



DATE: OCTOBER 1, 1992
CASE NO.: 90-CLA-10

In the Matter of

LYNN M. MARTIN, Secretary of Labor
United States Department of Labor

Plaintiff

versus

HERON LOPEZ d/b/a
RIO FRESH, INC.
Respondent

APPEARANCES:

Michael H. Olvera, Esq.
U.S. Department of Labor
Office of the Solicitor
Dallas, Texas
For the Plaintiff

Tom Wilkins, Esq.
Wilkins & Slusher
McAllen, Texas
For the Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201 *et seq.*, (hereinafter referred to as "FLSA"), and in accordance with the regulations promulgated thereunder at 29 C.F.R. Parts 570, 579, and 580. Respondents, Heron Lopez d/b/a Rio Fresh, Inc. (hereinafter referred to as "Rio Fresh"), request review of the imposition of a civil money penalty imposed pursuant to Section 16(e) of the Act for alleged violations of Section 12 of the child labor provisions of the Act.

Following an investigation, the Wage and Hour Division of the U.S. Department of Labor, on May 16, 1986, assessed a civil money penalty against the Respondents in the

amount of \$1,400.00. In a letter dated June 2, 1986, the Respondents filed exceptions to the assessment of the penalty, denied all liability for violations of the Act, and demanded a hearing on the matter. On March 16, 1990, the Regional Director of the Wage and Hour Division, U.S. Department of Labor, referred the matter to the Chief, Administrative Law Judge for a final determination of the violations for which the penalty was imposed.

On March 18, 1992, a formal hearing on the merits was held in McAllen, Texas. Both parties presented evidence and provided legal arguments. Post-hearing briefs were also filed by both parties. This decision is based upon an analysis of the entire record and the application of pertinent law. Each exhibit included within the record, although perhaps not specifically mentioned in this decision, has been carefully reviewed and given thoughtful consideration in arriving at the decision herein.

DISMISSAL OF REQUEST FOR HEARING OF HERON LOPEZ

On March 5, 1992, the U.S. Department of Labor filed a Motion for Default against Heron Lopez because of his failure to answer or to comply with the Notice of Docketing and the Pre-hearing Exchange Order. The motion related only to Heron Lopez and it did not seek default against Rio Fresh, Inc. On March 6, 1992, I issued an Order to Show Cause to Heron Lopez. Mr. Lopez did not respond to that Order and on March 17, 1992, I dismissed the request for hearing of Heron Lopez under authority of 29 C.F.R. Sections 18.39(b), 18.29(a) and Fed. R. Civ. P. 41(b). As a result of that dismissal, Mr. Lopez was ordered to pay a civil money penalty in the full amount of \$1,400.00 to the Secretary of Labor.

ISSUES

1. Whether Heron Lopez conducted business as Rio Fresh, Inc.;
2. Whether Rio Fresh, Inc. was an employer or a joint employer of the harvest crews within the meaning of the Fair Labor Standards Act.
3. Whether children under the age of 14 were employed by Rio Fresh, Inc. in an agricultural occupation without written parental consent:
4. Whether children under the age of 16 were employed by Rio Fresh, Inc. in an agricultural occupation during regular school hours and
5. Whether any of the agricultural employment engaged in by the minors under the age of 16 years was exempt from the prohibitions of the Act.

FINDINGS OF FACT

The parties stipulated at the hearing that Heron Lopez did not do business as Rio Fresh, Inc. That stipulation disposes of the first issue. In addition, it was stipulated that

March 31, 1986 was a holiday and that April 1, 1986 was a school day at the Pharr San Juan Alamo School District. It was also stipulated that March 24 through March 28, 1986 were all holidays. The form WH-103, Notice to Employer, Employment of Minors Contrary to the Fair Labor Standards Act asserts periods of illegal employment for the seven individuals involved as being March 27, 1986, and March 31, 1986 to April 1, 1986.

William R. Morley who is the general manager of Rio Fresh testified at the hearing. I find him to have been a credible witness. He had been in his position fourteen years. Rio Fresh is a packing shed that packages produce for the grower and then sells and ships it. The Secretary of Labor has asserted violations of the Fair Labor Standards Act against Rio Fresh as a joint employer of the individuals involved. Rio Fresh is duly incorporated under the laws of the state of Texas. (RX 1) As noted above, it was stipulated that Heron Lopez did not do business as Rio Fresh, Inc.

