SECRETARIAT OF LABOR AND SOCIAL SECURITY

GENERAL INTERNATIONAL AFFAIRS COORDINATION OFFICE
NATIONAL ADMINISTRATIVE OFFICE
FOR THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION

REVIEW REPORTS
PUBLIC NOTICE MEX 9802

Mexico City, Federal District, August 1999.

PUBLIC NOTICE MEX 9802
REVIEW REPORT FROM THE MEXICO NAO

I. Executive Summary

The NAALC's objective is to improve labor conditions and living standards on each Party's territory; to promote to the maximum extent the principles established within Annex 1; to promote the effective compliance and application of each Party's labor law; and to promote transparency in the administration of labor law. In order to achieve such objectives, the NAALC provides for public notices, among other mechanisms. Through public notices, each Party's National Administrative Office (NAO) reviews labor law issues which have arisen on each Party's territory, within the framework of cooperative consultations and evaluations under Part Four of the NAALC.

On May 27, 1998, the Mexico National Administrative Office (NAO) received the Public Notice "regarding labor law issues arising in the United States." The following petitioners presented this: the Union of Workers in the Metal, Steel, Iron, Related and Similar Industries; the Authentic Labor Front; the National Workers Union; and the Democratic Peasant Front.

The Public Notice discusses labor issues in the apple industry in the Washington State, U.S.A. It argues that "violations of the rights of Mexican and U.S. workers in the Washington State apple industry are continuing because the U.S. government has not developed laws, regulations, procedures and practices to protect the rights and interests of its labor force, in violation of commitment it established in Annex 1 of the NAALC.[1]" In cases in which the petitioners acknowledge the existence of such laws or regulations, they also note the violation of their labor rights, thereby violating the principles established in such legal ordinances.

The petitioners state that migrant workers in the Washington apple industry do not receive the same treatment as domestic workers. They state that because of this discrimination, their rights to minimum employment conditions and their right to organize a union are being violated.

They argue that the Labor Department has not fulfilled its obligations to improve minimum employment conditions (wages and payments corresponding to overtime work performed).

They state that they lack protection under the Labor Law to exercise the right to organize, since the National Labor Relations Act, by not considering agricultural workers as being "employees," cannot protect them in the event that employers dismiss them for wishing to organize a union.

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[1] Paragraph 2, page 3 of the Public Notice.

With respect to safety and health issues, the petitioners claim the existence of a persistent violation of U.S. law in matters of ergonomic protection, claiming a complete lack of safety measures to prevent injuries caused by repetitive movements affecting workers. They also note that the federal and state authorities have not set a standard regulating the information provided to workers on the handling of pesticides nor the provision of protective equipment for these types of toxic substance. Many accidents involving these substances have been recorded, where the worker was not given the necessary medical assistance; many other accidents are not even reported.

The labor law violations claimed by the petitioners in such Public Notice refer to seven of the principles included in Annex 1 of the NAALC: freedom of association and right to organize (1); right to collective bargaining (2); right to minimum employment conditions (6); equal opportunity without discrimination (7); prevention and compensation in the case of job-related injuries and illness (9 and 10); and protection of migrant workers (11).

On July 10, 1998, the Mexico NAO accepted this Public Notice for review. On August 7, 1998, pursuant to article 21 of the NAALC, the Mexico NAO requested cooperative consultations with the U.S. NAO on the referenced Public Notice. Also on August 13, 1998, the petitioners were requested to expand upon the information that had been submitted.

U.S. law, both federal and local, protects the rights of workers against the practices mentioned in the Public Notice, and it is the duty of the corresponding authorities to ensure proper compliance with the law and, as the case may be, to apply the corresponding penalties.

During the review, labor-related issues were considered that had arisen on U.S. territory, as presented by the petitioners, and well as the relationship between such issues and the obligations established in NAALC. Based on this, pursuant to article 22 of the NAALC, the Mexico NAO recommends that the Secretary of Labor and Social Security ask the U.S. Labor Secretary for ministerial-level consultations on the following issues: freedom of association and right to organize; minimum labor conditions; job discrimination; prevention of job-related injuries and illnesses; and compensation in cases of job-related injuries and illnesses.

