MONUMENTAL FLAWS AND DYSFUNCTIONS: SOME SUGGESTIONS FOR MENDING THE BROKEN TRADE ADJUSTMENT ASSISTANCE CERTIFICATION PROCESS

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Good afternoon. Please accept my apologies if I suddenly tear out of here, or look nervously at my watch throughout the panel. My wife is due to give birth at literally any minute, and I had to promise I would handle no less than twenty middle of the night feedings in order to be here today. Talk about a job I would not mind outsourcing.

Anyway, I would like to begin with a quote from a recent Court of International Trade (or, CIT) opinion:

> This case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. Only time will tell whether the Labor Department, and Congress, are listening.[1]

So wrote Judge Jane Ridgway, venting her frustration after four long years of trying to resolve the case of *Former Employees of Chevron Products Co., v. Sec'y of Labor*. Unfortunately, it does not appear that her words have been fully heard yet. And although other CIT judges have begun to join Judge Ridgway in reversing their former hesitance to do the Department of Labor's[2] labor job for it, and affirmatively certify workers as eligible for trade adjustment assistance (TAA), it is clear that these words need to be heard, and soon.

Amidst all of the current politicking about how to deal with outsourcing, job creation and free trade agreements, one major issue has been largely overlooked, or at least is not being paid enough due. In sum, despite the jobs numbers the presidential candidates like to toss about, we have people losing

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1. Former Employees of Chevron Products Co. v. United States Sec'y of Labor, 298 F. Supp. 2d 1338, 1348 (Ct. Int'l Trade 2003).

2. The division of the Labor Department formally responsible for the TAA program is the Employment and Training Administration.

jobs to outsourcing and other trade-related factors all of the time, and there is a program, TAA, in place, flawed in overall structure though it may be, to address at least some of the needs of some of these people. In fact, TAA has been with us, in various forms, since 1962, providing retraining benefits, extended unemployment payments, etc. President Bush touted TAA specifically in Wednesday night's debate, referencing the increased funding for TAA during his tenure. Nevertheless, despite the President's confidence in TAA, according to one estimate of the manufacturing job loss situation in 2003, less than forty percent of potentially eligible workers even applied for TAA—and only thirteen percent of the potentially eligible workers received benefits.[3]

It is my belief that the failures in the Labor Department's administration of the legal side of TAA investigation and certification are among the primary factors in the trend we see of fewer and fewer workers applying for benefits, as well as the program's overall mixed record. Because of the knowledge that the certification process is flawed, and may well result in a denial of benefits or years of protracted appeals, many workers simply choose not to apply to take advantage of the benefits they may well be entitled to. A report on TAA issued just last month by the GAO showed that many of the program's newest and most progressive benefits have gone largely untapped, as workers are either unaware or uninterested in even starting the process.[4] When combining the TAA failures with the shortcomings in the rest of the array of benefits available to workers whose jobs have been outsourced—a recent report by the TAA Coalition concluded that the U.S. spent the least among Germany, Japan, France and the U.K. to assist unemployed workers[5]—many of our workers are unable to adapt to the changing economy, with our nation the worse for it.

Let's start with the problem. According to a special report issued by the Bureau of National Affairs this past May, a study of three years of CIT decisions found that the Court upheld only twelve and a half percent of Labor's denials of certifications of TAA eligibility.[6] Now, in the TAA context, the Court will uphold investigations supported by "substantial evidence," defined as sufficient evidence to show that the investigation based on more than a mere

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3. Michael R. Triplett, *Trade Court's Critique of Labor Department Places Spotlight on Handling of TAA Claims*, 21 INT'L TRADE REP. 795, 797-98 (2004).

4. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE COMMITTEE ON FINANCE, U.S. SENATE: TRADE ADJUSTMENT ASSISTANCE - REFORMS HAVE ACCELERATED TRAINING ENROLLMENT, BUT IMPLEMENTATION CHALLENGES REMAIN 3-5 (2004).

