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Milking Them for Their Worth:

An Assessment of the Dairy Industry and the Status of the Dairy Worker

by Ashley Byers¹

According to a New Mexico dairy worker reflecting on workplace conditions, “They [owners and managers] treat the cows like a person and the workers like slaves” (Sorrentino, 2014:1). As reported by Dairy Farming Today (2014), there are approximately 51,000 dairy farms in the United States today producing milk and dairy products for domestic markets. This translates to an estimated \$140 billion in economic output and \$29 billion in household earnings, per year (Ibid.). A typical dairy farm has a herd of approximately 115 cows (Dairy Farming Today, 2014). This means that if all of the cows on the farm were to produce an average of six to seven gallons of milk a day, one farm alone can produce 690 to 805 gallons of milk per day. In order to produce all of this milk, one cow eats approximately 100 pounds of feed each day. This work is performed by dairy workers and is very laborious.

With such high product volume and the intensive care required, it is evident that it is necessary for the dairy industry to have a competent work force. Yet, most unemployed Americans are not willing to perform such work, and immigrant, noncitizen individuals are drawn to this work because of its steady, year-round nature. It has been estimated that in 2009, there were roughly 138,000 people employed on dairy farms; 41% of these workers were immigrants, including a large number from Latin American countries such as Mexico and Guatemala (National Center for Farmworker Health, 2014). Even with a workforce that appears to be large, in 2009 one-fifth of farmers expected to experience a shortage of laborers (National Milk Producers Federation, 2009). With the passage of time the dairy industry has seen a rise in the number of foreign-born workers employed on dairy farms (Ibid.). This trend is predicted to continue into the future.



Personal accounts of the living and working conditions for dairy workers would shock most Americans. As told by dairy worker Jill McGee during the 30th Anniversary Conference of the Cornell Migrant Program in 2002, the living conditions are horrendous. She wrote that the employer-provided housing was rat-infested, had spotty electricity, and sewage was littered throughout the house (McGee, 2002). The working hours were so long (approximately 15-hour work days) that her children rarely saw their father, who also worked at the dairy. The workers did not receive minimum wage, let alone overtime pay. In another account, a dairy worker in California detailed an incident where he was kicked in the chest by a cow and suffered a broken disk in his back (Arrieta, 2004). The injury was so severe that he blacked out and had blood in his urine. When he told the owner what had happened, he was met with the choice of either leaving work and losing his job or getting back to

work. The worker chose to go back to work, working 12-hour days, and deciding between eating and sleeping.

In addition to these problems faced by dairy workers, the issues that foreign-born dairy workers face are even more varied and difficult. For example, most foreign-born workers have minimal English proficiency, migrate from job to job, which disrupts education for their children, work long hours for minimum pay, and are exposed to a wide range of occupational hazards (National Center for Farmworker Health, 2014). Moreover, they are subjected to systematic racial and economic discrimination. However, perhaps the most serious issue that all dairy workers face today is the lack of legal protections afforded to them. Presently, dairy workers are not afforded protection under federal regulations, including the National Labor Relations Act, the Fair Labor Standards Act, and the Migrant and Seasonal Agricultural Workers Protection Act. Unlike their counterparts working in other sectors of the economy, dairy workers have few employee protections and legal remedies outside of basic employment protections. Further, they are systematically kept ignorant of the law and the remedies available to them. As one dairy worker stated, “[T]he patron [boss] makes the rules. We know nothing of the law, nothing of the government” (Sorrentino, 2014:1). This article provides an analysis of past and present legal protections that are available to dairy workers, and proposes policy recommendations for reforms that will benefit these workers.

Historical Overview

As early as the 1600s, dairy production was occurring in what is present-day United States with the introduction of various breeds of dairy cattle into the colonies (United States Department of Agriculture, 2014). In the beginning, dairy farming was engaged in small-scale, private production, requiring only the labor of the dairy farmer and family members (*Ibid.*). That model prevailed until recent decades, when dairy production has increasingly become mass, large-scale commercial production that requires a larger workforce (United States Department of Agriculture, 2014). Improvements in the industry over the long run led to a safer supply of dairy products, such as the use of glass milk bottles, pasteurization procedures, and milking machines (*Ibid.*). Indeed, scholars have noted that

Between 1850 and 1910 the annual flow of milk from American dairy cattle increased almost five times while the national dairy herd grew slightly more than three times. This increase of about 50 percent in milk yield per dairy cow was due to a variety of influences, notably: (1) interstate relocation (“westward movement”) of dairy activity after 1850; (2) advances after 1850 in care and feeding techniques, breeding, and breeds; (3) post-1850 diffusion of better techniques to regions where

practices were poor in 1850; and (4) lengthening of the annual milking season (the number of days that cows were milked each year) as a result of improved economic opportunity for, and the commercialization of, dairying (Bateman, 1968:256).

