



In the Matter of:

**RONALD R. BRADBURY**

**ARB CASE NO. 02-042**

**Dispute concerning the payment of prevailing wage rates or proper classification by TLT Construction Corporation, RLH Flooring and Reliance Insurance Company, contractors hired by the United States Navy for the improvement of naval facilities in Rhode Island**

**(Formerly ARB Case No. 01-100)**

**DATE: July 31, 2003**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner:*

*Charles S. Kirwan, Esq., Charles S. Kirwan and Associates, Pawtucket, Rhode Island*

*For Respondent Administrator, Wage and Hour Division:*

*Barbara Eby Racine, Esq., Doug Davidson, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Acting Solicitor, U.S. Department of Labor, Washington, D.C.*

### **FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board pursuant to the Davis-Bacon Act (DBA or the Act), 40 U.S.C. § 276a et seq. (1996), Reorganization Plan No. 14 of 1950, 5 U.S.C. App. (delegating to the Secretary of the United States Department of Labor the responsibility for developing government-wide policies, interpretations and procedures to implement the DBA and its so-called Related Acts), the regulations at 29 C.F.R. Parts 5 and 7, and Secretary's Order (SO) 2-96, 61 Fed. Reg. 19,978 (May 3, 1996).<sup>1</sup> We are considering a

---

<sup>1</sup> Under SO 2-96, the Secretary of Labor established the Administrative Review Board and delegated to the Board jurisdiction to hear and decide administrative appeals arising, inter alia, under the Act and various other statutes requiring compliance with DBA requirements. See 29 C.F.R. § 5.1 (2002). SO 2-96 has been superseded by subsequent orders amending and updating the provisions relevant to the composition of the Board and its jurisdiction; however, the delegation with respect to

Continued . . .

Petition for Review filed by Ronald Bradbury (Bradbury) who worked as a laborer or mechanic on a construction project subject to the Act. Bradbury argues that he was entitled by law, but did not receive, the full amount of the prevailing wage applicable to his classification for all hours of work he performed on the Federal public work. The Administrator, Wage and Hour Division (Administrator), investigated Bradbury's complaint and ruled that there was insufficient evidence to support Bradbury's allegation. Bradbury seeks review and reversal of the Administrator's December 6, 2001 final ruling. Bradbury also requests that we direct the convention of a "de novo hearing to develop the record and to permit the full briefing of this matter by the interested parties." Petition for Rev. (Pet.) at 7. We affirm the Administrator's ruling and deny the request for a hearing.

### SCOPE OF REVIEW

This Board reviews final determinations issued pursuant to the Act by the Administrator under the authority of 29 C.F.R. § 7.1(e), which provides that proceedings before us are in the nature of an appellate proceeding and that the Board "will not hear matters *de novo* except upon a showing of extraordinary circumstances." The Board acts "as fully and finally as might the Secretary of Labor" concerning the matters within its jurisdiction." 29 C.F.R. § 7.1(d).

### BACKGROUND

The parties do not contest certain facts in this matter. They do, however, differ on the significance of those facts. The United States Navy (Navy) awarded TLT Construction Corporation, Inc. (TLT) Navy Contract No. N62472-89-C-0012 for improvement of Navy facilities in Newport, Rhode Island. Pet. at Attachment Exhibit 1. Bradbury worked on the project for a subcontractor to TLT, one Richard Hudson d/b/a RLH Flooring (collectively RLH) during the period between June 13, 1999, and February 6, 1999. He then worked for TLT from the first week in February 1999 through the end of April 1999. Bradbury does not allege that he was underpaid during the period TLT directly employed him. He does, however, assert that during the period he worked for RLH he was paid at rates below the applicable prevailing rate as established in the Navy contract's wage determination. Therefore, Bradbury argues he is owed "Davis [sic] Bacon wage underpayments in an amount not less than \$21,680.00" by TLT<sup>2</sup> and RLH. *Id.* at 2.