II. Introduction

The review by the Mexico National Administrative Office (NAO) was carried out within the framework of the North American Agreement on Labor Cooperation (NAALC) signed by the governments of Mexico, United States and Canada, and in force since 1994. The governments committed to encouraging their labor authorities to apply national labor law effectively. It is to be noted that the NAALC commitments did not provide for the establishment of common standards in labor matters, changes in domestic laws, or recourse to supra-national authorities.

This report refers to issues relating to the application of U.S. labor law, based on Public Notice MEX 9802, submitted to the Mexico NAO. The petitioners claim that the labor authorities of that country did not effectively apply its labor law in matters of:

1) Freedom of association and the right of workers to organize,
2) Collective bargaining,
3) Minimum labor conditions,
4) Employment discrimination,
5) Safety and health, and
6) Protection of migrant workers.

This report alludes to the corresponding provisions of U.S. labor law, the resources available to the affected parties, and the results that have been obtained.

Framework:

The NAALC includes the following objectives: "to improve labor conditions and living standards on each Party's territory;" "to promote to the maximum extent the principles established in Annex 1;[1]" to promote the observance and effective application of each Party's labor law;" and "to promote transparency in the administration of labor law."[2]

With a view to achieving these objectives, the Parties are required to:

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[1] The labor principles that the Parties committed to promoting under the conditions established by their domestic labor law (Annex 1 of the NAALC) are the following: 1) freedom of association and the right of workers to organize; 2) right of collective bargaining; 3) right to strike; 4) prohibition of forced labor; 5) restrictions on child labor; 6) minimum working conditions; 7) elimination of job discrimination; 8) equal wages for men and women; 9) prevention of job-related injury and illness; 10) compensation in cases of job-related injury and illness; and 11) protection of migrant workers.

[2] Article 1 of the NAALC.

Establish government measures for the effective application of the labor laws;
Guarantee access by private parties to the procedures;
Guarantee that the procedures brought before their administrative, quasi-judicial or labor courts are fair, equitable and transparent;
Publish their laws, regulations and procedures; and
Promote information and public awareness of their labor laws.[3]

In performing the review, the Mexico NAO took into consideration the fact that the NAALC acknowledges that the effective application of the labor laws must be by the labor authorities with jurisdiction in each country, since the NAALC does not create or recognize supra-national mechanisms. Each Party promised to fully abide by its respective Constitution and to acknowledge its right to establish its own labor standards and to consequently amend its labor laws and regulations. In this regard, the Mexico NAO also took into consideration the fact that the NAALC establishes that "resolutions decreed by the administrative, quasi-judicial, judicial or labor courts, issues pending resolution, as well as other related procedures shall not be subject to review, nor be re-opened pursuant to the terms of the provisions of this Agreement.[4]

The NAALC provides for the NAO to establish rules for the presentation and receipt of Public Notices on labor law-related issues arising on each Party's territory. In this regard, a review of such issues by the NAO will be consistent with each country's procedures.[5]

Mexico published the "Mexico National Administrative Office Regulation (NAO) on Public Notices" to which article 16.3 of the North American Agreement on Labor Cooperation Agreement of 28 April 1995 refers. Such ordinance establishes that Public Notices:

Will be addressed to the domicile of the NAO;
Will be drafted in Spanish;
Will be identified to the petitioner;
Will state whether they contain confidential information, in which case the NAO will withhold information of that nature;
Will detail labor law-related issues arising on the territory of the other Parties (Canada and United States).

Once having received the Public Notice, the NAO will notify the petitioner of its acceptance or any missing data. For review purposes, the NAO may request consultations with the National Administrative Offices of either Party, as provided for in article 21 of the NAALC; obtain additional information from the petitioners, as well as engage experts and consultants; or organize information

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[3] Articles 3 to 7 of the NAALC.

[4] Article 5.8 of the NAALC.

[5] Article 16.3 of the NAALC.

sessions.

Within a reasonable period, depending upon the complexity and nature of each Public Notice, the NAO shall issue a report containing the following:
labor law-related issues arising on the other Parties' territory;
The relationship between such issues and the obligations established in NAALC;
Recommendation as to whether or not to request ministerial-level consultations pursuant to article 22 of the aforementioned Agreement, and any other applicable measures to facilitate fulfillment of the objectives pursued in such tripartite legal instrument.

