



In the Matter of:

PLUMBERS LOCAL UNION NO. 27

ARB CASE NO. 97-106

***In re: Davis Bacon Wage Survey,
Wage Determination No. PA960013, Mod.
No. 1, August 16, 1996***

DATE: July 30, 1998

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

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 29 C.F.R. Part 7. Petitioner Plumber's Local Union No. 27 (Local 27) seeks review of the Wage and Hour Division's April 24, 1997 final determination, issued by the Division's National Office Program Administrator ("Administrator"). The Administrator denied Local 27's request for reconsideration of the plumber's wage rate for residential construction in Allegheny County, Pennsylvania, as published in Davis-Bacon Wage Determination No. PA 960013, Modification No. 1, dated August 16, 1996.

Local 27's petition was received by the Board on May 21, 1997, and counsel for the Administrator filed a response. In addition to the pleadings filed by the parties, the Board received a request from the Building and Construction Trades Department, AFL-CIO (BCTD), to intervene in the case.^{1/} 29 C.F.R. §7.12. Oral argument before the Board was heard on June 4, 1998, with all parties participating.

For the reasons stated below, this matter is remanded to the Wage and Hour Division for further proceedings consistent with this decision.

BACKGROUND

In February, 1996, the Wage and Hour Division initiated Survey No. 96-PA-003, a wage survey of residential construction projects in Allegheny County, Pennsylvania (including Pittsburgh). All interested parties, including Plumbers Local 27, were advised of the survey and

^{1/} The Building and Construction Trades Department's request to intervene is granted, as are motions for extensions of time for filing briefs filed by the BCTD and Local 27.

invited to submit data. The cut-off date for submitting data was April 5, 1996. Administrative Record (AR) Tab C.

Local 27 submitted wage data on approximately 505 plumbers^{2/} working on residential projects in Allegheny County as part of the Division's original survey process, Petition for Review at 3, utilizing the Department's standard survey report form (WD-10). However, most of the data submitted by Local 27 related to plumbers working on federally-funded projects, and therefore was not considered by Wage and Hour when the data for calculating the wage determination rate was compiled. AR Tab C. The Wage and Hour Division received wage data on only six plumbers who performed work on privately-funded residential projects in Allegheny County during the survey period.^{3/}

Based on the wage data from the six plumbers observed on private-sector work, the Division issued a new residential wage determination for Allegheny County, PA960013 (Mod. 1), on August 16, 1996. Whereas the Division's previous wage determination for plumbers performing residential construction in Allegheny County had reflected Local 27's collectively bargained hourly wage rate (\$21.89 plus \$8.47 in fringe benefits), the hourly rate for plumbers under the new wage determination dropped to \$11.20 plus \$1.20 in fringe benefits. AR Tabs C, F.

Soon after the publication of the new wage determination, Local 27 contacted the Division requesting background information regarding the new residential plumbers' rate. A meeting was held on November 6, 1996, in Pittsburgh between Local 27 representatives and George Durbin, the Wage and Hour Division's Regional Wage Specialist, to review the situation. Mr. Durbin subsequently forwarded correspondence to Local 27's attorney on November 29, 1996, explaining that:

data from Federal or federally assisted projects subject to Davis-Bacon requirements are not used [by the Wage and Hour Division] in determining prevailing rates for building or residential wage determinations unless there is insufficient wage data from other projects. In this survey, there was sufficient wage data from projects not subject to Davis-Bacon and thus, we did not use any Davis Bacon data to determine the prevailing wages.

AR Tab C.

^{2/} There is no data in the Administrative Record documenting Local 27's representation that responses were submitted reporting wages paid to 505 plumbers on residential projects, mostly on federally-funded jobs. However, we note that the Administrator nowhere contests Local 27's representation, and we therefore accept it as accurate.

^{3/} Although the Administrator's Statement indicates that data on eight plumbers was considered, Statement at 3, wage data on only six plumbers can be identified on the Project Wage Summary sheets. See AR Tab E.

By letter to the Wage and Hour Administrator dated December 16, 1996, Local 27 formally requested review and reconsideration of the wage determination for plumbers performing work on residential projects in Allegheny County, PA, as provided by 29 C.F.R. §1.8 (1997). AR Tab B. On April 24, 1997, the National Office Program Administrator affirmed the earlier wage determination.

DISCUSSION

The Davis-Bacon Act charges the Secretary with responsibility for determining locally prevailing wage rates for various classes of workers employed on construction projects. The Secretary's regulations for determining prevailing wage rates are found at 29 C.F.R. Part 1. In addition to the regulations, the Wage and Hour Division has developed two guidance documents that are used internally in the wage determination process: (a) the Davis-Bacon Construction Wage Determinations Manual of Operations (April, 1986)(Manual of Operations); and (b) an internal training manual.

The Division has an on-going program of compiling wage data for issuing updated wage rates. Information on wage rates for the various job classifications is solicited periodically from contractors, contractors associations, unions, governmental sources, and others in a given locality. 29 C.F.R. §1.3(a). This process primarily involves developing data identifying individual jobsites in a locality, the names of the contractors working at the site, project cost, dates of project start and completion, as well as the number of employees working at the site, their classification and wage/fringe benefit rates. 29 C.F.R. §1.3(b)(1). Typically, these surveys (and the resulting wage determinations) are divided into four broad categories of construction: residential, building, highway and heavy. Manual of Operations at 23-29, *citing* All Agency Memoranda 130 and 131.

