeper's case. The Court of Appeals limited its reversal of the District Court to the field employees because it regarded the bookkeeper as exempt, in any event, as an administrative employee. We need not decide whether it erred in so doing since the company in this Court disclaims—as it did in the District Court—any reliance on the administrative exemption. And our discussion with regard to the field employees makes it clear that the Court of

770

Appeals decision is, in the absence of any claim of administrative exemption, equally applicable to the bookkeeper. It has been stipulated that his work is a necessary part of the operation of the company's water supply system. The fact that it is clerical rather than manual is immaterial. Borden Co. v. Borella, 1945, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, 161 A.L.R. 1258. It follows that his case is on all fours with that of the field workers and that he is engaged, as they are, in the production of goods for commerce and is not exempt as employed in agriculture. The judgment of the Court of Appeals, reversing the District Court and remanding the case to it, should, therefore, be treated as applicable to both types of employee.

As so modified, the judgment is affirmed.

Modified and affirmed.

Mr. Justice FRANKFURTER, concurring.

Both in the employments which the Fair Labor Standards Act covers and in the exemptions it makes the Congress has cast upon the courts the duty of making distinctions that often are bound to be so nice as to appear arbitrary in relation to each other. A specific situation, like that presented in this case, presents a problem for construction which may with nearly equal reason be resolved one way rather than another. Except when a conflict between Courts of Appeals requires settlement by this Court, it does not seem to me very profitable to bring the individual cases here for adjudication. But since this case is here it has to be decided. The nature of the problem being what it is, I acquiesce in the judgment that commends itself to the majority of my brethren.

Mr. Justice JACKSON, dissenting.

If employees operating these irrigation works are so necessary to the raising of crops destined for interstate commerce that they are "producing goods for commerce"

771

within the Fair Labor Standards Act, I cannot agree that they are not "employed in agriculture" within its exemptions.

It is admitted that as a separate enterprise this handling of irrigation water does not bring these employees within the Act regulating interstate commerce, because the water is captured, stored, transmitted, delivered and consumed solely within one state. The reasoning by which they are nevertheless brought under the Act is this: To deliver water on arid lands is so inseparable from agriculture thereon that it is to produce goods, that is, agricultural crops, for commerce.

However, 29 U.S.C. § 213(a) (6), 29 U.S.C.A. § 213(a) (6), exempts individuals "employed in agriculture." It would seem logical that one who is producing agricultural products for commerce is "employed in agriculture." But according to the Court

the Administrator, Wage & Hour Division, 29 C.F.R. § 780, 81–82 (Supp.1947).

20 While it lacks relevance to the question of congressional intention in 1938, we may note that the precise question here involved was discussed at length on the Senate floor in 1946 in connection with certain amendments to the Fair Labor Standards Act. It was clearly stated, without objection, that employees of an irrigation company which supplied water to farmers were, like the employees of a power company which supplies electricity to farmers, not exempt as employed in agriculture. 92 Cong.Rec. 2318–2319 (1946).

he is not. The irrigation activity seems endowed with some esoteric duplicity not apparent on its face. When we read 29 U.S.C. § 206 or § 207, 29 U.S.C.A. §§ 206, 207, the irrigator is producing crops because his activity is inseparable from crop production; but when we read on a half-dozen sections and get to 29 U.S.C. § 213(a) (6), 29 U.S.C.A. § 213(a), (6), the irrigation has been converted into a distinct and disconnected enterprise.

This paradox is attributed to the definition of agricuture in 29 U.S.C. § 203(f), 29 U.S.C.A. § 203(f), which is said to make a distinction between agricultural production "in the normal sense" and the same thing "in the special sense" of § 3(j) of the statute, 29 U.S.C. § 203(j), 29 U.S.C.A. § 203(j). However, its text and history seem to show that the congressional purpose was not to make the agricultural exemption less comprehensive than "normal" agricultural operations but to make certain that nothing connected with farming remained subject to the Act. It exempted "any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with farming * * * operations." Thus the farm exemption did not end at the line fence.

