



DATE: SEPTEMBER 6, 1991

In the Matters of

FLORIDA FRUIT AND VEGETABLE ASSOCIATION,  
Complainant,

CASE NO.: 91-TLC-0004

v.

UNITED STATES DEPARTMENT OF LABOR,  
Respondent.

and

CEREVERT VINCENT,  
Respondent-Intervenor

and

UNITED STATES SUGAR CORPORATION,  
Complainant,

CASE NOS.: 91-TLC-0007  
91-TLC-0008

v.

UNITED STATES DEPARTMENT OF LABOR,  
Respondent.

and

CEREVERT VINCENT,  
Respondent-Intervenor

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and

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Before: E. EARL THOMAS  
District Chief Judge

## **DECISION AND ORDER**

These cases arise under the Immigration and Nationality Act (hereinafter "Act"), 8 U.S.C. § 1184, 1186 and 1188 and the implementing regulations found at 20 C.F.R. Parts 653 and 655, pursuant to a request by the Complainants, or Petitioners seeking expedited judicial review of a denial by the Employment and Training Administration, U.S. Department of Labor (hereinafter "ETA") of the Petitioners' H-2A applications for alien employment certification. The captioned matters involve three separate petitions for labor certification. Because they involve similar factual situations and the same counsel for the Respondents, all three cases were consolidated for trial purposes.

## **STATUTORY AND REGULATORY BACKGROUND**

The Temporary Alien Agricultural Labor Certification program (H-2A Program), established pursuant to the provisions of the Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 *et seq.*), as amended, and the Regulations promulgated thereunder (20 C.F.R. Part 655, Subpart B, 1988), provides a means for agricultural employers who anticipate a shortage of domestic workers to apply for permission to bring into the United States non-immigrant aliens to perform agricultural labor or services of a temporary or seasonal nature. Under the Act, the

Attorney General is vested with the primary authority to oversee the admission policies and procedures for nonimmigrant aliens. 8 U.S.C. 1184(a). Specifically, the Attorney General may not approve a petition to admit aliens under this section unless the petitioner represents to the Secretary of Labor that:

- (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition, and
- (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1186(a)(1); see also, 20 C.F.R. Part 655 (52 Fed. Reg. 20496 (1987)). By utilizing this language, Congress sought to promote and balance the two competing interests affected by the certification of H-2A workers; notably, providing a means by which domestic agricultural employers may secure adequate seasonal labor while protecting the jobs of American citizens. See, Flecha v. Quiros, 567 F.2d 1154 (1st Cir.), cert. den., 436 U.S. 945 (1978). In accordance with this statutory mandate, and the authority granted by the Wagner-Peyser Act, 29 U.S.C. § 49 et seq., the Department of Labor (hereinafter "DOL") has established a regulatory framework under which employers may obtain permission to employ a temporary foreign workforce. 20 C.F.R. §655 et seq.

Initially, an employer seeking to hire temporary alien farm workers must file an application with the DOL for certification that it has met the statutory requirements necessary to employ such workers. The employer submits this application to the Regional Administrator of the ETA on prescribed agency forms. 20 C.F.R. § 655.101(a). One such form that the grower must submit is a job offer, also known as a clearance order. This job offer is circulated through the Employment Service System, a cooperative federal-state system of clearing labor funded by the DOL, to determine the availability of domestic workers. If the circulation of these job offers does not result in the hiring of sufficient American workers to fulfill the grower's needs, the DOL may then certify the need for foreign workers. 20 C.F.R. § 655.105-106.

The job offer that the grower submits to the DOL for circulation through the Employment Service System must comply with a variety of requirements, including minimum benefit, wage, and working condition provisions. 20 C.F.R. § 655.102.. Moreover, "[n]o local office [State Employment Service Office] shall place a job order seeking workers to perform agricultural... work into intrastate clearance unless:

- (2) The employer has signed the job order and the job order states all the material terms and conditions of the employment, including:
  - (i) The crop;
  - (ii) The nature of the work;
  - (iii) The anticipated period and hours of employment;

- (iv) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;
- (3) The job order contains all the material terms and conditions of the job, and the employer assures that all items therein are actual conditions of the job by signing the following statement: 'This job order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job'...

20 C.F.R. § 653.501(d)(2)(i), (ii), (iii) and (iv), and 653.501(d)(3). Included in the job order must also be assurances that the grower will comply with various conditions contained in the regulations and specifically, with employment related laws at the local, state and federal level. See, 20 C.F.R. § 653.501(d)(2)(v)-(xvi).

