



In the Matter of:

JOHNSON-MASSMAN, INC,
Contractor

ARB Case No. 96-118

and

(Formerly WAB Case No. 96-02)

MASSMAN CONSTRUCTION CO.,
Subcontractor

(ALJ Case No. 90-DBA-99)

DATE: September 27, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD¹

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the Davis-Bacon Act, as amended (DBA), 40 U.S.C. § 276a *et seq.* and the regulations at 29 C.F.R. Parts 5 and 7. The Administrator, Wage and Hour Division (Administrator or Petitioner) seeks review of a portion of the November 27, 1995 Decision and Order (D. and O.) issued by an Administrative Law Judge (ALJ). The ALJ ruled that welding work performed by three employees of Johnson-Massman, Inc. and Massman Construction Co. (Respondents) was “incidental” to their work duties as laborers on a federal construction project subject to the prevailing wage contract labor standards of the DBA. Accordingly, the ALJ held that Respondents did not violate the DBA when they paid the three workers as laborers, rather than as ironworkers, as alleged by the Administrator. For the reasons set forth below, the Administrator’s Petition for Review is granted and the ALJ’s decision is reversed in part.

BACKGROUND

The U.S. Army Corps of Engineers awarded Johnson-Massman, Inc. Contract No. DACW29-82-C-0402 to “furnish[] all plant, labor, material and equipment and construct[] the Old River Control Structure, Concordia Parish, Louisiana.” JX-1². (Massman Construction was a subcontractor of Johnson-Massman, Inc. S-1.) Pursuant to the requirements of the DBA, Wage

¹ On April 17, 1996, the Secretary of Labor re delegated authority to issue final agency decisions under, *inter alia*, the Davis-Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board. Secretary’s Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996. *See also*, 29 C.F.R. Part 7 (1996). Secretary’s Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions.

² “JX” refers to the ALJ hearing exhibits submitted jointly by the parties; “S” refers to stipulations submitted by the parties; “SA” refers to the Statement of the Administrator.

Determination (WD) No. 82-LA-230 was incorporated into Respondents' prime contract and subcontract.

Respondents were signatories to a collective bargaining agreement (CBA) known as the *Project Agreement Old River Control Auxiliary Structure*. JX-3 and 4, S. ¶5. Unions signatory to the CBA included locals of the International Union of Operating Engineers, United Brotherhood of Carpenters and Joiners of America, Laborers' International Union of North America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Operative Plasterers and Cement Masons' International Association and the International Association of Bridge, Structural and Ornamental Ironworkers. JX-3. WD No. 82-LA-230 reflects these locals' CBA rates as prevailing. JX-1, 2, 3. WD 82-LA-230 contained the following proviso with regard to welding (a craft not listed separately in the WD):

WELDER - receive rate prescribed for craft performing operation to which welding is incidental.

JX-1, 2. The CBA contains no mention of welding.

A compliance officer of the Wage and Hour Division investigated Respondents' labor standards performance on the contract and concluded that between April 10, 1983 and August 7, 1983 three employees (Jerry Herbert, Lawrence Hebert and Harry E. Ploschenski) worked -- and should have been classified and paid -- as welders while performing welding work in the performance of the construction contract. Each of the three affected employees was classified and paid for this work at the WD's laborer wage rate of \$7.73 per hour, including fringe benefits. One employee (Lawrence Herbert) performed welding nearly full-time (an average of 36 hours per week; JX-7) on a steel ramp barge for the entire four month period. (The other two employees welded for a total of one and eight days, respectively.) Respondents conceded the hours worked by the employees and the fact that they performed welding on a steel ramp barge on the project. JX-4 at ¶¶ 10, 11.

The Wage and Hour Division assessed back wages for all three workers based on the allegation that their disputed work was "incidental" to the ironworker's classification and therefore should have paid at the WD's hourly rate (including fringe benefits) of \$11.05 for the ironworker classification. Upon Respondents' refusal to pay the back wage assessment, Wage and Hour referred this matter for hearing. By the parties' agreement, this matter was decided below on the parties' exhibits and briefs, without a hearing. The ALJ ruled that the record did not support the conclusion that the welding performed by the three employees should have been classified as within the scope of duties for the ironworker classification.

The Administrator filed the instant Petition for Review with the Wage Appeals Board (WAB), prior to creation of the Administrative Review Board. *See* n.1, *supra*. Petitioner seeks reversal of only that portion of the ALJ's findings and conclusions regarding the proper classification and pay for Lawrence Herbert, who performed welding full-time during the four months of the investigation period. AS at 5, 7.

