THE WHITE HOUSE

WASHINGTON

December 27, 1994

MEMORANDUM FOR JENNIFER O'CONNOR

FROM: HAROLD ICKES HB

SUBJECT: Florida Sugar Manufacturers

On 23 December, Florida's Lt. Governor Buddy Mackay called to ask me to look into the Administration's position that affects the rate of pay for sugar cane workers.

Apparently the Department of Labor ("DOL") has long taken the position that sugar cane cutters, who are paid by "piecework" should be paid enough, on the average for their piecework so as to yield a reasonable "hourly wage". He claims that the "minimum hourly wage", based on piecework, averages about $5.35/hour.

Apparently there is a case pending before a federal court in which the sugar manufacturers are contesting DOL's position. According to Mr. Mackay, DOL is about to change its position and peg minimum wages to a per ton basis.

He told me that the sugar manufacturers, who he has seldom taken the side of, are willing to take their chances with the pending court case. He also informed me that the Machinist's Union has protested to DOL requesting that it not change it's position at this time.

Would you please find out what this issue is about so that I can have a more intelligent discussion with Abner Mikva, if needed. If you need additional facts, you should call Lt. Governor Mackay directly.

The growers

- H2A prog - temp for wkrs in agric
- controv
- fl sugar cane growers use Jamaicans
- now only 1 - US Sugar - 12000 → 3000 ppl
- issue 1 = whether a task rate system = same as piece rate ($/ton)
  - task rate; growers inst in 86/87
  - pay per ~~task~~ → per task + task = day long
    $30 for 10 rows
- issue 2 = applic for growers to hire includes long saying avg product expected = 8 ton/day

Litig - is task rate = piece rate + subj to DOL enf + ~~so~~ cldnt be 13 day today

+ if applic lang = productivity std

NAACP v Reich

farm labor advocates sued saying it ≠ pice rate + ≠ prod std

Growers said DOL right

2d case - state ct - K action by farm labor advs v growers

lower ct → there is prod std +
growers for $50 mill owed

on appeal to intermed ct in state

Fall '94, Farm labor advs challenged dept again

Pitchey said in Oct DOL wrong, is product std & is piece rate

but std of review too high so didn't overturn

but said if want answers & may want other ev hearing

he wanted to settle it; Thinks DOL wrong

papers due Dec 21

2 wks b4 Velazquez said pressure from growers, esp Fanjul & Cuban growers -
they play both sides

said wld have to lay off 2000 pple

Machinists - same side as growers

b/c potential layoffs

DOL staff trying to persuade lawyers to Δ mind

that pressure was leaked to growers

so growers + nachinusk ↑ pressure

DOL met w/ US ~~Grower~~ Sugar + Flosun (Fanjul cos)

we acquiesced → filed papers, pissed farm labor ads

→ continued pos of last

10 years

Dec 21 + filed papers, answered paper, shed here

confronted growers

said if you conclude X happened,
~~but~~
they might look to be concede

- now waiting for Ritchey
- prob overturned
- he wants hearing at end of January
  ~~to~~ to decide if needs ev hearing

- didn't overturn it yet

- district ct level

- cld be overturned on appeal

growers asked Ct App to direct
Ritchey to not due what
planning to appeal
rejected fast

grower prob will win

Lt Gov →

1/2

Jennifer O'Connor

For your advice

JE

# MEMORANDUM

December 2, 1994

**RE: Reversal of Department of Labor Findings -**
**Impact on Unionized American Sugar Workers**

The Department of Labor is considering reversal of a long-standing finding concerning payment of alien workers for cutting sugar cane. An action to reverse, if taken, will have a terrible impact on the Florida sugar industry and will result in painful loss of jobs to American members of the Machinists and Aerospace Workers Union.

These are the facts:

- For over thirty years, the alien workers (mostly Jamaican) who came to cut sugar cane under the government-sanctioned guest worker program were paid on a task rate basis of so much per row of cane. The rate was set row-by-row according to the relative difficulty of cutting. Workers were guaranteed a minimum hourly "adverse effect wage rate" (AEWR), which for the most recent seasons was $5.30 per hour.

- In Washington, D.C. and Florida, in different cases, lawyers for alien workers have argued that the workers should have been paid a minimum of the AEWR ($5.30) per ton, notwithstanding such was never required or contemplated by contract, law, regulation, clearance order or any action of the Department of Labor.

- In the Washington case, Federal District Judge Charles Richey ordered the Department of Labor to investigate the practices of Florida sugar growers. In a draft report (October '87) and a final report (November '93), the Department of Labor found that the growers were using a proper task rate system, that growers were not in violation of any Department of Labor regulations and that no remedy against growers was in order. Growers have relied on the Department's findings.

- Despite the findings of the Department, lawyers for alien workers have continued to press Judge Richey and the Department for a finding of wrongdoing against the sugar growers.

- The lawsuits challenging payments to alien workers are "lawyers' cases" - that is, cases where the controlling lawyers intend to collect literally millions of dollars in fees while the alien workers get a windfall of a few hundred dollars each. The alien worker lawyers in the Washington case issued a press release trumpeting: "Lawyers get $63 million!" In the Florida case, they are demanding more than $50 million.

Repudiation of the Department of Labor's prior findings would be poor administration, poor law and poor politics. It would make multimillionaires of the controlling lawyers under the guise of increasing retroactively the pay of foreign workers no longer employed in Florida. In reality, the Department's action would deal a devastating blow to the Florida sugar industry and destabilize the employment of its 2,500 unionized Florida workers, whose current annual wage averages more than $30,000.

STATE OF FLORIDA

# Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

BUDDY MACKAY
LIEUTENANT GOVERNOR

# FACSIMILE

DATE December 21, 1994

TO [illegible] Harold Ickes

TELEPHONE NUMBER

FAX NUMBER [illegible] (202) 456 - 1121

FROM [illegible]

TELEPHONE NUMBER ~~(904) 488-4711~~ (904) 288-2333

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MESSAGE Harold Ickes - 202/456-2459
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| NAACP, JEFFERSON COUNTY BRANCH, *et al.*, Plaintiffs, v. ROBERT REICH, SECRETARY OF LABOR, *et al.*, Defendants, v. UNITED STATES SUGAR CORP. and SUGAR CANE GROWERS COOPERATIVE OF AMERICA, Defendant-Intervenors. | Civil Action No. 82-2315 CRR |

FEDERAL DEFENDANTS' MEMORANDUM
IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT

I.

