SWEATSHOPS IN THE FIELDS: CONTINGENT WORKERS IN AGRICULTURE

By Robert A. Williams, Florida Legal Services

I. INTRODUCTION

The current labor system in the fruit and vegetable industry (1) emphasizes temporary jobs, (2) encourages subcontracting for labor management, and (3) recruits workers in a manner that results in the chronic oversupply of labor. These labor practices are more prevalent in agriculture than in other industries, even immigrant dependent industries. In fact, the agricultural industry furnishes the model for a low-wage exploitive industry which is now surfacing in other sectors of the economy. There are two reasons why these practices are so pervasive in agriculture. First is the nature of the work of the work itself, and the second is the fact that historically, agriculture has been exempt from governmental regulations and social insurance programs that discourage these practices.

Work in the fruit and vegetable industry is both short-term and subject to seasonal labor peaks. U.S. farm employment declines to an estimated low of 640,000 workers in January, climbs to 1.0 in May, and peaks at 1. 1 million in September.[1] Regional swings in labor demand are even greater.

In any given year, half of the farm labor force performs tasks that last six weeks or less.[2] Migrant
workers who make up 42% of the farm labor force, are critical to U.S. agricultural production. The pervasive use of farm labor contractors in agriculture emerged from the necessity of recruiting and transporting hundreds of thousands of workers for short-term employment.

The contracting system in agriculture also evolved largely outside of the protective laws and social safety net created by the New Deal. Farm workers are not covered by the National Labor Relations Act and are excluded form the overtime provisions of the Fair Labor Standards Act. Only those employed on larger farms must be provided with unemployment compensation. Thirteen states still do not require farm employers to provide workers compensation insurance.

While over time, much of the New Deal legislation has been extended to farm workers, legal

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[1] Migrant Farmworkers: Pursuing Security in an Unstable Labor Market, Research Report No. 5 U.S. Department of Labor, May, 1994 at p. 6.

[2] Id. at p. 9.

protections for farm workers have tended to evolve more or less in isolation from changes affecting other workers. Ever since Edward R. Murrow's famous docwnentary, Harvest of Shame, the public's attention has been drawn to the plight of farm workers in the United States. The Congressional response has been to create special protective laws and programs for farm workers rather than to include farm workers under general labor laws such as the NLRA. After more than 30 years of legislative reform and litigation, one of these laws, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) has emerged as an effective tool for attacking the sweatshops in the fields.

II. THE ROLE OF INTERMEDIARIES IN THE AGRICULTURAL WORKPLACE

Farm labor contractors (FLCS) are the intermediaries who for a fee, recruit, transport, and supervise farmworkers. They offer employment, make other representations about the job terms, and transport workers to the farm, ranch or processing plant. In most cases, the farm labor contractor will not only contact and move the workers, but will also stay on the farm as the workers' supervisor, foreman and paymaster. Often, the contractor controls the housing and other vital aspects of the workers' everyday needs. The isolated location of many labor camps and differences in language and culture mean that the farm labor contractor often is the only link between the workers and the outside community. Especially when the workers are new immigrants, the contractor may be the worker's banker, landlord, transportation service, restaurant, and check-cashing service. Charging workers for these services can be a significant source of the contractor's income.

Farm labor contractors vary widely in the scope of their operations. The majority are nothing more than foremen or "crewleaders" who supervise a crew of between 10 and 30 workers. Many of these operate on a "day haul" basis, transporting workers from a pickup point to the work site in vans or buses. These individuals are generally former farm workers themselves, and have little in the way of assets. Often, they are paid on a piece rate basis for the work done by their crew. Above the crewleaders are often larger contractors who have a contract with the grower or processing plant. Harvesting companies in the Florida citrus industry may employ 10 or 20 crewleaders, who in turn employ 500 to 1,000 workers. These companies may also provide additional services for the grower or processor such as transporting the produce to the packinghouse or processing plant.

Most farm labor contractors operate on overhead. That is they supply workers for the close to the minimum wage, and then collect an overhead, for example, 35 percent, to cover the cost of social security, unemployment insurance, and workers compensation taxes, plus the cost of recordkeeping, toilets, supervision, etc. California contractors say that their costs are equivalent to 32-34 percent of payroll. However, many contractors work for less.

