Apples and Aliens

Growers Challenge Feds over Who Does the Picking

Edward Cowan

ON A MILD, SUNNY SUNDAY in early autumn, there is an air of languor about the migrant workers camp of the Frederick County Fruit Growers Association, a few blocks from downtown Winchester, Virginia. Inside the low cinderblock bunkhouses, unpainted inside and out, men lounge on double-decker bunks, smoking and idling away the day. In front of the mess hall, a loose line has formed, early birds waiting for Sunday supper.

Virtually all the men in the camp are blacks or dark-skinned Hispanics. The Hispanics are from Puerto Rico. The blacks are from Puerto Rico, Jamaica, and the U.S. mainland. The mainlanders are concentrated in the section of the camp given over to family housing, identifiable by the presence of women, children, and automobiles with Florida tags. All of the people in camp, some with families, have come to harvest the orchards of northwestern Virginia.

The camp is calm, settled, bored. There is no visible sign of the confusion and tension that disturbed the apple pickers and the apple growers a few days earlier. That tension arose when a redundancy of labor developed. The Puerto Ricans, some of whom arrived after the start of the harvest, found the growers regarding them as extra hands. Moreover, the camp was filled to capacity and the U.S. Department of Labor was forced to house and feed Puerto Ricans at motels. All of this led to a flurry of newspaper and television reports—reports that gave the public a glimpse of frictions between growers and the government that have been irritating both for some time. The government has been regulating the temporary immigration of foreign agricultural workers in one way or another since World War II. The present regulatory scheme goes back about fifteen years, but only in the last few has controversy about apple picking flared publicly.

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Who Shall Pick the Apples?

The frictions arise because the Immigration and Nationality Act of 1952 discriminates in favor of U.S. citizens for temporary agricultural work, and because many apple growers in the eastern United States prefer to hire Jamaicans to bring in the crop. The growers say that the Jamaicans are fast, reliable workers, that Americans do not work as well and are more likely to walk away from the job. The Labor Department contends that the growers also prefer Jamaicans—the only aliens who have regularly picked apples—because they are more tractable (if not exploitable) and because they accept a lower rate of compensation than Puerto Ricans and other U.S. workers. Moreover, it cannot be overlooked that the growers do not have to pay social security and unemployment insurance taxes for Jamaicans or other aliens. Some growers who have been employing Jamaicans for two decades or so argue that the return of Jamaican laborers to the same orchards every year shows they get a fair deal.

As the Labor Department's newly revised regulations make clear, the burden is on the employer to justify in advance the use of aliens (*Federal Register*, March 10, 1978). The employer must show that sufficient American workers are not available to bring in the crop

and that the employment of aliens will not have an "adverse effect" on the terms and conditions of U.S. citizens doing similar work.

Although the Labor Department, through the United States Employment Service (USES), is charged with helping the apple growers find harvest labor, the growers and the department regard each other as antagonists. Each accuses the other of taking an adversarial approach to the annual recruitment of the apple harvest labor force. The sense of conflict has sharpened in the past few years for several reasons. The department is being prodded by federally financed legal services firms to do more to place Americans in harvest work—harvesting apples, onions (in Texas), and sugar cane (in Florida). (However, in 1974 the National Association for the Advancement of Colored People complained in a suit that the Farm Labor Service of USES kept shunting blacks to farm work, denying them access to counseling for placement in steady, better-paying nonfarm work. Under the terms of a consent order, the department abolished the Farm Labor Service as a separate entity within USES.) In response to the prodding of the legal services corporations, the apple growers have retained Washington counsel.

Finally, the Labor Department under President Carter is headed by Ray Marshall, a man with a special interest in the problems of migrant workers. In a speech to the International Apple Institute in November 1977, Marshall told the growers that, given their acknowledged preference for Jamaicans, he doubted the sincerity of their efforts to recruit domestic labor. Therefore, USES "should have more responsibility for testing the domestic labor market."

The secretary went on to concede, in effect, that the government has had difficulty in compelling economic behavior that is perceived by the employers as contrary to their interest. His solution to this problem was to try harder to compel that behavior.