In addition, the job offer must also offer a certain rate of pay for the worker. This rate of pay is determined by the highest wage available under one of three methods: (1) the adverse effect wage rate (hereinafter "AEWR");<sup>1</sup> (2) the prevailing rate, as set by the DOL, for similar work in the area; or (3) the federal or state minimum wage. 20 C.F.R. § 653.501(d)(4); § 655.102(b)(g)(ii)(A). To determine the prevailing rate, a State agency survey is performed and the rate is computed from the data collected.

If, as the result of a State agency prevailing wage survey determination, the prevailing wage rate in an area and agricultural activity (as determined by the State agency survey and verified by the Director) is found to be higher than [sic] the AEWR computed pursuant to paragraph (a) of this section, the higher prevailing rate shall be offered and paid to all workers by employers seeking temporary alien agricultural labor certification for that agricultural area and activity.

20 C.F.R. § 655.107(b).

With respect to the sugar cane industry, such a survey was performed, utilizing wage data from the previous harvest season, to determine the prevailing wage for seed cane cutters for the 1991-92 harvest season. This wage was based on a piece rate and determined to be \$.07 per foot.<sup>2</sup> The growers, however, are not bound to pay the piece rate under the regulations if they can

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<sup>1</sup> The adverse effect wage rate is the wage rate which the Director has determined must be offered and paid, as a minimum, to every H-2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected. 20 C.F.R. § 655.100(b). At the present time in Florida, that rate has been set at \$5.38 per hour.

<sup>2</sup> Under a piece rate system, a worker earns a certain amount for cutting a specific linear footage of seed cane, regardless of the amount of time spent performing the work.

demonstrate that their "... estimated hourly wage rate... is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher." 20 C.F.R. § 653.501(d)(4). Currently, the DOL employs an internal handbook, ETA Handbook No. 385 (hereinafter "Handbook"), to calculate this differential and decide whether the wages offered by the growers "are no less favorable than those experienced under the prevailing method of payment."<sup>3</sup>

## **STATEMENT OF THE CASE**

The causes currently under consideration involve the H-2A applications of two Florida sugar cane growers the Florida Fruit and Vegetable Association (hereinafter "FFVA")<sup>4</sup> and United States Sugar Corporation (hereinafter "USSC"). Both petitioners submitted applications for temporary alien agricultural labor certifications with the DOL in June, 1991. Each of these applications was subsequently denied. In regard to the FFVA application, the DOL determined that the application did not meet the requirements of the H-2A regulations due primarily to the wage rate offered. Significantly, the DOL stated that the rate did not meet the prevailing wage for workers who cut seed cane.<sup>5</sup>

With respect to USSC, the DOL concluded that its application was deficient in the wage rate offered as it failed to meet the prevailing wage for seed cane cutters as well. Moreover, USSC had deleted information regarding an eight ton per day productivity standard from its application which the DOL found to be material. To a lesser degree, the DOL rejected USSC's application based on the language of its housing offer and its definition of quitting time.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **A. Rate of Pay**

The H-2A regulations state that a grower submitting a job offer must ensure that the "wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher." 20 C.F.R. § 653.501(d)(4). The regulations delineate two methods of payment to meet this standard. Specifically, if the worker is paid by the hour, the employer must pay the worker at least the AEW in effect at the time the work is performed. 20 C.F.R. § 655.102(b)(9). If the worker is paid on a piece rate basis, the piece rate "shall be no less than the piece rate prevailing for the

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<sup>3</sup> ETA Handbook No. 385 at I-118 to I-119.

<sup>4</sup> The FFVA acts as agent in the labor certification process for Atlantic Sugar Association, Okeelanta Corporation, Osceola Farms Company, Sugar Cane Growers Cooperative of Florida and Shawnee Farms.

<sup>5</sup> Seed cane, unlike harvest cane, is not processed and refined into sugar; rather, it is cut in order to be replanted for future crops.

activity in the area." 20 C.F.R. § 655.102(b)(9)(ii)(A). No other system of compensation is authorized by these rules.

In past harvesting seasons, FFVA and USSC have compensated their seed cane cutters on a task rate basis. Under this task system, each row of cane is assigned a price. This price is determined by a multitude of factors such as cane variety, age, density, recumbency and weather conditions. At the end of each day, the portion of the row cut by the worker is measured and the workers daily earnings are computed as the sum of the row price times the portion of the row cut. Although this method of payment has been the growers custom for many years, it does not comport to the permitted mode of remuneration under the regulations.