In May 1999, the Wage and Hour Division conducted an investigation of RLH's alleged

---

the Act is essentially unchanged. The current delegation of authority is set forth in SO 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

<sup>2</sup> TLT's potential liability for RLH's alleged prevailing rate violations is premised on the provisions of the Act and implementing regulations that make prime contractors on DBA-covered projects liable for violations committed by subcontractors. *See* 40 U.S.C. § 276a(a); 29 C.F.R. § 5.5(a)(2).

underpayments on the Navy contract. The Administrator states that the underlying complaint for this investigation was “generated by another investigation.” Administrator’s Statement in Opposition to Petition for Review (Adm. Stmt.) at 5. *See* Administrative Record (AR) Tab H (May 24, 1999 Limited Investigation Report) at 1.

The Wage and Hour Division’s investigator examined RLH’s certified payrolls; this review did not reveal RLH’s commission of any violations. *Id.* RLH’s signed declaration of wage forms certified the correct payment of prevailing wages on the Navy project. The investigator also sent blank employee interview statements to the RLH employees listed in the payrolls; several employees (including Bradbury himself) had no address listed in the records and therefore could not be contacted. AR Tab G (July 18, 2001 Narrative Report at 1)<sup>3</sup>. Only one employee interview form was returned to the investigator and this interview statement indicated that RLH was in compliance with the prevailing wage requirements of the project. The investigator recommended taking no further action and closing the investigation file.

Subsequently, Bradbury filed suit in Federal district court in Rhode Island pursuant to the Miller Act, 40 U.S.C. § 270(a) et seq., against TLT, Reliance Insurance Co. (TLT’s surety on the Navy project) and Richard Hudson d/b/a RLH Flooring. The Miller Act affords unpaid laborers, mechanics and materialmen on DBA-covered projects private rights of action against prime contractors’ payment bonds, which are also required under the terms of the Miller Act. The district court issued a decision on March 30, 2001, denying the defendants’ motion to dismiss, and advising Bradbury that he must “secure an administrative determination of what, if anything, he is owed under the Davis-Bacon Act” prior to recovery of damages under the Miller Act. *United States of America for the Use of Bradbury v. TLT Constr.*, 138 F. Supp. 2d 237, 245 (D.R.I. 2001). The district court stayed further action in the lawsuit so that Bradbury could obtain an administrative determination.

As a result of the district court’s ruling, the Wage and Hour Division reopened the investigation file concerning RLH and, in this second inquiry, the investigator personally interviewed Bradbury. *See* AR Tab F. During the interview, Bradbury alleged that he worked 40-48 hours weekly on the Navy project and was paid hourly wage rates of \$12.00, \$13.00, and \$15.00 during the time he was employed by RLH. AR Tab G at 1. Also during the interview, Bradbury told the investigator that he would contact other employees on the Navy project who would then, in turn, contact the investigator and provide corroborative statements. Bradbury never provided any such additional employee statements. *Id.* at 1-2. Finally, Bradbury reported that “TLT could verify all the hours [of his work] if they still have the records.” *Id.* at 2.

The Wage and Hour Division’s investigator also interviewed TLT’s vice president (Ken Tarbell) who informed the investigator that RLH’s owner was dead and that his business was no longer in operation. *Id.* at 2. Tarbell stated that before Hudson (RLH’s owner) died, he provided TLT with Bradbury’s payroll information and cancelled paychecks. TLT’s vice president also

---

<sup>3</sup> This 2001 investigative report recounts information collected during the first investigation conducted in 1999.

charted information from the daily work logs (maintained by TLT) against a roster of all of RLH's "sander/tapers" (Bradbury's classification on the project) who were reported on certified payrolls to have worked on the project in each week. *Id.* This compilation revealed that the daily logs and certified payrolls agreed in that they listed the same number of sander/tapers on the job at any one time. The TLT compilation also showed that the number of days worked by the sander/tapers coincided in the two sources. *Id.* Bradbury, however, was not listed in the certified payrolls for the majority of the sander/taper workdays reported during the period. The investigator's review of cancelled checks demonstrated that the net amounts paid to Bradbury did not equal the numbers of hours Bradbury claimed multiplied by his alleged hourly rates of \$12.00, \$13.00 and \$15.00. *Id.* at 1 – 2. Ken Tarbell also informed the investigator that, before his death, Hudson stated that he paid Bradbury on a piece-rate basis. *Id.* at 2; *see also* AR Tab G, Exhibit D-2 at 1.

