

that Lewis County Dairy is engaged in a “business affecting commerce” within the meaning of section 3(3) of the Act and, therefore, is not an employer as defined by section 3(5) of the Act. The Secretary subsequently timely filed before the Commission a Petition for Discretionary Review. For the following reasons, we hereby direct review of this case, reverse the judge’s decision, and remand the case to him for a decision on the merits.

The judge correctly noted that, in its Answer to the Complaint, Lewis County Dairy denied that it “was and is engaged in a business affecting commerce within the meanings of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.” Subsequently, however, Lewis County Dairy stated in *Respondent’s Supplemental Responses to the Secretary’s First Set of Interrogatories and Production of Documents*, dated April 21, 2004, that “Respondent will stipulate that Lewis County Dairy Corp. was involved in business that affected interstate commerce.” On April 24, 2004, Respondent filed with the judge its *Declaration in Opposition to the Secretary’s Motion for Sanctions*, in which Respondent reiterated its interstate commerce stipulation and attached a copy of it as “Exhibit A.” Finally, the first sentence in Respondent’s post-hearing brief begins as follows: “Respondent, a corporation engaged in a business affecting commerce, is a small employer”

Based on the foregoing, we find that the judge clearly erred in concluding that Lewis County Dairy is not an employer under the Act. Respondent has admitted that it is engaged in a business affecting interstate commerce, and well-settled precedent supports its admission. *See U.S. v. Lopez*, 514 U.S. 549, 555-56, 559-60, 115 S.Ct. 1624, 1628, 1630 (1995) (noting “greatly expanded” Commerce Clause authority to include intrastate activities that “substantially affect[] interstate commerce” such as intrastate coal mining and homegrown wheat consumption) (citations omitted); *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110, 119-20, 62 S.Ct. 523, 526-27 (1942) (finding intrastate milk handling subject to federal regulation, stating that “the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity”);

Wickard v. Filburn, 317 U.S. 111, 127-29, 63 S.Ct. 82, 89-91 (1942) (finding intrastate production and consumption of homegrown wheat “competes with wheat in commerce” and is subject to federal regulation, as its contribution to demand for wheat not “trivial” when “taken together with that of many others similarly situated”). *Accord Eric K. Ho*, 20 BNA OSHC 1361, 1364 (No. 98-1645, 2003) (consolidated), *aff’d*, *Chao v. OSHRC & Eric K. Ho*, No. 03-60958, 2005 U.S. App. LEXIS 2979 (5th Cir. Feb. 21, 2005) (upholding the Act’s applicability to intrastate construction work, which “*per se* affects interstate commerce because there is an interstate market in construction materials and services”). Accordingly, we reverse the judge’s decision vacating the citations, order the citations reinstated, and remand this case for a decision on the merits of the complaint allegations.

Although we have resolved the dispositive issue before us, we find it necessary to clarify our earlier interlocutory rulings that the judge has apparently either misperceived or disregarded. In his decision, the judge oddly characterized the Commission’s earlier rulings on the Secretary’s petitions for interlocutory review as having “affirmed the decisions of the [judge].” This is simply inaccurate. Our denials of the Secretary’s petitions for interlocutory review were expressly predicated upon the failure of the petitions to meet the criteria for obtaining interlocutory review under Commission Rule 73(a), 29 C.F.R. § 2200.73(a).¹ We in no way indicated approval or affirmance of the judge’s pre-trial orders. In fact, Commissioners Stephens and Rogers noted in the first denial of interlocutory review that “[a]lthough they vote to deny the petition, . . . the Secretary makes a convincing argument that the judge erred in his order denying the Secretary’s request to issue subpoenas *Ad Testificandum* or *Duces Tecum* and in his order imposing sanctions barring the testimony of the Area Director and prohibiting the Secretary from using the compliance officer’s

¹ That the denial of an interlocutory petition does not constitute an affirmance of a ruling below is also self-evident from Commission Rule 73(c), entitled *Denial without prejudice*, which provides that such a denial “shall not preclude a party from raising an objection to the Judge’s interlocutory ruling in a petition for discretionary review” (as provided under Commission Rule 91).

investigatory file,” and noted errors in the judge’s imposition of discovery sanctions. *Lewis County Dairy Corp.*, 20 BNA OSHC 1779, 1780 n.1 (No. 03-1533, 2004). Chairman Railton, writing separately, “agree[d] that the record as developed to date evinces what appears to be judicial error during the pretrial stage of this matter.” *Id.* at 1780 n.2. *See also Lewis County Dairy Corp.*, 20 BNA OSHC 1780, 1781 n.1 (No. 03-1533, 2004) (Commissioner Rogers) (New York State Insurance Fund representative’s testimony relevant to willful characterization under Commission precedent). The judge’s decision does not address or resolve our concerns about the propriety of his pre-hearing discovery rulings. We expect the judge’s decision on remand to comport with applicable Commission and court precedent.

