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United States District Court, District of Columbia.

NAACP, Jefferson County Branch, et al., Plaintiffs,
v.
U.S. SECRETARY OF LABOR, et al., Defendants,
and U.S. Sugar Corporation, et al.,
Defendant–Intervenors.

No. 82–2315 (CRR). | Feb. 06, 1995.

Attorneys and Law Firms

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Opinion

ORDER

CHARLES R. RICHEY, District Judge.

***1** Cross–Motions for Summary Judgment are now ripe in the above-captioned case, and each party has submitted a summary of their respective arguments raised therein. Upon careful review of the pleadings, and in view of the Department of Labor's admission that the "logical consequence" of the findings in the Court's September 22, 1994 Memorandum Opinion and Order "would be that violations of Departmental regulations at 20 C.F.R. § 102(b)(9) may be present," the Court has determined that remand to the Department is appropriate at this time. Federal Defendants' Summary of Arguments in Support of their Renewed Motion for Summary Judgment, at 2.

In its September 22, 1994 Memorandum Opinion, this Court determined that the Department's Final Report, in which it essentially concluded that the task rate system was not subject to the piece rate regulations and that no violations of DOL regulations had been documented, could not be upheld. *NAACP v. U.S. Secretary of Labor,* 865 F.Supp. 903 (D.D.C.1994). The Department of Labor now takes the position that the Court has, as a practical matter, ruled that the 8–ton productivity language in the clearance order constitutes a minimum productivity requirement of one ton per hour. *Id.;* Federal Defendants' Memorandum in Support of their Renewed Motion for Summary Judgment, at 1. The Department thus reasons that if the 8–ton language "does constitute a minimum productivity standard, and a different, and higher standard, was actually realized, then several regulations may have been violated. *See* 20 C.F.R. §§ 655.102(b)(9), 655.106(a)(iii) and 655.108." Federal Defendants' Summary, at 2. The Department concludes that "[s]uch a finding would compel a remand to the Department to determine whether to debar for that violation was appropriate. *See* 8 U.S.C. § 1188(b)(2) and 20 C.F.R. § 655.110(a)." *Id.*

The Court views the Department's request for a remand as an indication of the Department's readiness to take seriously its responsibilities to enforce its regulations, and of the Department's willingness to consider fully and fairly whether, based on the extensive record compiled in this case, DOL regulations have been violated. Thus, on remand, the Court expects that the Department will not merely "rubber stamp" its prior findings but, rather, that it will reconsider the Plaintiffs' contentions carefully, conscientiously, and without bias, and do so in light of this Court's findings, as well as the legal memoranda filed herein by all three parties and the entire record in this case.

Having considered the pleadings extant, the Court finds that several of the Plaintiffs' contentions demand particularly careful consideration by the agency. First, the Court agrees with the Plaintiffs that "[t]he evidence supporting [its] finding of a[n] 8 ton per day or one ton per hour benchmark productivity standard is overwhelming." Summary of Plaintiffs' Motion for Summary Judgment [hereinafter "Plaintiffs' Summary"], at 2. Thus, the Court is troubled by the Plaintiffs' observation that "[i]t was only in 1991 that DOL began to change its view of the 8 ton language, and even in that year DOL was forced to return to its former interpretation. *See* Ex. 10.08 at 9 (DOL ALJ 1991)." *Id.* In any event, the Court anticipates that the Department on remand will provide an explanation for its apparent change in its prior consistent interpretation of the clearance orders as offering a one ton per hour productivity requirement. *See id.* at 2–3 (citing *American Fed. of Gov't Employees v.*

Reagan, 870 F.2d 723, 726 n. 20 (D.C.Cir.1989) (government precluded from retroactively changing interpretation of vested contract terms)).

***2** Second, the Court urges the Department to reexamine very seriously its position that cutting fast enough to earn the AEWR was the benchmark productivity standard, in view of the purpose of the relevant regulations. The Department's conclusion, in short, begs the question of what was the minimum amount of work a cutter had to perform in order to earn the AEWR. As the Plaintiffs observe, "[a] requirement that workers cut fast enough to earn the AEWR would allow an employer to hold his piece rate constant in the face of an increase in the AEWR, thereby forcing workers to increase their productivity in order to continue to earn the AEWR." *Id.* at 6 n. 8. Nowhere in the papers of the Defendant or the Defendant–Intervenors is this critical point properly addressed.