5. Howard Rosen, TRADE-RELATED LABOUR MARKET ADJUSTMENT POLICIES AND PROGRAMS WITH SPECIAL REFERENCE TO TEXTILE AND APPAREL WORKERS (2003), http://www.newamerica.net/Download_Docs/pdfs/Pub_File_1426_1.pdf.

6. Triplett, *supra* note 3 at 795.

scintilla of evidence that leads to an arbitrary and capricious finding.[7] For there to be a mere five Labor determinations satisfying this standard, out of a possible forty-one published opinions in three years, should be all we need to know to establish that things are serious. After all, only a few of Labor's denials make it to this stage—based on these percentages, it is possible thousands of potentially eligible workers have been left without the benefits they need, and deserve.

What is it that needs to be shown for benefits to be conferred when workers petition the Labor Department's benefits? In order to be certified, a group of at least three workers must meet the following statutory standards[8].

1) That a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision, have become, or are threatened to become, totally or partially separated;
2) That sales or production, or both, of such firm or subdivision have decreased absolutely; and
3) That one of the following is present: (a) increase of imports of articles like or directly competitive with articles produced by such workers' firm or subdivision contributed importantly to such total or partial separation, (b) shift in production to a country that is party to a free trade agreement or other tariff preference program; (c) the firm is a downstream or upstream supplier to another firm.

On the whole, this seems like it should be doable. Fact-intensive, to be sure, but relatively straightforward standards. But when so few of the cases that get before the CIT pass judicial muster, we must look at what the issues have been, and what can be done. To my mind, the current issues with the investigation and certification process break down in three ways:

1) The understanding of what constitutes "production";
2) What factors are evaluated in determining the impact of trade on the job losses; and finally
3) The process Labor uses to address the first two issues.

The first question is what a worker must do in order to be certified. In light of both the estimated loss of 300,000-500,000 service industry jobs, and the failure of a Senate bill this past Spring that would have enabled service industry workers to receive TAA, the issue of what work is covered by TAA has become

7. Former Employees of Rohm & Haas Co. v. Chao, 246 F. Supp. 2d 1339, 1346 (Ct. Int'l Trade 2003).

8. 19 U.S.C.S. § 2272 (2004).

more critical than ever. An example of the difficulties involved is the 2003 CIT case of *Former Employees of Marathon Ashland Pipeline*,[9] where Labor was faced with the issue of whether gaugers at an oil production facility were production workers. In sum, gaugers perform quality control to determine whether oil can be introduced into the stream of commerce. In reviewing and then denying the gaugers' petition, Labor relied exclusively on basic information from the company, ignored the workers' claims and determined, with, as the Court found, no other investigation, that the gaugers were not involved in production, but in post-production activity.

The Court reversed this determination and certified the workers for TAA. After reviewing at length, mostly because Labor had not reviewed it all, the issue of what production means in the context of oil production, the Court found that all activity leading up to the introduction of oil into the stream of commerce, such as gauging, should be considered production. The Court used a variety of secondary publications, some authored by Labor itself, in creating a judicial definition of production.

And after all of the CITs heavy lifting, the Federal Circuit reversed, saying, in essence, the CIT had overstepped its bounds.[10] Which left everything back at the Labor drawing board. But was the CIT right to say what it had, that production equals anything done up to the point of entry of the good into the stream of commerce? Was the Federal Circuit right to stop the CIT from doing Labor's job for it? I'm not sure—but what I am sure about is that this is the type of question the courts should not—must not—be dealing with at all. In my opinion, the fix required is to establish standards for what "production" is. GAO statistics show that approximately thirty-five percent of workers applying for TAA in the past several years have been from the textile industry.[11] We therefore should have definitions of what the production process means in the textile context: does it include every worker involved from thread to yarn to cutting and sewing and finishing? More importantly, does it include workers, like oil gaugers, involved in inspection, shipping, etc. How to account for the changing nature of American work, where the traditional notion of employment —i.e. companies make only certain products, and workers perform only certain defined tasks—bears little resemblance to how American companies and workers must operate to stay afloat?

