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Reply to:
Andrew A. Vanore, Jr.
Administration
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August 21, 1998

Mr. Keith Werner
Assistant District Attorney
Nash County Courthouse
P. O. Box 750
Nashville, NC 27856

Dear Mr. Werner:

I reply to your letter requesting advice concerning a situation which has arisen in your prosecutorial district between a local farmer and attorneys with Farmworkers Legal Services of North Carolina.

The question you ask is: "Whether migrant farm workers, under H2-A status, are afforded the protection of the landlord-tenant relationship which is contrary to the contract that is provided by the federal government." Put another way, you ask whether and to what extent a landowner may enforce a criminal trespass statute against a Farmworkers Legal Services attorney who, upon the invitation of a migrant worker, seeks access to the landowners property to communicate with the migrant worker living thereon.

For reasons which follow, if the attorney accesses the landowners property at the invitation of a migrant worker, I most seriously doubt that you could successfully prosecute the attorney for criminal trespass.

Before proceeding, I note a couple of things. First, the H2-A status of the migrant worker makes no legal difference. All importers who desire to import non-immigrant farm workers (H2-A workers) must first obtain proper approval from the U. S. Department of Labor. For your information, the federal statute dealing with this type migrant worker is 8 U.S.C. 1188 (1997). Regulations have been adopted by the U.S. Department of Labor with respect to H2-A workers. Those regulations are set out in Subpart B of 20 CFR Chapter V, Section 655.90, et. seq. Finally, as we discussed in our telephone conversations, you are not certain as to the facts giving rise to your question. However, I may assume for this discussion that a migrant worker requested the attorney to visit at the worker's housing facility provided by the landowner.

The Work Agreement (hereinafter "Agreement") is a 12-page, single spaced printed document. Paragraph 6 of the Agreement, titled "Housing and Meals" provides in pertinent part the following:

> Housing is provided at no cost to workers who are not reasonably able to return to their place of residence the same day . . . . No tenancy in such housing is created; employer retains possession and control of the housing premises at all times and worker, if provided housing under the terms of this work agreement, shall vacate the housing promptly upon termination of employment with the assigned employer who provides such housing. Workers who reside in such housing agree to be responsible for maintaining the housing in a neat and clean manner. Reasonable repair costs of damage or loss of property, other than that caused by normal wear and tear, will be deducted from the earnings of the worker if he is found to be responsible for damage or loss to housing or furnishings. (Emphasis added).

My review of the pertinent language in Paragraph 6 suggests that the intent was to protect the landowner from having to give notice to the migrant-employee to end his right to remain on the landowner's property after the employment period ended, rather than to remove all tenancy rights from the worker. Absent other evidence, I seriously doubt any court would conclude that the language of Paragraph 6 denies the worker the right to invite an attorney to visit.

State and federal courts are in general agreement that the question of access to migrant labor camps involves an analysis of at least two major legal issues: (1) the rights of migrants as tenants; and (2) the First Amendment rights of both migrants and third parties.

RIGHTS OF MIGRANTS AS TENANTS

Whether or not the landlord-tenant relationship can be established in this case is questionable, and depends on the facts which are brought out if there is a trial. Arguably, the landowner could assert that the migrants were licensees because the housing was given free of charge and not in return for compensation for labor; and, the migrant signed a contract which provided that "no tenancy in such housing is created; employer retains possession and control of the housing premises at all times . . . ."[1] If a court concludes that the worker has tenancy rights, there is clear law in North Carolina that a migrant worker may invite a third party on the landowner's property if a landlord-tenant relationship is established. See, State v. Smith, 100 N.C. 466 (1888), and Tucker v. Yarn Mill Company, 194 N.C. 756 (1927).

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[1]I should point out that if the contract were interpreted to exclude all rights of tenancy, arguably the contract may be unenforceable if it can be shown that the contract was unconscionable because of a lack of bargaining power of the migrants with the landowners. See, Brenner v. SchoolHouse, Ltd., 302 N.C. 207, 213 (1981).

Other state jurisdictions have also concluded that a landlord-tenant relationship exists between an agricultural employer and a migrant farm worker. In State v. Fox, 82 Wash.2d 288, 510 P.2d 230 (1973), the Washington Supreme Court overruled a criminal trespass charge against an employee of Legal Services. The court held that the employer did not have a right to bring a trespass charge against the employee of Legal Services since the migrant farm workers were tenants of the labor camp and they had possession of the premises. The California Supreme Court reversed a similar trespass conviction in People v. Medrano, 78 Cal. App.3rd 198 (1978), on the grounds that the migrant farm workers were tenants and had possession of the premises.

FIRST AMENDMENT CONSTITUTIONAL RIGHTS OF MIGRANTS

As you know, the First Amendment to the U.S. Constitution protects, among others, the freedom of speech and association. The question here is whether the enforcement of a criminal trespass statute against an invited visitor to a migrant labor camp constitutes unconstitutional state action. As we discussed in one of our telephone conversations, assuming there is clear evidence that one of the migrant workers invited the attorney to visit, I do not see how the State could successfully maintain a criminal trespass action. The controlling case in this area is Marsh v. Alabama, 326 U.S. 501 (1946), where the Supreme Court found the constitutional guarantees of freedom of speech and religion precluded enforcement of a state trespass statute against persons who distributed religious literature on the street of a company-owned town. Because the company had "open[ed] up its property for use by the public in general," the company's right as a landowner to forbid trespassing was "circumscribed" by the First Amendment rights of free speech and association. Id., at 506. Federal courts have particularly applied the "company town rationale" in permitting migrants to invite third parties onto the landowners property. See, Folgueras v. Hassle, 331 F.Supp. 615, 625 (W.D. Mich. 1971) and Mid-Hudson Legal Services, Inc. v. GNU, Inc., 437 F.Supp. 60, 62 (S.D.N.Y. 1977). See also, New Jersey v. Shack, 58 N.J. 297, 277A.2d 369 (1971).

Based on the facts as I understand them, and assuming that the Farmworkers Legal Services attorney is on the landowner's property at the invitation of a migrant worker living thereon, I seriously doubt that the State may successfully prosecute a criminal trespass statute against the invited attorney.

Very truly yours,

Andrew A. Vanore, Jr.
General Counsel

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