In turn, the Court expects the Department to reevaluate its current interpretation of the 8–ton language as informing workers of the difficulty of the job, in light of the Court's observation that "to the extent the [8–ton] language was included to advise workers of the difficulty of the job, it would [be] pointless to understate the minimum production standard then in effect." *NAACP v. Dep't of Labor,* 865 F.Supp. at 918. Again, the Court would expect a direct response to this concern from the Department.

Finally, the Court anticipates that, in light of the Court's September 22, 1994 Memorandum Opinion, the Department will examine carefully the data submitted by the Plaintiffs to support their contention that "[t]he tonnage rates paid by the growers in 1986–87 and subsequent seasons were so low that workers had to cut far in excess of one ton per hour in order to earn the AEWR/hour," and thereafter determine whether it is appropriate to debar for any violations of the DOL's regulations. Plaintiffs' Summary, at 6–7.

Accordingly, it is, by the Court, this 6th day of February, 1995,

ORDERED that the above-captioned case shall be, and hereby is, REMANDED to the Department of Labor for further consideration of the issues outlined in the Court's Memorandum Opinion of September 22, 1994, and the subsequent papers filed herein; and it is

FURTHER ORDERED that all pending motions filed herein by the Plaintiffs, the Defendants and the Defendant–Intervenors shall be, and hereby are, DENIED, without prejudice; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, DISMISSED, without prejudice to the right of the Plaintiffs, the Defendants or the Defendant–Intervenors to re-open the same by making oral application to the Court's Deputy Clerk, Ms. Debra White (202–273–0553), on or before 4:00 p.m. on June 30, 1995; and it is

FURTHER ORDERED that the Court takes this opportunity to express the precatory wish that Secretary Reich himself will take what we in the law call "a hard look" at this case, and familiarize himself with the long history of this litigation, beginning with its genesis in 1972 and continuing through all decisions forward.[1]

[1] *See NAACP v. Hodgson,* 57 F.R.D. 81, 5 Fair Empl. Prac. Cas. (BNA) 391 (D.D.C.1972); *NAACP v. Brennan,* 360 F.Supp. 1006, 5 Fair Empl. Prac. Cas. (BNA) 1239, 5 Empl. Prac. Dec. P 8637 (D.D.C.1973); *NAACP v. Brennan,* 1973 WL 161, 6 Empl.Prac.Dec.P 8692 (D.D.C.1973); *NAACP v. Brennan,* 1973 WL 193, 6 Empl.Prac.Dec.P 8796 (D.D.C.1973); *NAACP v. Brennan,* 1974 WL 229, 8 Empl.Prac.Dec.P 9634 (D.D.C.1974); *NAACP v. Donovan,* 554 F.Supp. 715, 95 Lab.Cas.P 34,307 (D.D.C.1982); *NAACP v. Donovan,* 558 F.Supp. 218 (D.D.C.1982); *NAACP v. Donovan,* 566 F.Supp. 1202, 98 Lab.Cas. P 34,411 (D.D.C.1983); *NAACP v. Donovan,* 1984 WL 3184, 102 Lab.Cas.P 34,606 (D.D.C.1984); *NAACP v. U.S. Dep't of Justice,* 612 F.Supp. 1143, 18 Fed.R.Evid.Serv. 1421 (D.D.C.1985); *NAACP v. Brock,* 619 F.Supp. 846, 103 Lab.Cas.P. 34,716 (D.D.C.1985); *NAACP v. McLaughlin,* 703 F.Supp. 1014 (D.D.C.1989); *NAACP v. U.S. Secretary of Labor,* 846 F.Supp. 91 (D.D.C.1994); *NAACP v. U.S. Secretary of Labor,* 865 F.Supp. 903 (D.D.C.1994).