1984 WL 3184
United States District Court, District of Columbia.

NAACP, Jefferson County Branch et al., Plaintiffs
v.
Raymond J. Donovan et al., Defendants.

No. 82-2315 | August 15, 1984

**Opinion**

RICHEY, D.J.

**[*Statement of Case*]**

***1** This court must again resolve a dispute between these litigants over the appropriate piece rates to be paid farmworkers. In its first decision, *NAACP v. Donovan,* [95 LC P 34,307] 558 F. Supp. 218 (D.D.C. 1982) ("*NAACP I"*), the court held that the Department of Labor ("DOL") had violated its own regulations on labor certification in West Virginia by not requiring growers to adjust piece rates proportionally to match increases in the adverse effect rate ("AER").[1] The protection of that decision was extended to a nationwide class of farmworkers in *NAACP v. Donovan,* [98 LC P 34,411] 566 F. Supp. 1202 (D.D.C. 1983) ("*NAACP II*"). *NAACP II* also adopted the 1977 productivity rate as the standard for calculating piece rates from the AER. *Id.* at 1208.

[1] "The AER is the minimum wage rate that employers may pay to both foreign and domestic workers. The purpose ofthe AER is to ensure that rates paid to aliens do not depress the wages of similarly situated American workers." *NAACP I,* 558 F. Supp. at 219-20 n.2. The statutory framework for the regulations at issue here is provided by the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii) and § 1184(c) (1982).

Following the *NAACP II* ruling, DOL promulgated an amended piece rate regulation, 20 C.F.R. § 655.207(c), after notice and comment.[2] The amended regulation became effective September 2, 1983, upon publication in the Federal Register. 48 Fed. Reg. 40,168 (1983). On September 8th, however, in response to plaintiffs' motion to enjoin enforcement of the regulation on the ground that it violated *NAACP II,* this court suspended the effective date of the amended regulation and enjoined DOL from granting labor certifications except under certain conditions. The Court of Appeals vacated that September order, reinstated the amended regulation, and remanded the matter to this court for a determination of whether the new regulation had been promulgated in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* (1982). *NAACP v. Donovan,* [101 LC P 34,554] Nos. 83-1919 and 83-2165 (D.C. Cir. June 12, 1984). For the reasons stated below, the court finds that DOL did not violate the APA in amending the piece rate regulation, and will therefore grant defendants' motion for summary judgment.

[2] The agency originally limited the notice and comment period to two weeks, 48 Fed. Reg. 33,684 (1983), but subsequently extended it to thirty days. 48 Fed. Reg. 35,667 (1983).

**The Court Must Determine Whether DOL's Action was arbitrary and Capricious**

The parties are in agreement that this court must determine whether DOL's action in promulgating an amendment to § 655.207(c) was "arbitrary and capricious." *See* 5 U.S.C. § 706(2)(a). "[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Manufacturers Association v. State Farm Mutual,* 103 S. Ct. 2856, 2866 (1983). The scope of review is thus narrow, and the court may not substitute its judgment for the agency's. *Id.* However, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."' *International Ladies' Garment Union v. Donovan,* [99 LC P 34,462] 722 F.2d 795, 814 (D.C. Cir. 1983). The court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.,* quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight Sustem, Inc.,* 419 U.S. 281, 285 (1974) and *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971). If agency action is to be upheld, it must be on the basis of the administrative record, not *post hoc* rationalizations of counsel, *Action on Smoking and Health v. CAB,* 713 F.2d 795, 799 (D.C. Cir. 1983), or judicial extrapolation. *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947). Nevertheless, the court must uphold agency action "of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation,* 419 U.S. at 286.

***2** Given this standard of review, the court must uphold DOL's amended regulation.

**DOL's Regulation Does Not Constitute a Change in Policy**

Although DOL amended its piece rate regulation after the court's ruling in *NAACP II,* that does not automatically indicate that the agency changed its policy. DOL affirms to this day that the AER is necessary to protect United States workers from foreign competition, that the AER must be adjusted annually, and that United States workers should not be required to increase their productivity to earn the equivalent of the AER. *See* 48 Fed Reg. 4017273 (Sept. 2, 1983). The old regulation, as definitively interpreted by this court in its earlier rulings, provided that increases in the AER be accompanied by *proportional* increases in piece rates; the new regulation provides instead that such increases are to be based on the productivity of the average U.S. worker. Such a shift does not amount to a new *policy* on the part of DOL, merely a new means of *implementing* its existing policy. The agency is still required to explain its action, but it is not required to provide as comprehensive and detailed an explanation as when it changes or rescinds a policy. *See Building and Construction Trades Department v. Donovan,* [98 LC P 34,403] 712 F.2d 611, 618-19 (D.C. Cir. 1983), *cert. denied,* [99 LC P 34,486] No. 83-697 (Jan. 16, 1984). *Cf. Motor Vehicles Manufacturers Association v. State Farm Mutual,* 103 S. Ct. 2856 (1983); *International Ladies' Garment Workers v. Donovan,* 722 F.2d 795 (D.C. Cir. 1983) (departures from existing policy require more explanation).