772

This irrigation seems to me to be "performed by a farmer" and hence, by definition, part of the operation of agriculture. Certainly the agricultural exemption is not lost because farmers pool their capital through a mutual, nonprofit corporation for no other purpose whatever than to carry water to their own arid lands to make it possible to produce crops. The only purpose of the corporate form is to limit individual liability for a project which is subsidiary to each farmer's main enterprise but which is beyond the means or demands of any of them as individuals. Only the landowners can become stockholders; only the stockholders can become water users, and the operating costs and capital charges are met by assessing them in proportion to their water benefits. Employees engaged in the water operation would be on a quite different footing if it were a water company selling water to the public or the farmer for profit.

If, as the Court holds, these employees are engaged in production of agricultural crops for commerce, I do not see how it can hold that they are not engaged in agriculture. If the Court could say "To be or not to be: that is the question," it might reasonably answer in support of either side. But here the Court tells us that the real solution of this dilemma is "to be" and "not to be" at the same time. While this is a unique contribution to the literature of statutory construction, I can only regret the great loss to the literature of the drama that this possibility was overlooked by the Bard of Avon. It will probably now be as great a surprise to the proponents of the agricultural exemption as it would have been to Shakespeare, had it been suggested to him.


337 U.S. 656

## NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH S. S. CO.

No. 258.

Argued April 19, 1949.

Decided June 20, 1949.

**1. Appeal and error ⇐1008(1)**

The resolution of all factual conflicts in a legal proceeding in favor of one litigant cannot of itself impugn the integrity or the competence of a trier of fact.

**2. Witnesses ⇐316**

In the determination of litigated facts, the testimony of one who has been found unreliable on one issue may properly be given little weight on another issue.

**3. Master and servant ⇐15(78)**

That the National Labor Relations Board credited a few of its own witnesses, rather than the many witnesses of respondent, is no evidence of bias unless the evidence credited is legally incredible and the

thus placing the obstructions, by the testimony of this witness for the appellees, a distance of forty-five to fifty feet south of the track.

Mrs. Matthews testified that she looked to her right when they reached the bottom of the rise to go over the crossing and could not see the track because the bushes along the right of way were so thick. J. D. Parker testified to the thickness of the bushes at the time of the accident, and also testified that they were low bushes reaching a height of five feet at a distance of a hundred feet down the track. He testified that at a distance of twenty feet from the crossing a motorist could look to his right and see for a distance of 225 feet down the track. There was no other helpful testimony about obstructions to vision.

[5] We have already noted that the level of the street, until within twelve to fifteen feet of the track, was four feet, more or less, lower than the crossing. The cars of the train were at least eight and perhaps ten or twelve feet above the elevation of the track. The appellant introduced a panoramic photograph which the cameraman testified was taken at a distance of fifty feet from the crossing. At this point there is a clear view of the track for at least 250 feet. In any event, at twenty feet from the track the photograph demonstrates what is clear from the testimony of Parker, that at this distance the appellees had a clear view of that portion of the tracks on which the train was traveling. Testimony which is at variance with physical facts is no evidence. Deitz v. Greyhound Corporation, 5th Cir. 1956, 234 F.2d 327, cert. den. 352 U.S. 918, 77 S.Ct. 218, 1 L.Ed.2d 124; Geigy Chemical Corporation v. Allen, 5th Cir. 1955, 224 F.2d 110; Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995, 1002. There is no dispute that at the speed he was traveling, Mr. Matthews could have stopped within twenty feet. It was his testimony that he could have stopped within two or three feet.

[6–8] The evidence was such as admits of no conclusion but that the approaching railway cars would have been plainly visible, prior to and at the time they were in hazardous proximity to the crossing, to a reasonably prudent man exercising ordinary care for his own safety. In other words, and we repeat, if Matthews had looked he must have seen the train in time to have stopped and avoided the collision. Thus, by failing to so stop within the statutory zone of fifty to fifteen feet, Matthews violated the statute and was guilty of contributory negligence as a matter of law. Lackey v. Gulf, C. & S. F. Ry. Co., Tex.Civ.App., 225 S.W.2d 630. There was no proper issue for the jury and the motion for a judgment notwithstanding the verdict should have been granted. Fort Worth & D. Ry. Co. v. Barlow, Tex.Civ.App., 263 S.W.2d 278; Bollinger v. Missouri-Kansas-Texas Railroad Co., Tex.Civ.App., 285 S.W.2d 300.

