Obama Administration Big on 'Hot Goods' Orders, Civil Forfeiture for Labor Regulations

Hot goods orders being used by the feds in attack on blueberry growers in the Pacific Northwest.

By Walter Olson

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One reason for the public outcry over civil forfeiture is its unfairness as a matter of procedure: at a point when you've been convicted of nothing, law enforcement can seize your property and make you sue to get it back. And then if you want to challenge the government's actions, the assets you need for a legal defense may themselves have been seized or frozen. So the pressure is to settle with prosecutors or police on unfavorable terms, perhaps getting back some of your bank account or of the value of your home or car but often without a practical chance to fight the case against you in court.

It isn't just forfeiture law that can give the government this intimidating type of power. Under a provision of the 1938 Fair Labor Standards Act, the U.S. Department of Labor can seek what is known as a "hot goods" order, freezing the physical output of an employer that it suspects of having violated wage and hour law, all without having to prove its case at a trial.

In recent years — urged by such constituencies as labor unions, trial lawyers, and left-leaning academics — the Obama administration has greatly stepped up its enforcement of FLSA wage-hour law. Part of that enforcement has taken the form of a revitalized use of hot-goods orders, which even defenders of its approach concede had until recently been little-known. So far the most notable result has been a federal attack on blueberry growers in the Pacific Northwest — an onslaught high-handed enough to have been met with a stinging rebuke from a federal court last year, and which has now ended in humiliation with the dropping of charges against two growers and a refund of moneys extracted from them.

The case started in 2012 when the Labor Department told three Oregon farms it didn't think the piecework rate system they used, which paid workers for pounds picked, resulted in high enough pay for field workers. Without spelling out exactly how it had arrived at this conclusion — an omission that would raise questions later — it obtained a hot-goods order against them, labeling an estimated $5 million worth of fresh blueberries as contraband forbidden to enter the channels

of commerce for supermarket sale, processing, or any other use. And then it offered the growers a deal: if they wanted Washington to release their crop, they would have to not only fork over a demanded cash settlement but — this is the kicker — *agree not to appeal*.

It's coercive enough to deploy the hot-goods power against a maker of steel ingots or knitted garments. But blueberries are a highly perishable crop that begins to lose value at once if not shipped. Indeed, no one could remember a case until the Obama years in which the hot-goods power had been used against agricultural produce at all, let alone one with a shelf life measured in days.

For the growers, of course, the proffered choice was no choice at all: rather than lose crops worth millions, they took the deal and agreed to pay $240,000. But outrage spread among farm groups, and the Oregon Farm Bureau offered to assist in a court case. The next year two of the growers went to court to challenge what had happened to them and undo the settlement. They told a federal court that the hot-goods order by its nature had prevented them from asserting their legal right to contest the department's wage calculations or even find out what they were. One grower said the government's tactics had amounted to "extortion."

Making matters worse, the growers finally managed to uncover some of the department's methodology in calculating wage underpayment. Here's the Bend (Oregon) Bulletin in an editorial last month:

Do you know how the department determined some of the alleged labor violations? It guessed.

It determined that a picker could pick only a certain amount of blueberries in a day. [*Since a larger amount had been picked than the number of reported workers would account for, it deduced that the farms must have used off-the-books time or laborers* — W.O.] One farm hired a former Labor Department investigator to test that theory. He had workers pick blueberries on a field that had already been picked, and many picked well over that amount.

It's hard — as in, really, really hard — to get a legal settlement thrown out on grounds of duress. But federal judges nonetheless sided with the growers and ruled that the Department had overstepped its powers. Federal district judge Michael McShane even wrote that the department's conduct constituted "fraud." Meanwhile, the U.S. House of Representatives held a hearing flaying the department over its actions, with Oregon Democrat Kurt Schrader joining Republicans in expressing outrage.

Last month DoL finally folded its hand, dropping the case and agreeing to pay the growers the disputed wage sums as well as $30,000 in compensation, hardly enough to make them whole but enough to dispel any "feds did nothing wrong" spin. But don't credit the department with any real change of heart: as insiders told sympathetic ears in the press, the Senate had flipped to Republican control in the mean time, and the prospect was suddenly very real that Congress might pass legislation to defang the hot-goods power, at least in its use against agriculture. It wanted to stave that off.

Like the civil forfeiture power, the "hot goods" power is ripe for a rollback or better yet outright repeal. Let's hope Congress is up to the task.

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