WHETHER AND HOW THE CIT CAN ORDER CERTIFICATION OF TAA WORKERS?

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Whether and How the CIT Can Order Certification of TAA Workers?

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Relevant Statutes

Jurisdiction of the Court of International Trade

28 U.S.C. § 1581

§ 1581. Civil actions against the United States and agencies and officers thereof

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review--

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 (19 U.S.C.S § 2273) with respect to the eligibility of workers for adjustment assistance under such Act;

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for--

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

Powers of the Court of International Trade

28 U.S.C.S § 1585

§ 1585. Powers in law and equity

The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States.

28 U.S.C. § 2643

§ 2643. Relief

(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

(c) (1) Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, or-

der any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

(2) The Court of International Trade may not grant an injunction or issue a writ of mandamus in any civil action commenced to review any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 (19 U.S.C.S § 2273), or any final determination of the Secretary of Commerce under section 251 (19 U.S.C.S § 2341) or section 271 of such Act.

Trade Adjustment Assistance

19 U.S.C. § 2272

§ 2272. Group eligibility requirements; agricultural workers; oil and natural gas industry

(a) In general. A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this chapter pursuant to a petition filed under section 221 (19 U.S.C.S § 2271) if the Secretary determines that--

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2) (A) (i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B) (i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii) (I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

(b) Adversely affected secondary workers. A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for trade adjustment assistance benefits under this chapter (19 U.S.C.S § § 2271 et seq.) pursuant to a petition filed under section 221 (19 U.S.C.S § 2271) if the Secretary determines that--

(1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) the workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility under subsection (a), and such supply or production is related to the article that was the basis for such certification (as defined in subsection (c) (3) and (4)); and

(3) either--

(A) the workers' firm is a supplier and the component parts it supplied to the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

19 U.S.C. § 2273

§ 2273. Determination by Secretary of Labor

(a) Certification of eligibility. As soon as possible after the date on which a petition is filed under section 221 (19 U.S.C.S § 2271), but in any event not later than 40 days after that date, the Secretary shall determine whether the petitioning group meets the requirements of section 222 (19 U.S.C.S § 2272) and shall issue a certification of eligibility to apply for assistance under this subchapter (19 U.S.C.S § § 2271 et seq.) covering workers in any group which meets such requirements. Each certification shall specify the date on which the total or partial separation began or threatened to begin.

19 U.S.C. § 2395

§ 2395 Judicial review

(b) Findings of fact by Secretary; conclusiveness; new or modified findings. The findings of fact by the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, or to set such action aside, in whole or in part. The judgment of the Court of International Trade shall be subject to review by the United States Court of Appeals for the Federal Circuit as prescribed by the rules of such court. The judgment of the Court of Appeals for the Federal Circuit shall be subject to review by the Supreme Court of the United States upon certiorari as provided in section 1256 of Title 28.

Case Excerpts

***United Electrical, Radio and Machine Workers Of America,* 15 CIT 299, 307-09 (1991)**

"III. *The Secretary Must Certify the Entire Plant:*

As the court previously noted,

'[a]t this point in time, it is highly unlikely that a true picture of the impact of imports on employment at Swissvale will ever be known. It may be that more workers will be certified as eligible than should have been if the proper documentary evidence was obtained and the proper avenue of investigation followed at the outset. But plaintiffs may not be penalized because of Labor's initial errors and easy grasp of erroneous data indicating lack of eligibility.' *United Electrical III*, Slip Op. at 26-27.

The court believes that the only just action to take now is to certify the entire plant. This will likely involve more workers than would have been certified had Labor followed proper procedures initially, but it is much too late for any further remands to produce any more accurate results. Due to the Secretary's repeated failure to conduct an adequate investigation, the documentation which would have resolved the pending questions is no longer available, and memories are stale. Petitioners must not be penalized for this. Recognizing this, in *United Electrical III*, the court ordered the Secretary to certify the plant if petitioners submitted sworn affidavits which continued to support certification. Petitioners did so, but Labor failed to carry out the court's instructions.

The court has the power to order the Secretary to certify the entire plant, and does so. *19 U.S.C. § 2395*(c) (1988). *See also United Electrical III*, Slip Op. at 24 n.14.

Conclusions

Throughout this investigation, Labor has relied on false data and has used protean reasoning to force its negative determination to fit whatever new facts come to light. No purpose would be served by yet another remand. Questions regarding this investigation will always remain. Nevertheless, '[a]ll things must end -- even litigation.' *Southern Rambler Sales. Inc. v. American Motors Corp., 375 F.2d 932, 938* (5th Cir.), *cert. denied*, *389 U.S. 832 (1967).* The Secretary shall certify the entire plant as eligible for Trade Adjustment Assistance."