The parties involved in this case operated in the following fashion. A farmer, also called a grower, either owned or rented the land to grow an onion crop. The grower made all final decisions with respect to the planting, growing and harvesting of the onion crop. (Tr. 84, 85) Throughout the entire process, the grower retained ownership rights to the onion crop. Rio Fresh is a packer who performed the service of packaging the onion crop, selling and shipping it. Rio Fresh charged the grower a packing charge the amount of which was not disclosed by this record. (Tr. 82, 86, 87) Rio Fresh received a fee only for its packaging and selling service and that-fee was basically set by an industry rate. The contract between Rio Fresh and the grower was oral and there exists no writing codifying the agreement. (Tr. 109)

After entering into the agreement with-the grower, Rio Fresh contracted orally with the Harvest Now Company (hereinafter Harvest Now) to have the onions harvested. Rio Fresh agreed to pay Harvest Now \$1.05 per fifty-five pounds of raw onions trucked across the scale at the Rio Fresh packing house. Harvest Now was run by a Richard Moore-who is also the Comptroller of Rio Fresh. Mr. Moore's office was located at one end of the Rio Fresh packing facility. Harvest Now was hired by Rio Fresh to coordinate the farm labor contracting activities of Rio Fresh. (Tr. 77)

Harvest Now, in turn, contracted with a Heron Lopez to harvest the crop and to have it trucked to the Rio Fresh packing house. Mr. Lopez who is referred to as a farm labor contractor, hires the people to clip the onions in the field, sack and collect them, and then transport the onions to the packing house. The record does not disclose the contractual arrangement between Harvest Now and Heron Lopez although it was speculated that Mr. Lopez would have received approximately \$50,000 to \$60,000 for the services he provided. Lopez hires the workers, determines their pay and was responsible for the trucking of the onions to the packing house. His profit is based upon the funds remaining after he has compensated his workers and paid any trucking charges. (Tr. 87, 88, 92) Apparently, various people including Lopez owned the trucks which are used to transport the onions. (Tr. 92) Neither Rio Fresh or Harvest Now owned any of the trucks.

Following the harvesting of the onions, the crop is left in the field for several days in order to allow it to dry. It is then picked up with a harvesting machine and trucked to the Rio Fresh packing shed where it was graded, sorted and packaged. (Tr. 89, 90) Some of the onions may not have been completely dried when removed from the field and Rio Fresh was required to dry them using their own produce dryers.

Once the onions are sold by Rio Fresh, Rio Fresh compensated Harvest Now by way of a single check. Harvest Now, in turn, compensated Lopez who was paid in cash. (Tr. 194) After receiving its packaging fee and compensating Harvest Now, Rio Fresh remits the rest of the money to the grower. Rio Fresh does not have a written contract with the grower and when the onions were sold to a buyer on the East Coast, that contract was also oral. (Tr. 111) Rio Fresh owned no trucks which were used to transport the onions to its packing house. Nor did it have any trucks in the field with the name Rio Fresh on them. Its single field man would have driven a pickup truck between jobs and the name Rio Fresh was not on the truck. (Tr. 105, 106) Rio Fresh owns no trucks other than a pickup truck. (Tr. 92, 95) Additionally, the portable johns which were located in the fields of the grower did not have the Rio Fresh name on them. It was possible that the initials "RF" standing for Rio Fresh did appear on the johns.

Rio Fresh has one field man whose name was Martin Cuellar. He has been employed by Rio Fresh for approximately nine years and his job basically was to check the progress of the harvesting activity. (Tr. 79) He determined the condition of the product, the size of the onion, and he assisted in the selling of the onions. (Tr. 79) Mr. Cuellar basically acted as an advisor to the grower and to Rio Fresh so that the packing house would know what produce was arriving in order to sell it and be prepared to process it. (Tr. 79) He also acted as an advisor to the farm labor contractor for purposes of determining the produce to be picked, but he was strictly an advisor since the grower made the final decision as to the crops. (Tr. 80, 81) Mr. Cuellar did not intercede in problems with individual laborers. Rio Fresh has instructed Mr. Cuellar in the law as it relates to children being permitted to perform farm labor. The growers make all final decisions concerning the growing and the harvesting of the crops. Rio Fresh and its field man act as advisors only to the growers. (Tr. 82)

The record also contains the testimony of Benedict R. Ramos who was a Compliance Officer of the U.S. Department of Labor, Wage and Hour Division. Mr. Ramos had been with the Department for 26 years and his duties were basically to enforce the provisions of the Fair Labor Standards Act. He was the investigator who wrote the report and recommended the penalties against both Heron Lopez and Rio Fresh, Inc. in this case.

Mr. Ramos basically testified concerning the operation of Rio Fresh and the relationship of Heron Lopez to Rio Fresh, Inc. I find his testimony to have been credible, however, it contains a variety of erroneous assumptions and errors which compel me to accept the testimony of William R. Morley as being more representative of the actual relationships of the parties. Mr. Ramos testified that he spent approximately two hours on

the job site (Tr. 27) and I do not believe that he fully developed all of the facts prior to asserting the penalties.