On July 23, 2001, the Boston District Director, Wage and Hour Division notified Bradbury of the results of the second investigation. The Director informed Bradbury that RLH Flooring was no longer in business and that investigation of TLT revealed no proof of Bradbury's allegations. Accordingly, the Director concluded, the Wage and Hour Division could take no further action.

On August 21, 2001, Bradbury sought to appeal the District Director's decision to this Board. On November 9, 2001, we dismissed that first Petition for Review without prejudice on the ground that the July 23, 2001 letter was not a final agency action of the Administrator and therefore was not appealable.

On December 6, 2001, the Administrator issued the final agency action that is now before us for review. In that final determination, the Administrator declined to take any further action, basing this decision on her re-examination of "the allegations and facts presented in the case." Further, the Administrator also relied on the contents of the "Petition For Review that was submitted to the ARB on behalf of Mr. Bradbury." AR Tab B. On December 29, 2001, Bradbury filed a "Renewed Petition for Review," seeking the right to recover backwages on behalf of himself and three other alleged unnamed RLH employees, who have not participated in this matter.

## DISCUSSION

The Administrator argues that after two investigations and her own review of the files, the only reasonable conclusion is that there is not sufficient evidence to support Bradbury's allegations. Our review of the record and the statements of the parties leads us to the same conclusion. No independent probative evidence was adduced in either of the Wage and Hour Division's investigations. Moreover, Bradbury's arguments fail to persuade us that the Administrator's final ruling was unreasonable. Likewise, the decision not to take further action was not arbitrary, capricious or otherwise not in accordance with law.

With the owner of RLH dead and the firm no longer in business, there remain few sources of pertinent information. Bradbury argues that the Administrator overlooked valuable evidence. First, Bradbury asserted that TLT's records would support his claim; but as shown

above, the records did not list Bradbury as working on the project for the majority of the days that the sander/tapers were on the job. Thus, this information militates against concluding that Bradbury's allegations were entirely truthful. Second, Bradbury informed the investigator that he would be able to provide another employee who had worked on the project to support his claims, but he never produced such an informant. In fact, the only employee interview other than Bradbury's was gathered in the 1999 investigation and that employee indicated that he was paid the prevailing wage. AR Tab H at 1. During the second investigation, both Bradbury and his counsel "promised to provide information so [the Wage and Hour Division's investigator] could contact other former workers . . . ." Adm. Stmt., attached affidavit of Wage and Hour Division investigator Gary Cowan at 1-2, paras. 4 to 5. The investigator "offered to travel to Rhode Island to obtain interview statements from the employees, but Bradbury and his attorney did not provide any information" so that the investigator could contact other former RLH employees on the project to try to substantiate Bradbury's claims. *Id.* at 2, para. 5. Ultimately, "no other former RLH Flooring employees came forward and on July 18, 2001, [the investigator] recommended that this investigation be closed." *Id.* at para. 7.

As discussed below, Bradbury suggests that the Administrator failed to interview an individual who drove him to work and another individual with whom he took coffee breaks. Bradbury also argues that his cancelled checks verify his allegedly substandard RLH rates of pay and the numbers of hours and days he allegedly worked. The Administrator contends that the information on these checks alternatively can be viewed as approximating the piece rates per unit about which Tarbell asserted RLH's owner informed him. For the reasons discussed below, we find that the Administrator's position on the cancelled checks is reasonable and that the testimony of Bradley's proposed witnesses would not be sufficiently probative to justify a hearing.