As previously noted, the prevailing rate of payment for seed cane cutters was determined to be \$.07 per foot of cane cut. This figure was computed based on the findings of a 1990 State agency prevailing wage survey of domestic cane cutters. As the rate was approved by the DOL this year, it was applicable to the 1991 job offers submitted by both FFVA and USSC. When these offers were filed, however, neither application contained the prevailing piece rate, or an hourly rate, for seed cane cutters; rather, the growers indicated that they would continue to pay their seed cane cutters under the aforementioned task system. Indeed, the growers noted that they would guarantee \$.07 per foot of cut seed cane by recording the number of feet cut by each employee and at the end of the pay period, increase the workers wages, if necessary, to meet the prevailing piece rate. FFVA and USSC also indicated that they would perform similar calculations to ensure that the employee was also earning the AEW and would pay the worker the higher of the two figures. While this method, at first glance, would appear to meet the prevailing wage regulations; on closer examination, the undersigned cannot conclude that it is sufficient to protect the workers' interests under the Act.

The Act specifically authorizes two methods of payment, an hourly wage that at least equals the AEW and the prevailing piece rate. FFVA's and USSC's task rate encompasses neither of these payment methods; thus, it cannot be an acceptable wage system pursuant to the regulations. Nevertheless, both the petitioners and the DOL have advanced that an alternate payment scheme may be employed as long as it complies with the requirements in the DOL's ETA Handbook No. 385. The Handbook states,

the State agency may accept job orders which offer rates at methods of payment differing from that specified in the prevailing wage findings, when the employer making such an offer can demonstrate to the appropriate Regional Administrator that the proposed method and rate are designed to produce earnings which are no less favorable than those experienced under the prevailing method of payment.

Handbook at I-118 to I-119.

While the parties have relied on this Handbook statement to argue their positions, albeit with differing interpretations of its implicit requirements, the Handbook may not be employed to broaden the scope of the regulations. This Handbook, while indicative of agency policy, was never published for public notice and comment; therefore, it cannot be utilized to bind private

industry. Were the Handbook given rule making effect, it would circumvent the legislative process that has been present in this country's democratic system of government for over 200 years. Judicial and Congressional directives have been abundantly clear that the public may not be bound to an agency policy or practice where it has not been given the opportunity to review and respond to that policy. As set forth in 5 U.S.C. § 553(b), "general notice of proposed rule making shall be published in the Federal Register" where a matter relating to agency management, personnel, public property, loans, grants, benefits or contracts is involved. Upon publication of this notice, "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments..." 5 U.S.C. § 553(c). This section does not merely provide a means to inform interested parties about official action which will affect them; the main purpose of this section is to permit those parties to be heard before any official action is taken. Saint Francis Memorial Hospital v. Weinberger, 413 F.Supp. 323 (1976); see also, Flying Tiger Line, Inc. v. Boyd, 244 F.Supp. 889 (1965).

Although the DOL argues that the growers herein were aware of the existence of the Handbook, that position is largely irrelevant. An agency cannot satisfy the rule making requirements of [5 U.S.C. § 553] merely by including a substantive rule in a manual which is generally available. Saint Francis Memorial Hospital, op. cit. Accordingly, neither FFVA or USSC may be governed by the contents of ETA Handbook No. 385. Since the handbook is without public effect, the regulations found at 20 C.F.R. § 653 and 655 are determinative and the prevailing piece rate or hourly rate must be paid.

Assuming arguendo that the Handbook is valid, the growers have not demonstrated that their task system is not less favorable than either the prevailing piece or hourly rate. Since the petitioner's stated that they do not pay by the foot or piece, they would have to compensate their workers at the prevailing hourly rate as determined by the 1990 State agency survey. This rate is not equivalent to the AEW. Notably, the survey found that domestic seed cane cutters earned a weighted average of \$9.70 per hour. The AEW is \$5.38 per hour. Merely guaranteeing, or "building up," to the AEW is not sufficient because these earnings would not be the same as the earnings experienced under the prevailing piece rate of \$.07 per foot. If the growers, however, were to employ the piece rate system, building up to the AEW would conform to the applicable regulations as they would be using the prevailing method of payment in their area. See, 20 C.F.R. § 655.102(b)(g)(ii)(A).