SO ORDERED.

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
James M. Stephens
Commissioner

_____/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 1, 2005

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

LEWIS COUNTY DAIRY CORP.,

Respondent.

OSHRC Docket No.03-1533

APPEARANCES:

William G. Staton, Esquire
Evanthia Voreadis, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

Susan G. Kellman, Esquire
Brooklyn, New York
For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work site from February 1, 2003, through July 25, 2003. As a result of the inspection, on July 28, 2003, the Secretary of Labor (“the Secretary”) issued to Respondent, Lewis County Dairy Corp. (“Respondent”), a Citation and Notification of Penalty that included a forty-three item serious citation, a two-item willful citation, and a one-item “other” citation and proposed a total penalty of \$141,100.00. Respondent filed a timely Notice of Contest as required by the Act, bringing this matter before the Commission. An administrative trial

was held on June 9, 10, 14, 15 and 16, 2004, in New York, New York. Post-trial briefs were filed on October 4, 2004.¹

DISCUSSION AND CONCLUSION

Pre-Trial and Discovery Issues

(A) Trial Venue

On May 6, 2004, the Secretary filed a motion to move the trial location from New York City to either Syracuse, New York or Watertown, New York. The Secretary asserted that “four individuals from the Syracuse OSHA Area Office will testify in addition to several witnesses that live in the vicinity of Syracuse or Watertown.”

On May 7, 2004, the Respondent filed its reply, asserting that “[t]he Secretary’s concern about the cost of having ‘four’ unidentified witnesses appear in the NYC area was not voiced at the time of the First Scheduling Order, nor was it address (sic) upon receipt of the Amended Scheduling.” Respondent further asserted that its counsel was a “single parent with no child care during this two week [trial] period.”

On May 13, 2004, the undersigned issued his order denying the Secretary’s motion to change venue. In the order, the undersigned stated: “[t]he trial venue was discussed during several pre-trial telephone conferences with counsel for both parties. It was determined that New York City would be the trial location, and on March 10, 2004, the undersigned issued his Pre-Trial Scheduling and Post-Trial Briefing Order setting the trial in New York City. Now, approximately sixty days from the issue of the Briefing Order and less than a month from the commencement of the trial, the Secretary seeks to change the venue. Given the fact that these witnesses are not identified and the Secretary is in a better financial position to absorb the costs of litigation, the motion is denied.”

On May 20, 2004, the Secretary filed a Petition for Interlocutory Review and Motion For Stay. The Secretary asserted that “[t]he Order of Judge Bober denying the Secretary’s request for a

¹The following exhibits were tendered by the Secretary and admitted post trial as ALJ exhibits: (1) ALJ-1, ANSI Standard A14.5, 9.4, dated January 14, 2000; (2) ALJ-2, Informal Settlement Agreement, Inspection # 106159510, signed by the employer on July 1, 1998; (3) ALJ-3, Informal Settlement Agreement, Inspection # 300629912, signed by the employer on July 1, 1998; (4) ALJ-4, Resume of Compliance Officer Andrew Palhoff. The following exhibit was tendered by Respondent and admitted post trial: (1) R-3, Affidavit of Moise Banayan.

change of venue and scheduling the trial to take place in New York City, approximately 300 miles away from the Secretary's witnesses was for the convenience of respondent's counsel." The Secretary additionally asserted that review of the order "involves important questions of law and policy about which there is substantial ground for difference of opinion and that immediate review of the [ruling] may materially expedite the final disposition of the proceedings."

On June 1, 2004, the Commission denied the Secretary's Petition for Interlocutory Review and Motion For Stay.

(B) Trial Subpoenas

On May 7, 2004, the Secretary filed her *ex parte* request for subpoenas *Ad Testificandum* and/or *Duces Tecum* for the following individuals, corporate entities, and governmental agencies:

Melissa Hirsch - a former manager of respondent whose trial testimony concerns "the safety conditions at respondent company."