## INTRODUCTION

The Court's September 22, 1994 Order expresses considerable concern with the conclusions reached in the U.S. Department of Labor's ("DOL or the Department") Final Report Regarding Methods of Payment in Sugar Cane ("Final Report"), dated November 12, 1993. In its decision, the Court raised a number of specific questions which it felt were unanswered in the Final Report and which the Court felt compelled to resolve through an evidentiary proceeding. The Department, however, remains convinced that the questions the Court raised can be answered exclusively through use of the existing, and voluminous, administrative record. It is our intent, through this pleading, to address the specific questions identified by the Court, to attempt to allay the Court's concerns regarding the adequacy of DOL's efforts and, whatever the Court's final ruling, to attempt to convince the Court of the desirability of avoiding a potentially lengthy and costly trial.[1]

Before reviewing the specific issues, we wish to note our disagreement with what appears to be the Court's operating assumption in rendering its decision. It seems to be the Court's position that the H-2 regulations and the successor H-2A regulations are <u>presumed</u> to have been violated and the Department must provide evidence sufficient to <u>prove</u> that no violations occurred. This is clearly not an appropriate standard to be applied in the current litigation.

It is the plaintiffs who have brought this action and who must bear the burden of proving the alleged regulatory violation and their entitlement to the desired relief. Even ignoring, for the sake of argument, the additional constraints on review of

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[1] As noted in our prior papers, the Department believes that the receipt of new evidence, whether on paper or through testimony, is neither necessary nor appropriate under the Administrative Procedure Act. Consistent with this position, it is the Department's intention to submit no evidence and proffer no testimony in any further proceedings before this Court. We should note, however, that the other parties are not following the same approach. The initial round of depositions has begun and, apparently, will continue over the next month at locations all over the country.

agency enforcement decisions imposed by Heckler v. Chaney, 470 U.S. 821, 833 (1985), it is the plaintiffs' burden to prove, based on the administrative record, that the Department's conclusion that no violations have occurred is arbitrary, capricious or not in accordance with law.[2]

Even if there were significant countervailing evidence in the record, which, we submit, there was not, the agency's conclusion would have to be accepted unless it was clearly insupportable in the record and was unreasonable. Even if this Court were to determine that there were other actions that DOL could have taken that would have been, in the Court's view, preferable, the court may not substitute its judgment for that of DOL, nor interject itself into the area of discretion reserved for the agency:

> That some other remedial provision might be preferable is irrelevant. We have consistently held that where

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[2] For these reasons, we respectfully disagree with the thrust of footnote 11 in the Opinion, Opinion at 53, that the Department has somehow abrogated its responsibilities in addressing the issues in this case. The agency reviewed a mountain of evidence before reaching its conclusions. The fact that a significant portion of that material was supplied by the plaintiffs and the growers, and was not developed through the Departments own investigation, is, in large measure a function of the fact that the Court authorized the plaintiffs to engage in third-party discovery to obtain information to respond to our draft report. This permitted the plaintiffs, for example, to compel the testimony of witnesses which the Department has no authority to do under the H-2A program. Indeed, through use of this discovery mechanism, the growers also obtained new evidence and submitted substantial material for our consideration.

The record, we submit, was far more complete than necessary to satisfy our obligations under the APA. In any case, because of their critical role in its creation, both the plaintiffs and the intervenor-defendant growers should now be estopped to claim it was inadequate. Since the plaintiffs seek to overturn an agency decision, they must prove that the decision was reached in violation of law.

reasonable minds may differ as to which of several remedial measures should be chosen, courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 371-72 (1973). See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). See also, Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978); Doraiswamy v. Secretary of Labor, 555 F.2d 832 (D.C. Cir. 1976).

DOL is not required to resolve every disputed issue or fact in favor of the growers in order to justify a no violation finding. In fact, it would be irresponsible for the Department to seek to impose penalties against regulated employers without substantial evidence of violations.[3]

II.

PRIMARY QUESTIONS RAISED BY THIS COURT'S DECISION OF SEPTEMBER 22, 1994

The Department recognizes that this Court raised a number of

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[3] At this time, we wish to clarify the record in one area. The Court notes in footnote 3, Opinion at 8, that Counsel for the Department, at the March 23, 1994 hearing, assured the Court that the notices to growers described in the Court's September 26, 1986 Order had all been sent. While that statement was made in good faith, further investigation has established that no such notices were sent after 1986. While we can offer no wholly satisfactory explanation for why the notices were not sent, we would note that the notice referenced potential grower liability based on this Court's interpretation of 20 C.F.R. § 655.207(c). That regulation was repealed in 1987 and does not apply to any harvest seasons after 1986-1987. Additionally, the notice provided for in the Order was merely that, a notice, it did not condition future labor certifications on any agreement to offer back pay. Thus, to the extent that notice of the litigation was the Court's objective, the 1986 notifications served that purpose. Given the lengthy discovery disputes, none of the growers could seriously argue that they were not fully aware of what was going on after 1986.

issues in regard to its Final Report. We hope that this memorandum will respond adequately to those question. For the convenience of the Court, the Department has noted below the Court's main questions and a summary of its response contained in this memorandum.

1. Whether the budgeted rate per ton was the regulable piece rate?

**The budgeted rate per ton was <u>not</u> the regulable piece rate in the sugar cane industry. This conclusion is wholly supported by the well-reasoned and well-documented report of the Department's expert, Doctor Robert Emerson.**

2. Whether DOL and the Growers complied with the requirement that the applicable piece rate be increased in response to increases in the AEWR?

