

FJF LITIGATES WAGE CASE TO VICTORY AGAINST DEPARTMENT OF LABOR

By Bruce Goldstein

Thousands of seasonal farmworkers in the United States who have been underpaid during parts of the past two years due to illegal conduct by the U.S. Department of Labor should not have to suffer the same fate in 2003, thanks to a federal court decision issued on September 10, 2002.

In *United Farm workers of America, AFL-CIO, and Farm Labor Organizing Committee, AFL-CIO v. Elaine Chao, Secretary of Labor*, a federal court ruled in favor of two farm labor unions and against Secretary of Labor and the U.S. Department of Labor in an important case regarding migrant farmworkers' wage rates under the H-2A temporary foreign agricultural worker program.

On September 10, 2002, Judge Gladys Kessler of the U.S. District Court for the District of Columbia ruled that the Department of Labor had violated its own regulations and the federal Administrative Procedure Act by adopting a policy that was inconsistent with its own regulations. Under the new policy, the DOL granted itself the discretion to delay issuing annual wage rates applicable to employers who hire guestworkers under the H-2A program. Implementing that policy led to thousands of farmworkers – foreign and domestic workers at those H-2A program employers—earning improperly low wage rates. The court held that the agency must follow its own regulations until it gives the public an opportunity to comment on proposed changes and then issues a reasoned explanation for any change in policy.

The DOL initially appealed the decision but then dismissed its appeal in December 2002, and the court's decision is now final. DOL also paid the

plaintiffs attorneys' fees for the work the Farmworker Justice Fund, Inc. and its cocounsel, James & Hoffman, P.C. David Dean of James & Hoffman served as lead counsel. FJF deeply appreciates the pro bono services the firm provided. The case is reported at 227 F. Supp. 2d 102 (D.D.C. 2002).

The case involves the "adverse effect wage rate" (AEWR or "ay-were") under the H-2A program. A long-standing regulation requires the Department of Labor to annually issue the AEWR. For the prior ten years, the AEWR had generally been issued in February. The H-2A wage rates for one year are determined by a survey of the wages paid to farmworkers during the prior year. The survey is conducted by the US Department of Agriculture and is completed during November of that prior year. The wage rates are issued by DOL for each state. Although H-2A program employers may use piece rate wage systems, the workers must earn at least the AEWR on an hourly basis.

In 2001, the DOL refused to publish the results of the USDA survey until the lawsuit was filed and the court scheduled a hearing on the plaintiffs' motion for a preliminary injunction in August 2001. DOL issued the wage rate just before the hearing was held. In 2002, the DOL again refused to publish the results of the wage survey until the plaintiffs went back into court, but then issued the wage rate before a court hearing could be held in May 2002.

The AEWR, under DOL's rules, does not take effect until it is published in the Federal Register and is not retroactive. Consequently, until August in 2001 and until May in

2002, many workers were underpaid. DOL allowed H-2A employers to pay the previous year's wage rates (which, in most cases, were lower). DOL contended that it had the authority to delay issuing the wage rates until December 31 of the year if it so chose, and that it was responding to Congressional requests in making that choice. However, DOL, besides lacking such authority, also ignored the requests to issue the wage rates on time by several members of Congress.

DOL now approves about 45,000 jobs under the H-2A program annually, a significant increase from a few years ago. Although, small in comparison to the national farm labor force, the H-2A program is used heavily on the East in tobacco, especially in North Carolina. It is also popular among growers in eastern apple orchards and nurseries, as well as for the harvesting of Christmas trees in several states. A variety of other locations across the country also use H-2A workers. In Kentucky, home to Senator McConnell, the husband of Secretary of Labor Chao, there were 2,663 H-2A workers approved for the year 2001 by the Department of Labor, mostly in tobacco. Some of the states in which the hourly wage rates are affected include the following:

	2000	2001	2002
New England & New York	\$7.68	\$8.17	7.94
Georgia & South Carolina	6.72	6.83	7.28
Kentucky	6.39	6.60	7.07
N. Carolina	6.98	7.06	7.53

For more information on the H-2A program and the wage rates, visit our website at www.fwjjustice.org and click on "legislative updates" and then click on "guestworker legislation." ♦