With the introduction of mechanical equipment such as the milking machine, by the 1950s operating crews were necessary to ensure the proper operation of the dairy processes (United States Census Bureau, 1950). Because of such innovations and continued population growth, the number of farms increased tri-fold between 1850 and 1950 (United States Census Bureau 1950). Further between 1900 and 1950, the number of milk cows increased by approximately 20% (United States Census Bureau, 1950). With the continued industrialization of the United States in the early 20th Century, the movement to protect workers influenced lawmakers and resulted in the enactment of various labor protections. For example, the National Labor Relations Act was passed in 1935, and the Fair Labor Standards Act was enacted in 1938. Yet, as will be shown, these laws did not provide protections for dairy and other agricultural workers, and essentially left these people in a figurative “no man’s land.”

Today, the typical workday for a dairy worker is extremely arduous. Work hours are not the normal “9 to 5.” Rather, a dairy is a 24-hour a day, seven days a week operation. Cows must be milked two to three times a day, the animals must get plenty of physical activity, and the excrement must be picked up and disposed of regularly (Midwest Dairy Association, 2014:1). With all of this work needing to be done, it would be devastating for the industry if immigrant workers were to be even further neglected or, even worse, eliminated. The American economy and the dairy industry would suffer greatly without immigrant dairy workers. The statistics are as follows: if immigrant labor were eliminated, the U.S. dairy herd would be decreased by 1.34 million cattle; milk production would be reduced by 29.5 billion pounds, and the number of farms would be reduced by an estimated 4,532 (National Milk Producers Federation, 2009). Moreover, retail milk prices would increase by an estimated 61%, and most shockingly, eliminating immigrant labor in dairy farms would reduce economic output by \$22 billion and 133,000 immigrant and native-born workers would be out of work (*Ibid.*).

It is estimated that dairy workers earn roughly \$10/hour or should make at least the state minimum wage (John, 2013). Additionally, dairy workers rarely receive formal training, with the greater part of instruction occurring on the job and typically performed by a fellow employee (Sorrentino, 2014). Further, dairy workers seldom take time off as they are regularly faced with the prospect of losing their jobs should they do so (*Ibid.*). In a December 2014 exposé, it was documented that at one

dairy farm, the workers did not receive holiday pay, overtime pay², sick pay, or workers' compensation (Sorrentino, 2014). This investigation is supported by additional research, which has shown that only 45.6% of dairy employers provide vacation time and 27.7% provide some form of health insurance (National Milk Producers Federation, 2009). It is likely that this is how the majority of dairy farms operate in the United States today, even though the provision of such benefits varies from state to state and is dependent on state and federal mandates.

In addition to worrying about the severe working conditions, many dairy workers, like most agricultural workers in general, face the reality of being in the United States without documentation. More than 70% of the farm workers currently working in the United States are foreign-born, with a majority coming from Mexico; it is estimated that about half of this population is undocumented (Wainer, 2014). Specifically with regard to dairy workers, in an investigation by Cornell University focusing on dairy workers in New York, it was determined that approximately two-thirds of the Spanish-speaking dairy workers in the state were undocumented (Sommerstein, 2013). In another example, out of the 8,300 dairy workers in Idaho, it has been estimated that as many as 90% are undocumented (Associated Press, 2013).

These workers have serious worries about being targeted by Immigration and Customs Enforcement ("ICE") for deportation. Increasingly, dairy farms have been the target for ICE and Internal Revenue Service raids (Runyon, 2015). Studies show that in 2013, approximately 438,421 people were deported from this country (Gonzalez-Barrera and Krogstad, 2014). Roughly 240,000 of these deportations were for non-criminals, compared to the 198,000 deportations that were for criminals (Ibid.). It is estimated that 75% of all deportations are the result of an individual being apprehended by ICE (Gonzalez-Barrera and Krogstad, 2014). These statistics are significant as they show that ICE initiates most of the deportations occurring in this country; thus, undocumented individuals, including dairy workers, live in constant fear of being identified by ICE.

Legal Provisions

Scholars note that lawmaking bodies have wrestled with "the problem of defining an agricultural worker and drawing the line between industry and farm" (Dyson, 1977:121). The complex nature of these jobs poses a difficult framework with which legislators must work. Even so, some of the legal remedies and protections that policymakers provide are insufficient or nearly nonexistent, especially for dairy workers. The following is a discussion of past and present legal provisions, most of which either do not address the

dairy industry or exclude dairy workers from the law's purview altogether.

National Labor Relations Act, 29 U.S.C. § 151, et seq.

The National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, was enacted in 1935 and regulates organized labor and the relationship with employers (Stockdale, 2013:764). As a response to the unionization movement, the NLRA affords workers with important rights, including that of collective bargaining. Yet much like its descendant, the Fair Labor Standards Act, the NLRA provides for an agriculture exception, supported by much of the same reasoning as that which supported the exception in the Fair Labor Standards Act. The purpose of this Act was to "diminish the cause of labor disputes burdening or obstructing interstate commerce" (Dyson, 1977:126). However, under § 152(3) "agricultural laborers" are not covered by the NLRA. In its current form, the NLRA uses the same definition from the Fair Labor Standards Act and defines "agriculture" as "includ[ing] farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities performed by a farmer or on a farm as an incident to or in conjunction with such farming operations" (29 U.S.C. § 203(f), current through 2014).

The NLRA explicitly identifies dairying as an agricultural activity. Indeed, the National Labor Relations Board ("NLRB") has held as much. For example, in *Pine State Creamery Co., Inc.*, the NLRB determined that employees who handled milk operations on a dairy farm were "agricultural laborers within the meaning of the Act and were therefore exempt from its protections" (130 NLRB 892, 893 (1961)). Thus, the NLRA does not provide any sort of protection to this country's dairy workforce.

Fair Labor Standards Act, 29 U.S.C. § 201, et seq.

The Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, establishes federal standards for minimum wage, overtime pay, child labor, and other important labor matters. The FLSA was originally part of President Franklin D. Roosevelt's New Deal legislation and sought to provide basic protections and guarantees for workers (Canny, 2005:357). "[T]he FLSA became the New Deal's attempt to meet the economic and societal problems of that era" (Canny, 2005:357). Yet, despite this desire to protect workers, agricultural workers were and continue to be left out. These standards are generally applied across the board to American employers and workers, but there are certain exceptions and loopholes for agricultural employers, so that

they do not need to comply with the standards set forth in the Act.

At the outset, it is important to note the definition of “agriculture” under the FLSA: “Farming in all its branches and among other things includes the cultivation and tillage of soil, *dairying*, and the production, cultivation, growing, and harvesting of any agricultural commodities” (emphasis added; 29 U.S.C. § 203(f), current through 2014). Thus, it is apparent that Congress intended dairy workers to fall under this category. Litigation that occurred subsequent to the enactment of the FLSA more clearly defined the work that would be considered “agricultural,” and thus, exempt from the FLSA requirements. After the determination of various factors that can be assessed to decide whether specific work is agricultural in nature and thus exempt, (see *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 265-70 (1955)), the Eighth Circuit Court of Appeals in *Wirtz v. Tyson’s Poultry, Inc.* determined that something as mechanical as a vertically integrated poultry operation qualified as “agricultural,” and was therefore exempt from the standards of the FLSA (355 F.2d 255, 259 (8th Cir. 1966)). “A persuasive factor [in the decision] included Tyson’s assumption of all the risk involved by furnishing and owning the producing stock” (Canny, 2005:376). So, even if something as complicated and mechanical as a modern poultry operation can be considered to be “agricultural,” it is reasonable to infer that dairy operations will always be considered “agricultural” and therefore exempt from the FLSA.

Generally, the FLSA is geared toward the protection of workers in all industries “engaged in interstate commerce or in the production of goods for interstate commerce” (Canny, 2005, 365). Thus, as long as the dairy is engaged in “interstate commerce” or produces dairy products that are then sold in interstate commerce, it will be subject to the provisions of the FLSA.³ Further, dairy operations will also be subject to state labor laws. Yet, as originally proposed and as it currently exists, the FLSA exempts agricultural workers from most of its protections. In order for an employer to qualify under the agricultural exemption, the work must be performed “on a farm.” For example, agricultural workers are not protected by workweek maximum hour limitations, nor are they afforded overtime pay. The explanations behind such exemptions are that “Congress wanted to pass a constitutionally viable bill; lobbyists urged their special interests; and legislators claimed to protect family farms” (Canny, 2005:366).

Moreover, another exception that affects agricultural workers is the lack of a required break time. Any breaks for workers are considered a matter “for agreement between the employer and the employees or their authorized representatives” (United States Department of Labor,

2014:1). It has been estimated that the average agricultural worker can work as many as 62 hours per week (National Center for Farmworker Health, 2014); if one were to assess dairy workers alone, it is likely that this number would be as high as 72 hours given that dairy work is a nearly 24-hour operation. Clearly, the working hours of the dairy worker are more than the “average” job. The continued emphasis on the protection of the farm owners themselves has greatly affected the livelihood of the dairy worker, since the farm takes in far more money than it would if it had to pay overtime wages and insurance, among other benefits.

Courts have repeatedly held that dairy workers and work performed in conjunction with a dairy operation fall under the agriculture exception to the FLSA. For example, the Tenth Circuit in *NLRB v. Karl’s Farm Dairy, Inc.* found that a worker as basic as a handy man that performed general tasks around the dairy was subject to the agriculture exception in the Act (570 F.2d 903, 904 (10th Cir. 1978)). Additionally, the District Court for the Western District of Louisiana found that a dairy worker who was engaged in the “first processing” of milk fell under the agriculture exception (*Wirtz v. Dunmire*, 239 F. Supp. 374, 380 (W.D. La. 1965)). Thus, even courts that are interpreting the language of the FLSA as Congress drafted it have interpreted it to include dairy workers and operations under the agriculture exception to the Act.

Despite these exceptions, there are certain specific requirements for employers to meet that do provide some protections for agricultural workers. For example, employers must pay workers at least the minimum wage; that is, workers must earn the minimum wage for the workweek (Mayer, Collins, and Bradley, 2013). Further, wages must be paid regularly and the employer must maintain pay records (*Ibid.*). Yet, these protections are insufficient to make up for the harmful effects created by the agriculture exception. Agricultural workers, including dairy workers, are still severely underpaid and are considered unskilled labor, even though their jobs are grueling and provide the country with vital products.

Migrant and Seasonal Worker Protection Act, 29 U.S.C. § 1801, et seq.

Enacted in 1983 and amended in 1995, the Migrant and Seasonal Worker Protection Act, 29 U.S.C. § 1801, et seq., is a law that provides protections and assistance to agricultural workers. The statute begins with a statement of purpose: “It is the purpose of this chapter to remove the restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers; to require farm labor contractors to register under this chapter; and to assure necessary protections for migrant and seasonal

agricultural workers, agricultural associations, and agricultural employers” (29 U.S.C. § 1801, current through 2014). More specifically, as set forth by the Department of Labor, “[t]he Migrant and Seasonal Agricultural Worker Protection Act [AWPA] . . . protects migrant and seasonal agricultural workers by establishing employment standards related to wages, housing, transportation, disclosures and recordkeeping” (United States Department of Labor, Wage and Hour Division, 2008:1).

In the 1960s, Congress became aware of the abuses perpetrated upon farmworkers by farm owners and farm labor contractors. Such abuses included “misrepresenting the nature and availability of work, providing inaccurate information about pay, transporting crews in uninsured, unsafe vehicles, forcing crew members to buy goods and services from the contractor at excessive prices, payroll irregularities, and supplying miserably inadequate housing” (Pederson, 1984:254). In response, the Farm Labor Contractor Registration Act was adopted in 1963 and there was subsequent related legislation, but all of this was ultimately supplanted by the AWPA (Pederson, 1984:254).

Workers protected under the AWPA are accorded certain assurances and protections, including, but not limited to, the following: the agricultural employer, agricultural association, or farm labor contractor cannot violate the terms of the working arrangement nor can they provide false or misleading information to the worker; transportation must be safe and fully insured; provided housing must be certified by the appropriate federal, state, or local agency; the housing must meet the applicable state health and safety standards; the housing terms and conditions, as well as the rights guaranteed under the AWPA, must be posted in a conspicuous location and in the native language of the workers; payroll records must be kept for the workers; wages must be paid when due; and no person can discriminate against a migrant or seasonal worker in any manner (Beardall, 2012:19-46).

There are two classes of agricultural workers that are protected by the AWPA: migrant and seasonal. These classes are not mutually exclusive and can be defined as follows: (1) “migrant agricultural workers are those individuals who are employed in agricultural employment of a seasonal or other temporary nature and who are required to be absent overnight from their permanent places of residence;” (2) “Seasonal agricultural workers under MSPA [AWPA] are those individuals who are employed in certain agricultural employment of a seasonal or other temporary nature and who are not required to be absent overnight from their permanent places of residence” (Pederson, 1984:264). The usage of words like “migrant” and “seasonal” signal that Congress only intended for workers who worked temporarily

to be covered by the statute. This excludes dairy workers from the Act’s purview, given that dairy work occurs year round, and the workers do not move from job to job as often as migrant farmworkers.

Indeed, courts have determined that dairy workers do not fall under the purview of the AWPA. The court in *Lopez v. Lassen Dairy, Inc.* determined that dairy workers’ employment is not subject to the AWPA because the work is neither seasonal nor temporary (2010 WL 3210765 (E.D. Cal. Aug. 10, 2010)). So even though this Act provides basic protections and benefits to farm workers, including payment of wages when due, payroll and recordkeeping requirements, and safety regulations, dairy workers are not protected by it. The exclusion of dairy workers from the Migrant and Seasonal Agricultural Worker Protection Act is a clear instance of how the federal government has failed to adequately protect this vulnerable population.

Unemployment Benefits

When a person’s employment with a specific employer is terminated, he or she may become eligible for unemployment benefits, pursuant to the specific state statute. These benefits are intended to provide a short-term income for someone who is “in between jobs,” so to speak. However, these benefits are not given out freely; one must meet certain requirements in order to qualify. For example, in Michigan one may be eligible for such benefits if (1) the person is authorized to work in the United States, (2) has earned enough money to open a new claim or have benefits remaining from a prior benefit year, (3) is able and available for work, and (4) did not voluntarily leave the last job without good cause attributable to the employer (Unemployment Insurance Agency, 2014). While the requirements do not appear to be overly burdensome, workers may face a variety of problems when attempting to obtain these benefits, including difficulty navigating the agency’s system or a determination by the agency that the worker does not qualify for such benefits, even though he or she may meet the eligibility requirements. Despite this, unemployment benefits do not provide the worker with any sort of legal protection, only temporary income while looking for a new job.

Public Assistance Benefits

Much like unemployment benefits, federal public benefits programs offer assistance to low-income individuals. Such programs include financial assistance, food stamps, emergency assistance, and medical assistance, including Medicaid. These benefits are subject to eligibility requirements. Most of these programs require that the applicant be a “qualified immigrant,” a category which usually consists of (1) lawful permanent residents, or (2) refugees, asylees, people

granted withholding of removal/conditional entry/paroled into the country, among other groups. Thus, should the applicant meet one of these requirements, he or she may be eligible to receive public benefits. These eligibility requirements are not as stringent as other federal program standards, so it is likely that individuals like dairy workers would be able to apply for, and receive, these types of benefits. But again, like unemployment benefits, public benefits do not provide the worker with any sort of legal protection.

Preference Allocation for Employment-Based Immigrant Visas: INA 203(b)

The provisions discussed below are only immigration options, and do not provide any protections other than the issuance of a Legal Permanent Resident card or other visa.

The Immigration and Nationality Act provides for visas to be allocated to noncitizens on the basis of employment. The statute lists types of employees that may be able to obtain an employment-based visa for entry into the United States. The most relevant provision for dairy workers would be either § 203(b)(3)(A)(i) or § 203(b)(3)(A)(iii). Section 203(b)(3)(A)(i) allows for visas for “[q]ualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States” (Immigration and Nationality Act, §203(b)(3)(A)(i), current through 2014). Section 203(b)(3)(A)(iii) provides visas for “[o]ther qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States” (Immigration and Nationality Act, § 203(b)(3)(A)(iii), current through 2014).

Under Section 203(b)(3)(A)(i), dairy workers could fulfill the second and third requirements, as the work is not seasonal in nature and there are not enough domestic workers to fill open positions. The problem that such individuals would have in qualifying for this type of visa is that dairy work is not likely to be considered “skilled,” as interpreted under the statute. The work that dairy workers perform is extremely labor intensive and requires diligent, attentive individuals; however, such work does not require two years of institutional, specialized training as is required by the statute. Therefore, dairy workers could not obtain legal permanent resident status (and resulting derivative benefits) in the United States under this section. It would be far more likely for dairy workers to obtain a visa under Section 203(b)(3)(A)(iii), due to its minimal requirements, as set forth by its broad language. Despite this, it may be difficult to obtain this

visa, as the process is extensive and dairy work may not be viewed as necessary as that of workers from other sectors.

H-2A Visas

A common visa issued to foreign workers for agricultural jobs is the H-2A visa, codified in the Immigration and Nationality Act at Section 101(a)(15)(H)(ii)(a). Established as a successor to the *Bracero* program, this visa is issued to workers “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services” (Immigration and Nationality Act, Section 101(a)(15)(H)(ii)(a), current through 2014). This is a guest worker program that has long been the object of discussion, and many groups, including the dairy industry, support reforms to the program. For example, Farmworker Justice in its 2010 report addressing the H-2A program, stated that reforms are necessary because “[f]oreign guest workers should not be treated as disposable human machines, nor should they be used to deprive U.S. workers of available jobs or to undermine wages and working conditions of U.S. workers” (2010:8).

“Agricultural employers in the United States may request nonimmigrant agricultural workers in order to mitigate a shortage of ‘able, willing, and qualified’ domestic workers available for employment” (Bent, 2011:744). The process to obtain an H-2A visa is complicated. It begins with an employer attempting to recruit domestic workers to perform the job and obtaining a wage determination to ensure that the wage to be paid is that which is paid to others in the same position and that the wage paid will not adversely affect the wages of domestic workers in similar positions. The employer then files a labor certification application with the Department of Labor so that foreign workers may be granted the visa to come to the United States to perform the work indicated in the application. Once granted, the employer files the petition and visa application with the United States Citizenship and Immigration Services. If no defects are found in the application, approval of the visa petition will then be communicated to a consular office in the noncitizen’s country for the ultimate processing of the immigrant visa.

As the Fifth Circuit Court of Appeals held in *Salazar-Calderon v. Presidio Valley Farmers Association*, an employer is required to offer employment consistent with the H-2A regulations, regardless of whether these regulatory terms and protections are included in the clearance order or temporary labor certification application (765 F.2d 1334, 1342 (5th Cir. 1985)). If a worker is present in the United States under an H-2A visa, he or she is guaranteed the following, but not limited to, benefits pursuant to the provisions under 20 CFR § 655, et seq.: free housing; workers’ compensation

insurance; free tools, supplies or equipment necessary to complete the job; meals (either prepared or kitchen facilities provided for workers to prepare their own food); transportation (or reimbursement) for any worker who completes 50% of the contract period; a guarantee of employment for at least three-fourths of the workdays of the total contract period, as indicated in the job offer; a proper wage with the appropriate deductions, equal to either the amount of the Adverse Effect Wage Rate, prevailing wage, or state minimum wage; payroll records; an hours and earnings statement; and a work contract. Despite these guarantees, H-2A workers are not eligible for federal public assistance programs, including nonemergency Medicaid, Supplemental Nutrition Assistance Program, Supplemental Security Income, and Temporary Assistance for Needy Families.

The statute indicates that H-2A visas are issued on a temporary basis; “temporary” means “where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year” (Bent, 2011:745). While the text of the statute uses the term “agricultural,” which includes dairy operations, this type of visa is currently unworkable within the context of the dairy industry because of the visa’s “temporary” requirement. The dairy industry has year-round production, whereas agricultural and crop production jobs are seasonal in nature. Thus, the H-2A visa cannot provide legal protection for dairy workers.

Congress has explicitly recognized the special nature of the dairy industry and its exclusion from the H-2A program. In a February 2013 hearing, members of the House of Representatives expressed concern about the current nature of the program (Agricultural Labor, 2013). For example, Representative Goodlatte from Virginia asserted that this program is costly and ineffective. “We can do this by designing a program with practical safeguards and expanding the current universe of jobs to include dairy jobs and work in food processing plants, among other things” (Agricultural Labor, 2013: 5). Similar sentiments were echoed by Representative Lofgren from California, who recognized that the H-2A program poses a problem for those dairies that are in need of more employees (Agricultural Labor, 2013: 5-6).

The assertion that the H-2A visa cannot provide more workers for dairies due to its temporary nature is supported by the testimony of Chalmers R. Carr, III, president of Titan Farms, LLC, during his appearance before this committee hearing. “[S]ome of the major problematic areas of the H-2A program [are]: . . . Limited Participation - The program mandates that the job is seasonal in nature . . . This precludes participation in the program for any year round

producer, such as the dairy, livestock and nursery industries, penalizes operations for diversifying and prevents growth within our industry” (Agricultural Labor, 2013: 25). Even though Congress has recognized that there is an issue with the H-2A program and its relationship with dairy workers, it does not appear that any major reforms to the program will occur, especially today when immigration reform is highly controversial. Thus, this legal avenue cannot, at present, provide any relief for dairy workers.

POLICY RECOMMENDATIONS

It has been noted that historically, agriculture is an industry that is “uniquely worthy of protection” (Canny, 2005:368). However, as is apparent from the discussion above, legal protections have fallen short of adequately protecting agricultural workers, especially those in the dairy industry. Today, there has been a renewed effort to fight for the basic rights that dairy workers deserve and should be afforded. Filed on May 1, 2014 in United States District Court, Northern District of California, *Ruiz, et al. v. Darigold, Inc.*, a class action suit was brought against Darigold, one of the nation’s largest dairy producers (No. 3:14-cv-02054 (N.D. Cal., June 10, 2014)). The plaintiffs, concerned consumers, alleged that Darigold engaged in deceptive business practices, endangering both the livestock and their employees. The plaintiffs had purchased Darigold’s products based on its representations of sound business practices, and filed suit after learning of gross misrepresentations concerning its treatment of cows and dairy workers (Rodriguez, 2014:1). While the complaint was ultimately dismissed, the fact that the suit was filed in the first place shows that people have become aware of the deplorable treatment of dairy workers. This is an important first step in reforming the treatment and legal protections available to dairy workers.

Dairy workers today have organizations that focus on protecting them. The 1960s saw the rise of Cesar Chavez and the movement to unionize farmworkers across America with the founding of the United Farm Workers Union (UFW). Today, the UFW operates in ten states and works to protect the rights and lives of farmworkers, including dairy workers. For example, the UFW has negotiated with large dairies in Oregon to ensure the ratification of work contracts that protect workers’ rights and provide for fundamental benefits (United Farm Workers, 2014).

Additionally, there have been several attempts by lawmakers to move forward with meaningful change to the agricultural labor system as well as the immigration system, but nearly all of these efforts have stalled or failed. For example, in 2009 the Agricultural Jobs Opportunities, Benefits and Securities Act was introduced in the House of

Representatives. This bill sought to include dairy workers in the H-2A program, but it was met with heavy resistance by groups opposing immigration reform, and by H-2A contractors who did not want to see workers' rights expanded (Bent, 2011). Further, the H-2A Improvement Act was introduced in the Senate in 2010, but again, was not moved forward (*Ibid.*). The bill sought to exempt dairy workers from the "temporary or seasonal" requirement for H-2A visas, and provided for a three-year visa for the workers (Bent, 2011). Both of these bills would have been immensely helpful in the effort to provide dairy workers with greater protections. As stated by author Merrill Bent, "Both acts . . . could alleviate the current labor shortages faced in . . . dairy states" (2011:751).

Further, efforts aimed at immigration reform have been met with fierce resistance, especially from the Republican Party and its conservative members. The Border Security, Economic Opportunity, and Immigration Modernization Act proposed by Senator Charles Schumer has moved at the pace of a slow crawl through the Senate. The bill was introduced in early 2013 and as of early 2015, it has only had a few hearings. While the process for a bill to become law takes time, the slow progression of this bill has been deliberate, as it has received fierce criticism from the opponents of immigration reform. For example, Senator Tom Coburn, during the May 7, 2013 hearing regarding the bill, characterized the country's immigration problem as a "disease" (Agricultural Labor, 2013:1). Presidential actions, too, have been challenged by critics. In November 2014, President Obama took executive action to make it possible for over four million undocumented individuals to stay in the United States, while at the same time making it easier for "highly-skilled immigrants, graduates, and entrepreneurs" to stay and work in the country. While these protections appear to help many people, there is an effort in Congress to undo these actions. As recently as January 2015, members of the House of Representatives acted to threaten the funding of the Department of Homeland Security on account of its implementation of the presidential actions (Foley, 2015:1). Therefore, it is unclear how long these programs will continue to benefit undocumented immigrants.

To date, there have been minimal changes made to the legal protections afforded to agricultural workers, and the protections available to dairy workers are severely lacking. Serious action must take place to rectify this gross inequity that perpetuates dangerous workplaces and opportunities to exploit dairy workers. First, perhaps the most important improvement and recommendation that can be made to improve the legal avenues available to dairy workers would be to expand the Migrant and Seasonal Agricultural Worker Protection Act to cover all agricultural workers, including

dairy workers. As has been identified by Farmworker Justice in its 2013 report *The Agricultural Worker Protection Act At 30*, "[t]he rationale for excluding these workers, if ever valid, no longer exists. Congress should eliminate the distinction between migrant and seasonal workers; all workers deserve to live in decent housing, and all workers deserve disclosure of accurate information before they commit to a job" (2013:11). If dairy workers were to fall under the purview of AWP, it would open a whole new range of rights that would be available to them. For example, employers would be required to pay dairy workers a reasonable wage, provide them with disclosures about the job, and ensure that provided housing



is inhabitable and transportation is safe. These reforms would make a world of difference to the current state of the dairy worker.

Second, in the absence of immigration reform, the "temporary or seasonal" requirement for H-2A visas should be reformed so that dairy workers can come into the United States for these jobs, and if undocumented, not live in fear that he or she may be picked up by Immigration and Customs Enforcement (ICE). As previously discussed, a significant percentage of dairy workers in this country are here without documentation. Because of this status, these people cannot leave the country even for something as serious as the death of a family member because of the likelihood of being detained by ICE. If dairy workers were to be included in the H-2A visa program, the benefits would be twofold: first for the dairy worker the fear of deportation would subside because now he or she is in the country with work authorization and can perform the job without the fear of deportation; and second, the employer would be able to quickly obtain a workforce that is capable to perform the jobs, thus alleviating the labor shortages faced by dairy farms.

Third, efforts should be taken to reform the FLSA, as well as the NLRA, so that agricultural workers are protected by the provisions of both of these laws. More important of the

two, the FLSA currently does not provide for overtime pay or maximum work hour limits for agricultural workers. This has led to gross abuses of the dairy worker's labor. Some of the reasoning behind such exemptions is that they would be too costly for farmers to pay these additional costs. While that may have been the case at the time of enactment, the agriculture industry in this country has grown dramatically in recent decades. As previously indicated, the dairy industry generated \$140 billion a year in economic output, with \$29 billion in household earnings. To be sure, paying dairy workers overtime pay would result in a reduction in the amount of revenue that the employer takes in; yet when measured with respect to the amount of money that goes into litigating issues such as labor disputes and the losses due to limited productivity due to employee turnover and poor working conditions, this amount of money may be equal to or less than the money that goes into litigation and can be recovered through increased productivity, thus making it a more prudent business choice. Moreover, enacting maximum work hour limits would be beneficial for both parties, as it would provide the dairy worker with respite and the employer with a workforce that is more rested and focused. The United States has changed drastically since the turn of the 20th Century, and its labor laws should reflect as much.

CONCLUSION

"For so long...dairies have been able to get away with exploiting their workers and treating them like animals" (Arrieta, 2004:1). Dairy workers are under-protected and under-served, making them vulnerable to a predatory labor system. They have endured an extensive history of discrimination, both economic and social. They are helpless under today's laws and will remain as such unless real reform is undertaken. With the proposals made herein, dairy workers can achieve some parity with their labor brethren. The time is now to speak out and make it known that such deficiencies need to be remedied. 🌱

Endnotes:

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² Under federal law, however, employers are not necessarily required to provide overtime pay. See the discussion regarding the Fair Labor Standards Act, *infra*.

³ If the dairy is engaged in operations that are wholly contained to the specific state, and its products are not sold outside of the state, it will not be engaging in "interstate commerce." However, in today's world, it is likely that very few operations will fall into this category, as many operations are heavily involved in commerce and transactions with other states.

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