**Earnings data contained in the record demonstrates that the task rates were properly increased in accordance with the regulatory requirements. No substantial contradictory data has ever been identified.**

3. Whether the 8-ton/day language was the minimum productivity standard in the sugar cane industry (and how many hours constituted a typical day)?

**The 8-ton per day language in the growers' job orders did not constitute a minimum productivity standard in the sugar cane industry. While the record demonstrates that 8 hours of work were <u>offered</u> to the workers per day and that this was the basis for computation of the 3/4 guarantee under the regulations, the**

**average number of hours worked in a typical day by a sugar cane worker was approximately 6 to 7 hours per day.**

4. The nature of the "check out" system and the facts surrounding its use in this industry during the relevant seasons.

**The check out system was utilized as a method of ensuring that workers met the productivity standard set forth in the job orders, "cut enough cane to earn the AEWR". A review of the system demonstrated that a higher standard than one ton per hour appeared to be utilized in the fields and that no violation of the legal productivity standard was present.**

5. Whether minimum productivity requirements were improperly increased in violation of the Department's regulations and this Court's prior orders?

**Minimum productivity requirements were not increased in violation of the Department's regulations and this Court's prior orders. Productivity remained relatively stable over the relevant period.**

## III.

## DISCUSSION

### A.

### THE RECORD DEMONSTRATES NO VIOLATION OF THE APPLICABLE REGULATIONS.

#### 1.

#### The Wages Paid In The Sugar Cane Industry During The Relevant Period Did Not Violate Applicable Regulations.

In order to expedite these proceedings and simplify the issues before this Court, the Department will, assume arguendo, at least for the purpose of further litigation in this forum, that the wages paid by the growers during the period, whether characterized as task rates or piece rates, needed to comply with the requirements of 20 C.F.R. § 655.207(c). We submit, quite simply, that the record does not contain any significant, much less compelling, evidence that they did not. Therefore, a finding of no violation must be affirmed.

We respectfully disagree with this Court that the Department did not pursue a full and objective inquiry into the determination of whether a violation occurred. Although the Department did not accept the plaintiffs position that the piece rate in existence in the sugar cane industry was based on the growers' "budgeted price per ton", see Final Report at 10, 13-21, the Department did not end its inquiry at that point. Rather than merely relying on this analysis to support a finding of no violation, the Department went on to examine the purpose of the regulations and how it could best determine whether a regulatory violation had occurred in this unusual payment system. The Department decided that two essential factors, productivity and earnings, were crucial bench marks in assessing whether violations existed. These factors, productivity and earnings, were scrutinized industry wide to determine if productivity had been improperly increased and whether earnings had kept pace with the increase in the Adverse Effect Wage Rate ("AEWR") as required by Section 655.207(c) of the regulations and this Court's order.

The Final Report concluded:

> [N]o illegal underpayment of wages resulted. The purpose of 20 C.F.R. § 655.207(c) was to eliminate the incentive for employers to raise productivity requirements in reaction to an increased AEWR. To the extent plaintiffs can prove that the actual wages paid were based on the budgeted price per ton, a violation of 20 C.F.R. § 655.207(c) still has not been demonstrated. A violation would only occur if the evidence demonstrates that either earnings dropped or productivity requirements increased to maintain the same relative level of earnings. <u>There is, however, no evidence to support either conclusion.</u>

Final Report at 24 (emphasis added). See Final Report at 24-26.

In order to ascertain whether there has been a violation of Section 655.207(c), the Department first reviewed the available earnings data. The data analyzed by the Department demonstrate that workers' earnings have not declined as would be expected if the regulatory mandate were violated. The earnings data for the sugar cane industry demonstrates that the "average hourly earnings exceeded the AEWR by at least 19 percent in every season except 1965-1966 when it was 15 percent." Final Report at 25. Emerson Report at 45, Table 7, citing DOL Draft Report, Exhibit F. Other information on this same Table shows that "the average payment per ton of sugar cane cut increased at an annual rate of 8.71 percent, in excess of the annual average AEWR increase of 8.62 percent." <u>Id.</u> As noted by Dr. Emerson, "[t]he AEWR increased by more than 300 percent over the period, as did the average hourly earnings." Emerson Report at 44. Information concerning the intervenor, United States Sugar Corporation ("USSC"), demonstrates a similar pattern. The Final Report notes that "Table 8 on page 47 [of the Emerson Report], covering only U.S. Sugar, shows that in the period 1983-84 to 1990-91 average hourly earnings exceeded the AEWR by as much as 37 percent (1989-90) and again the percentage increase in the payment per ton exceeded the percentage increase in the AEWR." Final Report at 28. "The rate paid per ton grew rather steadily over the period, just as for the industry over the earlier time period. Moreover, the rate paid per ton grew at an average annual rate of 1.6 percent per year while the AEWR declined at a rate of 0.6 percent per year." Emerson Report at 46. Thus, earnings data demonstrate that increases in the AEWR were matched by increases in the earnings per ton of sugar cane. If the regulation had been violated, it would be expected that the earnings per ton would have decreased with a corresponding increase in productivity. The record supports no such conclusion.

It is important to reiterate the issue of burden. The Department concluded, <u>after a review of all of the available evidence</u>, that the wages paid met regulatory requirements.[4] It

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[4] The Court noted, with some concern, Opinion at 40, a statement in one of DOL's pleadings, that the data used by DOL in reaching its conclusions ". . . may not have been the best for its analysis." We wish to correct any confusion created by that observation. The data utilized in developing the agency's findings, whatever its limitations, represented <u>all extant data, information and material</u> available on those questions. The data utilized included material gathered by DOL, as well as voluminous information submitted by both the plaintiffs and the growers. Whether different or more complete data on earnings or productivity would be useful is irrelevant. To the Department's knowledge no such data exists, and the viability of the Final Report must be assessed against the data in the record. In this regard, we find the plaintiffs' assertion, referenced by the Court, Opinion at 40, that the statistics relied upon by DOL were "useless," difficult to reconcile with the extensive record in this case. The plaintiffs had every opportunity to submit additional statistics or different analyses of the statistics
(continued...)

is not enough for the plaintiffs to offer some evidence that might tend to contradict that conclusion. They must offer such compelling evidence to the contrary so as to render the agency's conclusion arbitrary. They do not even begin to meet that burden.

