



**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

DATE PREPARED: August 21, 1984

RE: TRI-COUNTY GROWERS INCORPORATED
84-TLC-9

DECISION AND ORDER

STATEMENT OF THE CASE

BY LETTER DATED AUGUST 2, 1984, THE EMPLOYER WAS NOTIFIED BY THE REGIONAL ADMINISTRATOR THAT HIS APPLICATION FOR TEMPORARY LABOR CERTIFICATION FOR FIVE HUNDRED AND SEVENTY-FIVE HARVEST WORKERS AND TWO COOKS WAS DENIED.

THE SPECIFIC REASONS GIVEN FOR THE DENIAL OF THE APPLICATION WERE AS FOLLOWS:

(1) INFORMATION WAS NOT PROVIDED TO PROVE EXEMPTION FROM THE REGISTRATION PROVISIONS OF MSPA, BY SHOWING THE EMPLOYER WAS A NON-PROFIT OR A COOPERATIVE ASSOCIATION, . MEETING DEFINITION OF "AGRICULTURAL ASSOCIATION". (29 C.F.R. 508.20).

(2) THE EMPLOYER'S APPLICATION (ATTACHMENT 5) STATED THAT "CREW LEADERS WOULD BE OFFERED OVERRIDES BASED ON PERCENTAGE OR PIECE RATE AS NEGOTIATED". IT WAS REQUESTED THAT THE SPECIFIC WAGE RATE OR THE RANGE WITHIN WHICH THEY WERE PREPARED TO NEGOTIATE SHOULD BE STATED.

(3) ADDITIONAL INFORMATION WHICH WAS REQUESTED BY THE RA REGARDING PAY RATES, EARNINGS AND HOURS WORKED IN 1983 DETERMINE WHETHER THE PIECE RATE OFFER FOR 1984 COMPLIED WITH 20CFR655.207(c) WAS NOT SUBMITTED.,

(4) THE REGIONAL ADMINISTRATOR INSISTED THAT THE EMPLOYER PAY BACKWAGES FOR THE DIFFERENCE BETWEEN THE PIECE RATE ACTUALLY PAID AND THE 1982 AEWV OF \$4.24 PER HOUR AND THE DIFFERENCE

BETWEEN THE PIECE RATE ACTUALLY PAID AND THE \$.48 PER BOX WHICH SHOULD HAVE BEEN PAID DURING THE 1982 APPLE HARVEST SEASON.

(5) NO EVIDENCE HAD BEEN SUBMITTED TO REBUT THE REGIONAL ADMINISTRATORS' FINDING THAT TRI-COUNTY WAS NOT THE EXCLUSIVE EMPLOYER. THEREFORE, REFUSAL TO FILE AS JOINT EMPLOYER OR AGENT FOR THE GROWER MEMBERS IN 1984 PRECLUDED GRANTING OF A LABOR CERTIFICATION IN 1984.

A REQUEST FOR ADMINISTRATIVE-JUDICIAL REVIEW WAS FILED ON AUGUST 7, 1984, AT THE SAME TIME THAT THE EMPLOYER REQUESTED AN EXTENSION TO STUDY THE DEFICIENCIES CITED IN THE LETTER OF AUGUST 2, 1984.

THE RA EXTENDED TIME TO SUBMIT ADDITIONAL INFORMATION TO AUGUST 14th. HOWEVER, AS THE REQUEST FOR THE ADMINISTRATIVE-JUDICIAL REVIEW WAS FILED ON AUGUST 7th, JURISDICTION PASSED TO THE OFFICE OF THE ADMINISTRATIVE LAW JUDGES, AND THE REGIONAL ADMINISTRATOR FORWARDED THE CASE FILE WHICH WAS RECEIVED IN THIS OFFICE ON AUGUST 13, 1984.

THE REQUEST FOR ADMINISTRATIVE-JUDICIAL REVIEW SENT BY TELEGRAM ON AUGUST 7, 1984 WAS RECEIVED ON AUGUST 10th, BUT IT INDICATED THAT THE GROUNDS FOR OBJECTION "WOULD FOLLOW". THESE WERE NOT RECEIVED UNTIL THE CLOSE OF BUSINESS ON AUGUST 17, 1984, HAVING BEEN SENT BY ORDINARY MAIL ON AUGUST 14, 1984.