Currently, there are over 10,000 crewleaders and contractors registered with the United States Department of Labor. However, there are thousands of other persons engaged in contracting activities who are not registered, including the ubiquitous "coyotes. "A coyote, of course, is a

smuggler, who recruits workers in Mexico and assists them in crossing the border for a fee. Often, the coyote also is involved in transporting workers hundreds of miles and delivering them to a grower or labor contractor. Sometimes, the labor contractor "buys" the workers from the coyote by paying the fee, usually between $400 and $1,200. The labor contractor then recoups this fee from the worker's wages. In other cases, the coyote shows up on pay day to claim his money. The coyote's activities are wholly illegal, yet today coyotes probably furnish most of the long distance transportation provided migrant workers in the United States.

In addition to the coyotes, the insurance requirements placed on contractors who transport workers have created a new type of unregistered contractor known as a "raitero" (in south Florida, they are know as "nickeleros"). The primary fimction of the "raitero" is to transport the farm workers, for a fee, from common gathering points to the fields on a day-to-day basis. According to the Department of Labor National Agricultural Worker Survey, 10% of the U.S. farm labor force working in fruit, vegetables or horticulture, is charged by "raiteros" to and from work. The Report of the Commission on Agricultural Workers stated that two-thirds of those working in California citrus and tomatoes paid "raiteros" an average of $3.00 per day for transportation.

The "raitero" practice is clearly farm labor contracting activity, subject to the Migrant and Seasonal Agricultural Worker Protection Act, but the thousands of individuals who are engaged in this business have failed to register. In fact, DOL Region 9, which includes California where the raltero practice is common, reported in 1996 that only 79 of the 4298 registered farm labor contractors were authorized to provide transportation.

Often, more than one intermediary is involved in the same workplace. A worker in Florida citrus may have been recruited in Mexico by a coyote who has furnished him to a Florida crewleader, who in turn works for a harvesting company which harvests fruit for a large grove owner whose fruit is contracted to Minute Maid or Tropicana.

As one commentator has suggested, "FLCs are practically a proxy for the employment of undocumented workers and for egregious or subtle violations of labor laws."

Fierce competition among contractors makes such violations inevitable. As noted above, realistically if the contractor is to meet all his legal obligations, he must charge at least 30% over and above his payroll. Contractors get by with less by cheating on the employment taxes and workers' compensation premiums, often keeping part of their work force "off the books" or under-reporting wages paid. Frequently, piece rate earnings do not result in the worker earning the minimum wage, but contractors rarely pay "buildup" to reach the minimum hourly rate. The Labor Department's NAWS reported that farm workers who are paid on a piece rate basis are four times more likely to make less than the federal minimum wage than those who earn an hourly wage (30% and 7% respectively). Piece rate earnings of workers paid through FLCs average $1 less per hour than for workers of other employees. From 1989 to 1991, the hourly earnings of piece-rate workers employed by FLCs fell, in real terms, from $7.11 to $5.01. This

was even more dramatic for harvest workers employed by FLCs. For this group, hourly earnings in 1991 were just two-thirds of 1989 earnings ($4.91 v. $7.32). Not surprisingly, the average personal earnings for FLC employees were $4,700 per year, compared to $6,900 for non FLC employees.[3]

Contractors further lower costs by making workers pay for equipment, daily rides, check cashing, meals and lodging. Compared to farm workers hired directly by the grower, farm workers employed by intermediaries are more likely to pay for their equipment (45% compared to 16%) and for rides, food and/or housing (34% compared to 14%). One study found that ride and tool deductions reduced gross wages for tomato harvesters in the Stockton and Fresno California by 14%. In addition these workers often paid check-cashing fees.

Contractors also lower their expenses by minimizing out-of-pocket expenses. For example, workers hired by intermediaries are less likely than their direct-hired counterparts (65% compared to 78%) to find sanitary facilities in the field. These methods, which lower farm workers' take-home pay, allow contractors to show a profit in a highly competitive market, and also lower labor costs for producers.

The result is that contractors routinely violate labor standards. DOL investigations have generally found that 50% to 60% of the contractors investigated are violating the Migrant and Seasonal Agricultural Worker Protection Act. Sooner or later, most contractors fail to pay the FICA or FUTA taxes for their workers, or let their vehicle insurance lapse, or fail to pay their workers compensation premiums.

[3] Report of the Comission on Agricultural Workers, 1992, p. 121.