The Court's principal concern in this area, Opinion at 40 - 42, seems to be that the number of hours actually worked, clearly a critical element in the equation that produces average hourly earnings, has been, historically, under-reported. Even if true, this does no damage to our analysis.[5] The statistics upon which

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[4](...continued) utilized by DOL. They never did. To DOL's knowledge, there are no other useful earnings and productivity statistics. Thus, even if an evidentiary hearing is held, as contemplated by this Court's October 25, 1994 order, it is our belief that any "new" testimony would only be a duplication of what is already in the record.

[5] Whatever level of under-reporting of hours may have occurred in the 1970's (see discussions of the "Sugarman Report" in Pl. Exhibits 11.02 and 11.03), DOL did not find that under-reporting was of a level during the period at issue in this litigation to invalidate the data relied upon by the Department in reaching its conclusions. Indeed, even the Sugarman Report was characterized by the Minority on the Labor Standard subcommittee as having been been "discredited over the years and has ultimately been shelved." Pl. Exhibit 11.05, at 37.

For example, DOL Wage and Hour reached a settlement with USSC regarding under-reporting in the 1986-1987 seasons, Pl. Exhibit 11.06, Appendix 10, at 94, which represented an under-reporting of 28,377 hours against the 4,846,529 hours reported, less than 3 minutes per day for the 3, 435 cutters involved. If those hours are added to the figures provided by the growers, Grower Exhibit 31, the average hours worked per day only changed by approximately .04 each year from 6.71 to 6.75 hours in 1986-1987 and from 6.29 to 6.33 hours in 1987-1988, still well within the range DOL based its conclusions on. If the additional hours are added without adding the wage settlement to the gross wages, the average hourly earnings only decreases from $6.21 an hour in 1986-1987 and from $6.42 an hour to $6.38 an hour in 1987-1988.
(continued...)

DOL relies show average hourly earnings holding steadily at around 20% above the AEWR. The relevance of this number, however, lies not in the precise amount of difference between the two figures but rather in their relationship over time. It is the uniform relationship which makes our point. Systematic and substantial under-reporting, if it could be proven, might well show that average earnings were not 20% above the AEWR but rather 18% or 15%. The <u>level</u> of earnings, however, is not at issue in the case. A 20 C.F.R. § 655.207(c) violation would flow not from the wages themselves but rather from the <u>ratio</u> of earnings to the AEWR. If wages moved in tandem with the AEWR, then 20 C.F.R. § 655.207(c) has not been violated and it does not matter whether the wages started out 20% above the AEWR or 2% above it.

This question also suggests another issue again related to burden of proof. The plaintiffs are seeking to force DOL to make a finding that the growers were guilty of violating agency regulations and, as a consequence, should be required to make back wage payments in the tens of millions of dollars. Fundamental fairness, in addition to the APA, would necessitate that such a finding be based on substantial evidence. This record contains no such evidence.

The Department does not condone under-reporting. It is a violation of the Fair Labor Standards Act and applicable federal

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[5](...continued)
These minor changes would not materially affect Doctor Emerson's tables and the conclusions drawn from them. Emerson Supplemental Report at 47.

regulations. When violations are found, they are acted upon, as was the case with Okeelanta and United States Sugar Corp. The fact that there may have been some violations that have not been found, however, does not provide a basis for finding that the conclusions based on this record are arbitrary.

2.

<u>The Record Demonstrates That Actual Productivity Did Not Increase During The Relevant Period.</u>

An analysis similar to that set forth above applies to the question of whether the growers improperly raised their productivity standards in violation of 20 C.F.R. §§ 655.207(c) and 655.102(b)(9).[6] There is no evidence that productivity requirements were ever increased. Worker productivity in the sugar cane industry for the period 1964-65 through 1982-83 harvest season was relatively stable ranging from 1.4460 tons per hour in 1964-64 to 1.4396 in 1981-82 with high productivity in the 1967-68 harvest season at 1.5160 tons and in the 1976-1977 harvest season at 1.5120 tons. Final Report at 28, Emerson Report at 45. Likewise, individual data for USSC demonstrates a similar situation. As noted by the Department, "in the period from 1983-84 to 1990-91, productivity was as high as 1.64 tons per hours but was trending lower and was 1.41 in the 1990-91 season." Final Report at 28, citing Table 8 in Emerson Report at 47. If, as plaintiffs posit, productivity requirements have been

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[6] We deal with this issue, at this point, without reference to the applicability of the alleged 8-ton productivity standard. That question will be discussed separately below.

raised over time, common sense suggests that average productivity would, of necessity, go up. No evidence of such increased productivity can be found in the record. Faced with the absence of evidence that productivity requirements have been raised or that earnings have not moved in concert with the AEWR, the Department's decision that no violation of the regulations has been demonstrated can, by no stretch of the imagination, be viewed as arbitrary.

The Court seems to conclude, Opinion at 41 - 42, that productivity minimums can go up without impacting average worker productivity. Unless an equivalent number of high productivity workers are also being discharged, a fact no one posits, we do not see how this can be the case. We suggest that the Court may be exaggerating the Department's authority over productivity requirements. For example, the Court notes that, under our analysis, "it would be entirely possible for productivity to remain at unlawfully high levels--" Opinion at 42. This statement is correct in part, but significantly incomplete.

Our analysis does find that there was stable productivity. Whether this rate, stable for at least the 14 years relevant here, and thus is in compliance with both 20 C.F.R. §§ 655.207(c) and 655.102(b)(9), is "unlawfully high" under some other theory, presumably the 8-ton per day formulation, is another matter. The legal issue, under the regulations which generated this litigation, is not the actual productivity level but rather whether that level has been illegally increased. Nothing in this record is sufficient to <u>require</u> the finding of a violation in this regard. Prior to 1987, the Department did not even directly regulate productivity (rather, piece rates were adjusted) and after 1987 the regulation only requires that productivity remain at 1977 levels.[7] Deferring, for now, the 8-ton issue, <u>there is no significant evidence in the record that the level of productivity demanded of sugar cane workers ever changed between 1977 and 1991.</u>[8] In the face of this, essentially undisputed, fact, suggesting that the Department <u>must</u> find that productivity has been illegally increased is clearly without any credible legal or factual basis.