Mr. Ramos assumed that Heron Lopez was an employee of Rio Fresh, Inc. (Tr. 25, 26) I note that the parties stipulated at the hearing that Heron Lopez did not do business as Rio Fresh, Inc. Although that stipulation does not dispose of the question as to whether there was a legal relationship between Heron Lopez and Rio Fresh, Inc., it makes me wonder as to whether any relationship existed. Heron Lopez did not testify in this case and I will accept the testimony of William R. Morley as to the contractual relationships of the parties.

Mr. Ramos testified that there were portable toilets in the field with the name Rio Fresh on the side and also that trucks used to transport the onions to the packing shed also bore the name of Rio Fresh on the side panels. Mr. Morley denied both of these contentions testifying that the initials "RF" possibly had appeared on the portable toilets but that Rio Fresh had no trucks whatsoever other than a pickup truck which was used by its field man. The pickup truck did not have the name of Rio Fresh inscribed on the body. I accept Mr. Morley's testimony in that regard.

Mr. Ramos also testified that Rio Fresh took the produce from the field to the packing shed and then processed it and shipped it to the purchaser. (Tr. 27) The testimony of Mr. Ramos in that regard contradicts the Morley testimony. Once again, I believe that the Ramos testimony indicates that he did not understand the nature of the relationship between the parties. The fact that his investigation lasted only two hours and considering the number of people that he interviewed, I believe that he did not fully exhaust full factual development in this area.

CONCLUSIONS OF LAW

As I noted above, on March 17, 1992, I entered an Order of Dismissal against Heron Lopez whereby his request for hearing was dismissed under authority of 29 C.F.R. Sections 18.39(b), 18.29(a) and Fed. R. Civ. P. 41(b). I also asserted the full amount of the civil money penalty prescribed by the Wage and Hour Division against Mr. Lopez. (ALJX 5) The determination letter issued by the Area Director, Employment Standards Administration, Wage and Hour Division asserted the \$1,400.00 in penalty against both Mr. Lopez and Rio Fresh, Inc. (ALJX 3) The determination letter indicates that Rio Fresh had acted jointly with Lopez as an employer in committing the violations. Thus the penalty asserted has already been determined as being owed by Lopez and this decision will now dispose of the assertion of that penalty against Rio Fresh. Michael H. Olvera, counsel for the Secretary of Labor, at the time of the hearing conceded that if I do not determine that Heron Lopez and Rio Fresh, Inc. were joint employers, then I would not have to address the issues as to the specific child labor violations. (Tr. 19) I agree with that concession in that if Rio Fresh was not an employer, then it cannot be held liable for any of the asserted violations.

The penalties asserted in this case were assessed pursuant to the provisions of the Fair Labor Standards Act of 1938, as amended. 29 U.S.C.A. Section 201. As used in the Act, the term employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . 29 U.S.C.A. Section 203(d). To "employ" means under the Act to suffer or permit to work. 29 U.S.C.A. Section 203(g). The FLSA was adopted by Congress as remedial legislation and, therefore, a restrictive interpretation of the Act is contrary to congressional intent. Lamon v. City of Shawnee, Kansas, 754 F. Supp. 1518 (D.C. Kan. 1991). The Act must be liberally construed in order to effectuate Congress' remedial intent. Donovan v. Sabine Irrigation Co., Inc., 695 F.2d 190, (5th Cir. 1983), cert. denied, 103 S.Ct. 3537, 463 U.S. 1207, reh'g. denied, 463 U.S. 1249.

Both parties filed a brief in this case and suggest that a determination as to whether Rio Fresh is liable as a "joint employer" of the minors is to be controlled by the law defined in Hodgson v. Griffin and Brand of McAllen, Inc., 471 F.2d 235 (5th Cir. 1973). I would suggest, however, that there have been a number of more recent decisions rendered by the Fifth Circuit which clarify the law and provide a clear definition of the approach to determining whether an individual or entity is actually an employer under the terms of this Act. Castillo v. Givens, 704 F.2d 181 (5th Cir. 1983), cert. denied, 104 S.Ct. 160 (1983); Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317 (5th Cir. 1985); Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987), cert. denied, 484 U.S. 924 (1987); Dalheim v. KDFW-TV, 918 F.2d 1220 (5th Cir. 1990).

