



In the Matter of

WESTERN RANGE ASSOCIATION,
CENARRUSA FARMING & LIVESTOCK, INC.,
and SOULEN LIVESTOCK COMPANY,
Employers

Case Nos. 95-TLC-4
95-TLC-5

Appearances

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For the Department of Labor

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER

This case arises under the provisions of section 218 of the Immigration and Nationality Act, 8 U.S.C. §1188, and implementing regulations set forth at 20 C.F.R. §655.90-§655.113. Both parties have waived their right to an oral evidentiary hearing under the provisions of 20 C.F.R. §655.112(b) and requested instead that the matter be decided solely on the basis of written submissions.

BACKGROUND

Cenarrusa Farming & Livestock Company ("Cenarrusa") and Soulen Livestock Company ("Soulen") are sheep farmers and members of the Western Range Association ("WRA"). The WRA is a non-profit corporation comprised of farmers who raise sheep in the Western United States. Its principal function is to assist its members in securing an adequate supply of shepherders. In furtherance of this purpose the WRA acts as joint employer with its members and submits applications to the Department of Labor ("DOL") for authorization to temporarily import alien shepherders into the United States. Under the provisions of 8 U.S.C. §1188 and 20 C.F.R. §655.0,

such applications may be granted if there are not enough shearherders in the United States to meet the demand for such workers and the if the importation of the alien shearherders will not "adversely affect" the wages or working conditions of similarly employed, lawful residents of the United States. In order to ensure compliance with this second requirement, no authorization to import an alien shearherder may be granted unless it is determined by the DOL that the alien shearherder will be paid wages that equal or exceed an Adverse Effect Wage Rate ("AEWR"). 20 C.F.R. §655.100(b). Under the provisions of 20 C.F.R. §655.93(b), the "methodology" for establishing AEWRs for shearherders must be "consistent" with the methodology set forth at 20 C.F.R. §655.107(a) for establishing AEWRs for other types of agricultural workers.¹ The methodology actually used by the DOL to establish AEWRs for shearherders is set forth in a DOL document entitled ETA Handbook No. 385 ("Handbook 385").

In 1994 Cenarrusa, Soulen, and the WRA ("the employers") resolved a dispute with the DOL concerning the 1994-95 special AEWR for Idaho shearherders by entering into a settlement agreement under which the DOL agreed to withdraw the AEWR and issue a new AEWR based on the results of a supplemental prevailing wage survey. The agreement also provided that the employers could appeal the new AEWR if it were determined that the amount of the new AEWR had been increased as a result of including in the supplemental survey the wages of shearherders who do not receive board as part of their regular compensation. In this regard, the parties further agreed that for purposes of any such appeal, board provided to shearherders would be regarded as having a value of at least \$150 per month.

In the middle of January of 1995, the DOL advised the employers that the supplemental survey showed that the prevailing wage for shearherders in the state of Idaho was \$700 per month and that this figure would have been only \$650 per month if shearherders who do not receive board as part of their compensation had been excluded from the survey.² Shortly thereafter, the employers filed applications for temporary alien agricultural labor certifications that proposed to pay alien shearherders \$650 per month plus room and board. The applications were promptly denied and therefore on February 7, 1995, the employers initiated this proceeding pursuant to the provisions of 20 C.F.R. §655.104(c)(3).

¹ The provisions of 20 C.F.R. §655.107(a) direct that AEWRs for such other types of workers be "equal to the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture (USDA) based on the USDA quarterly wage survey." This regulation also specifies, however, that in no case can an AEWR for such other types of workers be lower than the federal minimum wage or such other amounts as may be determined through prevailing wage surveys for particular areas or types of agricultural activity.

² According to various documents in the record, the supplemental survey covered four shearherders who were paid cash wages but were not provided with board and 29 shearherders whose compensation included both board and cash wages.

ANALYSIS

The only issue raised by the parties in this proceeding is the legal propriety of including the wages of shearers who do not receive board as part of their compensation in the supplemental survey of Idaho shearers.

On one hand, the employers contend that it was improper to include such wages in the survey because: (1) it is arbitrary and capricious to combine fundamentally different "units" or "methods" of payment in a single wage survey, (2) the workers in the survey whose compensation did not include board were probably not in fact open-range shearers, (3) the prevailing method of compensating shearers is through cash wages plus room and board and therefore other methods of compensation should not have been included in the DOL calculation of the new AEW, (4) the failure to exclude shearers who were not provided with board from the supplemental survey in effect generated an AEW that would inequitably require the employers to pay alien shearers more in practical terms than competing sheep farmers pay domestic shearers.