The Department's conclusions with respect to the alleged productivity increases are wholly consistent with the existence and operation of the "checkout" system. Neither the Department,

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[7] Although not relevant to this case, 20 C.F.R. § 655.102(b)(9) also provides that employers who entered the program after 1977 may utilize the productivity standard that was normal in the area at the time they first applied for foreign workers.

[8] This is one of the two areas that the question of the typical work day, referenced by the Court, Opinion at 53, may be relevant to the Department's findings. The vast majority of the evidence in the record, see, <u>e.g.</u>, Plaintiffs' Exhibits, 1.02, 8.01, 8.04, 10.10 and Growers Exhibit 31, demonstrates that the average work day, between 1977 and 1991, varied from just under 6 to somewhat under 7 hours per day with no discernible pattern. This fact provides further support for the conclusion that the growers made no change in the nature of their productivity requirements during this time.

Furthermore, the length of the work day also provides a vehicle for understanding the relationship between the productivity information and the job order. If the <u>average work day</u> is approximately 6.1 hours and the <u>average hourly</u> productivity is approximately 1.3 then the <u>average daily</u> productivity is 8 tons, precisely the result described in the job order.

nor, we expect, the growers would deny that minimum productivity standards were enforced. The job orders required workers to cut enough cane to meet the AEWR. The "checkout" system, as far as the record demonstrates, was administered to achieve that result. The stability of average productivity over time suggests that it was utilized in a generally consistent manner. Except as it may relate to the 8-ton issue, we do not see the checkout cards as having any impact on resolution of this case.

3.

Although Other Methods Of Payment
Could Have Been Implemented, The Growers
Were Not Obligated To Do So Under The Regulations.

This Court expressed its concern as to whether the budgeted rate per ton was the regulable piece rate or whether some other alternative method of payment, i.e. the "row with given conditions," as espoused by Doctor Emerson, was the regulable piece rate. In our view, under the analysis set forth above, it is not actually necessary to closely examine the "alternative" piece rate systems discussed in the Court's opinion.[9] If the wage rates actually utilized complied with the regulations, the existence of other possible payment methods which could have been utilized is irrelevant where the data showed that the wage rates which were paid, whether called piece rates or task rates, did move upward in tandem with the AEWR.

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[9] This case has never been about the authority or desirability of the Department requiring growers to change their payment system. The disappearance of the task rate in the Florida sugar cane industry has, in any case, mooted that issue.

While other methods of payment could have been utilized during the time in question, the record demonstrates that they were not. Merely because a system can be hypothesized which would look more like a traditional piece rate is beside the point and does not lend support to the plaintiffs' theory that the growers violated the regulatory prohibitions. Because of the Court's concerns, however, we would offer some observations concerning both of the alternative methods identified by the Court.

The issue of the "budgeted rate per ton" was the central question in this case until the 8-ton per day productivity standard issue came to the fore, three years after the filing of the Motion for Further Relief. The bulk of the statistical analyses, by all of the various experts, were directed precisely to the question of the role of the budgeted rate in the determination of task rates. The principal thrust of plaintiffs' submissions was an effort to buttress the allegation that the daily variations in task rates were meaningless and that efforts by the employer to "meet the budget" drove the setting of task rates. If this were true, consideration of the budgeted rates as the "piece rate" might be worth exploration.

To the contrary, however, the major finding of the Department's expert, Dr. Robert Emerson, was that the budgeted rate <u>did not</u> drive the task rates and that other factors, related to the relative difficulty of performing the particular tasks, played a significant role in setting daily task rates. In its lengthy and thorough review of the Department's Report, this Court indicated no disagreement with any of Dr. Emerson's conclusions. The only references in the Opinion to his Doctor Emerson's report are positive.

In the report, entitled An Analysis of the Task Rate System for the Harvest of Florida Sugar Cane ("Emerson Report"), dated July 1993, Dr. Emerson specifically determined that a piece rate based on a budgeted rate per ton was not supported by the record. He found:

> The primary implication of these results is that the pricing decisions were systematic determinations on the basis of factors influencing the degree of effort required for the harvest. <u>While estimates of tons per acre were highly influential in the row price determination, other mitigating factors result in modification of the row price from what it might have been solely on the basis of tons per acre.</u>

Emerson Report at 42 (emphasis added). Dr. Emerson noted:

> In summary, many of the factors suggested in the original DOL report do have merit in explaining the row price for harvesting sugar cane. In addition, the estimated tons per acre which was the central focus of the Marshall and Piascencia analysis, clearly had a dominant influence on the row price. The multiple regressions presented in the Coopers & Lybrand report submitted with the Growers' response, while an appropriate statistical methodology, focus on an inappropriate variable to be explained, cost per ton. <u>The system used was the pricing of the row of cane, not a ton of cane.</u> The system was designed to generate different costs per ton for fields with the same tons per acre, but with differing degrees of difficulty of harvest. Consequently, the relationship between estimated tons per acre and cost per ton should be relatively weak, and it was.

Emerson Report, Executive Summary at 2, 3 (emphasis added).

In rejecting the plaintiffs' temporal pricing theory, the Department noted:

> <u>The plaintiffs' assertion that variations in pricing were temporal adjustments to achieve the budgeted rate per ton and not adjustments for varying conditions is not supported by the available evidence.</u> The documents do show that a cost per ton was established at the beginning of the season via the use of row pricing cards whose foundation was cost per ton. However, the information does not support the plaintiffs' hypothesis that an adjustment process, monitored and adjusted as the season progressed, and geared exclusively to maintenance of a standard, uniform tonnage price, took place. Statistical analysis of task rate variations over the course of a season do not support plaintiffs' hypothesis.