In accordance with the NAO's recommendation, the Secretary of Labor and Social Security may request ministerial-level consultations regarding any issue falling within the scope of the Agreement, with his counterpart in the United States of America or Canada, with a view to undertaking an exhaustive examination of the specific case through the available public information.[6]

Public Notice MEX 9802:

To this end, on May 27, 1998 the Mexico NAO received Public Notice MEX 9802, submitted by the Authentic Labor Front, the Union of Metal, Steel, Iron, Related and Similar Industries, the National Workers Union and the Democratic Peasant Front. This notice refers to failures by the U.S. Government to apply the labor law in the Washington State apple industry, at the companies Washington Fruit Corporation and Stemilt Growers.

The petitioners believe that the protection of migrant workers has been violated, since the U.S. labor authorities do not grant such workers the same protection as domestic workers with respect to freedom of association, labor conditions, medical insurance, housing, and safety and health, as stipulated in principle 11, stated in Annex 1 of the NAALC.

They also claimed alleged violations in issues relating to freedom of association and the right of workers to organize, as specified in principle 1 of the aforementioned Annex, because the U.S. National Labor Relations Board failed to penalize violations committed against union drives within the companies, in which the International Brotherhood of Teamsters and United Farm Workers participated. They believe that these violations also limit the right to collective bargaining.

They also note alleged violations in matters of minimum labor conditions, pursuant to principle 6 of the aforementioned Annex 1, since the U.S. labor authorities have not guaranteed that workers will receive overtime payments and that wages will be above that country's poverty level. They also argue that principle 7, on the elimination of job discrimination, was violated since there is no equal opportunity for migrant workers.

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[6] Article 22 of the NAALC.

They believe that principles relating to the prevention of work-related injuries and illness and compensation in such cases were violated, since the Occupational Safety and Health Administration (OSHA) authorities did not apply the laws covering pesticides, nor undertake inspections, resulting in a high rate of job-related accidents and illnesses, and that government officials discouraged workers from claiming compensation under principles 9 and 10 of Annex 1 of the NAALC.

The Mexico NAO accepted the Public Notice for review on July 10, 1998, notifying the petitioners of its status. With a view to obtaining information, the Mexico NAO held consultations with its U.S. counterpart pursuant to article 21 of the NAALC of August 7, 1998, and obtained additional information from the petitioners during the informal meeting held between them and the Mexico NAO authorities on December 2, 1998.

III. Issues relating to labor law and NAALC obligations

This report seeks to systematically present the events in question, as presented by the petitioners of the public notice, and the applicable labor law, with respect to each of the articles and principles of the NAALC relating to that Public Notice. To that end, it refers first of all to the corresponding events as presented by the petitioners; next, to the NAALC principle or article; and finally, to the applicable labor law as provided by the U.S. NAO.

3.1 Freedom of association and right of collective bargaining

3.1.1 Petitioners' arguments

The petitioners claim that their rights of freedom of association and collective bargaining are being violated in the Washington State apple industry. They state that agricultural workers lack protection under the labor law to exercise the right to organize. They base this claim on the stipulations contained in Section 2(3) of the National Labor Relations Act (NLRA), which excludes any person employed in agricultural work from the definition of employee.

The petitioners acknowledge that although the Washington State courts have provided that agricultural workers are entitled to organize under the State Constitution, in practice this does not happen, since there is no legal mechanism protecting this right. They note that this causes agricultural workers in the Washington State apple industry to be excluded from any legal protection.

The petitioners also state that although workers in warehouses or packing plants are defined as employees under the NLRA, they face obstacles to enforcing their right of freedom of association and right to organize. They also claim that employers discourage any attempt to unionize through supposedly discriminatory labor practices such as threats, intimidation or coercion, etc.

The petitioners note that these alleged practices occurred during the weeks prior to the union elections of January 8, 1998, at the Washington Fruit Corporation and Stemilt Growers Corporation apple packing plants. This—in the opinion of the petitioners and of the International Brotherhood of

Teamsters / AFL-CIO—prevented a fair election and made unionization impossible. The International Brotherhood of Teamsters / AFL-CIO consequently filed a claim before the National Labor Relations Board, to obtain a court order that the companies recognize the union and negotiate their contracts.