In this proceeding, Bradbury avers that Hudson hired him to work for RLH during the first week of June 1998 at a \$15.00 hourly rate. Petitioner's Reply to Administrator's Statement in Opposition to Petition for Review (Pet'r Rep.), Bradbury Affidavit at p. 2, para. 9. The very next week, Bradbury states, RLH reduced his hourly rate to \$12.00 through August 21, 1998. *Id.* Subsequently, Bradbury claims, RLH raised his hourly rate to \$13.00 through September 30, 1998; to \$13.30 through November 8, 1998; to \$13.75 hourly through "early 1999"; and to \$15.00 after "early 1999." *Id.* These hourly rates do, taken in isolation, indicate possible prevailing wage underpayments but only if one accepts Bradbury's version of hours worked ("forty hours, forty one hours, forty five hours, etc.;" *Id.* at para. 11) and uses them to divide his net pay to arrive at the hourly rates which he asserts RLH paid him.

Bradbury has supplied the Board a compilation of these calculations. See Pet'r Rep. Attachment. However, in his own compilation, Bradbury actually uses additional numbers of weekly hours worked (which vary substantially from those stated in his affidavit) to justify his assertions regarding hourly rates: 17, 19, 24, 30, 38, 42, and 42.5 hours worked in certain weeks. These varying numbers of hours stated in the compilation directly belie the numbers of hours worked as stated in Bradbury's affidavit, where he asserted his workweeks were "forty, forty one hours, forty five hours, etc." Bradbury Affidavit, attachment. Thus, the weeks in which Bradbury's chart indicates that he worked 17, 19, 24, 30, or 38 hours stand in contradiction to his

earlier assertion to this Board that he “always worked 8 hours per day, 5-days [sic] per week for a regular 40 hour workweek for both TLT and RLH.” Pet. for Rev. at 4, para. 11.

We note also that during the second investigation (in his signed May 29, 2001 employee interview statement), Bradbury claimed that he “averaged 40 – 48 hours per week depending on [whether he worked on a Saturday].” AR Tab F. Yet, nowhere in Bradbury’s compilation is there any reference to a single week in which he purports to have worked on a Saturday or as much as 48 hours in a single week; in only three pay periods does Bradbury assert that he worked more than 40 hours. During those three weeks he asserts that he worked 41, 42.5, and 44 hours, respectively.

Further contradicting his hourly rate compilation, in his May 2001 interview Bradbury averred: “I was paid \$12.00 per hour when I first started. I was paid \$13.00 and then \$15.00 per hour over the year. I was paid \$12.00 per hour for about 5 months, then \$13.00 for about 3 months and \$15.00 for the remainder of the project.” *Id.* at 2. Thus, in May 2001 Bradbury made no mention that RLH paid him hourly rates of \$13.30 and \$13.75 as he now claims and attempts to demonstrate in the compilation. These inconsistencies substantially reduce the value of Bradbury’s uncorroborated submission that he was not paid the required prevailing wage.

On the other hand, the Administrator argues that the net amounts shown on Bradbury’s pay checks can also be seen as “approximate[ly] the piece rates for completing the work per unit that RLH Flooring’s owner advised TLT that it paid Bradbury.” Adm. Stmt. at 10. We agree. TLT’s vice president advised the investigator that Hudson told him RLH paid Bradbury a piece rate. This rate was calculated as follows: \$228.00 (representing 8 hours pay at \$28.50 hourly) for sanding or taping each unit of a duplex unit (i.e. \$456.00 for two units) and 2.5 hours of “clean up” time at \$17.50 hourly for each unit. AR Tab G, July 18, 2001 Narrative Report at 2; Exhibits D-1, -2. Under this formula, the piece rate would yield a total amount due per duplex of \$543.00: \$456.00 for the sanding and taping plus \$87.50 for cleaning “when he did it and showed up.” AR Tab G. While no RLH paycheck in the record is in the exact amount of \$543.00, the vast majority of Bradbury’s checks fall within a range of \$520 to \$550.00 (\$520.00 – two; \$525.00 – one; \$520.00 – two; \$525.00 – one; \$528.00 – one; \$530.00 – two; \$532.00 – five; \$550.00 – two). With a little variation in cleaning time per unit, these amounts are consistent with payment under the piece rate system reported to the Wage and Hour Division’s investigator. Given the inconsistencies in Bradbury’s otherwise unsupported information about his work hours, the Administrator reasonably concluded that Bradbury’s payroll information did not conclusively support either Bradbury’s scenario of hourly rate underpayment or TLT’s version that RLH compensated Bradbury on a piece rate basis. We agree with the Administrator’s conclusion that the evidence was also consistent with Bradbury’s receipt of piece rate compensation.