Final Report at 10, 11 (emphasis added). This was supported by Dr. Emerson in his Supplemental Report where he stated that "[n]o statistical support is found for the temporal pricing hypothesis." Emerson Supplemental Report at 5, Table S1 at 6.

Both the Department and Dr. Emerson thoroughly reviewed the facts surrounding the budgeted rate per ton and found that the "task rate" was not a disguised piece rate based on the budgeted rate per ton. As such, it is not a useful concept in seeking to resolve the question of whether DOL regulations have been violated.

The Emerson Report also described a second possible method of payment which could have been utilized in the sugar cane industry. The Report described this payment system as a "row under given conditions." Doctor Emerson stated:

> The primary implication of these results is that the pricing decisions were systematic determinations on the basis of factors influencing the degree of effort required for the harvest. . .
>
> While it was clearly not a strictly tonnage (or output) based system, it was most definitely an incentive system. The standard row of cane was clearly the unit of work to be done (the piece), and the worker was

> given a fixed payment for that work. Different rows of cane with different conditions--variety, age, maturity, etc.--were priced differently. However, the results most clearly demonstrate that two rows of cane with the same characteristics are likely to have the same row price. This follows from the result that the regressions reveal a systematic explanation of the row price, not a spurious one. The price can then be considered the row with given conditions: just as an orange harvest crew is paid a different piece rate for groves requiring more or less effort to harvest a bag of oranges, a cane cutter was paid different rates (row prices) for cut rows that require more or less effort.

Emerson Report at 42, 43. Under this system, a grower would set a base price per row under some normative condition and provide for appropriate adjustments or "bonus" to account for the differing degrees of difficulty actually encountered in the field. Such a system would be premised on the conclusion that rows of similar length and sharing the same characteristics, e.g., cane type, maturity, weather on the harvest day, would be priced similarly. That would be the "piece rate" for all rows sharing those factors. While a payment system along those lines, with some modifications, perhaps could have been created, nevertheless, such a system demonstrably did not exist during the relevant period and the growers were under no legal obligation to utilize that, or any other specific payment system.

Furthermore, it would appear that the efforts needed to create such a system retroactively for thousands of rows cut as much as eight years ago would be impossible with the available data. As noted by Doctor Emerson, such a system would be based on the individual characteristics of thousands of rows of sugar cane in thousands of fields. While that information is present in sufficient form to determine how those variables affected the payment system in a gross manner, it would be impossible to recreate that system now for a payment system based on individual rows with highly specific characteristics.

In any case, such an exercise is unnecessary. The only purpose in pursuing that approach, would be to create a "piece rate" that could be adjusted upward in the manner prescribed by 20 C.F.R. § 655.207(c). Yet, as noted above, the evidence demonstrates that the wage rates that were paid, whether called piece rates or task rates, <u>did move upward in tandem with the AEWR</u>.

B.

THE MINIMUM PRODUCTIVITY STANDARD
IN THE SUGAR CANE INDUSTRY WAS NOT ONE TON PER HOUR.

1.

<u>The 8-ton Language In The Job Order Does Not Constitute A Productivity Standard.</u>

The Opinion correctly recognizes that the proper interpretation of the 8-ton per day language in the sugar cane job orders is critical to the ultimate disposition of this case. Plaintiffs' claim that the disputed language creates a one-ton per hour minimum productivity requirement is the key both to their claim that the growers raised productivity requirements in violation of 20 C.F.R. § 655.102(b)(9) and that the proper piece rate is the AEWR for every ton of cane cut. We do not wish to burden the Court with a mere reiteration of the arguments set forth in our earlier pleadings, although that will be required to some degree in order to address some of the questions raised by the Court in its opinion. Initially, however, we would suggest a different construct which may assist the Court in evaluating this issue.

Lost, to a large extent, in the back and forth of who said what when about the 8-ton language is the fact that neither of the proposed interpretations of the provision is <u>required</u> by either statute or regulation. In other words, nothing in the regulations, either pre-1987 or post-1987, would have prohibited the growers from having written the 8-ton provision to say, explicitly and unambiguously, that the reference to 8-tons per day is only an informational item and does not provide a minimum productivity standard for the purpose of job retention. Consistent with this fact, plaintiffs' arguments about the proper interpretation of the provision are keyed exclusively to how the language was characterized by various grower and DOL officials.

These observations are critical when juxtaposed with the issue actually presented by this case; to wit, has the Department of Labor improperly failed to enforce its H-2/H-2A regulations against the sugar cane growers. Whatever plaintiffs' ability to litigate the proper interpretation of federal regulations, we see no authority for the plaintiffs to force DOL to impose upon the growers one particular interpretation of demonstrably ambiguous job order language where that interpretation is not, in any sense, required by law or regulation. The legal consequences of language which has been negotiated between growers and DOL is a matter _exclusively_ for resolution between those parties unless the interpretation agreed to is contrary to law.[10]

The fact that the 8-ton language is, from plaintiffs' perspective, at best ambiguous, should be beyond dispute. We have argued previously about why the 8-ton language, on its face, is inconsistent with the interpretation posited by plaintiffs. In addition to the obvious fact that the language which talks about daily "average" productivity over the course of a season is inconsistent with a hourly productivity minimum, the job order itself contains an explicit productivity requirement, _i.e._, the worker must cut enough cane to meet the AEWR.[11] It is illogical to contend that a job order would contain two productivity requirements and that the general requirement should control.

Moreover, it is undisputed that the cane was not weighed in the field and was not specifically attributable to one particular

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[10] We take no position as to the merits of any contract claims that may lie against the growers by workers who accepted employment under these job orders. DOL regulations make clear, however, that DOL is _not_ a party to any contract between the worker and the employer. 20 C.F.R. § 653.501.

[11] In addition, the 8-ton language, _on its face_, references _daily_ not hourly production. Plaintiffs' argument that this sentence _requires_ a one-ton per hour productivity standard demands importation of language elsewhere in the job order which talks about a normal work day of 8 hours. This incorporation, however, cannot be so easily accomplished. Other language in the job specifies the _average_ work day, computed based on the previous years' statistics, as routinely being less than 7 hours per day. See _i.e._, Pl. Exhibits 1.02 and 1.03.