Steven Edick - a maintenance employee for respondent whose trial testimony concerns "his entries into confined spaces at respondent company, respondent company's procedures regarding entries in permit required confined spaces, and training."

Al Lashbrook - a maintenance employee for respondent whose trial testimony concerns "utilization of lockout/tagout procedures and lockout/tagout training at respondent company."

Ed Ayers - an employee of Basic Chemicals Solutions, LLC, who may have supplied chemicals and "hazcom training" to respondent company employees. "The Secretary seeks training materials and testimony from Mr. Ayers regarding the details of any training he provided to the employees of respondent company."

Zee Medical Service Co. - "The Secretary seeks documents" [concerning purchases of first aid supplies by respondent from Zee] and "testimony from a person most knowledgeable regarding respondent company's purchase of first aid supplies."

New York State Insurance Fund - "The Secretary seeks documents from NYSIF and testimony from a person most knowledgeable regarding ["safety inspections and re-inspections at respondent company"]].

On May 13, 2004, the undersigned issued his order compelling the testimony of Melissa Hirsch, Steven Edick, and Al Lashbrook. The undersigned denied the issuance of a subpoena

compelling the appearance of Ed Ayers at the trial as it was the opinion of the undersigned that his testimony would not be relevant or material. The undersigned also denied the issuance of a subpoena to New York State Insurance Fund, concluding that any forthcoming testimony and documents would not be relevant or material, as any inspections and re-inspections by that entity would not have been conducted pursuant to the provisions of the Act.

On May 20, 2004, the Secretary filed a Petition for Interlocutory Review and Motion For Stay. The Secretary alleged that “[t]he Order of Judge Bober denying trial subpoenas requested by the Secretary based upon his determination that the expected testimony or evidence would not be relevant or material to the case” prejudiced her ability to prove her case. The Secretary also asserted that review of this order “involves important questions of law and policy about which there is substantial ground for difference of opinion and that immediate review of the [ruling] may materially expedite the final disposition of the proceedings.”

On June 1, 2004, the Commission denied the Secretary’s Petition for Interlocutory Review and Motion For Stay.

(C) Discovery Period

On April 27, 2004, the undersigned issued an order which stated that “the Respondent shall be permitted to depose [the OSHA Compliance Officer (“CO”) and the Area Director (“AD”)] at a mutually agreeable location as long the as the depositions are conducted between April 27 and May 6, 2004, unless some other date and time are mutually agreeable.” The depositions were to be completed no later than May 17, 2004.

On May 6, 2004, the Respondent filed its motion seeking an “extension of time to take the deposition[s] of the [OSHA AD and CO] until the end of discovery, which is presently May 28, 2004.” The Respondent asserted that the Secretary’s counsel had informed it that the AD was not available during the entire period of the extension of time and that the CO’s notes and reports could not be provided earlier than May 13, 2004.

Based upon the representations contained in the Respondent’s motion, the undersigned issued on May 13, 2004, his Order On Motion To Extend Discovery Period, holding: that the Secretary had not acted in good faith; that the Secretary was aware of the time constraints imposed by the Court with respect to the deposition schedule which was agreed upon by counsel; that counsel for the

Secretary were experienced and should have known that the Respondent would require the CO's notes and reports prior to the taking of his deposition; and that the undersigned could not fathom why there was no individual available in either the OSHA office or in the Office of the Solicitor with the ability to copy the notes and reports prior to May 13, 2004. The Order also stated that the Secretary had not acted in good faith with respect to the deposition of the OSHA AD and that the AD's unavailability prejudiced the Respondent.

As a result, the undersigned denied the Respondent's motion to extend the discovery period. The undersigned also prohibited the Secretary from using the notes and reports of the CO as a basis for her case and further prohibited the CO from using his reports and notes during his testimony. The undersigned additionally held that the OSHA AD would not be permitted to testify.

On May 20, 2004, the Secretary filed a Petition for Interlocutory Review and Motion For Stay. The Secretary alleged that "[t]he Order of Judge Bober imposing sanctions on the Secretary that preclude the Secretary from utilizing the inspection file 'as a basis for its case' and preclude the OSHA [CO] from having the use of the inspection file during his testimony" prejudiced her ability to prove her case. The Secretary also asserted that review of the order "involves important questions of law and policy about which there is substantial ground for difference of opinion and that immediate review of the [ruling] may materially expedite the final disposition of the proceedings."

On June 1, 2004, the Commission denied the Petition for Interlocutory Review and Motion For Stay.