The judgment for the appellees is reversed and the cause is remanded for the entry of a judgment notwithstanding the verdict.

Reversed and remanded.


**NATIONAL LABOR RELATIONS BOARD, Petitioner,**

**v.**

**MONTEREY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, Respondent.**

**No. 19053.**

United States Court of Appeals
Ninth Circuit.

Aug. 18, 1964.

Rehearing Denied Oct. 31, 1964.

Petition by National Labor Relations Board for enforcement of cease and desist order issued against county building and construction trades council. The Court of Appeals, Jameson, District

Judge, held that carpenters, electricians and plumbers engaged in constructing buildings for poultry farm were not agricultural laborers and were not exempt from provisions of National Labor Relations Act proscribing recognitional picketing and secondary boycotts.

Board's petition for enforcement of its order granted.

**1. Labor Relations ⇐65**

Exemption contained within section of National Labor Relations Act providing that term "employee" shall not include individual employed as agricultural laborer was meant to embrace the whole field of agriculture, but was meant to apply only to agriculture, and it is necessary in each case to determine what is and what is not properly included within that term. 29 U.S.C.A. § 152(3).

**2. Labor Relations ⇐63**

National Labor Relations Act, like Fair Labor Standards Act, was designed to include all employees not specifically excepted. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3); Fair Labor Standards Act, § 3(f), 29 U.S.C.A. § 203(f).

**3. Labor Relations ⇐539**

Party claiming exemption from provisions of National Labor Relations Act has burden of proving that it comes within exemption. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

**4. Labor Relations ⇐65**

Carpenters, electricians and plumbers engaged in constructing buildings for poultry farm were not "agricultural laborers" and were not exempt from provisions of National Labor Relations Act proscribing recognitional picketing and secondary boycotts. National Labor Relations Act, §§ 2(3), 8(b) (4) (i, ii) (B), (7) (C), 29 U.S.C.A. §§ 152(3), 158(b) (4) (i, ii) (B), 158(b) (7) (C).

See publication Words and Phrases for other judicial constructions and definitions.

**5. Labor Relations ⇐65**

If work in creation of particular structure for farm is performed by persons who were not separately organized as an independent productive activity, agricultural exclusion from National Labor Relations Act would be applicable. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

**6. Labor Relations ⇐65**

Extent of mechanization and size of particular farm does not preclude exclusion under agricultural exemption of National Labor Relations Act where operations are conducted by the farmer. National Labor Relations Act, § 2(3), 29 U.S.C.A. § 152(3).

**7. Labor Relations ⇐578**

National Labor Relations Board's findings with respect to county building and construction trades council's unfair labor practices in violation of sections of National Labor Relations Act proscribing recognitional picketing and secondary boycotts were supported by substantial evidence. National Labor Relations Act, §§ 2(3), 8(b) (4) (i, ii) (B), (7) (C), 29 U.S.C.A. §§ 152(3), 158(b) (4) (i, ii) (B), 157(C).

---

Arnold Ordman, General Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, Allison W. Brown, Jr., and Allen M. Hutter, Attorneys all with National Labor Relations Board, Washington, D. C., for petitioner.

P. H. McCarthy, Jr., McCarthy & Johnson, San Francisco, Cal., for respondent.

Before JERTBERG and DUNIWAY, Circuit Judges, and JAMESON, District Judge.

JAMESON, District Judge.

The National Labor Relations Board has petitioned for enforcement of a cease and desist order issued against the respondent, Monterey County Building and Construction Trades Council, on April 28, 1963. The Board found that respondent had violated (1) Section 8(b) (7) (C) of the National Labor Relations Act, 29 U.S.C. § 158(b) (7) (C), which proscribes recognitional picketing by a labor

organization to force an employer "to recognize or bargain with a labor organization"; and (2) Section 8(b) (4) (i) and (ii) (B) of the Act, 29 U.S.C. § 158 (b) (4) (i) and (ii) (B), which proscribes secondary boycotts.