BY SUBMITTING THE ARGUMENTS SEPARATELY, AND NOT WITH THE REQUEST FOR REVIEW ON AUGUST 7, 1984, TRI-COUNTY FAILED TO COMPLY WITH 20 C.F.R. 655.204(d)(2). IN VIEW OF THE REQUIREMENT OF 20 C.F.R. 655.212(b) THAT I ISSUE A DECISION WITHIN 5 WORKING DAYS AFTER RECEIPT OF THE CASE FILE, THE SUBMISSION OF THE ARGUMENTS ON AUGUST 14, 1983 BY REGULAR MAIL WAS CLEARLY UNTIMELY. FURTHERMORE, THE DELAY MUST BE VIEWED AS DELIBERATE IN VIEW OF THE PREVIOUS EXPERIENCE BEFORE JUDGE EARMAN IN AUGUST 1983, AND CANNOT BE EXCUSED.

ALTHOUGH I FIND THAT THE APPLICATION FOR JUDICIAL REVIEW WAS UNTIMELY, I ALSO FIND THAT THE DENIAL OF TEMPORARY LABOR CERTIFICATION BY THE REGIONAL ADMINISTRATOR WAS LEGALLY SUFFICIENT.

BY LETTER DATED AUGUST 14, 1984, THE EMPLOYER NOTED THAT NO ORDER WAS PUT IN FOR CREW LEADERS "CONTRARY TO THE REGIONAL ADMINISTRATORS' LETTER". NEVERTHELESS, THE ATTACHMENTS TO THE

APPLICATION, CLEARLY REFER TO THE UTILIZATION OF THE CREW LEADER TO RECRUIT QUALIFIED FRUIT PICKERS, AND CONTAINS INSTRUCTIONS FOR THE USE OF CREW LEADERS. IT IS ALSO INDICATED THAT "CREW LEADERS WOULD BE OFFERED OVERRIDES BASED ON PERCENTAGE OR PIECE RATE AS NEGOTIATED". THE REGIONAL ADMINISTRATOR'S DEMAND, THEREFORE, THAT THE SPECIFIC WAGE RATE OR THE RANGE WITHIN WHICH THE EMPLOYER IS PREPARED TO NEGOTIATE SHOULD BE STATED, WAS REASONABLE.

THE INFORMATION PROVIDED IN PARAGRAPHS 3 and 4 OF THE EMPLOYER'S LETTER OF AUGUST 14, 1984 CANNOT BE CONSIDERED BY ME AS IT IS IN THE NATURE OF EVIDENCE. UNDER 20 CFR 655.212 I HAVE NO AUTHORITY TO RECEIVE EVIDENCE, AND MAY ONLY CONSIDER LEGAL ARGUMENTS. BUT I FIND THAT THE REGIONAL ADMINISTRATOR'S DEMAND FOR SUCH INFORMATION IS REASONABLE AND NECESSARY, AND DENIAL, THEREFORE, FOR FAILURE TO SUBMIT SUCH EVIDENCE WITHIN THE TIME LIMITATION, IS AFFIRMED. ON THE JOINT EMPLOYER ISSUE, THE EVIDENCE CITED BY THE REGIONAL ADMINISTRATOR WHICH INCLUDES DEPOSITIONS OF JOHN PORTERFIELD, AND RICHARD LOWMAN AND THE REPORT OF A FEDERAL ON SITE INVESTIGATION IN WHICH THE RESPONSIBILITIES OF THE GROWER MEMBERSHIP FOR EMPLOYEE SUPERVISION ARE OUTLINED, INCLUDING CONTROL AND TRANSPORTATION TO AND FROM THE ORCHARD WORKSITES, FURNISHED SUFFICIENT INFORMATION TO SUPPORT THE DECISION OF THE REGIONAL ADMINISTRATOR THAT THE EMPLOYER SHOULD FILE AS A JOINT EMPLOYER OR AGENT. NO REBUTTAL EVIDENCE HAVING BEEN SUBMITTED, THIS GROUND ALONE WOULD SERVE TO SUPPORT THE DENIAL OF TEMPORARY LABOR CERTIFICATION.

ORDER

THE DENIAL OF TEMPORARY LABOR CERTIFICATION IS AFFIRMED. ANY FURTHER ACTION WITH RESPECT TO THIS APPLICATION MUST BE TAKEN PURSUANT TO 8 C.F.R.214.2(h)(3)(i).

LEONARD N. LAWRENCE
ADMINISTRATIVE LAW JUDGE

Washington, D.C.
LNL/koj