(D) Motion To Quash

On June 2, 2004, counsel for Melissa Hirsch, Steven Edick and Al Lashbrook filed a motion to quash subpoenas issued for the appearance and testimony of these individuals at the trial. On June 4, 2004, the undersigned denied the motion but required the Secretary and the Respondent to pay "Mr. Edick and Mr. Lashbrook for lost wages, travel costs to the trial location, lodging, food, and other incidentals which must be supported by receipts PRIOR TO THEIR TESTIMONY and approved thereafter by the undersigned." The undersigned also required the Secretary to pay "Ms. Hirsch for lost wages, travel costs to the trial location, lodging, food, and other incidentals which must be supported by receipts PRIOR TO THEIR TESTIMONY and approved thereafter by the undersigned."

On June 3, 2004, the Secretary filed her Second Petition for Interlocutory Review and Motion For Stay, alleging that “the continuing denial of the Secretary’s right to trial subpoenas raises an important question of law and that immediate review of the [ruling] may materially expedite the final disposition of the proceedings.”

On June 4, 2004, the Commission denied the Secretary’s Second Petition for Interlocutory Review and Motion For Stay.

Federal Rule of Evidence 801(d)(2)(D)

During the course of the trial, the Secretary sought to introduce statements made by employees of the Respondent based upon Federal Rule of Evidence 801(d)(2)(D) (“Rule 801(d)(2)(D)”). That rule provides, as pertinent, as follows:

“(d) A statement is not hearsay if— ***

(2) *Admission by party-opponent.* The statement is offered against a party and is ***

(D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, ***.

To utilize the admissions exception to the hearsay rule, the proponent must establish a foundation that (1) the declarant was an agent or servant of the party against whom the statement (oral or written) was made, (2) the statement must concern a matter within the scope of the employee’s authority, and (3) the statement was made during the existence of the employment or the agency. *Rovtar v. Union Bank of Switzerland*, 852 F.Supp. 180, 185 (S.D.N.Y. 1994); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 109 (M.D.N.C. 1993).

The 1997 amendment stated, as pertinent, “[t]he contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D) * * * .”

The Committee Note to the 1997 amendment to the rule enunciated that the contents of the declarant’s statement alone do not suffice to establish authority under subdivision (C). As a preliminary matter, proof of the existence of the declarant’s authority to speak for the party is also required. *Federal Rules of Evidence*, 171 F.R.D. 708, 717 (1997). 5 J. Weinstein & M. Berger, *Weinstein’s Federal Evidence* 801.32[3] (2d ed. 2004).

The Secretary’s primary witness, the OSHA CO, testified regarding certain written or oral statements made by Respondent’s employees Tom Spencer, Melissa Hirsch, Chris Techonica, Ron

Stone, Karen Karelus and Cindy Peck. The Secretary's counsel moved pursuant to Rule 801(d)(2)(D) to have these statements admitted into the record. Respondent's counsel objected to their admission. Based upon case law discussed herein, it is the opinion of the undersigned that these statements constitute inadmissible hearsay and were correctly excluded. (Tr. 35-50).

Rule 801(d)(2)(D) requires the proffering party to lay a foundation that shows that an otherwise excludable statement relates to matters within the declarant employee's scope of employment and that the declarant employee had authority to speak for the party. In this case, the Secretary failed to demonstrate either of these requirements. *Nekolny v. Painter*, 63 F.2d 1164, 1171 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1719 (1982) ("*Nekolny*") ("After the fact of the agency is established, Rule 801(d)(2)(D) requires that the statement 'concern a matter within the scope of the agency or employment'"); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 816-17 (2d Cir. 1983) ("*Litton*") ("In any event, [proponent of notes] made no attempt at trial to lay the necessary foundation for the admission * * * under 801(d)(2)(D) * * *"); *OKI America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 314 (9th Cir. 1989) (hearsay testimony of a third party regarding a statement made by a party's employee is not admissible under Rule 801(d)(2)(D) where the proffering party failed to demonstrate that the statement was made by the party's employee and the statement concerned a matter which was within the scope of his/her employment); *Krause v. City of La Crosse*, 246 F.3d 995, 1001-1002 (7th Cir. 2001) (hearsay testimony of a third party regarding a statement made by a party's employee is not admissible under Rule 801(d)(2)(D) where the proffering party failed to demonstrate that the statement made by the party's employee was within the scope of his/her employment and he/she had the authority to speak for the party).