How the System Works: 1978

Federal regulations require the growers to make their own efforts to recruit domestic labor (for example, through newspaper and radio advertisements) and also to turn to the USES. Apple growers (like western sheep ranchers or Florida sugar cane growers) must submit offers of employment—known as "clearance orders"—to the employment service, which then disseminates the offers in states and communities where a response is expected. (As U.S. citizens, residents of Puerto Rico—where unemployment is chronically high—count as "domestic" labor.) The clearance orders must be submitted at least eighty days before the employer's "date of need" so that enough time is available for a thorough search. Within twenty days of the date of need the government is supposed either (1) to give the grower the names of domestic workers who have been recruited or (2) to tell the grower that aliens may be brought in.

The apple harvest begins about Labor Day and runs into October. In the eastern apple-raising country—New England, New York, Maryland, West Virginia, Virginia—there are upwards of 4,000 growers whose individual crops range from 10,000 to 450,000 bushels (according to the International Apple Institute). Some apple pickers are mainland migrants, many of whom make their homes in Florida, picking citrus fruit in winter and driving north in summer to harvest the vegetables of New Jersey and Maryland. Some migrants—a decreasing number, the growers say—stay on for the September-October apple harvest.

By late August 1978, some growers in New York, Virginia, West Virginia, and Maryland had been denied the certifications they had sought for the hiring of Jamaicans. Lawyers representing these growers asked the federal district court in Roanoke (Virginia) to order the Labor Department to certify about 1,000 more aliens than the 4,000 it had approved. Judge James Turk, who had responded affirmatively to a similar complaint by the growers in 1977, entered a temporary restraining order for them on August 31, 1978, five days before the date of need specified in the clearance orders. A week later, with the matter before the Court of Appeals for the Fourth Circuit, the growers and the Labor Department reached a settlement that included the additional certifications the growers wanted.

Aaron Bodin, the Labor Department's chief of certifications and a career public administrator, says that by August 31 the Department of Labor of the Commonwealth of Puerto Rico, working with the USES, had recruited 2,077 Puerto Rican workers. The first batch arrived on the mainland on September 1, and 992 had arrived by September 12. On that day, accord-

ing to Bodin, officials stopped sending Puerto Ricans because it had become apparent that there was an oversupply of apple pickers in the camps. The difficulty was that while the authorities in San Juan had been sending Puerto Ricans, the growers' agent in Miami had been dispatching Jamaicans northward by bus under additional certifications.

As more and more Puerto Ricans arrived at the apple pickers' camp in Winchester, confusion and tension mounted. Some of these workers had to wait days to start picking and earning money. Most spoke only Spanish and could communicate with the authorities and the growers only through the few of their number who spoke English. A number of them worked a few days and went back to Puerto Rico. "A lot of these guys, they left without even having a day's work," according to one English-speaking Puerto Rican who had stayed on to pick apples.

Some Puerto Ricans complained to Baltasar Corrada, Puerto Rico's elected nonvoting delegate to the U.S. House of Representatives, that the growers discriminated against them in housing, transportation, and work assignments. The complaints included late transportation from the camp to the orchards, missed meals, no bed sheets, and assignment to trees that had already been partially picked. Delegate Corrada's aide reported that some Puerto Ricans were given no work and that others were put to work and discharged after a day or two of picking. Pam Browning of the National Association of Farm Worker Organizations said the growers "used all kinds of means to slow down the work so Puerto Ricans wouldn't make any money so they would be discouraged" and quit.

On the other hand, the growers believe they were being pressured by federal officials to employ pickers they did not want or need. And they deny that they discriminated against the Puerto Ricans. "We kept 'em and we did not terminate anybody," said Jim Robinson, a Winchester grower, about his Puerto Rican workers, but "they all quit" on their fifth day. He also said that his workers had told him they had no previous agricultural experience.