Respondent has not here attacked the Board's findings relative to the unfair labor practices, but contends that the employees involved were "agricultural laborers" and accordingly exempt from the provisions of the Act. Section 2(3), 29 U.S.C. § 152(3) provides that, "The term 'employee' shall include any employee * * * but shall not include any individual employed as an agricultural laborer * * *." [1]

The charging party, Vito J. LaTorre, and his wife are the owners of all of the stock of three corporations operating poultry ranches in the Watsonville, California, area.[2] The Elkhorn Ranch, the site of the dispute, is not incorporated, but is owned equally by LaTorre and his wife. This ranch did not begin operating until early in the year 1962. The cost of the buildings and equipment exceeded one million dollars.[3]

Construction was started in 1961. In July, 1961, LaTorre contracted with Buckeye Incubator Company, a Delaware corporation primarily engaged in the manufacture of poultry equipment, for the construction of the buildings and equipment on the Elkhorn Ranch. Buckeye subcontracted the actual work of constructing the buildings to Jack L. Whiteside doing business as Jack L. Whiteside Construction Co., a labor contractor, and the electrical work to Sanders Electric Company Inc. Buckeye's own employees installed the poultry raising equipment. LaTorre contracted with Granite Construction Company to perform the site preparation, grading and road work.

The employees of Sanders and Granite were represented by labor organizations which were constituent members of Respondent Council. Whiteside employed carpenters, plumbers, electricians and other laborers, none of whom were represented by any labor organization in connection with their employment with Whiteside.

On September 1, 1961, the secretary of Respondent Council requested Buckeye to execute respondent's standard labor agreement. Buckeye refused on the basis that Whiteside employed all the personnel within respondent's jurisdiction, and referred the secretary to Whiteside. Officers of Respondent Council approached Whiteside at the Elkhorn Ranch and asked him to sign the agreement. Whiteside refused, and picketing started on September 20, 1961.

Were the persons employed by Buckeye and Whiteside "agricultural laborers" within the exclusion of section 2(3) of the Act?

Although the Act does not define "agricultural laborer", Congress has supplied a definition by adding a rider to the annual appropriation for the Board, which in effect provides for use of the definition of "agriculture" set forth in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C.A. § 203(f). See N.L.R.B. v. Olaa Sugar Co., 9 Cir. 1957, 242 F.2d 714, 715. This definition reads in pertinent part:

> " '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

1. Respondent contends that this exemption barred the Board from finding that its activities were violative of either section 8(b) (7) or 8(b) (4).

2. All do a substantial business. The largest grossed in excess of $400,000 in 1961 and employs between 30 and 50 persons.

3. The construction project called for the erection of 42 "fryer" buildings, 380 feet by 40 feet, each housing 17,000 chickens; four brooding and two brooder houses, each housing 11,500 chickens, a hatchery capable of handling 20,000 eggs per day; and homes for two managers.

horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * *."

The Board concluded that the employees of Buckeye and Whiteside were not "agriculture laborers" for two reasons: (1) the interpretation of the Fair Labor Standards Act by the Department of Labor, Wage and Hour Division, "limits the agricultural-labor exemption to persons performing work on a farm as an incident to or in conjunction with farming operations", and the term "farm" is defined as "a tract of land devoted to actual farming operations." At the time of the commencement of the picketing, there were no active farming operations and the "Elkhorn Ranch was still a tract of land not yet developed into a farm * * *"; and (2) the "construction here appears to be a major independent construction in itself, and not part of an agricultural function".

[1–3] It is clear that the exemption contained in section 2(3) of the Act was "meant to embrace the whole field of agriculture",[4] but "no matter how broad the exemption, it was meant to apply only to agriculture * * *", and it is necessary in each case to determine "what is and what is not properly included within that term". Maneja v. Waialua Agricultural Co., 1955, 349 U.S. 254, 260, 75 S. Ct. 719, 723, 99 L.Ed. 1040. "A basic factor for determining what practices are incident to or performed in conjunction with a farmer's farm operations is whether the practices are among those ordinarily, customarily, or usually performed by a farmer or on a farm". Mitchell v. Hunt, 5 Cir., 1959, 263 F.2d 913.