The petitioners therefore claim that the United States is not promoting its labor laws through appropriate government measures. They offer the criticism that personnel at the NLRB are being cut, while the number of complaints is increasing. This results in "procedures that are unnecessarily complicated and delays which made be of three or more years." They note, for example, that warehouse workers have filed these types of appeals for many years, but with minimal results (the workers succeeded in being represented in NRLB elections in four warehouses in the 1970's, but were never able to sign a collective agreement), for which reason it is possible that the claim submitted on January 8 will not prevail.

The petitioners claimed that although there are legal mechanisms under the "Gissel Order" (for collective bargaining) for the NRLB to certify the union without prior elections, or independently of the results of any election affected by an employer's discriminatory actions, these are frequently disputed before the courts, which causes a delay at times of up to several years before initiation of the bargaining.

3.1.2 NAALC Articles

In the case of the alleged violations of the rights of freedom of association and collective bargaining of packing plant and warehouse employees, the Mexico NAO, pursuant to NAALC article 5.8, performed no investigation. This was because the issue—as the petitioners themselves acknowledge—is still in the process of being reviewed by the NLRB.

In the case of the agricultural workers, the NAALC articles that may have been violated are the following:

Labor principle No. 1: Freedom of association and protection of the right to organize. This principle recognizes "the right of workers, freely exercised and without impediment, to form organizations and join them at their own discretion, with a view to promoting and defending such interests."

Labor principle No. 2: Right to collective bargaining. This provides for "protection of the right of organized workers to freely bargain, in collective form, the terms and conditions of their employment."

Regarding the alleged failure to promote appropriate government measures to ensure effective application of the labor law, the NAALC articles in which the petitioners note violations are the following:

Article 3: Government measures for effective application of the labor law. Part 1. "Each Party shall encourage compliance with its labor law and shall effectively apply it through appropriate

government measures (...) such as (...) (g) initiating procedures, on a timely basis, to seek penalties or appropriate solutions for violations of its labor laws."

Article 4: Access by private parties to the procedures. Part 1 "Each Party shall guarantee that parties with a legally recognized interest pursuant to their domestic law covering specific matters shall have appropriate access to the administrative, quasi-judicial, judicial or labor courts for application of the Party's labor law." Part 2. The law (...) shall guarantee access to the procedures by which the established laws shall be enforced: (a) in its labor law, including that corresponding to safety and health, working conditions, worker-employer relations and migrant workers..."

Article 5: Procedural guarantees. Part 1. "Each Party shall guarantee that the procedures filed before their courts (...) (d)...are not unnecessarily complicated, nor involve unreasonable costs or time nor unjustified delays."

Article 7: Information and public awareness. This states that "each Party shall promote public awareness of its labor laws, and shall specifically: a) guarantee the availability of public information relating to its labor laws and the procedures for their application and fulfillment..."

3.1.3 Respective law

The respective law, as the petitioners acknowledge, does not grant the capacity of "employees" to agricultural workers (section 2(3) of the NRLA and section 3(f) of the Fair Labor Standards Act). For the case of warehouse or packing plant employees, Section 8c of the NRLA does not restrict anti-union campaigns by employers. This section recognizes that "...the expression of any point of view, argument, or dissemination of opinions, whether in written, graphic or visual form," does not constitute job discrimination.

In the case of warehouse employees, the applicable legislation is the following:

NRLA Section 7. (Section 157) states that workers are entitled to organize, form, join or assist labor organizations to collectively bargain through representatives elected by them, and to commit themselves in other such activities with a view to collective bargaining or for any other mutual assistance or protection, and they must also have the right to refrain from any or all such activities, unless such rights may be affected by an agreement which requires them to be a member in a labor organization as a condition of employment, pursuant to Section 8(a)(3).

Section 8. (Section 158 (a), Unfair labor practices by employer) Unfair labor practices by an employer consist of the following:

(1) Interfering, restricting or limiting workers in the exercise of their rights as guaranteed in Section 7;
(2) Dominating or interfering in the formation of any labor organization, or financially contributing to or giving any other type of support;

(3) Discriminating in the hiring of a worker, or making such hiring conditional upon encouraging or discouraging membership in any labor organization;
(4) Dismissing or discriminating against a worker for having filed charges, or testifying in any of the proceedings provided for in this Law;
(5) Refusing to collectively bargain with the worker representatives.