If the Administrator’s theory that Bradbury could have been paid on a piece rate basis is correct, we conclude that there is no way to arrive at an accurate number of hours worked by Bradbury absent an “additional independent source of evidence.” Adm. Stmt. at 10. If Bradbury was actually paid at an hourly rate, the need for additional, independent evidence of hours worked is equally necessary because of the inherent unreliability which we now see in Bradbury’s “evidence” regarding the numbers of hours he worked.

But there are no other sources of evidence on the question of Bradbury's hours worked in the record and he has not directed our attention to any potential new sources that might be available and probative of the issue. For instance, Petitioner suggests that people who drove him to and from the Navy project could testify to his hours of work. But information from such persons would not be probative of his hours worked, since Bradbury does not allege that these drivers worked with him, only that they brought him to and from the Navy worksites. Bradbury also urges that one "employee on the same contract for a different TLT subcontractor" could verify his hours of work; however, respecting this potential witness, Bradbury merely asserts that this person would testify that "Bradbury was on the project worksite every workday" and that they "took coffee breaks together each workday." Pet'r Rep. at 17. Once again, such testimony would not be probative evidence on the question of hours worked; it would, if anything, demonstrate only that two employees took daily coffee breaks together.

Bradbury also urges the Board to conclude that the Wage and Hour Division has "failed or refused to conduct a complete investigation." Pet. at 4. We disagree. Two separate investigations over the course of the administrative process (ultimately followed by the Administrator's own review) failed to disclose any independent information that would support Bradbury's allegations. As noted above, Bradbury's allegations (and "evidence") taken alone do not prove that RLH failed to pay him the proper prevailing rate on the Navy contract.

The Wage and Hour Division's investigations disclosed no documentation to support the underpayment allegations; indeed, the documentation provided by the prime contractor tended to show that Bradbury did not work the numbers of days and hours he claimed. No supporting witnesses have come forward in either of the two investigations. Bradbury promised the investigator that he would produce another former RLH employee to verify his charges but failed to do so.

The regulations governing ALJ proceedings under the DBA require the ALJ to base his decision on "reliable and probative evidence." 29 C.F.R. § 6.33(b)(1). We conclude that Bradbury's evidence is not reliable given its inconsistencies. Further, we conclude that Bradbury's proposed witnesses' testimony would prove nothing of relevance to the question of whether he was underpaid. The Administrator's refusal to proceed to hearing, given the paucity of "reliable and probative" evidence, was a reasonable decision and well within the broad zone of discretion allowed the Administrator in enforcing the Act.

The first investigation concluded that there were no RLH violations on the Navy contract. The second investigation ended in concluding that no further action should be taken, because the investigator did not discover and Bradbury failed to provide any independent corroborative proof of Bradbury's allegations. Moreover, the information TLT provided during the investigation indicated that Bradbury did not work or may not have worked the number of hours that he claimed RLH employed him on the project.

Previous Boards have deferred to the Administrator's reasonable decisions not to enforce the Act based on the circumstances of each case. For instance, the Administrator once pursued numerous cases on the basis of a regulation that required the Act's coverage of certain work,

even if that work was performed at locations not “directly upon the site of the work” as required by the Act. *See* 40 U.S.C. § 276a(a). An appellate court eventually invalidated the regulation finding it inconsistent with the plain language of the DBA. *Ball, Ball & Brosamer v. Reich*, 24 F.3d 1447 (D.C. Cir. 1994).