In construing Section 3(f) of the Fair Labor Standards Act in Farmers Irrigation Co. v. McComb, 1949, 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672, rehearing denied 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513, the Court said:

"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 that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agricultural function includes many types of activity which, in others, are not agricultural. * * Economic progress, however, is characterized by a progressive division of labor and *separation of function.* * * * In this way functions which are necessary to the total economic process of supplying an agricultural product become, in the process of economic development and specialization, *separate and independent productive functions* operated in conjunction with the agricultural function *but no longer a part of it.* Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. 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.*" (Emphasis added.) 337 U. S. at pp. 706–761, 69 S.Ct. at p. 1277.

Respondent argues that "the Elkhorn poultry farm was but an addition to the family's already extensive poultry farm-

4. On the other hand, it is equally clear that the National Labor Relations Act, like the Fair Labor Standards Act, was designed to include all employees not specifically excepted. Cf. Bowie v. Gonzales, 1 Cir., 1941, 117 F.2d 11, 18. As this court held in construing the Fair Labor Standards Act, the party claiming an exemption has the burden of proving that it comes within the exemption. Coast Van Line v. Armstrong, 9 Cir. 1948, 167 F.2d 705, 707.

ing operations—it was not an 'independent productive activity'. It was not 'major *independent* construction activity'. It was all part and parcel of the family poultry farming operations". This argument, however, misses the point. It is not the independence of the Elkhorn Ranch from the rest of the poultry operation which is in question; it is the fact that the Whiteside Construction Co. and Buckeye Incubator Company are organized separately from any farming or poultry operation and are engaged in a productive activity which is independent from any farming or poultry operations.

[4] It cannot be questioned that the Whiteside construction workers—carpenters, electricians, and plumbers—would be "employees" within the terms of the Act, were they building a store, a church or even a home on a tract of land adjacent to the Elkhorn Ranch. Can they be said to lose this status and become "agricultural laborers" because the construction project undertaken happens to form the basis for a farm? It does not appear to us that this construction of the Act would be consistent with the realities of our modern economy. As the Supreme Court said in Farmers Irrigation Company v. McComb, supra, "Economic progress * * * is characterized by a progressive * * * separation of function". These "separate and independent productive functions (are) operated in conjunction with the agricultural function but (are) no longer a part of it". The construction activity and the installation of the equipment, although necessary to the functioning of the poultry ranch, were done by organizations "separately organized as an independent productive activity".

[5] We recognize that a farmer might build a barn or silo or brooder house, using the laborers ordinarily and concededly employed as "agricultural laborers", or he might hire individuals to assist in the erection of the particular structure. Where the work is done by persons who are not "separately organized as an independent productive activity", the agricultural exclusion would be applicable. The determination is not dependent upon "the physical similarity of the activity to that done by farmers in other situations". Farmers do not ordinarily perform the functions of a construction project of the type involved here. Cf. Mitchell v. Budd, 1956, 350 U.S. 473, 481, 76 S.Ct. 527, 100 L.Ed. 565.

[6] We recognize also that the extent of mechanization and size of the particular farm does not preclude exclusion under the agricultural exemption where the operations are conducted by the farmer. See Maneja v. Waialua Agricultural Co., supra, where the Court held that persons who operated a railroad, hauling sugar cane from the fields to the processing plant, were within the agricultural exemption where the railroad was owned by the farmer, a large corporation, and operated on the plantation to haul the cane to the corporation's own mill. The Court also held, however, that workers employed in the maintenance of the village and repair of the dwelling houses owned by the corporate farmer but rented to the farmer's laborers were not within the agricultural exemption.

While the exemption relating to agricultural laborers has been construed in many cases, no case has been found involving the precise situation here presented. The analysis of the provisions of the Act and the separation of functions recognized in Farmers Irrigation Co. v. McComb, supra, impel the conclusion that the "agricultural laborer" exception is not applicable and that the employees of Whiteside and Buckeye are covered by the Act.

[7] The Board's findings with respect to respondent's unfair labor practices in violation of Sections 8(b) (7) (C) and 8(b) (4) (i) and (ii) (B) of the National Labor Relations Act are supported by substantial evidence.

The Board's petition for enforcement of its order is granted.