**DOL Provided an Adequate Statement of Basis and Purpose**

The amended regulation's "concise general statement of basis and purpose," 5 U.S.C. § 553(c), explained that the AER "is meant to be a minimum, not an escalator to maintain earnings (or to set 'attractive' wages) above the adverse effect level." 48 Fed. Reg. 40,17273 (Sept. 2, 1983). DOL also stated that its amended piece rate regulation was promulgated in response to *NAACP I* and *NAACP II,* because those decisions "would ... guarantee workers earnings at levels above that determined by DOL as the adverse effect level." *Id.* The agency did not rely on any hard data such as actual wage surveys showing that workers' earnings under the old regulation were exceding the AER.[3] Rather, DOL's concern was based on the mathematical possibilities inherent in the alternate formula for computing piece rates. As long as the formula chosen serves the established policy goals – protecting U.S. workers' wages from foreign competition and not requiring increased productivity to earn the equivalent of the AER – the agency has broad discretion to select a piece rate formula. *See Building and Construction Trades Department,* 712 F.2d at 618-19; *Rowland v. Marshall,* 650 F.2d 28, 30 (4th Cir. 1981); *Williams v. Usery,* 531 F.2d 305, 308 (5th Cir.), *cert. denied,* 429 U.S. 1000 (1976); *Florida Sugar Cane League v. Usery,* 531 F.2d 299, 304 (5th Cir. 1976). DOL's reason for amending the regulation is clear: to avoid requiring growers to pay higher piece rates than necessary to allow average U.S. workers to earn the AER. Although U.S. workers might earn more under theold regulation advocated by plaintiffs, it is not arbitrary and capricious for the agency to choose the lowest piece rate formula compatible with its goal of protecting U.S. workers. Such decisions are committed to agency expertise, not to the courts, and an agency may alter "its course when circumstances or attitudes shift ...." *Action on Smoking and Health,* 699 F.2d at 1216.

[3] As counsel noted at oral argument, actual worker productivity in West Virginia is a disputed, but immaterial, fact in this case.

***3** Plaintiffs criticize the adequacy of the statement of basis and purpose and the rulemaking record, noting the lack of evidence on a variety of issues and the failure to discuss alternatives. Despite these alleged flaws, the court finds the record supports DOL's determination. *See National Soft Drink Association v. Block,* 721 F.2d 1348, 1354 (D.C. Cir. 1983). "[T]he agency's path may reasonably be discerned," *Bowman Transportation,* 419 U.S. at 286, and the court cannot say that there has been a "clear error of judgment." *International Ladies' Garment Workers,* 722 F.2d at 814.

**The New Regulation is not so Vague or Unenforceable That it Defeats the Statutory Purpose**

Plaintiffs object that the amended regulation, which relies on the productivity of the "average U.S. worker" to calculate piece rates, is unenforceable and therefore aribtrary and capricious. Plaintiffs complain because DOL cannot accurately measure U.S. worker productivity and because this formula is susceptible to manipulation by employers. The amended piece rate regulation provides that each Regional Administrator of DOL's Employment and Training Administration:

> shall determine the average U.S. worker's hourly earnings by obtaining from employers in the area of intended employment information as to the piece rates, earnings, hours worked, and the productivity of U.S. workers, in a manner to be determined by the Administrator.

20 C.F.R. § 655.207(c). Since the regulation was reinstated by the Court of Appeals, DOL has been gathering such information. Plaintiffs object that DOL will rely on wage surveys which do not accurately portray average U.S. worker productivity. The first problem identified by plaintiffs is that the surveys are conducted at the peak of the season when productivity is at its peak. They also allege that the surveys do not reflect the fact that growers routinely terminate workers below a specified productivity level, although that level may approximate the level of an average U.S. worker. Finally, plaintiffs object because the surveys rely on payroll records that may be inaccurate and unreliable. While the court recognizes that these are valid concerns, they are not documented in the rulemaking record. The court cannot say at this time that DOL will not be able to compile a reasonable estimate of the productivity of the average U.S. worker, taking account of plaintiffs' concerns, and overcome possible distortions in making its calculations. The agency must be given an opportunity to implement its amended regulation.[4] If it fails in practice to provide adequate protection to U.S. workers and to serve statutory goals, plaintiffs will have to return to court once again to challenge DOL's implementation.

[4] Plaintiffs have also argued that DOL's implementation of its final rule on the eve of the 1983 harvest was arbitrary and capricious because it did not give the agency time or means to determine the productivity rate of the average U.S. worker and thus the agency could not enforce the amended regulation. The court now considers this claim moot due to the passage of time.

## Conclusion

***4** DOL did not violate the APA's prohibition of arbitrary and capricious decision making in amending § 655.207(c) because it provided an adequate explanation for the change, supported by the notice and comment rulemaking record. Accordingly, the court will issue an order of even date herewith, granting defendants' motion for summary judgment.

## Parallel Citations

102 Lab.Cas. P 34,606