This section notes that the United States, by contrast with Mexico and Canada, has not yet ratified International Labor Organization Agreement No. 87 on freedom of association and the right to organize, which is considered as being one of the seven basic agreements of the ILO.

3.2. Minimum labor conditions

3.2.1 Argument of the Petitioners

The petitioners note that the wages of warehouse and field workers are below the poverty levels defined by the U.S. Federal Government and the Washington State Government. They note that the average annual wage of field workers is less than 10,000 U.S. dollars per year and of warehouse workers less than 12,000 dollars. The U.S. Federal Government considers the poverty line for a family of three as being 13,650 dollars per year.[7]

As an example of the above, the petitioners note that:

> The combination of low wages and the lack of year-round employment or part-time work relegated almost two-thirds of migrant workers to living standards below the poverty level. If agricultural workers receive an hourly wage, as is the case for 66% of migrant workers, it averages only $4.47 (dollars) per hour. If the piecework payment system is used, by output, the average wage is $6.94 (dollars) per hour. Despite their constant efforts to search for work, following the migrant path marked by the seasonal harvest, they work an average of 29 weeks per year, with average income of no more than $5,000 per year, i.e., an average of $2.50 (dollars) per hour.

They also note that average annual wages in the Yakima and Wenatchee regions are 30% lower than average wages throughout the State. They state that over 20% of Yakima's population lives in poverty. The petitioners note that this situation could become increasingly worse as a result of the social benefit cuts being considered in the Welfare Law and the Immigration Law.

The petitioners call attention to the fact that only 50% of agricultural workers are entitled to the minimum wage as stipulated by the Fair Labor Standards Act (FLSA). They note that

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[7] Data extracted from "Complex overview of poverty in the United States;" CNN in Spanish. August 10, 1998. [Illegible URL]

this is because there are exceptions in that law which eliminate worker protection, such as being employed by an independent contractor or broker, rather than by the farm owners.

The petitioners complain of the U.S. Labor Department's failure to apply the labor laws and attribute this to limited personnel, which they consider as being insufficient. They point out that in 1980 that office had over 1,000 inspectors covering wages and working hours, while in 1994 the number had declined to only 700.

3.2.2 NAALC articles

As to the alleged failure to fulfill the minimum wage as noted by the petitioners, the articles that apply are the following:

Labor Principal No. 6: Minimum working conditions. This provides the following: "...minimum wage and payment of overtime for salaried workers, including those not protected by collective bargaining."

Article 2: General Commitment. This provides that: "Ratifying full compliance with each Party's Constitution and acknowledging each Party's right to establish, internally, its own labor standards and consequently to adopt or amend its labor laws and regulations, each Party shall guarantee that its labor laws and regulations provide for high labor standards consistent with high quality and productive workplaces and that they will continue to make their best efforts to improve such standards within that context."

Regarding the alleged failure to apply adequate government measures to ensure effective fulfillment of the stipulations set forth in the labor law, the NAALC articles that the petitioners claim are violated are the following:

Article 3: Government measures for effective application of the labor law.[8]
Article 4: Access by private parties to the procedures.[9]
Article 7: Information and public awareness.[10]

3.2.3 Respective Law

Sections 6 (a) and 5 of the FLSA state that each employer must pay its workers (...) no less than $4.75 dollars per hour during the year beginning October 1, 1996, and no less than

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[8] Cited on page 9 of this report.

[9] Cited on page 10 of this report.

[10] *Ibidem.*

$5.15 dollars per hour as of September 1, 1997.

Although the petitioners mentioned that there are exceptions in the FLSA which eliminate protection for workers, such as being employed by an independent contractor rather than by the farm owners, the Mexico NAO found no basis for this statement.