In regard to the above, the Secretary submits that (1) Melissa Hirsch, who provided a written statement, was identified by the CO as human resources director (Tr. 35, 39); (2) Chris Techonica was identified as the safety director (Tr. 35); and (3) Karen Karelus was identified as the quality assurance manager (Tr.35). These individuals were employed by the Respondent during the relevant time in question. However, Rule 801(d)(2)(D) also requires the proponent to demonstrate that the statement "concern a matter within the scope of the agency or employment." See *Nekolny* and *Litton*, discussed *supra*. The Secretary's counsel made no attempt to lay the foundation as required by Rule 801(d)(2)(D), and the statements were properly excluded.

Federal Rules of Evidence 103(a)(2) and 403

The undersigned issued a series of pre-trial and discovery orders in this matter which were adverse to the Secretary. The Secretary thereafter filed Motions for Discretionary Review with the Commission. The Commission affirmed the decisions of the undersigned. At the trial, the Secretary sought to circumvent those decisions by offering testimony of the CO and certain exhibits. When the undersigned ruled against the admission of the testimony and exhibits, the Secretary's counsel attempted to introduce the exhibits into the record as Offers of Proof.

Federal Rule of Evidence 103(a)(2) ("Rule 103(a)(2)") provides as follows:

- (a) Effect of Erroneous Ruling.--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ***
- (2) Offer of Proof.-- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Federal Rule of Evidence 403 ("Rule 403") provides as follows:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Advisory Committee Notes to Rule 403 define "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

In *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 151 (2d Cir. 1997), the Court stated, "Rule 403 allows the trial court to exclude relevant evidence on the ground of prejudice to the party against whom it is offered 'if its probative value is substantially outweighed by the danger of unfair prejudice.'* * * The prejudice that Rule 403 is concerned with involves some adverse effect * * * beyond tending to prove the fact or issue that justified its admission into evidence."

In *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir 1980), the Second Circuit set forth its test regarding Rule 403 and unfair prejudice. It requires that the court balance the probative value of evidence on an issue against the potential prejudicial effect.

Upon applying the *Figueroa* test to the circumstances of this case, it was the conclusion of the undersigned that admitting the Offers of Proof into the record at the trial as exhibits would have required the Respondent to litigate issues for which it was unprepared due to the above-noted pre-

trial and discovery orders in addition to the orders of the Commission. Stated another way, admitting the Offers of Proof as exhibits at the trial would have resulted in unfair prejudice to the Respondent. Thus, the Offers of Proof were properly excluded as exhibits. However, for completeness of record, should review of this matter be sought with the Commission, Attachment A to my decision is a list of the Offer of Proof exhibits.

Jurisdiction

The Complaint alleges in paragraph I that “[j]urisdiction * * * is conferred upon the [Commission] by section 10(c) of the Act.” The Complaint alleges in paragraph III that “[m]any of the materials and supplies used and/or manufactured by respondent corporation originated and/or were shipped from outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.”

The Answer asserts in paragraph 1 that the Respondent “[d]enies the allegations contained in paragraph ‘I’ of the complaint, that Section 10 * * * of the Act confers jurisdiction for this action over respondent.” The Answer asserts in paragraph 3 that the Respondent “[d]enies the allegations contained in paragraph ‘III’ of the complaint, that ‘[m]any of the materials and supplies used and/or manufactured by respondent corporation originated and/or were shipped from outside the State of New York’ and denies that the respondent corporation ‘was and is engaged in a business affecting commerce within the meanings of sections 3 (3) and 3 (5) of the Act and is an employer within the meaning of section 3 (5) of the Act.’”

The United States Court of Appeals for the Fifth Circuit addressed the issue as to which party has the burden of proving that the employer “is engaged in a business affecting commerce who has employees.” In *Austin Road Co. v. OSHRC*, 683 F.2d 905, 907 (5th Cir. 1982) (“*Austin Road*”), the Court stated: “When the issue is contested, the burden of showing that the employer’s activities affect interstate commerce rests upon the administrative representative involved--in the case at bar, the Secretary of Labor.”

The Respondent contested the jurisdiction issue, and, therefore, based upon the decision in *Austin Road*, the Secretary is required to prove that the Respondent is subject to the Act.