FLC activity has increased substantially since passage of the amnesty program for farmworkers in the Immigration Reform and Control Act of 1986. In California, the portion of seasonal workers that is hired through labor contractors has grown from about one-third in the early 1980's to between one-half and two-thirds.[4]

There are several reasons for this expansion. First, the large farm labor surplus in the wake of IRCA created the conditions for lowering wages and working conditions as outlined above. This in turn has destabilized the farm labor market further and led to a new influx of undocumented workers. By increasing their reliance on farm labor contractors to recruit and hire, growers have sought to further insulate themselves from employer sanctions for employing unauthorized workers. Many growers also hope that the use of FLCs will insulate them from liability for workers' failure to receive the minimum wage and other labor law violations.

111. THE EVOLUTION OF THE JOINT EMPLOYMENT DOCTRINE

It has taken farm worker advocates over thirty years to develop a legal framework for combating the worst abuses of the labor contracting system in agriculture.

I . The Farm Labor Contractor Registration Act of 1963

In 1963, Congress concluded that the "the plight of the migrant laborer in this country is an inexcusable and cancerous sore in the body politic." 1 1 0 Cong. Rec. 19,896 (1964) (statement of Rep. Bennett). Farm workers' "transportation and living conditions are far below the general standard of living are far below the general standards of living - are indeed inhuman."

While the rhetoric of the bill sponsors was heated, the measures actually taken by Congress to stem the tide of "exploitation and abuse" were fairly tepid. The new legislation focused solely on the labor contractor, who was required to obtain a certificate of registration from the Department of Labor as a condition of engaging in the activities of a farm labor contractor. Grounds for revocation of the certificate and other penalties included giving false or misleading information to migrant workers concerning their employment terms. Enforcement of the new law was given to the Farm Labor Service of the Employment and Training Administration which was more concerned with filling growers' requests for workers than with protecting worker rights. There was no real attempt to enforce the law during the next decade. Instead, ETA adopted a policy of "voluntary compliance" whereby contractors found to have violated the law were merely warned not to do it again.

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[4] P. Martin & J.E.Taylor, "Merchants of Labor: Farm Labor Contractors and Immigration Reform," The Urban Institute (May 1995).

2. The Fair Labor Standards Amendments of 1966

In 1966, Congress extended FLSA's protections to an estimated 7.2 million workers, including many of the nation's agricultural workers, who had been excluded from the original legislation. This necessarily raised the question as to who should be held liable for paying the minimum wage in agriculture, the grower, the labor contractor, or both. In extending the Act's protections to farmworkers, the Senate Committee fully endorsed the approach toward determining employer status taken by the Supreme Court in *Rutherford Food Corp. v. McComb,* 331 U.S. 722 (1947). In Rutherford, the Court said that there is no single rule or test for determining an employment relationship and that the "total situation controls." Id. at 730. The Committee approved of the criteria which aided the Supreme Court in assessing the total situation: (1) the extent to which the services rendered are an integral part of the principal's business; (2) the permanency of the relationship; (3) the opportunity for profit or loss; (4) the initiative, judgment, or foresight exercised by the one who performs the services; (5) the amount of investments; and the degree of control which the principal has in the situation.[5]

The Department of Labor subsequently brought two cases where the courts rejected the defense that the crewleaders were independent contractors and held that the growers were also employers under the FLSA. *See Hodgson v. Okada,* 472 F.2d 965 (10thCir. 1973) and *Hodgson v. Griffin & Brand of Mc,41len, Inc.,* 471 F.2d 235 (5thCir. 1973). Despite these initial successes, DOL did not vigorously apply the joint employment doctrine thereafter.[6]

3 . The 1974 Amendments to FLCRA

In 1974, Congress found that FLCRA's exclusive focus on the crewleader had been an abject failure:

> Noncompliance by those whose activities the Act was intended to regulate has become the rule rather than the exception ... It is quite evident that the Act in its present form provides no real deterrent to violations.

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[5] S. Rep. No. 1487, 89" Cong. 2d Sess. (1966), reprinted in 1966 U.S.C.C.A.N. 3012-13.

[6] In fact, there have not been any subsequent circuit court cases in which DOL was a plaintiff. All the reported joint employment cases in agriculture after *Griffin & Brand* have been brought by legal services lawyers.