The DOL, on the other hand, argues that: (1) in not distinguishing shearers who receive only wages from those who receive wages and board, the methodology of the supplemental survey is consistent with the methodology set forth in 20 C.F.R. §655.107(a), (2) the methodology of the supplemental survey is consistent with the definition of "wages" set forth at 20 C.F.R. §655.100(b), (3) the supplemental survey did not impermissibly mix data concerning different "units" of payment because board is not a unit of payment, (4) it would be administratively difficult to attempt to adjust different wages to account for different types of fringe benefits, (5) the provisions of the settlement agreement governing this proceeding preclude the employers from raising the question of whether or not workers who are not provided with board are in fact open-range shearers.

There are no statutory provisions or regulations that explicitly allow or disallow the consideration of fringe benefits when determining which workers are to be included in AEW surveys. Although the provisions of 20 C.F.R. §655.93(b) require that the methodology used to formulate AEWs for shearers be consistent with the methodology set forth in 20 C.F.R. §655.107(a), that provision is not apposite here because it provides no guidance, either explicit or implicit, for collecting wage data when such data is not available from the Department of Agriculture. Rather, the provisions of that regulation contain only a methodology for establishing an AEW once the relevant data is obtained, not a methodology for collecting the data. Similarly, the definition of "wages" set forth at 20 C.F.R. §655.100(b) is inapposite because that definition in no way prescribes a methodology for conducting AEW surveys. Further, although the provisions of Handbook 385 appear to prohibit the use of different "units" of payment in conducting AEW surveys, the term "units" is not defined and nothing in the handbook expressly allows or disallows the consideration of fringe benefits when conducting AEW surveys. In view of this absence of any explicit legislative or administrative guidance, it is thus necessary to resolve the dispute in this case by considering the general statutory goals underlying the relevant provisions of the Immigration and Nationality Act ("the Act"). After doing so, I have concluded that at least in the circumstances presented in this case, it would be inconsistent with the purposes of the Act to calculate an AEW for shearers on the basis of a wage survey that did not distinguish between shearers who

are paid only in cash and those who are paid both board and cash. There are three reasons for this conclusion.

First, both the Board of Alien Labor Certification Appeals ("BALCA" or "the Board") and at least one court have held that in order to achieve the Act's statutory purposes it is necessary in certain cases to consider fringe benefit compensation when determining whether to grant a proposed labor certification. Most significantly, in a 1991 *en banc* decision BALCA ruled that although the provisions of 20 C.F.R. §656.40(a)(2)(i) could be read to mean that only cash wages and not fringe benefits need be considered in setting a prevailing wage for labor certification purposes, such a reading would be inconsistent with the purpose of the Act's "adversely affect" provisions. Kids "R" Us, 89-INA-311, 312, 344 (Jan. 28, 1991). Accordingly, the Board found that the relevant provisions of the Act and the implementing regulations required consideration of fringe benefit compensation when determining prevailing wages under the provisions of 20 C.F.R. §656.20(c)(2) and §656.40. Likewise, at least one court has held that a refusal to consider fringe benefits in determining whether to grant a labor certification was inconsistent with the purposes of the Act. Ozbirman v. Regional Manpower Administration, 335 F. Supp. 467, 471-72 (S.D. N.Y. 1971). Indeed, in the same decision the court held that it was an abuse of discretion for the Secretary of Labor to deny a labor certification solely because a proposed cash wage was below a pre-determined prevailing wage without first considering the value of fringe benefits that would have also been provided to the alien worker under the provisions of a union contract. Id. at 472-73.

Second, it is clear that in this case there are no administrative difficulties that would make it impractical to consider fringe benefits when determining which workers should be included in the supplemental wage survey. Only one fringe benefit (board) is in issue and that benefit is of essentially equal value to all workers. Moreover, since only a small minority of the surveyed shepherders do not receive board as part of their compensation, it is unlikely that the exclusion of such shepherders from the survey would endanger its statistical validity. Indeed, such an exclusion would appear to enhance the survey's accuracy by insuring that all of the workers surveyed are being paid under the same compensation system rather than different systems.

Third, I conclude that the inclusion in an AEW survey of shepherders who do not receive board as part of their compensation would produce results that are directly contrary to the purposes of the Act. This would occur because the inclusion of such shepherders in an AEW survey would in effect require Idaho sheep farmers to provide alien shepherders with compensation of a substantially greater total real economic value than the compensation ordinarily provided to Idaho's domestic shepherders and would thereby potentially make it prohibitively expensive to hire alien shepherders. Such a result would clearly be inconsistent with the Act's purpose of facilitating, rather than discouraging, the importation of foreign workers to fill jobs that cannot be filled by domestic workers.

ORDER

The above-described applications for certification pursuant to the provisions of section 218 of the Immigration and Nationality Act are hereby granted.

Paul A. Mapes
Administrative Law Judge

Date: March 17, 1995
San Francisco, California