In this case, the Secretary offered no support and produced no evidence to prove that “the respondent corporation was and is engaged in a business affecting commerce within the meanings of sections 3(3) and 3(5) of the Act and is an employer within the meaning of section 3(5) of the Act.” Thus, the Secretary has not established jurisdiction.² *Vak-Pak, Inc.*, 11 BNA OSHC 2094, 2095 (No. 79-1569, 1984) (Secretary failed to “present evidence of activities which either directly or indirectly have an effect on interstate commerce”); *Thomas Slingluff, a/k/a Stuck In The Mud*, OSHRC Docket No. 03-1371, 2004 OSAHRC 6 *8 (employer will “come under the aegis of the Act if it is engaged in a business affecting interstate commerce”).

Jurisdiction not having been established, the Citation and Notification of Penalty issued July 28, 2003, is DISMISSED. *Burk Well Serv. Co.*, 12 BNA OSHC 1598 (No. 79-6060, 1985); *Austin-Crider Constr., Inc.*, 14 BNA OSHC 1397 (No. 89-0610, 1989) (ALJ decision).

ORDER

Based on the foregoing, the Citation and Notification of Penalty issued on July 28, 2003, is DISMISSED.

/s/

G. MARVIN BOBER
Administrative Law Judge

Dated: March 4, 2005
Washington, D.C.

²The Secretary likewise failed to argue and/or produce any evidence that Respondent’s intrastate activities, when aggregated with similar and related activities, could substantially affect interstate commerce. Thus, under the “aggregation principle,” jurisdiction was not established. For a discussion of the “aggregation principle,” see *United States v. Ho*, 311 F.3d 589, 594-604 (5th Cir. 2002) *cert. denied* 123 S.Ct. 2274 (2003).

ATTACHMENT A - OFFERS OF PROOF

The following Offers of Proof are in the order in which they were presented at the trial, along with the transcript page number:

Exhibit C-74	Tr. 45
Exhibit C-73	Tr. 48
Exhibit C-75	Tr. 49
Exhibit C-1	Tr. 58
Exhibit C-4	Tr. 73
Exhibit C-2	Tr. 77
Exhibit C-3	Tr. 78
Exhibit C-5	Tr.80
Exhibit C-6	Tr.81
Exhibit C-7	Tr. 86
Exhibit C-8	Tr. 87
Exhibit C-9	Tr 93
Exhibit C-10	Tr 94
Exhibit C-11	Tr.100
Exhibit C-12	Tr.109
Exhibit C-83	Tr.114
Exhibit C-84	Tr.115
Exhibit C-85	Tr.118
Exhibit C-16	Tr.126
Exhibit C-17	Tr.136
Exhibit C-18	Tr.137
Exhibit C-20	Tr.138
Exhibit C-23	Tr.148
Exhibit C-26	Tr.154
Exhibit C-28	Tr.156
Exhibit C-85	Tr.156

Exhibit C-30	Tr.160
Exhibit C-29	Tr.162
Exhibit C-32	Tr.165
Exhibit C-33	Tr.169
Exhibit C-39	Tr.174
Exhibit C-37	Tr.176
Exhibit C-38	Tr.179; not admitted Tr.183
Exhibit C-36	Tr.183
Exhibit C-34	Tr.185
Exhibit C-35	Tr.188
Exhibit C-40	Tr.192
Exhibit C-41	Tr.200
Exhibit C-42	Tr.210
Exhibit C-44	Tr.221
Exhibit C-45	Tr.224
Exhibit C-43	Tr.227
Exhibit C-46	Tr.230
Exhibit C-47	Tr.232
Exhibit C-50	Tr.236
Exhibit C-48	Tr.245
Exhibit C-52	Tr.258
Exhibit C-56	Tr.261
Exhibit C-55	Tr.263
Exhibit C-57	Tr.265
Exhibit C-58	Tr.267
Exhibit C-59	Tr.269
Exhibit C-60	Tr.272
Exhibit C-60	Tr.272
Exhibit C-62	Tr.274

Exhibit C-61	Tr.276
Exhibit C-70	Tr.290
Exhibit C-69	Tr.297
Exhibit C-72	Tr.299
Exhibit C-95	Tr.316
Exhibit C-93	Tr.337
Exhibit C-95	Tr.316
Exhibit C-122	Tr.1089
Exhibit C-123	Tr.1089
Exhibit R-6	Tr.1095
Exhibit R-7	Tr.1095
Exhibit R-8	Tr.1096
Exhibit R-9	Tr.1096
Exhibit R-10	Tr.1096
Exhibit R-11	Tr.1096