S. Rep. No. 1206, 93d Cong. 2d Sess. 3 (1974)("1974 S. Rep.). A 1973 Labor Department study had found that two-thirds of labor contractors had never registered, and that 73 percent were violating FLCRA's worker protections.[7] In the entire decade following FLCRA's enactment, the Department of Labor had referred only four cases to the Justice Department for prosecution, and only one contractor had been tried and convicted.[8]

Again, the legislative fix was rather modest. The 1974 amendments to FLCRA prohibited the use of unregistered labor contractors and imposed on the growers the duty to obtain and maintain copies of the contractor's payroll records. The definition of "farm labor contractor" was broadened to include not only traditional transient crewleaders but also a number of fixed situs employers such as associations which fumished workers to their members. Predictably, Department of Labor enforcement of FLCRA became bogged down in the pursuit of technical registration violations against fixed situs employers and litigation over the definition of "farm labor contractor." Growers began to bitterly complain of the bureaucratic burdens of registering as farm labor contractors and being fingerprinted "as if they were crew leaders with no fixed addresses or financial integrity."

Perhaps more importantly, the 1974 amendments also created a private cause of action for aggrieved workers. Legal Services lawyers quickly began to file dozens of lawsuits against labor contractors for every kind of worker abuse. They quickly learned the limitation of the law. While the suits were generally successful, many of the contractors proved to be judgment proof. Even when the Department of Labor would revoke a contractor's license for failure to satisfy the judgment, the contractor would simply have a family member obtain a license or continue to operate without a license. Nevertheless, these cases were important in demonstrating the ongoing level of abuse and the futility of pursuing only the farm labor contractor. This set the stage for a new approach.

D. The Migrant and Seasonal Agricultural Worker Protection Act of 1983

In 1983, Congress concluded that the twenty-year effort to reform the farm labor market by focusing regulatory efforts on farm labor contractors had "failed to reverse the historical pattern of abuse of migrant and seasonal farmworkers."[9] To redress these problems Congress enacted the

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[7] H.R. Rep. No. 1493, 93d Cong., 2d See. 6 (1974).

[8] 1 974 S. Rep. at 3.

[9] H.R. Rep. No. 885 at 2-3.

Migrant and Seasonal Agricultural Protection Act, 29 U.S.C. § 1801-72 ("AWPA"). Although the AWPA repealed the FLCRA in its entirety, in most respects the statute was simply renamed and reenacted. The only sense in which the AWPA took a "completely new approach" to the farmworker problem, was in abandoning the FLCRA's attempt to police all conduct through the single locus of the often-transient crewleader.

AWPA reclassified fixed situs employers as "agricultural employers" or "agricultural associations" and made them directly responsible for compliance with the Act's substantive protections. In exchange for the assumption of statutory responsibility, fixed situs businesses secured legislative relief from the administrative burdens associated with transient farm labor contractors.

Congress recognized that many farm workers who had been denied minimum wages were relegated to costly litigation against a fixed situs grower that disclaimed employer status and a fly-by-night crewleader who admitted employer status but could never pay a court judgment. Congress concluded that the FLSA's concept of joint responsibility "represented the best means by which to insure that the purposes of this Act would be fulfilled." Thus, the AWPA expressly provides that the term "employ" be given the same meaning given such term under section 3(g) of the [FLSA]."[10]

The use of the FLSA definition "was deliberate and done with the clear intent of adopting the 'joint employer' doctrine as a central foundation of this new statute."[11] Indeed, the joint employer doctrine was to be "the indivisable hinge between certain important duties imposed for the protection of migrant and seasonal workers and those liable for the breach of those duties."[12] Accordingly, the Congress approved of the Supreme Court's decision in *Rutherford* and lower court decisions that applied its analysis to the agricultural sector:

> [W]here an agricultural employer ... asserts that the agricultural workers in question are the sole [sic] employees of an independent contractor/crewleader..., it is the intent of the Conunittee that the formulation as set forth in *Hodgson v. Griffin & Brand ofMcAllen, Inc.* be controlling. This decision makes it clear that even if a farm labor contractor is found to be a bona fide independent contractor, ...this status does not as a matter of law negate the possibility that an agricultural employer may be a joint employer ... of the harvest workers and jointly responsible for the contractor's employees.

The issue of joint employment under the AWPA has now been addressed several times by the appellate courts with mixed results. *Compare Antenor v. D &S Farms,* 88 F.3d 925 (11 th Cir.