***Former Employees of Hawkins Oil and Gas, Inc*. 814 F. Supp. 1111, 1115 (CIT 1993)**

"Accordingly, although this Court must uphold Labor's determinations regarding certification for trade adjustment assistance if they are supported by substantial evidence, *19 U.S.C. § 2395*(b) (1988 & Supp. 1992); see also, *Former Employees of General Electric Corp. v. U.S. Dep't of Labor, 14 CIT 608, 611 (1990); Woodrum v. Donovan, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983),* aff'd sub nom. *Woodrum v. United States, 737 F.2d 1575 (1984),* a reviewing court may remand a case and order the Secretary to further investigate if "good cause [is] shown." *19 U.S.C. § 2395*(b); Local 116 v. U.S. Secretary of Labor, 16 CIT , , *793 F. Supp. 1094, 1096 (1992); Linden Apparel Corp., 13 CIT at 469, 715 F. Supp. at 381.*

This Court, however, has unequivocally declared that no deference is due to determinations based on inadequate investigations. *General Electric Corp., 14 CIT 608; United Electrical Radio and Machine Workers of America v. Dole, 14 CIT 818 (1990).* In both of the aforementioned cases, the court established that although Labor possesses considerable discretion in handling trade adjustment assistance investigations, there exists a threshold requirement of reasonable inquiry. Investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed. In the case at hand, Labor has repeatedly ignored the Court's instructions to conduct a more thorough investigation. After three tries the record continues to be scant and Labor has once again failed to substantiate its conclusions. Thus, ordering another remand in this case would be futile.

As plaintiff has requested in this case, the Court also has the power to order the Secretary to certify the entire plant. See United Electrical, Radio and Machine Workers of America v. U.S. Dep't of Labor, 15 CIT , , Slip Op. 91-53 at 19 (June 27, 1991). According to *19 U.S.C. § 2395*(c), the 'Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part.'

. . . Under the circumstances, the Court cannot in good conscience affirm Labor's remand determination. The investigation put forth by Labor was once again the product of laziness which as a result yielded a sloppy and inadequate investigation. Remanding this case again would serve no purpose as Labor has already had three opportunities to perform an adequate investigation. As a result, the Court remains unsatisfied with Labor's efforts and is faced with no alternative other than to certify plaintiff as eligible for trade adjustment assistance.

Conclusion

Accordingly, the Court finds that Labor's repeated denial of plaintiff's petition for certification is not supported by substantial evidence and, therefore, the Secretary of Labor shall certify plaintiff as eligible for trade adjustment assistance."

***Former Employees Of Marathon Ashland Pipeline, LLC,* 277 F. Supp.2d 1298 (CIT 2003)**

"Labor's and the company's inability or unwillingness to answer with any specificity the questions necessary for this court to evaluate the legitimacy of Plaintiffs' claim place the court in a difficult position. This court retains the ability to remand again, 'for good cause shown,' 19 U.S.C. § 2395(b), or can order the Secretary to certify Plaintiffs for eligibility. *See United Elec., Radio and Mach. Workers of Am. v. Martin,* 15 CIT 299, 308 (1991) (citing 19 U.S.C. § 1395(c) (which confers on this Court 'jurisdiction to affirm the action of the Secretary of Labor ... or to set such action aside, in whole or in part.')). . . .

Labor has had four chances to determine whether the Robinson plant was converted to accommodate increased foreign crude imports, and if those increased imports contributed to the decision to sell the assets in question. . . . Plaintiffs have placed serious, specific and relevant questions in the record that Labor did not adequately address, even after being directed by this court to do so. Therefore, no evidence exists in the record to support Labor's conclusion that the gaugers' termination was not the result of a decision by Marathon to import crude oil. . . .

As a general rule, the court will refrain from ordering certification until an additional remand would be 'futile.' *See Fmr. Emp. of Barry Callebaut v. Herman,* 26 CIT ----, ----, 240 F.Supp.2d 1214, 1228 (2002) (citing *Hawkins Oil,* 814 F.Supp. at 1115). During the last remand Labor directly asked MAPL to 'describe in detail' the business reason for the sale of the assets. In response, MAPL essentially said it had business related reasons. This is not an adequate answer. Nothing in the record indicates that MAPL will be more forthcoming if the court were to remand again. Nothing in the record indicates that Labor has the resources or willingness to conduct an investigation beyond making inquiries of MAPL. The court sees little benefit to be gained by an additional remand.