We do not propose to defend the sugar cane job orders as testaments to clarity. They could have been clearer. That fact, however, does not automatically translate into a violation of the regulation and certainly not a violation so unambiguous that it would be arbitrary for DOL not to sanction it.

worker. Indeed, when cutting cane, the cane cut by one worker was normally commingled with the sugar cane cut by another worker in an adjoining row, and, therefore, was not separated out even at the time of the initial cutting.

Much has been written about the appropriate interpretation of this 8-ton language both by the growers, officials of the Department and the plaintiff farmworkers. Whatever spin one places on these various statements, the defendants are hardly alone in apparent inconsistent characterizations of this language.

Even the plaintiffs are relatively recent converts to the notion that the job order contains a one-ton per hour productivity standard. Although the 8-ton language has been in the growers' job orders since 1979, the plaintiffs, in their initial pleadings filed in the sugar cane phase of this litigation characterized the applicable productivity standard as follows:

> Like apple growers and other piece-rate employers, the sugar cane companies enforce a minimum productivity standard as part of their piece-rate pay system. A worker is fired if he cannot meet the minimum required production by the end of the eight-day "training" period. _See_ U.S. Sugar Corp. Clearance Order 1985-86, Pl. Ex. 8, p. 1. _The sugar companies do not disclose to the worker (or to anyone else) the actual productivity standard -- that is, the number of tons of cane a worker is expected to cut a day._ The standard apparently is based on internal estimates as to the number of tons of sugar cane in a given field. The companies' job offers state only that:
>
> > "[After the eight-day training period], the workers will be paid on a task basis and will be _required to cut fast enough so that his average task-rate earnings will be at least_

equal to the adverse effect wage rate."
(Citations omitted.)

Plaintiffs' Memorandum in Support of Their Motion for Further Relief, dated July 14, 1986, at 8, 9 (emphasis added). See also, Plaintiffs' Reply Memorandum in Support of Their Motion for Further Relief, dated August 8, 1986, at p. 4, citing testimony of James Terrill, Vice President, U.S. Sugar Corp., p. 71, Pl. Ex. 15. It was not until several years later, after the filing of the Bygrave litigation, that the plaintiffs sought to raise the contention that the 8-ton language constituted the appropriate productivity standard in the sugar cane industry.

The plaintiffs' specific claim that the provision create a one-ton per hour firing standard is specifically belied by the plaintiffs' own past positions on this issue. In 1991, the Department litigated, administratively, the question as to whether the 8-ton language could be deleted from the clearance orders of U.S. Sugar Corporation and the Florida Fruit and Vegetable Association ("FFVA").[12] The Department contended that the language was a disclosure item which constituted a material term and condition of the job order and which therefore could not be deleted. In that litigation the Department specifically did not argue that the 8-ton language constituted a minimum

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[12] The opinion ultimately issued by Administrative Law Judge Thomas which found that the 8-ton language was a productivity standard has been vacated by the Eleventh Circuit Court of Appeals. Florida Fruit and Vegetable Assoc. v. DOL, 91-TLC-0004, dismissed as moot, sub nom., United States Sugar Corp. v. Reich, C.A. No. 92-213 (S.D. Fla. Sept. 29, 1993), aff'd, Case No. 93-5181, per curiam (11th Cir. November 4, 1994).

productivity standard.

Prior to trial, the FFVA offered to keep the language in its job order if it was permitted to modify the language. The Department agreed that FFVA could include in their order the following language:

> A worker would be expected to cut an average of eight (8) tons of harvest cane per day throughout the season; <u>however, this is not a minimum productivity standard as a condition of job retention</u> (emphasis added).

FFVA job order, 1991-1992 season. This modification of the job order was agreed to by the same farmworker advocates who are now vigorously contending that the 8-ton provision is, and can only be, a minimum job retention criteria.

In resolving this question, it is clear that the "facts", such as they are, are undisputed: The language has been in the order since 1979. It has been called a "productivity requirement" by DOL officials. Other DOL officials, including the author of the provision, have said that it was included in the job orders for informational purposes to provide prospective employees some general idea of the difficulty of the work and was not intended to create a one-ton per hour firing standard. The growers <u>never</u>, either before or after 1979, enforced a one-ton per hour standard. Prior to the filing of the <u>Bygrave</u> litigation in 1989, <u>no one</u> had ever contended that the 8-ton language was a factor in computing wage rates, <u>i.e.</u>, a piece rate of the AEWR per ton. It is from these facts, and a textual analysis of the language, that the Court must make its decision.

While we understand that the Court finds our reliance on the

Alewine affidavit "problematic", Opinion p. 36, we disagree with the Court that we "primarily" rely on it. As suggested above, the discussion in the Alewine affidavit is consistent with a textual analysis of the language and the undisputed fact that the growers never enforced a one ton per hour productivity standard.

Moreover, irrespective of the Court's skepticism concerning Mr. Alewine's credibility, the affidavit does accurately set forth the Department's position on this issue. Ultimately this Court will have to resolve the dispute. Furthermore, we continue to believe that disposition of this issue can and should be based on the existing administrative record. We can see no useful purpose to be served by an evidentiary hearing on this point.[13]

2.

A One Ton Per Hour Productivity Standard
Was Not Utilized In The Sugar Cane Industry In The Fields.

As discussed above and as noted in our prior pleadings and in the Final Report, the Department concluded that the productivity rate required of the workers was not improperly increased in violation of Sections 655.207(c) and 655.102(b)(9) of the regulations. The productivity rate evidenced by the data in the record demonstrated that the productivity rate remained relatively constant over the relevant period, notwithstanding the

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[13] Without specifically rearguing all of the Heckler v. Chaney issues concerning proper review of agency enforcement actions, this confusion of interpretations must have some relevance to those considerations. It simply cannot be reasonably argued that the interpretation of the 8-ton language is so clear that the Court can force that interpretation upon DOL and require the agency to impose a sanction as a result.

fact that the AEWR and earnings increased. Moreover, there was little or no data in the record which supported the position that a one ton per hour productivity standard was ever in existence in the field.