That there was an oversupply of labor is hardly surprising, for at least three reasons. One is the conflict in the preferences of the growers and the Labor Department (acting under the Immigration and Nationality Act of 1952). A second is the way in which the growers calculate how many aliens they will need. They do this by estimating the number of "domestic" workers they expect and trying to anticipate "attrition" (the number likely to leave before the crop is in—which they anticipate will be substantial in the case of Puerto Rican workers). A third reason is that the regulations tend to create an upward bias in the number of U.S. citizens to be referred by the Labor Department. The regulations require the growers to employ, house, and feed domestic workers referred to them by the department even after aliens lawfully admitted have been put to work. This obligation is imposed until the halfway point in the specified harvest period. It is in light of this requirement, Corrada said, that Puerto Rico's Labor Department is drawing up class-action suits on behalf of Puerto Ricans who were sent home with little or no work, with the growers to be named as defendants.

A Grower's View

Jim Robinson is twenty-six years old. He and his brother, who is twenty-four, took over the management of their father's orchards, Frederick Farms, two years ago. "We've always been in the apple business," Robinson says. "Most of these trees were planted by my grandfather." He feels put upon by the government and by the press, and believes the growers have treated the pickers, especially the Puerto Ricans, fairly. He wants to tell his version of events.

The important thing to understand, he says, is that when the crop is ready it must be harvested promptly. From the first ripening at about Labor Day, "you've got forty days to get your crop off" before the first nighttime frost. Robinson's farm was one of those that the Labor Department refused to certify this year for the hire of aliens. "Our backs were to the wall without certification," Robinson declares. The growers "went to court for the reason that if the Puerto Rican help didn't work out, how were we going to get our crop off?"

"We knew that the Puerto Ricans—from past history—could not pick fast enough." Jamaicans, Robinson added, all pick 100 or more bushels a day, with the most productive picking 200 or 210. The incentive to hustle is a piece-rate system of compensation. Few Puerto Ricans, he said, even after the three-day learning period required by federal regulations, picked

even 70 bushels a day. Robinson referred to 70 as "the limit," but it is more like a break-even figure. The grower pays 40 cents a bushel, 32 cents to the picker and 8 cents to the camp to cover its recruiting and operating expenses. (In addition, the picker pays the camp for meals, about $4 a day.) With federal regulations guaranteeing the pickers minimum earnings of $2.71 an hour (in Virginia), an eight-hour day comes to about the same as 70 bushels, Robinson explained. Even if a worker does not "make the limit, we pay $2.71 an hour. That's called make-up pay." He added that a grower much prefers a picker who earns a lot more on piece rates.

Experienced pickers pick with both hands, putting the apples into a half-bushel bucket suspended from a shoulder harness. When the bucket is full (and weighs about twenty-four pounds), the picker descends his ladder and pours his apples into a bin. The ladders generally used in Virginia are twenty-two or twenty-four feet high and weigh about thirty-five pounds. A picker must become skillful at moving the ladder from tree to tree while keeping it upright, to avoid the loss of time and energy required to lower and raise it. Growers and even some of the Puerto Rican workers say the Jamaicans work better in the trees. In the words of one Puerto Rican worker, "they are coconut pickers—they climb like a monkey."

Speaking emphatically about Labor Department hostility to the growers, Jim Robinson said: "We've gone at it with these guys for a number of years. There's a feeling among growers they're out to get us." That feeling is reciprocated by Labor Department certifications chief Aaron Bodin. "Every year it's been a battle," he says. "It's viewed inside as an adversary thing. These guys are trying to outgame us."

Lawyers and Issues

The perennial conflict over who is to pick eastern apples appears to have put down deep institutional roots. In 1974 eastern growers organized the Farm Labor Executive Committee, which has retained as counsel S. Steven Karalekas and Thomas J. Bacas of Washington, D.C. Also in Washington is Migrant Legal Action Program, Inc., a legal services firm of ten lawyers funded by the Legal Services Corporation, which gets its money from the U.S. Congress.

As framed by Karalekas, the central issue in this regulatory program is whether an adequate supply of domestic labor is available. Although he does not say so, he means available without any increase in the piece-rate wage paid by the growers. As framed by the Migrant Action lawyers, the key issue is whether the growers have systematically discouraged domestic labor by emphasizing restrictions (such as no alcohol in camp) and by generally providing unattractive work conditions or improper food. In New York, several domestic workers, assisted by a legal services firm, complained to the state Department of Labor that they were given "Jamaican food exclusively" and thereby were "forced to go hungry." The requirement that growers provide meals to workers (for which the workers pay) may thus be on its way to burdening the regulatory process with the question of appropriate foods and national tastes.

