Opinion No. 48-5123

January 12, 1948

BY: C. C. McCULLOH, Attorney General

TO: Benjamin D. Luchini Chairman, Executive-Director Employment Security Commission Albuquerque, New Mexico

*{*125}* We are in receipt of your letter of December 23rd in which you ask whether a purely commercial cotton gin which gins cotton for farmers, whereby title remains in the farmer, is agriculture labor as defined by Section 57-822 (r) (4). This section provides as follows:

"The term 'agriculture labor' includes all services performed . . . (4) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivery to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, greenhouses, ranges, and orchards."

Able briefs have been submitted by Attorney for the Commission and by Mr. I. M. Smalley, Attorney at Law, of Deming, New Mexico. The question involved is whether the ginning of cotton by a commercial *{*126}* gin amounts to processing cotton as an incident to ordinary farming operation. Certainly, as Mr. Smalley points out, until cotton is ginned it is not in a marketable condition for sale. However, the services performed are not performed by the farmer or any employees of his. They are performed by an entirely separate business enterprise. In the case of Jones, Collector of Internal Revenue v. Gaylord Guernsey Farms, 128 F.2d 1008, (CCA 10, 1942) the Court, in defining agricultural labor, said:

". . . a great number of cases were analyzed and considered, and from them the court defined an employee of a farmer as being one 'doing work for a farmer which is ordinarily incidental to farming as that operation is generally understood.' The court further defines a farm laborer as 'one who labors upon a farm in raising crops or in doing general farm work.' In the end, the answer must in each case be arrived at by a process of exclusion or inclusion."

In that case the Court, in interpreting agricultural labor as defined by the Social Security Act, said:

"The regulation establishes two factors necessary in determining the scope of the exclusion -- the nature of services rendered by an employee, and the dominant purpose of the enterprise in which the employer is engaged. An employee is excluded if he does work on a farm in connection with the cultivation of the soil or the harvesting of crops, or the raising, feeding or management of livestock, bees, or poultry. If an employee is employed in processing materials produced on a farm, he is exempt if the work is done on the farm for the tenant or owner of the farm, and if the operation is an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations."

In California Employment Commission v. Kovacevich, 157 P. 2d 416 (1946), the Supreme Court said:

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations."

It thus appears that the ginning of cotton is incidental to manufacturing or processing business rather than an incident to ordinary farming operations.

Any doubt that might have existed would seem to be eliminated by the history of Section 57-822 (r) (4) which now appears as Chapter 209 of the Laws of 1947. The present statute appears to be based upon Section 1607, par. 1 of the Internal Revenue Code wherein agricultural labor is defined. In the federal act, agricultural labor is defined to include all services performed "in connection with * * * the ginning of cotton * * *." When the Legislature adopted the present statute, the section applying to the ginning of cotton was omitted.

In view of the foregoing, it is my opinion that employees of a commercial cotton gin are not agricultural labor as defined by Section 57-822 (r) (4) of the New Mexico Unemployment Compensation Law.

By ROBERT W. WARD,

Asst. Atty. General