Moreover, when applying the task rate, the growers are guaranteeing solely an average of \$.07 per foot each pay period, not a minimum of \$.07 per foot. As FFVA and USSC readily admit, they do not price every row of seed cane at least at \$.07 per foot. The price of the rows can be higher or lower depending on the condition of the cane in the particular row. Thus, a worker under the task system is not earning a minimum of \$.07 per foot in each row.

This system additionally has the potential for rate tampering. A worker, either domestic or H-2A, has no way of ascertaining what his exact earnings will be on any given day, much less for the season, prior to arriving in the fields. Notwithstanding the proffered method of pricing due to the condition of the row, a row may be priced at any rate the field supervisor sees fit that day. An employee could easily be "adversely affected" by this system. Under the piece rate

system, however, that potential for abuse is non-existent. Each worker would know, prior to accepting the job, that he would earn \$.07 per foot for each row daily. Further, if all rows were priced at least \$.07 per foot, a seed cane cutter working in a field with less difficult rows has the potential to complete a greater number of rows and earn more money. With the task system, the less difficult rows would be priced under \$.07 per foot and the worker could earn only \$.07 per foot at a maximum. Regardless of the witnesses contradictory testimony, the Court finds that the task rate fails to satisfy the requirements set forth in the Handbook. Assuming the validity of the Handbook provisions, the task method of payment would nevertheless be unavailable to the petitioners. Accordingly, FFVA and USSC must conform their compensation practices to either the prevailing piece or hourly rate.

## **B. Inclusion of the Tonnage Language**

The regulations governing the H-2A program provide that all job offers must contain "all material terms and conditions of the job." 20 C.F.R. § 653.501(d)(3). For the past ten years, USSC's job offer has contained the following language regarding the cutting of cane: "A worker would be expected to cut an average of eight (8) tons of harvest cane per day." In their 1991-92 job offer, however, USSC deleted this language. According to the petitioner, this language was not included in the current application because it is neither a minimum productivity standard nor a reflection of actual experience; thus, it cannot be considered a material term and condition of the job. The DOL maintains the opposite position. Under DOL policy, USSC would have to establish that there was a substantial change in the actual employment situation to justify the deletion of the language as it is a material productivity standard.

The 8 ton language was first included in the 1979-80 sugar cane job offers due to a change in the regulations in the late 1970's. Prior to adopting this specific language, the DOL and the sugar cane industry met and together determined a tonnage rate that would be reflective of actual cane cutting experience. As a result of this discussion, the 8 ton language was adopted. Prior to the 1990-91 harvest season, no challenge was made to this provision.

Section 653.501(d)(2) describes the material terms and conditions of agricultural employment, in part, as "the nature of the work." The 8 ton language directly addresses this term. As a component of the job offer, it informs the worker of the scope of the job before him. This is especially true for the inexperienced worker. The 8 ton language allows him to determine what standard he would have to maintain to be considered a satisfactory worker. In addition, it tells the experienced worker that the job has not changed from the previous season. Although USSC and a number of the witnesses at the hearing maintained that the grower does not have any productivity standard for the harvesting of cane, the undersigned finds this position unlikely. If USSC truly had no standard of competency, it would not be able to effectively hire or terminate employees. Without such employee management and control, USSC could not remain a viable sugar producer. Accordingly, the Court holds that the 8 ton language is a productivity standard and thus, is a material term and condition of employment which must be included in the job offer.

Further, the 8 ton language aids in the determination of the number of workers a grower will require for the harvest season. As early as 1974, this figure was utilized in estimating the

H-2A workers needed to effectively harvest the sugar cane crop. Indeed, USSC has employed this figure in its worker estimates as recently as the 1988-89 season. By use of the 8 ton figure, in combination with other factors such as number of work days, mill capacity and estimated total tonnage, the grower determined the number of H-2A workers it would request in its clearance order. Given the common and continuous usage of the tonnage language for this purpose, the undersigned cannot conclude that the language is immaterial or irrelevant.

The Court, however, cannot ignore the fact that the petitioner has presented substantial evidence that the 8 ton figure is not indicative of actual worker experience. In conjunction with providing the material terms and conditions of employment in the job offer, the grower certifies the accuracy of this information by signing the offer. 20 C.F.R. § 653.501(d)(3). Neither USSC nor any other grower can be expected to verify false information in its contract. Given the time constraints of the 1991-92 application process, USSC must include the tonnage language in their job offer as it is material. However, the Court believes that the growers and the DOL should negotiate a figure which more accurately reflects the actual tonnage cut per worker for future harvesting seasons.