3.3 Job Safety and health

3.3.1 Arguments of the Petitioners

The petitioners complain that out of over 70,000 high-risk chemical substances used in industrial production in the U.S., the Occupational Health and Safety Administration sets standards for only 27. Under their argument, this means that according to that U.S. Bureau of Labor Standards (BLS), agricultural workers have a higher rate of illness from chemical substances than any other group of workers; the rate is 5.5 per 1,000 workers. Data from the Environmental Protection Agency (EPA) indicate that close to 300,000 field workers suffer from serious illness (cancer, birth defects, neurological damage) due to pesticide-related poisoning caused by pesticides.[11]

The petitioners note that Washington State is fourth among the 50 states in the U.S. with respect to the rate of workplace injuries and illness, with 10.5 injuries and illnesses for every 100 workers.[12] Despite this, the percentage of fines imposed by OSHA on employers nationwide is minimal, with this state ranked 41st out of 50.[13]

According to the petitioners, the absence of standards and the failure to apply existing ones caused agricultural workers in Washington State to experience a rate of synthetic poisoning 3.2 times higher than that of all workers in the State, as well as a rate of toxic illness 2.2 times higher during the period from 1987 to 1990. Respiratory illnesses and skin infections were 2.4 and 3.9 times higher than the norm, respectively.

The petitioners complained of the industry's use of insecticides such as *Phosdrin, Thlodan*

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[11] See U.S. Federal Register, No. 52, 16,050,16059 (1987); U.S. General Accounting Office (GAO), Agricultural Workers: Health and Well-being at Risk (1992). Documents cited by the petitioners.

[12] See U.S. Labor Department, sampling of job-related injuries and illnesses (1995). Document cited by the petitioners.

[13] See U.S. Labor Department Data on OSHA compliance (1996). Document cited by the petitioners.

and *Guthion*, which cause serious illness and are highly toxic.[14] They also claimed that when agricultural workers refuse to do field work where such pesticides are used, they are subject to intimidation by employers.

They also argue that neither the federal or state authorities effectively apply the labor laws and regulations on the use of agricultural pesticides. They state that the number of federal inspectors and OSHA's budget have declined between 1980 and the present. This has resulted in a drop in the number of inspections and a failure to apply health and safety standards.[15] They note that delays in applying OSHA regulations are frequent.

At the state level, the petitioners note that the EPA delegated the application of agricultural regulations to the Washington State authorities, but the state's Department of Agriculture has only 12 inspectors.

Regarding the compensation system, which tends to be under state jurisdiction, the petitioners say that Washington State authorities discourage workers from claiming pesticide-related compensation. They report that in 1998 only 245 agricultural workers filed claims for compensation for that type of illness. 98 (40%) of these claims were rejected.

3.3.2 NAALC Articles

Regarding the absence of regulations for protecting job-related accidents, the following NAALC articles apply:

Labor principle No. 9: Prevention of job-related injuries and illnesses. Establishes "the requirement and application of standards that minimize causes of job-related (injuries) or illnesses."

Labor principle No. 10: Compensation in cases of job-related injuries and illnesses. This principle includes "the establishment of a system to provide benefits and compensation to workers or their dependents in the event of the occurrence of job-related injuries, accidents or death during work, related to or occurring by reason thereof."

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[14] According to the petitioners, in 1993 27 agricultural workers were hospitalized for the use of *Phosdrin* and 55 workers for the use of *Guthion*.

[15] According to the petitioners, OSHA had 1,400 inspectors in 1980, compared to fewer than 1,000 in 1998. The number of inspections declined from 29,[?] in 1995 to 24,000 in 1996. During the same period, budget cuts reduced OSHA activities by over 15%. See Stephen Barr, "Budget Cuts Hamper OSHA's Ability to Apply Worker Safety Laws," *Washington Post*, February 19, 1996, pp. A1-A2, cited by the petitioners.

Article 2: General Commitment.[16]

Regarding the alleged failure to promote appropriate government measures to ensure the effective application of labor laws (regulations, lack of inspection personnel) the applicable NAALC articles are the following:

Article 3: Government measures for the effective application of labor laws[17];

Article 4: Access by private parties to the procedures.[18]

Regarding the allegedly delays in the procedure for applying the OSHA regulations, the NAALC articles that may have been violated are the following:

Article 5: Procedural guarantees.[19]

Article 7: Information and public awareness.[20]

Regarding the alleged pressure by the Washington State Government for workers to not claim compensation, the NAALC articles that may have been violated are the following:

Labor principle No. 10: Compensation in cases of job-related injury or illness.[21]

Article 3: Government measures for the effective application of the labor laws.[22]

Regarding the claims of omission in the U.S. labor law framework regarding the failure to protect workers with respect to medical insurance and housing which, as the petitioners note, is different from that received by domestic workers: the failure to apply pesticide laws; the absence of legal mechanisms that protect the right of agricultural workers to exercise their right to organize under the protection of the labor laws, in that the NLRB excludes any

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[16] Article cited on page 12 of this Report.