After the court invalidated the regulation, the Administrator then adopted the enforcement position to cease litigation of all “site of the work” cases that were pending at the time of publication of an interim rule implementing the court’s invalidation of the “site of the work” regulation. The WAB affirmed the Administrator’s decision to cease enforcement:

In our October 30 *Ames* decision (slip op. at p. 8), we noted the Acting Administrator’s decision to release more than \$326,000 of contract funds previously withheld pursuant to a Section 5.2(j) enforcement action:

It appears to the Board that the decision to release the withheld funds was essentially an exercise of the Acting Administrator’s enforcement discretion, and the Board is disinclined to disturb the Acting Administrator’s enforcement determinations.

*Ames Constr., Inc.*, WAB Nos. 91-02, 88-10, Decs. on Recon., slip op. at 2 (Feb. 23, 1993). The WAB continued:

We have carefully reviewed the respective positions of the Petitioner and the Administrator. We conclude that the Administrator’s decision to take no further action was an exercise of enforcement discretion. We have declined to review otherwise reasonable non-enforcement decisions in the past and again decline to second-guess the Administrator’s refusal to initiate an administrative law judge hearing. *See, Gust K. Newberg Construction Co.*, WAB Case No. 91-35 (Mar. 31, 1992); *Builders, Contractors and Employees Retirement Trust and Pension Plan*, WAB Case No. 90-28 (Mar. 1, 1991). On this record, we rule that the Acting Administrator’s discretionary enforcement is not reviewable by the Board.

The WAB went on to rule on an alternative basis, stating that “even if reviewable, we would conclude that the discretionary enforcement exercised in this case was not arbitrary, capricious or otherwise not in accordance with law within the meaning of the Administrative Procedure Act. We see the Acting Administrator’s decision to apply the interim Section 5.2(j) regulation to all cases pending on May 4, 1992 as consistent with the law of the case in the Court of Appeals’ *Midway Excavators* decision . . . .” Thus, the Board there also found that the Administrator’s declination to enforce a provision of the Act was “reasonable” and affirmed the Administrator’s enforcement stance, stating that “there is no showing on this record that the action is arbitrary, capricious or otherwise not in accordance with law.” *Id.*

The Administrative Review Board has also mirrored the WAB's earlier rulings with regard to the Administrator's broad discretion to decide whether to enforce the DBRA provisions. *Veterans Canteen Ser.*, ARB No. 96-115 (Oct. 25, 1996) concerned a single employee's Petition for Review. That employee appealed the Administrator's declination to pursue the employee's allegations of prevailing wage underpayment. The Administrator had based the decision not to enforce the Act on the facts that the underlying contract had already been completed, the contract had failed to include any DBA provisions, and the scarcity of agency resources. The ARB affirmed the Administrator's decision, stating only that "[T]his Board will not second guess the Administrators reasonable decision not to enforce the DBA in this case, in which [the employee] worked for three weeks on a paid out contract that did not contain Davis-Bacon Act provisions or an applicable wage determination." *Id.* at 1.

Likewise, in this case, Bradbury has not made a convincing case that the Administrator's ruling was arbitrary, capricious or otherwise not in accordance with the law. To the contrary, the Administrator's decision was extremely reasonable, given the lack of substantial and probative evidence to corroborate Bradbury's allegations.

The Wage and Hour Division conducted two separate investigations over the course of more than two years. The agency investigator made on-site investigations in reviewing TLT's payroll information. Further the investigator made very reasonable attempts to locate the employees, yet none came forward. Even Bradbury's documentation (cancelled checks) is susceptible to two diametrically opposed interpretations, both of which are arguably reasonable. On this record, we conclude that the Wage and Hour Division acted reasonably in its investigation of Bradbury's allegations and the decision to close the file was not unreasonable. Bradbury has failed to demonstrate on the record that the Administrator's refusal to take further action is arbitrary, capricious or otherwise not in accordance with law.

## CONCLUSION

For the foregoing reasons, the Administrator's final ruling of December 6, 2001, is **AFFIRMED** and the Petition for Review is **DENIED**.

**SO ORDERED.**

**JUDITH S. BOGGS**  
Administrative Appeals Judge

**CYNTHIA M. DOUGLASS**  
Chief Administrative Appeals Judge