A review of the checkout system utilized by the growers does not support the proposition that a one ton per hour productivity standard was being utilized in the field.[14] Since the early 1970s there has been a statement in the job orders which explicitly set forth a productivity standard which a worker was expected to meet. It stated that:

> Sugar cane harvest hands will be paid the current USDL adverse effect rate per hour minimum for the first (8) working days. This will be considered a training and work period. Thereafter, the worker will be paid on a task basis and will be required to cut fast enough so that his average piece-rate earnings will at least equal the adverse effect wage rate. Workers will be advised orally of the price they will be paid for cutting each assigned row or portion of row. . . .
>
> The work of slower cutters will be measured during three different trial work days subsequent to the 8-day training period to determine whether the worker is cutting fast enough to comply with the minimum production standard required of all workers. On each of the three (3) trial days the worker is measured, the worker will be sent home if he does not meet the required minimum production standard. Upon failure to meet the minimum required production standard on the third trial day, the worker will be terminated.

Pl. Exhibit 1.02, USSC 1982-1983 job order.

Under this system, a worker would be expected to cut enough

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[14] In addition to utilizing the information contained in the job orders, the information in this discussion was gathered from depositions of the grower employees and knowledge of DOL employees. See depositions of Walter Parker at 16 (April 1992); Walter Parker, at 171-172 (November 1990); James Terrill at 133-134; Pedro Alvarez at 21-22 (May 1988).

cane to earn the AEWR per hour. After a period of training, a worker could be "checked out" and disciplined if he did not meet that level of productivity. Workers who did not cut at that level would be subject to dismissal.

The job orders provided that the first eight work days of each season were a work-training period and no one would be dismissed for lack of productivity during that period. During those eight days, if a worker failed to cut enough cane to earn the AEWR, makeup pay would be added to bring the worker's earnings to the AEWR.[15] Also, if a worker felt he could exceed the AEWR at the task rate, he could declare himself no longer in the hourly pay mode of the training period and subject himself to checkout. At the end of the eight days of training, workers who cut too slowly could be checked out and sent home from the field for that day. The orders stated that being checked out three times would subject a worker to dismissal.

In the fields, the checkout system functioned in the following fashion. Before work commenced each day, each crew was informed of the price established for the field they were harvesting. That field price is translated into the required row feet per hour which a worker would need to cut to earn the AEWR in that particular field. Workers who appear to be cutting too slowly would have their work checked by tape measure and if they

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[15] If a worker did not earn enough to meet the AEWR, his pay would be supplemented in order that he would earn the minimum necessary per hour, the AEWR. See 20 C.F.R. § 655.102(b)(9)(ii)(A).

have cut too few feet, the workers are checked out and sent back to the barracks for the day.

Although the Department does not agree that task rate payment system was a tonnage based system, the plaintiffs argue that the checkout card, although using footage as a measurement, can be utilized to determine the number of tons in use under the system. The checkout card lists the field being cut but does not list the tons cut that day. However, the "tons paid on" and the actual tonnage in the field as weighed at the mill is on the completed field report for that field. By knowing the length of the row and the task and the number of rows in the field, you can convert the raw feet a worker had to cut before "checkout" into a tonnage figure. See analysis of check-out cards at Pl. Exhibits 1.17, 2.13 and 2.14; check-out cards at Pl. Exhibits 1.16, 2.15, 2.23, 3.15, 4.27 and 4.48.

A review of this system and the cards submitted by the plaintiffs demonstrate that a one ton per hour productivity standard was not utilized in the sugar cane industry in the fields. In fact, the rate appears to be higher than one ton per hour. Id.

3.

## If The 8-Ton Language In The Job Order Constitutes A Valid Productivity Standard, The Matter Should Be Remanded To The Department For Further Proceedings.

Even assuming the 8-ton language could be interpreted as a productivity standard under the regulations, a violation of Section 655.207(c) would not be shown. 20 C.F.R. § 655.207(c) provides that "in any year in which the applicable adverse effect rate is increased, employers shall adjust their piece rates upward to avoid requiring a worker to increase his or her productivity over the previous year in order to earn an amount equal to what the worker would earn if the worker were paid at the adverse effect wage rate." Under this Court's prior opinions, a violation can only be premised on a determination that piece rates have not been adjusted in tandem with the AEWR. As indicated above, such a determination is not warranted.

On the other hand, other regulations, including 20 C.F.R. §655.102(b)(9), required that productivity standards utilized for job retention be specified in the job order. If the 8-ton language does constitute a productivity standard, and a different, and arguably higher standard, was actually utilized, then this regulation, as well as the general obligation that all material terms of employment be specified in the job order and be true and correct, has arguably been violated. See i.e., 20 C.F.R. §§ 655.106(a)(iii) and 655.108.

Under the applicable legal authority, a sanction against the grower, however, does not automatically follow. Both the statute, 8 U.S.C. § 1188(b)(2), and applicable regulations, 20 C.F.R. § 655.110(a), require that violations be investigated and provide for possible sanctions depending on the substantiality of the violation. See 20 C.F.R. § 655.110(g) for a definition of substantial violation. The subject of the proposed sanction is entitled by statute and regulation to an administrative hearing before the sanction is imposed. See 20 C.F.R. § 655.112. Should the Court conclude that the Department is required to apply plaintiffs' interpretation of the 8-ton language, a remand to the DOL to follow the process set out in the regulations would be the correct course.[16]

IV.

CONCLUSION

In accordance with the foregoing discussion, the Department again renews its Motion for Summary Judgment and requests that judgment be granted in its favor.

Respectfully submitted,

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[16] This suggestion should not be construed as a waiver of any arguments that may be available to the Department that a remand under the unique circumstances of this case could be viewed as a final appealable order. We would also note that any action under the sanction provisions of IRCA may be time barred. See 20 C.F.R. § 655.110(a) and 8 U.S.C. § 1188(b)(2).