Summarizing the view that the growers consciously discourage domestic workers, Pam Browning says: "The workers are there if the growers would treat them fairly." Replies Karalekas: "Our answer is, if you've got the workers, produce 'em. We can't pick apples with affidavits."

Do growers discourage domestic hands? "We deny that categorically," exclaims Karalekas. "Well, there may be an instance here and there."

In the view of Howard Scher and Michael Semler, lawyers at Migrant Legal Action, the certification program fails to protect American workers because it does not require the growers to offer an "attractive" wage. The wage quoted by growers in their requests to the U.S. Employment Service for workers is an hourly rate, calculated by the Labor Department to satisfy a second condition of the Immigration and Nationality Act—that the aliens shall not be admitted if their presence would have an "adverse effect" on the wages of domestic workers. This "adverse-effect" rate is based on the wages for "field and livestock workers" reported by the Department of Agriculture for each state and is decidedly lower than average hourly earnings of all apple pickers. In New York, studies by the state government showed average hourly earnings ranged from $4.75 for "processing apples" (those used in canned applesauce or other prepared foods) to $5.65 for "eating apples." These are the "prevailing hour-

ly wage rates" and, according to Migrant Legal Action, the adverse-effect rate should be set no lower.

But the growers' lawyers argue that this confuses piece-rate earnings with an hourly wage, and that the true prevailing rate is the piece rate. Moreover, federal courts have held that the secretary of labor is *not* required by law to set an "attractive" wage rate (see *Williams* v. *Usery*, 1976).

In at least one respect, according to Bodin, the regulations are unenforceable. Section 655.207 requires the growers to raise their piece rates whenever the government increases the adverse-effect rate, so that the minimum productivity standard will not be raised. "We are not enforcing it," Bodin admits. "The lawyers say that even though it was published we really don't have the authority to do it." This is frustrating to the Migrant Legal Action lawyers who complain that higher productivity requirements nullify the attractiveness of higher piece rates and who assert that nothing in the regulations authorizes the inclusion of productivity standards in clearance orders.

Another issue (which, like the question of food, illustrates the difficulty of this sort of regulation) is the question of transportation money. The regulations require a grower to pay the cost of a worker's travel from home or place of previous employment to the apple-picking job and require the employer to pay for the return trip "if the worker completes the work contract period." Migrant Legal Action contends that employers refuse to send transportation money to workers in advance, and thus discourage Americans from picking apples. The growers say they refuse because some workers do not show up, or do not stay long on the job. The Migrant Legal Action lawyers say the grower should be required to advance transportation money if the worker needs it, even at the risk of paying for no-shows. Note that the regulations require that employers offer and pay advance transportation money to U.S. workers only if foreign workers get such advances, directly or indirectly. The regulations also say that if employers do not deduct transportation from a foreign worker's pay they may not deduct it from an American's pay. This requirement is typical of several that are meant to ensure that employers will treat U.S. workers as well as they do aliens.

In the growers' view, the current regulations have two major shortcomings. First, they require that a grower accept domestic referrals up until the time the season is half over. Karalekas indicates that he will challenge the legality of this rule in defending any suits brought by Puerto Ricans. Moreover, he adds, the rule leads to "bumping" of Jamaican workers and the risk that what has been a reliable source of labor will become less reliable. The 50 percent rule is explained by David O. Williams, former deputy director of USES, as an effort to "strike a balance" between the law's "stated preference" for citizens and the growers' preference for Jamaicans.

To the grower, any additional cost imposed by the regulatory system means a smaller profit. He has no thought of marking up his price. Like other agricultural producers, he regards the price he gets as a given, determined by the size of the crop and the other costs incurred by processors.

The second shortcoming in the regulations, say the growers, is that they fail to take account of the high attrition or dropout rate of American workers. To protect the grower from a shortage of hands in mid-harvest the regulations should, the growers argue, provide for a standby or emergency certification system once the season has started, so that the grower can bring in new hands with minimal delay.