DISCUSSION

As noted by the ALJ, the facts of this matter are, “basically,” not in dispute. D. and O. at 4. It is our conclusion that the ALJ erred in his application of DBA area practice legal principles to these undisputed facts. Respondents’ federal construction contract was subject to the terms of WD No. 82-LA-230. Although there is no specific language establishing a prevailing rate for a classification of welder, we find that the WD contains operative language governing proper classification of employees performing welding. This language is the WD’s notation that: “WELDER - receive[s] rate prescribed for craft performing operation to which welding is incidental.” JX-1.

The ALJ held that the employees performing welding on the contract were properly paid as laborers. D. and O. at 8. The ALJ’s analysis of the foregoing language in WD 82-LA-230 concerning the proper classification and wages for welders is clearly flawed given that he begins and ends the analysis with the faulty premise that the full-time welding performed by Lawrence Herbert was “incidental” to his employment as a laborer.

We note initially that the regulations implementing the DBA (and its related Acts) generally define the terms “laborer” and “mechanic,” the two broad categories of employees subject to the protections of the DBA. 29 C.F.R. § 5.2(m) provides:

The term *laborer* or *mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade

Beyond this, the regulation does not define the scope of the work which a worker may perform (under the DBA) and still be properly classified as a laborer. Exact delineation of the duties laborers may perform and the tools they may utilize is a matter defined on a case by case basis as reflected by the particular area practice prevailing in a locality. In the instant case, the duties of laborers are not specified in the WD. However, since the wage rates found prevailing in the area are those contained in the project agreement CBA, proper classification of duties under the WD must be determined by resort to the area practices of those unions signatory to the CBA. *Fry Brothers Corp.*, WAB Case No. 76-06, June 17, 1977. Thus, we conclude that this matter is not -- as alleged by Respondents -- a “jurisdictional dispute” between the ironworkers and the laborers. Rather, this is a matter to be decided based upon the appropriate area practice for the disputed work.

Here, the CBA specifies that the laborer classification includes not only common laborers, but also rakers, power tool operators, formsetters, powdermen, and laborer foremen. No mention is made of laborers under the agreement performing work associated with welding. The WD itself lists only the laborer subclassifications of common laborer and air tool operator. Thus, the ALJ erred in concluding that Lawrence Herbert’s welding work was “incidental” to his duties as a laborer, where both the CBA and WD 82-LA-230 demonstrate that none of the laborers’ subclassifications perform welding.

The fact that the parties stipulated that Lawrence Herbert was hired by Respondents as a “laborer/welder” is simply not relevant to determining appropriate classifications under WD 82-LA-230. First, there is no “laborer/welder” classification in the WD 82-LA-230. Secondly, where an employee spends more than a minimal amount of time performing duties of a classification other than that for which the employee was hired, that employee is due the prevailing wage appropriate to the classification. Thus, the regulation at 29 C.F.R. § 5.2(m) offers this analogous guidance with respect to foremen (who otherwise would not be subject to DBA coverage):

Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties . . . are laborers and mechanics for the time so spent.

Accordingly, regardless of the fact that Respondents hired Lawrence Herbert as a “laborer,” his actual -- nearly full-time -- duties as a “welder” were clearly not minimal and Respondents’ classification and payment of this employee as a laborer was not appropriate.

Moreover, the record in this case clearly shows that Ironworkers in the locality claim jurisdiction over the type of work being performed by Lawrence Herbert. The business agent for the Ironworker’s local union produced a statement -- introduced as an exhibit -- claiming jurisdiction over the disputed work. He stated that “[i]f we had been informed of work being done at the time of building a ramp to the barge . . . [Ironworkers’] Local 623 would [have taken] the position that the work belonged to them.” JX-11. The ALJ characterized this exhibit as “ambiguous” and stated that it “has little probative value in the determination of this case.” D. and O. at 7. We disagree. The business agent’s statement clearly refers to the project’s ramp work and specifically claims that the work is that of the Ironworkers in the area. Moreover, Respondents did not proffer any evidence disputing the Ironworker’s claim to the work. Nor did Respondents proffer any evidence that the Laborers in the locality claimed the work in dispute. Thus, substantial uncontroverted evidence of record supports the conclusion that the ramp work was that of Ironworkers and that Lawrence Herbert’s welding was “incidental” to that classification.

Respondents contended that the classification of laborer should be considered a “craft” within the meaning of the WD’s language regarding welding (and therefore, the affected employees were performing welding “incidental” to their employment as laborers). However, here, the disputed work was shown to be that of Ironworkers and the disputed welding was clearly “incidental” to the

Ironworker's craft, and not that the laborer's classification. For the foregoing reasons, the ALJ's D. and O. as it relates to Lawrence Herbert is reversed.

SO ORDERED.

David A. O'Brien
Chair

Karl J. Sandstrom
Member

Joyce D. Miller
Alternate Member