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[10] 29 U.S.C. § 1802(5).

[11] 1982 H.R. Rep. No. 885 at 6.

[12] Id.

1996) and *Torres-Lopez et al. v. May*, 1 1 1 F.3d 633 (9' Cir. 1997) with *Aimable v. Lotig & Scott Farms,* 20 F.3d 434 (11th Cir. 1994). However, it is fair to say that the general direction of the law has been in favor of grower responsibility.

IV. THE CURRENT SITUATION

In March, 1997, the Department of Labor issued a final rule clarifying the definition of "joint employment" under AWPA. The new regulation reaffirmed that in determining whether or not an employment relationship exists between the agricultural employer/association and the agricultural worker, the ultimate question to be deter-mined is the economic reality - whether the worker is so economically dependent upon the agricultural employer/association as to be considered its employee. It also further clarified the multi factor analysis to be used to determine the existence of "economic dependence" in the agricultural context. *See* 29 C.F.R. § 500.20(h)(4). The new regulation was endorsed by farm worker advocates and vehemently opposed by agricultural interests who contended that the new regulation effectively established a strict liability test for joint employment.

In the first case to reach a court of appeals since the new regulation was issued, the Eleventh Circuit has held that several farmers were joint employers with the crewleader even though the farmers did not set the piece rate paid to the workers, did not handle the payroll, and did not directly hire or fire the workers. See Charles v. Burton, 169F.3d l322 (11 th Cir. 1999). The Court found that the farmers were within the definition of employer because they determined the fields where the crew would work, determined when the crew would begin picking a field, and supplied the boxes into which the workers put the beans they picked. The Court also said that even though the direct supervision of workers in the field was done by the crewleader, the farmers exercised control by giving instructions to the crewleader about which areas of the farm to harvest, and by monitoring the harvest work several times each day. The farmers also had indirect control over the workers' employment conditions because the farmers made the ultimate decision about when the picking would begin, where the picking would be done, and for how long the picking would continue. The Court also found that the workers were dependent upon the farmers as a matter of economic reality because picking beans is a repetitive, rote task, and is an integral part of the farmers' production process. Further, the work was performed on the farmers' land. These factors according to the Court of Appeals, showed that the workers were employed by the farmers as well as by the crewleader.

The combination of the new regulations and the court victories has been described as a "double punch" by one grower attorney. Farmers are being advised that they will probably be held to be joint employers with their labor contractors:

> Gone are the days in which a farmer hired a farm labor contractor and left worries about instruction, transportation, labor laws and various liability issues to her. Now farmers may be sorry if they don't take the time to educate themselves about labor laws.[13]

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[13] "Wine Grape Growers Beware of FLC Liability" by Lee Tarkington-Lundrigin in *Wine Business Monthly.*

The other predictable response is a bill in Congress entitled the MSPA Clarification Act of 1999 (H.R. 1886) which would "clarify" the concept of joint employment out of existence. In determining if an agricultural employerjointly employs a farmworker, DOL and the courts would only be allowed to consider the following factors:

(1) the nature and degree of control of the workers,

(2) the degree of supervision, direct or indirect, of the work,

(3) the power to determine the pay rates or the methods of payment of the workers,

(4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of
the workers, and

(5) preparation of payroll and payment of wages.

While passage does not appear likely at this time, if enacted H.R. 1886 would reduce the AWPA to little more than the ineffective FLCRA approach.

V. CONCLUSIONS

Several lessons can be drawn from the experience of the past three decades in regulating farm labor contractors in agriculture:

I Efforts to improve labor standards which focus only on the farm labor contractor as was the case under FLCRA are almost certain to be unsuccessful. Real improvements can only be made if the grower or processor is held responsible.

2. Workers must be given the ability to enforce labor standards through a private right of action. DOL cannot be counted on to aggressively enforce joint employer responsibility against a politically powerful industry.

3. FLSA's concept of joint responsibility as developed in the case law under AWPA is flexible enough to reach the wide variety of contractual schemes by which employers are attempting to avoid responsibility for labor standards.

4. However, even under the joint employment approach, some agricultural employers will escape responsibility for labor standards. *See Aimable v. Long & Scott Farms.* Moreover, enforcement against large employers may require considerable resources and is always subject to the vagaries of litigation. These factors argue in favor of pursuing the goal of strict liability.