[17] Article cited on page 9 of this Report.

[18] Article cited on page 10 of this Report.

[19] *Ibidem.*

[20] Article cited on page 10 of this Report.

[21] Labor principle cited on page 14 of this Report.

[22] Article cited on page 9 of this Report.

individual employed in agricultural work from being defined as an employee, despite the fact that the state Constitution, by court ruling, recognizes the exercise of this right; and the fact that the U.S. government has not ratified International Labor Organization Agreement No. 87 on "freedom of association and the right to organize," the Mexico NAO notes that the NAALC does not provide a basis for questioning the Parties' legal framework, and it reiterates its permanent respect for the Constitution and laws of each of the Parties, and in particular respect for their sovereignty.

3.3.3 Respective laws

The applicable laws are the following:

The Occupational Safety and Health Act of 1970 provides protection for worker safety and health by promoting job safety and health conditions.

Section 5(a) states that employers are required to keep the workplace free of risks which harm or may harm health, including the death of workers.

Section 5(a)(7) provides for the existence of mandatory standards, such as the use of labeling or any other form of notices, to ensure that workers are aware of the risks to which they are exposed, significant symptoms and appropriate emergency treatments, as well as conditions and safety precautions that must be taken into consideration in the event of use or exposure. If necessary, such standards must also provide for the use of appropriate protection equipment, and monitoring or technical procedures to be used in connection with risks in the workplace and at intervals, and in any other form that may be needed for worker protection. In addition, when appropriate, any other regulation which provides for the obligation to perform the type and frequency of medical exams or other examinations needed by workers exposed to hazardous substances, with a view to demonstrating whether or not the health of such workers is being affected. The examinations must be offered by the employer, which shall assume their cost (...)

Section 8 (a) provides that an employer representative and a worker representative must have the opportunity to accompany OSHA inspectors to assist in the inspection. In the event that the worker representative is not present, the OSHA inspector must consult with an appropriate number of workers regarding health and safety conditions at the work site.

The authority with jurisdiction to monitor application of this Law is the Occupational Safety and Health Administration, which is required to perform inspections to verify proper application of the safety and health standards specified in such law. The law sets penalties of a monetary and criminal nature for companies that violate safety and health standards.

3.4 Protection of migrant workers

3.4.1 Arguments of the Petitioners

The petitioners state that the vast majority of migrant workers (74%) have U.S. work permits, and that in some areas, U.S. labor law does not afford them the same protection as domestic workers. In this sense they note that discrimination against migrant workers extends to aspects such as unequal protection in: a) rights to freedom of association and collective bargaining, b) the compensation system, c) the H2A foreign agricultural workers program, and d) housing.

The complainants claim that the rights of freedom of association and collective bargaining are not being respected in the case of migrant workers. They note that when workers attempt to form a union, employers called the Immigration and Naturalization Service (INS) with a view to intimidating them. This—according to the petitioners—is a discriminatory practice that hampers the rights of migrant workers to organize.

In the case of the compensation [illegible], the petitioners state that in 17 states, compensation benefits are lower for migrant workers than for domestic U.S. workers. By restricting the benefits of families of workers who died on the job to 50% of the levels afforded to U.S. citizens, Washington State is one of the 17 mentioned.

According to the signatories of the Public Notice, the H2A program for temporary agricultural workers grants unequal protection to workers of this kind. They are excluded from the Agricultural Worker Protection Act (AWPA). By being excluded, they are denied similar protection granted to U.S. citizens under the AWPA. Under this program's structure, migrant workers remain unprotected in matters of concern such as work conditions and wages, records of agricultural work contractors and minimum transportation, safety and housing standards.