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9. Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 277 F. Supp. 2d 1298 (Ct. Int'l Trade 2003).

10. Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 370 F.3d 1375, 1386 (Fed. Cir. 2004).

11. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE COMMITTEE ON FINANCE, U.S. SENATE: TRADE ADJUSTMENT ASSISTANCE—IMPROVEMENTS NECESSARY, BUT PROGRAMS CANNOT SOLVE COMMUNITIES' LONG-TERM PROBLEMS, 2 (2001).

After all, if production equals creation of a good for sale and introduction of it into the stream of commerce, it is certainly reasonable to argue that anyone involved, in any way, in the process of bringing a good to market should be eligible for TAA. As Howard Rosen of the TAA Coalition has argued, shouldn't all workers who lose their jobs in this context be eligible for TAA?[12] Even the Accounting and Customer Service departments make possible the sale of a good—so why should they be denied TAA because they are not "production" workers? Although the argument has always been that individuals in a department like Accounting can find other jobs in their field, with the growth in outsourcing of white-collar/service functions, this is no longer an assumption based on reality. But if the answer to these questions is no, and we do prefer a more limited TAA coverage scope, shouldn't workers at least know what the scope is?

The second issue is how, when evaluating TAA petitions, we determine whether the job losses are, or should be, of the type eligible for TAA. That is, do we look only to imports or shifts in production related to the specific item or firm, or do we look industry-wide at overall trends that affect workers? This is perhaps the most critical question of all—most commentators agree that a company's decision to outsource or shift production abroad can generally not be narrowed down to a single factor. For example, domestic plants may become out-dated, education and training levels may not be at desired levels, etc., in addition to the more common explanation of salaries and wages. Yet Labor generally attempts to investigate by simply asking the narrow question presented by the statute: are imports increasing or have jobs left to one of a certain list of countries?

In *Former Employees of Rohm & Haas*,[13] Labor attempted to deny certification based on just such an analysis. In *Rohm & Haas*, workers whose plant was scheduled to have its production shifted to two other company locations applied for TAA. Labor's investigation consisted solely of inquiring whether imports of the company's own products from its foreign locations had increased. Labor then found that, in addition to other factors, because imports were not increasing, the workers were not eligible for TAA.

The Court rejected this analysis and remanded for further investigation. Specifically, the Court demanded that Labor investigate the possibility that imports of competitive third party products had increased, thus impacting the decision of *Rohm & Haas* to close the workers' facility. The Court also mentioned that Labor needed to make determinations related to the other potential

12. Howard Rosen, *Trade Adjustment Assistance and Offshore Outsourcing* (2004), http://www.newamerica.net/index.cfm?pg=article&DocID=1486.

13. *Former Employees of Rohm & Haas Co.*, 246 F.Supp.2d at 1344.

factors involved in the decision to transfer the jobs, such as technological obsolescence, in order to satisfy the statutory requirements.

Should it be that, even if there are non-import factors, non-labor related factors, or shift in world demand for a product to focus on non-U.S. markets, that those workers are covered as well? Shouldn't the issue of whether jobs are lost due to "international trade" be redefined to include all aspects of international trade? This is admittedly a dangerous road to go down, and the 2002 revisions to TAA addressed some, like upstream/downstream suppliers.[14] But there is room for much more. Resolution of this issue could challenge the current balance between TAA and other benefit programs available to dislocated workers, benefits not tied to international trade. Looking elsewhere than imports for reasons to grant TAA could also impact international trade obligations, not to mention take the program to potentially untenable funding levels. Nevertheless, a truly functioning program should at least address and respond to all of these issues, so that the Court need not take the issue up again and again, and workers will know the scope of what is available to them.

Finally, there are the details of how investigations are conducted. Reading through CIT opinions gives you a sense almost that Labor is doing its job for the first time each time it handles an investigation. Recognizing that the individuals at Labor are, in general, good people attempting to do a good job, but are chronically under-funded and short-staffed, one would nevertheless hope that a system of conducting investigations would have evolved that could pass the Court's muster.