### **C. Housing**

Section 653.501(d)(2)(XV) provides that the job offers shall include,

an assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.

20 C.F.R. § 653.501(d)(2)(m). In its current job offer, USSC placed the following language regarding housing,

The employer shall provide to those workers who are not reasonably able to return to their residence within the same day sanitary facilities and hygienic housing, without charge to the worker, which comply with all pertinent local, state and federal regulations... Workers who are reasonably able to return to their residence within the same day will not be provided with housing...

As readily evident from the above paragraphs, USSC has mirrored the language of its housing offer to the language contained in the regulations. Although the DOL argues that USSC's final sentence is redundant, redundancy is not the equivalent of illegality. In denying this portion of USSC's application due to semantics, the DOL improperly exercised its authority under the Act.

The DOL additionally maintains that this housing paragraph is misleading because it does not refer to the worker's permanent residence. A brief review of the regulations reveal that reference is not made to the worker's permanent residence therein. Thus, USSC is not required to

place that wording in its job offer. Nonetheless, since the grower has knowledge, provided publicly, that the DOL interprets the housing requirement as based on the employee's permanent residence, as opposed to place of recruitment, this is the standard to which the grower shall be held. See, Phillips v. Brock, 652 F.Supp. 1372 (D.MD. 1987), appeal dismissed as moot, 854 F.2d 673 (4th Cir. 1988). Accordingly, the undersigned finds that USSC's housing provision is acceptable under the Act.

#### **D. Waiting Time**

When discussing the scope of the sugar cane cutters workday, reference must be made to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (hereinafter "FLSA") and the Portal-to-Portal Act, 29 U.S.C. § 251 et seq. (hereinafter "PTPA"). Significantly, these pieces of legislation define compensable activity. Under both provisions, compensable activity does not include preliminary or postliminary activities performed prior or subsequent to the workday, except in very limited situations, if not so contracted between the parties.

In their job offer, USSC included the following description of when a worker's compensable hours of work begin and end each day:

For workers furnished transportation to the fields by the Employer, working time for all workers at a field starts, for those workers ready, willing and able to work, when the first cutter gets off the bus ready and willing to work. For any worker who is not ready and willing to work at such time, working time will begin when he is so ready and willing. Quitting time for each cutter is when he actually stops working for the day. Time spent Waiting for return transportation after a worker finishes his task(s) for the day is not working time and is not compensable.

This language reiterates the long-standing contractual relationship that has existed between USSC and its workers. The DOL argues that USSC's position on quitting time is "potentially inconsistent" with the FLSA. This argument is without merit. Although the DOL states that "quitting time occurs when compensable activity ceases," it offers no definition of when this time actually occurs. Therefore, the language of the applicable legislation is determinative.

Pursuant to Section 3(o) of the FLSA, certain activities performed at the beginning or end of each workday, such as changing clothes or washing, are excluded from the measured working time unless these activities are "indispensable to the performance of the employee's work or . . . required by law or by the rules of the employer." This determination must be made on an individual basis as the circumstances of the job dictate whether the pre-or-postliminary tasks are an integral or indispensable part of the employee's position. As stated in Skidmore v. Swift & Co., 323 U.S. 134 (1944),

The [FLSA] does not define 'work' or 'workweek' and does not prescribe what preliminary or incidental activities shall be compensable under the provisions of the law. That was left to be settled by the employer and employee, either by

express agreement or by implied agreement, based on the custom or practice in that particular place of employment.

House Rep. No. 71, House Comm. on the Judiciary (Feb. 25, 1947), reprinted in 1947 U.S. Code Cong. & Admin. News 1029, 1030.<sup>6</sup>

This interpretation comports with the provisions of the PTPA. Under the implementing regulations set forth at 29 C.F.R. § 785.9, the workday is defined as "the time... such employee commences [his] principal activity or activities and the time... at which he ceases such principal activity or activities." The definition expressly "eliminates from working time certain...preliminary or postliminary activities performed prior or subsequent to the workday that are not made compensable by contract, custom or practice." 20 C.F.R. § 785.9(a). As further clarified by the regulations,

Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked... The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities, except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which the employee is employed to perform."