TAA is a remedial program. . . . Its purpose is to assist those workers and communities harmed by the impact of international trade to recover from the losses they incur. . . . Congress has recognized that the loss of jobs in specific communities is the price paid for the overall public benefit of a liberalized international trading system. . . . The court is mindful that TAA cases are different from most litigation before this court. This is not a situation, such as in customs or antidumping duty cases, where a bond can be posted to cover anticipated cost and reduce liability. The workers at issue here suffered a loss. To perpetually delay remedying that loss would inflict additional hardship contrary to the purpose of the statute. . . . In weighing the decision to remand the court must consider the purpose of the statute and factor the welfare of the workers into its decision to bring the litigation to a conclusion. *See United Elec., Radio & Mach. Workers of Am.,* 15 CIT at 308. . . .
The court finds that Labor's denial of Plaintiffs' petition for certification is not supported by substantial evidence and not in accordance with law, and, therefore, the Secretary of Labor shall certify Plaintiffs as eligible for trade adjustment assistance. Plaintiffs' motion for judgment on an agency record is granted. Judgment will be entered accordingly."

***Former Employees Of Marathon Ashland Pipeline*, LLC, 370 F.3D 375 (CAFC 2004)**

"This is a government appeal from an order of the Court of International Trade. The trial court directed the Secretary of Labor to certify eight former employees of Marathon Ashland Pipe Line LLC as eligible for statutory benefits that are available to employees who lose their jobs because of competition from imported goods. Because we conclude that substantial evidence supports the Secretary's determination that the former employees were not engaged in the production of crude oil, we reverse the trial court's ruling to the contrary. . . ."

***Former Employees of Barry Callebaut,* 240 F.Supp.2d 1214, 1228 (CIT 2002)**

"The court is guided by the decision in *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor,* 17 CIT 126, 814 F.Supp. 1111 (1993). In that case, Labor conducted three investigations on the petitions for trade adjustment assistance. The court found that all three investigations were inadequate. Ultimately, the court ordered the Secretary to certify the workers, stating that 'Labor has repeatedly ignored the Court's instructions to conduct a more thorough investigation. After three tries the record continues to be scant and Labor has once again failed to substantiate its conclusions. Thus, ordering another remand in this case would be futile.' *Hawkins Oil,* 17 CIT at 130, 814 F.Supp. at 1115. In this respect, this case strongly parallels *Hawkins Oil.*

Ordering the Secretary to certify the Plaintiffs' claims is within the court's discretion. The court has declared that determinations based on inadequate investigations are not afforded deference. *Former Employees of Gen. Elec. Corp. v. U.S. Department of Labor,* 14 CIT 608 (1990); *United Elec., Radio & Mach., Workers of Amer. v. Dole,* 14 CIT 818 (1990). These cases make clear that although Labor has significant discretion in conducting trade adjustment assistance investigations, a reasonable inquiry is still a minimum requirement. Moreover, the court may order the Secretary to certify the entire plant. *See United Elec., Radio and Machine Workers of Amer. v. Martin,* 15 CIT 299, 308, 1991 WL 117400 (1991). Finally, 19 U.S.C. § 2395(c) states the 'Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part.'

Labor is the agency tasked with properly overseeing and addressing TAA and NAFTA TAA claims. When Labor is presented with a petition for trade adjustment assistance, it has an affirmative duty to investigate whether petitioners are members of a group which Congress intended to benefit from the legislation. *Stidham v. U.S. Dep't of Labor,* 11 CIT 548, 551, 669 F.Supp. 432, 435 (1987); *Cherlin v. Donovan,* 7 CIT 158, 162, 585 F.Supp. 644, 647 (1984). Labor's inadequate efforts have failed to produce a determination that meets minimum legal standards. Having failed to conduct an adequate investigation after four opportunities, Labor will not receive another. The Secretary must certify the former employees in this case and grant their applications for TAA and NAFTA TAA."

***Former Employees Of Barry Callebaut*, 357 F.3d 1377 (CAFC 2004)**

"The Former Employees again sued in the Court of International Trade. *Fmr. Empls. II*, *240 F. Supp. 2d at 1216*. The court ruled that Labor had again failed to follow its remand instructions and that its decision was still not supported by substantial evidence. *Id. at 1227*. As promised, rather than remand again, the court simply ordered Labor to certify the Former Employees for the requested benefits. *Id. at 1228*.