But, as I mentioned, this is not the case at present. The recent opinion of *Former Employees of Sun Apparel*[15] is just the latest in a line of cases demonstrating that there is a need for standardization in the process, as well as guidelines for what must occur during an investigation, in order for it to pass the CITs review. In *Sun Apparel*, a series of petitions were presented to Labor by employees of a garment production factory in Texas. The workers lost their jobs in waves, and a number of petitions were filed over time, with an admittedly complicated series of petitions, dismissals, and requests for reconsideration.

Unfortunately, even with several series of workers applying, from a number of departments, Labor's investigation consisted of a few emails to the firm's Human Resources director. Not anyone in the manufacturing, sales, logistics, or other similar departments, but the Human Resources director, someone who is likely not aware of the precise details of the jobs actually performed by each individual. Even when her answers appeared inconsistent, or at least incomplete, Labor failed to follow up. Labor also failed to pay any attention

14. Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

15. Former Employees of Sun Apparel of Texas v. United States Sec'y of Labor, No. 04-106, slip op. at 11 (Ct. Int'l Trade, Aug. 20, 2003).

whatsoever to the information provided by the workers. By the end of the opinion, Chief Judge Restani, although she did not comment on the questionable choice by Labor of which company official to contact, was actually composing basic questions for Labor to use in its investigation, such as "what actual work was performed?"[16]

It is hard to imagine both that questions like this would not be asked by Labor, and that a CIT judge is so aware of the issue that she would feel the need to actually draft specific questions for Labor, rather than rely on previous practice, where the Court suggested general areas of a case that it had concerns about. What can be done? The first is to issue guidance on the petition process. In many situations, workers completing the initial petition may not understand the full implications of the questions, or have access to the accurate information, yet feel obliged to complete the document. GAO data shows that approximately eighty percent of workers completing TAA petitions have not gone past high school in their education, and twenty percent are not proficient in English.[17] Without the assistance of a guide to completing the petitions, or formal assistance from a trained Labor official or an attorney, the process often begins with unusable, or in some cases inaccurate or detrimental, information and just deteriorates from there. With a streamlined petition process that provides detailed instructions for workers so that the information they provide is worthy of detailed review, we would certainly be better off.

Another part of this is to standardize who within a company completes the Labor questionnaire. My suggestion would be to direct all questionnaires to in-house counsel, or if there are none, to the company's outside legal counsel. By directing the questionnaires in this way, with instructions to the attorney to consult with all relevant company departments and requiring them to provide a list of whom they spoke with, Labor can rely on the standards of professional ethics in demanding that information be provided in a complete and accurate form. It is also reasonable to assume that, in most cases, attorneys will research the relevant standards and issues in order to provide Labor with usable answers.

Of course, it's always nice to give a presentation where you present a problem, suggest solutions and then leave it to someone else to figure it out. I am trying to respond differently. At present, an ad hoc committee of the Customs and International Trade Bar Association, of which I am a part, is currently developing a plan to identify what we can do to help change the situation. Similarly, advocacy groups like the TAA Coalition are bringing a wide array of sectors together to advocate for, and bring more sweeping changes to,

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16. *Id.* at 21.

17. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN AND RANKING MINORITY MEMBER, U.S. SENATE—TRADE ADJUSTMENT ASSISTANCE: TRENDS, OUTCOMES AND MANAGEMENT ISSUES IN DISLOCATED WORKER PROGRAMS 30 (2000).

the TAA program, as well as working hard to insure that all workers who lose their jobs are aware of the possible benefits out there for them. We can only hope that the efforts of these organizations will be understood for what they are by the Labor Department—offers of assistance to improve the program vis-à-vis workers and the CIT. The sooner these issues are remedied, the more effectively our nation and its workforce will be able to adapt to outsourcing and the ever-changing global economy, relying less on political rhetoric and more on real action, in the way our competitors have.