The petitioners note that approximately 30,000 workers in the Washington State apple industry live in housing that lacks basic sanitary conditions. Even various articles in the regional press have noted that in addition to lacking basic sanitary services, housing is expensive for agricultural workers.[23]

3.4.2 NAALC Articles

The referenced NAALC principles and articles are the following:

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[23] See the articles in the *Yakima Herald Republic* of March 27 and April 19, 1998.

Labor principle No. 11. Protection of migrant workers. This provides that "migrant workers on the territory of any Party must be granted the same legal protection as to nationals, with respect to work conditions."

Regarding the prevention [*sic*] of high labor standards with regard to protecting migrant agricultural workers:

Article 2: General Commitment.[24]

Article 4: Access by private parties to legal procedures.[25]

Article 7: Information and public awareness.[26]

3.4.3 Respective Law

The U.S. laws applying to the protection of migrant workers in the apple industry are the following:

The Migrant and Seasonal Agricultural Worker Protection Act establishes the obligation to guarantee the necessary protection to temporary migrant agricultural workers.

Equal Rights Under the Law, 42 USC & 1801 notes that all parties under U.S. jurisdiction must have the same rights in each state and territory to enter into and enforce contracts, to file claims, to be party thereto, to proffer evidence and to receive the benefits of all laws and procedures for the safety of individuals and assets, as are enjoyed by white citizens, in addition to being subject to all type of penalties, sanctions, punishment, taxes and licenses.

Title VII of the Civil Rights Act of 1964 (42 USC & 2000e) prohibits employers from job discrimination by reason of origin.

Executive Order 11246 prohibits employers from discriminating against workers or job applicants by reason of race, color, religion, gender or nationality, and requires them to take actions that ensure that all qualified applicants and employees receive the same

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[24] Article cited on page 12 of this Report.

[25] Article cited on page 10 of this Report.

[26] *Ibidem.*

job opportunities.

Although the agricultural industry is not required to provide housing to workers and their families, if it does so, it must satisfy federal and state OSHA regulations, in addition to those of the AWPA. Section 29 USC & 1801 of this act requires employers in the agricultural industry to provide minimum levels of housing which must satisfy certain standards to be inhabitable.

RECOMMENDATIONS

Workers in the Washington apple industry state that the corresponding authorities are not enforcing the applicable labor laws in such a way as to affect their rights in the face of violations of the law in matters relating to freedom of association and the right to organize; the right to collective bargaining; the right to minimum job standards; equal opportunity without discrimination; prevention and compensation in the case of job-related injury and illnesses; and protection of migrant workers, all of them principles protected by the NAALC.

Federal and local labor laws protect and regulate these rights and state, in all cases, that the government of the United States of America, through the corresponding administrative authorities, must ensure the fulfillment of such laws.

The review made by the Mexico NAO was carried out within the framework of the NAALC, at the request of the petitioners, in an effort to obtain the governments' action through exchanges of information regarding the claimed points.

It is to be noted that the Mexico NAO review was in full compliance with the laws and labor authorities with jurisdiction in the United States of America, and that it was not intended to create supra-national mechanisms, since it is not its function to judge or attempt to amend laws, but rather to promote strict compliance of U.S. laws and to protect the rights of workers. An in-depth examination is the purview of the Expert Evaluation Committees; and penalties, where necessary, for allegedly persistent patterns in failing to effectively apply the laws are provided for in Part V of the NAALC through an Arbitration Panel.

With a view to fulfilling the provisions set forth in Article 5.8 of the NAALC, the Mexico NAO sought to obtain information relating to issues that might be pending resolution, and to leave outside this report any *sub judice* issue.

After reviewing Public Notice MEX 9802, which was submitted by the following petitioners: the Union of Workers in the Metal, Steel, Iron, Related and Similar Industries; the Authentic Labor Front; the National Workers Union and the Democratic Peasant Front; the Mexico NAO, pursuant to Article 22 of the North American Agreement on Labor Cooperation, recommends that the Secretary of Labor and Social Security request ministerial-level consultations with the Secretary of Labor of the United States of America. These

ministerial-level consultations would be intended to obtain further information on actions carried out by the Government of the United States to guarantee the following rights of agricultural sector workers: freedom of association and collective bargaining, minimum job conditions, effective compliance with safety and health standards, and legal protection, which according to the NAALC, must be the same, in labor-related matters, as those enjoyed by the country's domestic workers.