. . .

In view of our holding that Labor's Fourth Negative Determination was supported by substantial evidence, we consider the question of the Court of International Trade's authority to order Labor to certify the Former Employees for the requested benefits to be moot, and will not discuss it further."

***Former Employees of Pittsburgh Logistics Systems, Inc*.** 2003 WL 22020510, 7-8, 22-23 and 46 **(CIT 2003)**

In this instance, the administrative record is adequate for a determination, and additional remand to Labor for the purpose of further reasoning on the precise question is unnecessary and would not promote the interest of efficient and speedy justice. . . .

Ordering certification of eligibility for trade adjustment assistance is a remedy of last resort. It is appropriate when, after one or more remands, it is clear that Labor continues to adhere to a discredited position that is at odds with the developed facts of record. *See, e.g., Former Employees of Barry Callebaut v. Herman,* 26 CIT ----, 240 F.Supp.2d 1214 (2002). The Court finds Labor's consideration of the facts developed and its treatment of the issues on remand not in accordance with the law of the case, not in accordance with the substantial evidence on the record, and results-oriented. . . .

The plaintiffs argue that reversal is appropriate because Labor has once again failed to point to substantial evidence on the record showing that the plaintiffs did not produce an article and that they were not controlled by LTV. The Court agrees. Labor has now had five bites at the apple: (1) initial denial of eligibility, (2) denial of reconsideration for eligibility, (3) contest of the plaintiffs' claim when filed with this Court, (4) refusal to seek voluntary remand after consultations with *pro bono* counsel prior to briefing, and (5) reconsideration of the matter on remand. Labor now seeks a sixth bite, and it is apparent that there is little apple left. The Court therefore relieves Labor of the core, reverses Labor's negative eligibility determination and awards judgment to the plaintiffs ordering Labor to certify the plaintiffs as eligible for trade adjustment assistance benefits. *See* 19 U.S.C. § 2395(c) ('[The] Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . or to set such action aside, in whole or in part.'); *United Elec. Radio and Mach. Workers of America v. Martin,* 15 CIT 299, 309 (1991) (Labor ordered to certify plaintiffs). *Cf. Former Employees of Hawkins Oil And Gas, Inc. v. United States Sec'y of Labor,* 17 CIT 126, 130, 814 F.Supp. 1111, 1115 (1993) (court-ordered certification of plaintiffs)."

***Former Employees of BMC Software, Inc*, 2006 WL 2527816, 19 (CIT 2006)**

"Thus, to the extent that the time consumed by litigation may operate in any fashion to limit the effectiveness of any relief that may ultimately be awarded in a TAA case, the court is duty-bound--particularly in light of the remedial nature of the TAA statute--to expedite its proceedings, limiting the number and the duration of remands, and otherwise keeping the parties (particularly the Labor Department) on a short leash. . . . To the extent that litigation delays may operate to limit the effectiveness of any relief that may ultimately be awarded in a TAA case, the judges of the Court of International Trade have a clear and legitimate interest in the matter--and inquiries on the topic are in no way 'inappropriate.' . . .

Finally, without regard to any authority the Court may (or may not) have, in the abstract, to order that a group of petitioners are 'entitled to receive full TRA benefits, regardless of the date of their certification,' there is nothing whatsoever that is abstract or hypothetical about the circumstances of the case at bar. To the contrary, in its Motion for an Extension of Time to File Remand Results, the Government here stated flatly and unequivocally that, 'in the event petitioners are certified in this case, *the petitioners would be entitled to receive full TRA benefits* regardless of the date they are certified.' (Emphasis added.) Thus, as the Workers have correctly observed, the issue presented in this case 'is whether this Court should exercise its inherent authority to give effect to a representation made by the Government in a pleading before this Court.' Plaintiffs' Reply to Defendant's Response to Plaintiffs' Comments on Remand Results, at 2. The Workers emphasize:

'Plaintiffs . . . have a reasonable expectation as litigants to have a measure of reliability in their dealings with the government in this case [--as does the Court--].... The Government should not have assured Plaintiffs of their entitlement to full benefits if the Government knew it would ultimately take the position that its representation (designed to induce an extension [of time]) could not be enforced. *In such a scenario, the Court must have the authority to hold the Government to its words.*'"

***Immigration and Naturalization Service v. Fredy Orlando Ventura,* 537 US 12, 16-17 (2002)**

"Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands. . . . The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides."