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REMANDS IN TRADE ADJUSTMENT ASSISTANCE CASES

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I. INTRODUCTION

Trade Adjustment Assistance ("TAA") actions are appealed to the Court of International Trade ("CIT") from the Department of Labor ("DOL"). The CIT has jurisdiction over TAA actions pursuant to 28 U.S.C. § 1581(d).[1] As discussed in detail below, almost all TAA actions involve at least one remand to the DOL, and many involve multiple remands to the agency.

II. BACKGROUND

TAA originated in the Trade Expansion Act of 1962, but has changed significantly through the Trade Act of 1974 and the Omnibus Trade and Competitiveness Act of 1988.[2] Although not often described as such, TAA is really the product of political compromises to garner support for the trade bills from members of Congress who were not anxious to liberalize trade because of the perceived potential loss of jobs in the United States. In exchange for votes in favor of the trade bill, provisions were included in trade bills that allowed workers, who lost their jobs due to imports, to apply to the DOL for certification of eligibility for benefits such as unemployment compensation, training, or relocation. The North American Free Trade Agreement Implementation Act ("NAFTA"), which entered into force on January 1, 1994, also had a "transitional adjustment assistance" provision, 19 U.S.C. § 2331 (repealed) ("NAFTA-TAA"). Congress reauthorized and revised the TAA program, and consolidated it with NAFTA-TAA in the Trade Adjustment Assistance Reform Act of 2002.[3]

III. TAA IN OPERATION

Throughout the history of the TAA, most applications for eligibility certification have been filed at the DOL by individual displaced workers or groups of workers on their own behalves and on behalf of their co-workers. From time to time, an application is filed by a state or local agency, a union, or the former employer. It appears that no displaced worker has ever been

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1. 28 U.S.C. § 1581(d) (2000).
2. 19 U.S.C. §§ 2271, 2395 (2000).
3. 19 U.S.C. §§ 2101 et. seq. (2000).

represented by counsel in his or her application to the DOL for certification of eligibility for TAA. TAA law gives workers who have been denied eligibility certification the right to request reconsideration of the DOL's decision. Likewise, no displaced worker has ever been represented by counsel in the administrative reconsideration process.

If the worker is denied eligibility certification at the administrative level, TAA law gives the worker the right to appeal to the CIT.[4] Inevitably, if the worker goes through the trouble of appealing to the CIT, the worker does so *pro se*. The clerk of the CIT typically assigns the action to a member of the private bar of the CIT who is willing to handle the action *pro bono*.

TAA cases are presented to the court on motions for judgment on the agency record, pursuant to CIT Rule 56.1.[5] In these actions, the DOL is typically represented by an attorney from the Department of Justice's Civil Division, Commercial Litigation Branch.

TAA decisions of the CIT may be, but rarely are, appealed to the U.S. Court of Appeals for the Federal Circuit ("CAFC").[6] TAA decisions by the CAFC may be the subject of a petition for a writ of *certiorari* to the U.S. Supreme Court, although it appears that no TAA action has ever made it that far.

IV. STANDARDS OF REVIEW

In TAA cases, the CIT applies the standards of review found in 19 U.S.C. § 2395, which provides:

> [T]he findings of fact by [the DOL], if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to [the DOL] to take further evidence, and [the DOL] may thereupon make new or modified findings of fact and may modify [its] previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.[7]

The relevant statute, 19 U.S.C. § 2395, also provides that the CIT "shall have jurisdiction to affirm the action of the [DOL], or to set such action aside, in whole or in part."[8] Even if the DOL's original determination is contrary to law or arbitrary and capricious, the CIT typically remands the action to the DOL to allow it to correct its errors. In many instances, the DOL voluntarily requests a remand.

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4. 19 U.S.C. § 2395.

5. CT. INT'L TRADE R. 56.1, *available at* http://www.cit.uscourts.gov/Rules/rules-forms.htm (follow "Rule 56.1. Judgment Upon an Agency Record for an Action Other Than That Described in 28 U.S.C. 1581(c)" hyperlink).

6. 19 U.S.C. § 2395.

7. *Id.*

8. *Id.*

V. TAA LITIGATION

Very rarely does the CIT simply affirm or reverse the administrative determination of the DOL. For example, according to the BNA *International Trade Reporter*, in the twenty-four TAA cases decided in calendar year 2003, the CIT affirmed the DOL without remand only twice, and reversed the DOL only twice. If the DOL's determination was not supported by substantial evidence or not otherwise in accordance with law, the CIT remanded the action to the DOL for further fact-finding or analysis (six times in 2003), or the TAA voluntarily requested a remand (eight times in 2003). In some instances where there were procedural irregularities – for example, when the complaint was not timely filed – the CIT dismissed the action without remand (three times in 2003).[9]

Appendix II of the U.S. Government Accountability Office's September 2004 "Report on Trade Adjustment Assistance" lists, and categorizes by result, the number of final decisions the CIT issued in TAA cases during fiscal years 1999 through 2004.[10] Of the twenty-six listed final decisions, only three affirmed the decision of the DOL without remand, sixteen affirmed or reversed the decision of the DOL after remand, and seven dismissed the action.[11]

Below are fifteen published decisions of the CIT in TAA cases from March 2001 to March 2003. In chronological order, the results were as follows:

- In *Former Employees ("FE") of Alcatel Telecommunications Cable v. Herman* (March 8, 2001), Judge Barzilay affirmed the DOL's negative determination on remand.[12]
- In *FE of Carhartt, Inc. v. Chao* (June 13, 2001), Judge Eaton affirmed the DOL's determination denying certification of eligibility for NAFTA-TAA because the shift of production involved a different division of the company than that in which the plaintiffs had worked.[13]

9. *Adjustment Assistance: Trade Court's Critique of Labor Department Places Spotlight on Handling of TAA Claims*, 21 INT'L TRADE REP. (BNA) 795 (May 6, 2004).

10. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE COMMITTEE ON FINANCE, GAO REP. NO. 04-1012, TRADE ADJUSTMENT ASSISTANCE: REFORMS HAVE ACCELERATED TRAINING ENROLLMENT, BUT IMPLEMENTATION CHALLENGES REMAIN, app. II (Sept. 2004).

11. The apparent discrepancies in numbers of TAA cases counted in the BNA International Trade Reporter and those in the GAO Report may be due to the facts that: (1) the former examined a calendar year, while the latter examined fiscal years, and (2) the latter listed final decisions, while the former may reflect multiple remands in a single civil action. In any event, it is clear that most DOL determinations in TAA cases that are appealed to the CIT result in at least one remand to the agency.

12. 25 Ct. Int'l Trade 169, 174 (2001).

13. 25 Ct. Int'l Trade 628, 634 (2001).

- In *FE of Barry Callebaut v. Herman* (November 2, 2001), Judge Wallach remanded the action to the DOL.[14]
- In *FE of Createc Corp. v. Department of Labor* (November 6, 2001), Judge Aquilino granted the defendant's motion to dismiss based on the untimely filing of the complaint when the plaintiff did not file a response to the motion.[15]
- In *FE of AST Research, Inc. v. Department of Labor* (December 20, 2001), Judge Eaton dismissed for lack of jurisdiction because the complaint was untimely filed.[16]
- In these five decisions from 2001, there was one remand. The CIT twice sustained the DOL's original or remand negative determination, and twice dismissed the civil action based on a jurisdictional defect.
- In *FE of Marathon Ashland Pipeline LLC v. Chao* (July 16, 2002), Judge Barzilay remanded the action to the DOL for one of several times during the course of this action.[17]
- In *FE of Galey & Lord Industries, Inc. v. Chao* (July 30, 2002), Judge Aquilino affirmed the DOL's negative determination on remand.[18]
- In *FE of Black & Decker Power Tools v. Chao* (August 30, 2002), Judge Tsoucalas affirmed the DOL's certification of eligibility on remand.[19]
- In *FE of Barry Callebaut v. Herman* (August 30, 2002), Judge Wallach ordered the DOL to certify the eligibility of the plaintiffs following a remand and a voluntary remand.[20]
- In *FE of Chevron Products, Inc. v. Secretary of Labor* (October 28, 2002), Judge Ridgway remanded the action to the DOL.[21]
- In *United Steel Workers of America v. Chao* (December 2, 2002), Judge Aquilino affirmed the DOL's remand determination certifying eligibility.[22]

These six decisions from 2002, in addition to following the pattern of remanding to the DOL, present the interesting question of whether the CIT can simply reverse the DOL's negative determination and order the DOL to certify workers (in *Callebaut*, Judge Wallach did this, and in 2004, after numerous remands, Judge Barzilay also did this in *Marathon*).

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14. 177 F. Supp. 2d 1304, 1313 (Ct. Int'l Trade 2001).
15. 25 Ct. Int'l Trade 1236 (2001).
16. 25 Ct. Int'l Trade 1391 (2001).
17. 215 F. Supp. 2d 1345, 1356 (Ct. Int'l Trade 2002).
18. 219 F. Supp. 2d 1283, 1289 (Ct. Int'l Trade 2002).
19. 24 INT'L TRADE REP. (BNA) 2023 (2002).
20. 240 F. Supp. 2d 1214, 1228 (Ct. Int'l Trade 2002).
21. 245 F. Supp. 2d 1312, 1335 (Ct. Int'l Trade 2002).
22. 25 INT'L TRADE REP. (BNA) 1063 (2002).

The TAA decisions in the first three months of 2003 exemplify the court's growing dissatisfaction with the manner in which the DOL deals with TAA petitions.

- In *FE of Rohm & Haas Co. v. Chao* (January 23, 2003), Judge Goldberg remanded an action to the DOL, noting that the DOL's original determination was not in accordance with law in that the DOL failed to follow precedent established in earlier CIT TAA actions.[23]
- In *FE of Spinnaker Coating Maine, Inc. v. Department of Labor* (January 28, 2003), Judge Pogue remanded because the DOL failed to consider price in its analysis of whether imports contributed significantly to the separation of the plaintiffs, even though the legislative history of the TAA law mandated that the DOL do so.[24]
- In *FE of Pittsburg Logistics Systems, Inc. v. Secretary of Labor* (February 28, 2003), Judge Musgrave remanded the action to the DOL for a "reasoned analysis" of whether the plaintiffs were production workers, service workers, or both.[25]
- In *FE of Tyco Electronics, Fiber Optics Division v. Department of Labor* (March 2003), Chief Judge Carman granted the plaintiffs' application for attorneys' fees when the DOL filed two motions to file remand results out of time after the agency had requested a voluntary remand.[26]

VI. Applying the Standard of Judicial Review in TAA Cases

On its face, the TAA statute's standard of judicial review of TAA cases appears to give the DOL a rebuttable presumption of correctness in its findings of fact. Those findings are "conclusive," but only if they are supported by "substantial evidence."[27] If the DOL was doing its job properly, one would think that, given this standard of review, most TAA decisions of the CIT would sustain the DOL's determination without remand, as was the case in 2001.

The TAA statute requires the court to remand the action to the DOL for further fact finding if the original DOL determination is not supported by substantial evidence. The statute also has the limiting language that the court may only remand "for good cause shown." Then, the agency's new or modified findings of fact are to be treated as "conclusive" if they are supported by substantial evidence.[28] Again, this statutory language suggests that, if the DOL is doing its job properly, there should be fewer remands to the agency, and certainly a dearth of multiple remands in the same action.

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23. 246 F. Supp. 2d 1339, 1351 (Ct. Int'l Trade 2003).
24. 246 F. Supp. 2d 1352, 1363 (Ct. Int'l Trade 2003).
25. 2002 Ct. Int'l Trade 21, 44 (2003).
26. 259 F. Supp. 2d 1246, 1253 (Ct. Int'l Trade 2003).
27. 19 U.S.C. § 2395 (2000).
28. *Id.*

With respect to findings of fact, if the DOL is not doing its job properly, the statute appears to command the court to continue remanding the action to the DOL until the agency finally has substantial evidence to support its determination. The statute does not appear, on its face, to permit the court to simply reverse the agency's determination based only on the lack of substantial evidence to support that determination. After multiple remands, however, there may still not be enough evidence for a reasonable person to come to the same conclusion as the DOL. Under these circumstances, the court should be able to reverse the DOL's determination without further remands.

In practice, the CIT follows the mandate of the TAA standard of review statute, but, from time to time, the court appears to find mixed questions of fact and law which allow it simply to reverse the DOL's determination. Although not frequently cited in CIT decisions, the TAA statute's "set such action aside, in whole or part" language seems to support the court's authority to do this.[29] Some cases that follow this course rely on the judicially-established requirement that the DOL's determination be supported by "reasoned analysis."

In a recent opinion, which addressed Judge Barzilay's ultimate decision in *Marathon*, the CAFC was presented with the question of whether the CIT can simply reverse a determination of the DOL and order the DOL to certify workers under the TAA.[30] Deciding the case on other grounds, the CAFC did not reach that question.

One might argue that the standard of judicial review established in *Chevron U.S.A., Inc. v. National Resources Defense Council*[31] should apply to questions of law in TAA actions. Following the *Chevron* standard, a court first looks to see if Congress has unambiguously addressed the question presented. If so, the agency must follow the clearly expressed intent of Congress. If not, the court must determine whether the agency's interpretation of the relevant statute is permissible – or "reasonable," depending on the court's reading of *Chevron*. The court may not substitute its interpretation of the relevant statute for that of the agency, as long as the agency's interpretation is permissible or reasonable. Applying the *Chevron* standard, it would appear that, if the DOL made an error in interpreting an unambiguous provision in the TAA law or rendered an impermissible or unreasonable interpretation of an ambiguous provision, the CIT would be free to reverse the determination of the DOL without remanding the action to the agency. This approach appears to comport with the portion of TAA standard of review statute which states that the CIT "shall have jurisdiction to affirm the action of the [DOL], or to set such action aside, in whole or part."[32]

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29. *Id.*

30. Former Employees of Marathon Ashland Pipeline v. Chao, 370 F.3d 1375, 1376 (Fed. Cir. 2004).

31. 467 U.S. 837, 843 (1984).

32. 19 U.S.C. § 2395.

VII. CONCLUSION

While remanding a TAA action to the DOL has been the traditional way to resolve a less-than-perfect original agency determination, it appears that two trends have been developing recently. First, an increasing number of TAA actions involve multiple remands. Second, the CIT seems to be more willing to simply reverse the DOL's determination if the remands do not achieve a satisfactory result. The easiest way to explain these trends is that the DOL is not doing a thorough analysis of the eligibility of displaced workers for TAA benefits, at least in those cases that are appealed to the CIT. Sadly, because of the time involved in TAA court actions, especially those with multiple remands, even if displaced workers are ultimately certified as eligible for TAA benefits, it may be too late for such benefits to be of any real use to them.