Appraisal

In principle, there is much to be said for the alien certification program. Congress has declared that Americans should get first crack at available farm work and that growers should be prevented from depressing pay scales by importing aliens who would work for less than the going rate. The proposition that Americans should be employed first, if they want and can do the jobs offered, is not disputed by the growers or by any audible segment of the body politic. It is settled policy.

But if the principle is agreed upon, the practice is not. The alien certification program is working not smoothly, but litigiously and with ingrained adversarial attitudes. Ideology is an element in this conflict. Reform-minded young lawyers want the government to compel the growers to pay an "attractive" wage (one Migrant Legal Action spokesman said the ad-

verse-effect rate should be based on what growers can afford), while the growers believe they are being harassed by bureaucrats who do not understand the business and take none of the risk.

Although questions of social justice and the passions they generate seem to be the dominant source of conflict, economic interests are also involved. The growers want above all else to be protected at low cost against the risk of not getting the crop off the trees on time. So they make generous estimates of their need for Jamaicans—workers they believe they can count on. But the regulations, biased in favor of U.S. citizens, require the grower to employ citizens referred by USES (in response to the clearance orders) up to mid-harvest. Plainly, a grower with the right-sized work force in the orchards has an incentive to discourage additional workers who show up from staying on the job (which is not to say that growers have in fact done that).

The lawyers for the migrants contend that in 1978 eastern apple growers deliberately overloaded the recruitment process by submitting requests for 7,052 aliens. (The department says it certified 4,925 aliens and that the Immigration Service admitted 5,345, the difference representing an exercise of discretion by the Immigration Service in response to growers' reports of no-shows by Puerto Rican workers.) From 1970 through 1977, the number certified was generally between 4,000 and 5,000 (reaching a peak of 5,087 in 1973). Whatever the actual redundancy of pickers in the eastern orchards in 1978, the Labor Department has paid $200,000 for air fares, lodging, and meals for Puerto Rican workers, according to Bodin. In other words, part of the cost of preference for U.S. citizens is assigned to the American taxpayer, at least this year.

The mandatory hiring of Puerto Rican workers might be acceptable if the growers could send their own agents to explain the job to applicants and screen them for experience in harvest work and motivation (including willingness to climb ladders)—at least according to one grower. But even that might not work because of the ill will between growers and Puerto Rican officials. Employment contracts the growers signed with Puerto Rico in 1976 led to forty-one suits in Puerto Rican courts, and the growers paid up to $1,000 per complainant to settle because of the cost of defending the suits (with Puerto Rican lawyers) and because of doubts that the courts in Puerto Rico would be evenhanded. Unsurprisingly, the growers want to stay as far away from the island and government of Puerto Rico as they can. They would certainly prefer having any point of law decided in Roanoke rather than in San Juan.

But it is not the case that the only politics involved are local politics. Labor Secretary Marshall sees the problem of the apple pickers in the context of high unemployment and of aliens displacing American workers. The growers reply that time and again urban Americans have tried picking apples but have quit, complaining that the work was too hard for the money. Moreover, with unemployment insurance and other forms of income maintenance protecting the unemployed from want, high unemployment no longer means a ready supply of labor for available jobs, especially now that agricultural workers are eligible for unemployment insurance. Presumably that insurance will cause some migrants to decide to return to Florida at the end of the summer vegetable season.

There is no reason to suppose that controversy over the use of aliens as harvest workers will abate. Congress had adopted a policy that seeks to satisfy both interest groups. To the growers it has left open the possibility of hiring foreign labor. However, it has undertaken to protect American workers from the consequences of foreign competition by insisting that the employment of aliens have no adverse effect on domestic wages. As is its wont, Congress has told the executive branch to be fair to both sides—to determine what is fair compensation and what is a good-faith recruiting effort by the employers. The regulators' determinations of these questions invariably—and perhaps inevitably—fail to satisfy one side or both.

Karalekas predicts that more use of the certification process will occur as apple growers in the Midwest and Northwest, responding to the government's campaign against undocumented workers, shift from the widespread use of illegals to certified aliens. If only for that reason, more debate, litigation, and controversy about foreign agricultural workers must be expected. ■