Counsel in this case relying on Hodgson v. Griffin and Brand suggest that the determination as to whether Rio Fresh was an employer or joint employer of the workers is essentially a question of fact. That suggestion is erroneous in that the Fifth Circuit in Beliz and Dalheim notes the prior confusion in Fifth Circuit case law and concludes that the ultimate determination of employee status is a question of law based upon the underlying findings of fact. The court in Dalheim states the law to be as follows:

Beliz was reaffirmed in Brock v. Mr. W Fireworks, Inc., supra, which teaches that there are three distinct types of findings involved in determining employee status under Section 3(e). First, there are findings of historical fact. These include such findings as whether the putative employer controlled the number of hours the individual worked. These are subject to reversal only if clearly erroneous. Second, there are findings as to the five factors set out by the Supreme Court in United States v. Silk, 331 U.S. 704, 715 (1947). These are based on inferences drawn from historical facts, such as whether a particular job required 'skill and initiative' and whether there was a 'permanent' employer-employee relationship. These, too, are fact findings, reviewed for clear error. Finally, there is the district court's ultimate conclusion - that is, whether the individual is an 'employee' under Section 3(e). 'The ultimate finding . . . is not simply a factual inference drawn from historical facts, but more accurately is a legal conclusion based on factual inferences drawn from historical facts.'

In applying these factors, no one of them is independently determinative, but rather it is necessary to make a determination as to whether the alleged employees as a matter of "economic reality" are economically dependent on the business to which they supply their labor. The Supreme Court in the Silk decision provided a five-part test. The test includes a determination of:

1. The degree of control exercised by the alleged employer;
2. The extent of the relative investments of the putative employee and employer;
3. The degree to which the alleged employee's opportunity for profit and loss is determined by the alleged employers
4. The skill and initiative required in performing the job; and
5. The permanency of the relationship.

These criteria are not exhaustive and they cannot be applied mechanically in determining employee versus independent contractor status.

Initially I consider the historical findings relative to the work tasks and the responsibilities of the parties. I must note disappointment that the record does not disclose the nature of the relationship between Harvest Now and Heron Lopez. Rio Fresh obviously was interested in distancing itself from any supervisory relationship with the employees and I believe that it succeeded due in part to the absence of evidence concerning the Harvest Now business entity. The following historical facts are established by this record:

1. There is no evidence of a legal relationship between Rio Fresh and Heron Lopez;
2. Rio Fresh entered into an oral contractual relationship with the grower to process, pack, ship and sell the onion crop;
3. Rio Fresh did not own the land upon which the crops were grown
4. Rio Fresh did not hire the employees used to harvest the crop;
5. Rio Fresh did not supervise nor was it aware of the compensation arrangement Heron Lopez had with the employees;
6. Rio Fresh did not direct the areas to be harvested nor could it hire or fire the employees used to harvest the crop;
7. The employees were paid by Heron Lopez and not Rio Fresh

8. No Rio Fresh equipment with the possible exception of one or more portable johns were used by the employees in harvesting the crop;
9. Rio Fresh did not provide crew leaders or field men to supervise the daily harvesting activity;
10. Rio Fresh gave advice to the grower as to the best methods to be used in managing his crop.
11. Rio Fresh did not maintain any Social Security or other business records pertaining to the harvesters used by Heron Lopez;
12. Rio Fresh did not transport the harvesters to the job site; and
13. Rio Fresh was not engaged in the business of cultivating or harvesting crops.

In applying the five-part test used in the Silk case, I conclude as follows:

1. Rio Fresh, Inc. exercised no control over either the activities of Harvest Now, Heron Lopez or the grower. Rio Fresh was involved in the packing business and acted merely as an advisor to one or more of these entities;
2. Rio Fresh had no investment in either the land, the onion crop in the field, the equipment used to harvest the crop or in the workers themselves;
3. The workers in this case apparently moved from job site to job site working for a large number of individuals. There is no evidence in the record that the harvesters involved in this case were employed by Rio Fresh for any extended period of time. Therefore, I cannot conclude that Rio Fresh controlled the economic destiny of any of these workers;
4. Obviously, for purposes of this type of labor, little skill or initiative is required in performing the job; and
5. There exists no evidence that with respect to any of the workers involved that an element of permanency was associated with the job relationship. It is possible that one or more of the harvesters had been employed by Rio Fresh on more than one occasion but this record does not support that conclusion.

In view of the above findings, I conclude as a matter of law and economic reality that Rio Fresh, Inc. operated as an independent contractor and not as an employer of the workers involved.

ORDER

In view of the above findings, IT IS ORDERED that Rio Fresh, Inc. is not liable for any of the civil money penalty imposed pursuant to Section 16(e) of the Fair Labor Standards Act.

RUDOLF L. JANSEN
Administrative Law Judge