The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do... Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are... riding on buses between a town and an outlying mine or factory where the employee is employed and riding on buses or trains

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<sup>6</sup> See also Brock v. El Paso Natural Gas Co., 826 F.2d 369, 373-74 (5th Cir. 1987); Rousseau v. Teledyne Movable Offshore, Inc., 805 F.2d 1245, 1248 (5th Cir. 1986), cert. denied, 484 U.S. 827 (1987); Allen v. ARCO, 724 F.2d 1131, (5th 1136 Cir. 1984); Donovan v. Williams Chem. Co., 682 F.2d 185, 188 (8th Cir. 1982); Ralph v. Tidewater Constr. Co., 361 F.2d 806, 808-10 (4th. Cir.), cert. denied, 385 U.S. 931 (1966).

from a logging camp to a particular site at which logging operations are actually being conducted...

29 C.F.R. § 790.7(a)(c) and (f). The Court readily associates the logging scenario with the transportation of USSC's sugar cane cutters. It seems apparent that USSC's position regarding waiting time fits squarely within the legislative directives.

Moreover, the DOL has failed to offer any evidence to rebut this finding. Although the DOL stated that Wage and Hour Administration (hereinafter "WHA") would provide guidance on the DOL's interpretation of when "compensable activity ceases" prior to the harvest season, no such guidance has been forthcoming and the harvest season is rapidly approaching. Indeed, USSC aptly noted that it had been waiting for the WHA's interpretation of this issue for over three years. The sole WHA opinion of record regarding the waiting time issue was promulgated in 1978. In Opinion Letter No. 1507 (WH-454) (Feb. 9, 1978), the WHA proffered,

Normal travel from home to work or from a temporary residence such as a labor camp to the worksite is not worktime under the [FSLA] and the Portal-to-Portal Act... This is true whether the worker is working at a fixed location or at different worksites. We recognize that farmworkers who reside in labor camps are generally provided transportation to and from the worksites by the agricultural employer. It is our opinion that the travel performed by these employees at the beginning and end of the workday is ordinary home to work travel. The fact that an employer provides the employee with transportation does not convert such travel time to a principal activity. However, if there is a custom, contract, or practice providing that an employee's regular daily travel between home or labor camp and the workplace at the beginning and/or end of the workday is compensable, such time will be so regarded under the provisions of... the Portal-to-Portal Act....

Apparently, even the WHA would approve the language in USSC's transportation offer.

The undersigned must additionally note that quitting time is a material term and condition of the job offer. See, 20 C.F.R. § 653.501(d)(3). It is essential for a worker to know exactly when his workday ceases and he will no longer be compensated. Merely including language that quitting time occurs "when compensable activity ceases" is of no value to the worker. It does not inform him, or give him any basis to draw his own conclusion, of when his workday ends. Accordingly, the DOL's proposed language cannot be accorded any deference as it is not reasonable and does not comport with either the applicable regulations or stated DOL policy. Consistently, the undersigned finds the language in USSC's job offer regarding waiting or quitting time valid.

#### **E. Length of Seed Cane Rows**

Since USSC is required to compensate its seed cane cutters under either the prevailing piece or hourly wage rate, the length of the seed cane row becomes immaterial. Each worker will

be paid \$.07 per foot regardless of the number of feet in a particular row; therefore, it is of no real consequence to know the footage of the rows. However, the DOL points out that this information could be useful to the employees, or potential employees, in determining the scope of the job. Similar to the 8 ton language, this figure could inform them of some level of productivity that needs to be maintained to be a satisfactory worker. As such, the length of the rows should be placed in the job offer for this purpose.

USSC has again raised the issue of accuracy with reference to the estimated footage of the seed cane rows. Currently, the DOL requires that the grower state that the "normal task for cutting of seed cane is a minimum of 375 linear feet per cut row to a maximum of 700 linear feet per cut row, depending upon anticipated yield of each field." USSC maintains that the actual rows vary between 290 and 863 linear feet per cut row. Nevertheless, the same evidence which yielded these figures also disclosed that only 25 of the 230 tasks fell outside the range of 375 to 700 feet. As determining the length of seed cane rows is not an exact science, these figures accurately represent the normal average length of these rows. Accordingly, the 375 to 700 foot figure must be included in the job offer.

### **ORDER**

Consistent with the foregoing, the Regional Administrator's non-acceptance of the Petitioners' H-2A applications is affirmed in part, and reversed, in part, as previously set forth.

E. Earl Thomas  
District Chief Judge

EET/VB/pc