The Administrator has developed internal guidelines for determining whether enough reliable data has been submitted during the survey process to support the issuance of a wage determination. First, the Administrator calculates the useable response rate, defined as the number of responses received that provide useable survey data divided by the total number of contacts made with general contractors and subcontractors. AR Tab C (Manual of Operations) at 62. The Manual of Operations continues with this guidance:

In most instances, when survey response rate equals at least 25%, data for a substantial number of workers in each of the major classes will be received. However, for surveys conducted in rural counties where construction activity is sparse or for highly specialized classes, the number of employees for whom data are provided may be limited. In such cases, a wage rate for an individual class is to be recommended only when information on at least six workers is received from three or more contractors, none of which accounts for 60% or more of total reported employment [Footnote omitted]. However, if the overall survey usable response rate is 50% or more, data on only three workers, from two contractors

may be utilized. Exceptions to these standards may be allowed, but must be justified in writing.

Id.^{4/}

When conducting these Davis-Bacon wage surveys, the Division receives wage data on all projects in the locality, both private and federally-funded. However, the Secretary's regulations limit the use of data from projects covered under the Davis-Bacon and related Acts, under certain circumstances:

In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.

29 C.F.R. §1.3(d).

The Administrator asserts that because the Allegheny County residential survey produced data on at least 3 workers employed by 2 contractors on privately-funded residential work, the private sector data was sufficient *per se* under the Division's internal policy guidelines, and the Administrator therefore was free to ignore entirely the data on more than 505 plumbers on federally-funded residential work. We respectfully disagree.

The current language of 29 C.F.R. §1.3(d), prohibiting the use of wage data from federally-funded residential- and building-type projects when there is sufficient data from privately-funded projects, was proposed by the Secretary in 1981 (46 Fed. Reg. 41444 (1981)) and published in final form in 1982. 47 Fed. Reg. 23644 (1982).^{5/} As part of the rulemaking, the Department:

concluded that, *where practicable*, it would be appropriate to exclude wage data from Davis-Bacon projects in determining prevailing wages... Accordingly, ...

^{4/} According to the Administrator, the "6 worker/3 contractor" rule has been abandoned in practice, although the policy still is found in the Manual of Operations. Statement of the Administrator at 8, n. 6.

^{5/} Implementation of the regulation was enjoined following a legal challenge, *Building and Constr. Trades Dep't, AFL-CIO v. Donovan*, 553 F. Supp. 352 (D. D.C. 1982), but the regulation subsequently was approved at the appellate level. *Building and Constr. Trades Dep't, AFL-CIO v. Donovan*, 712 F. 2d 611 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). The regulation was fully implemented by Federal Register notice published January 31, 1985. 50 Fed. Reg. 4506 (1985).

wages paid on projects subject to the Davis-Bacon Act will not be considered in developing wage determinations for “building” and “residential” projects *unless the Department finds that there is not sufficient data from privately financed construction projects of a similar character to determine prevailing wages.*

47 Fed. Reg. at 23645 (emphasis added). Although the Secretary did not specifically express a rationale for this limitation on the use of data from Davis-Bacon projects when issuing the regulation, the Secretary noted in the final rulemaking that the proponents of this change were concerned that the inclusion of wage data from federally-funded building- and residential-type projects tended to skew the Department’s survey results upward when compared with rates typically paid on privately-funded projects in the locality. *Id.*

Nowhere in the regulation is the term “sufficient data” defined, suggesting that the Administrator has discretion in making the determination whether the available wage data from private sector projects is insufficient to issue a wage rate without also incorporating wage data from projects subject to Davis-Bacon wage standards. However, it is the Board’s responsibility to insure that the exercise of this discretion is in keeping with purposes of the Act and the regulations.

Definitionally, the word “sufficient” suggests that a criterion is to be evaluated in a specific context, *i.e.*, in relationship to some purpose. Black’s Law Dictionary defines “sufficient” as “[a]dequate, enough, as much as may be necessary, equal or fit for end proposed, and that which may be necessary to accomplish an object. Of such quality, number, force, or value as to serve a need or purpose.” Black’s Law Dictionary 1443 (6th ed. 1990). An amount or quantum that may be “sufficient” for one purpose plainly might be insufficient in another context. The underlying “object” or “purpose” of the wage determination process is the Secretary’s statutory mandate to determine the locally *prevailing* rate of pay for laborers and mechanics engaged on construction projects, 40 U.S.C. §276(a), as guided by the various considerations found within the Secretary’s implementing regulations at 29 C.F.R. Part 1.

When deciding whether a wage survey has developed sufficient data to justify the publication of a prevailing wage rate for any particular job classification, the Administrator has adopted a threshold standard for sufficiency. The Administrator will publish a wage determination for a particular job classification so long as usable responses have been received on at least three workers employed by at least two employers (the “3 worker/2 contractor rule”). According to the Administrator, this minimal standard is based upon guidelines used by the Bureau of Labor Statistics. AR Tab C (Manual of Operations) at 62. In the hearing before the Board, counsel for the Administrator represented that this relatively low standard has been adopted in part because it often is difficult to develop large amounts of wage data in a given locality as part of the survey process, particularly in connection with residential construction surveys.

The Wage and Hour Division’s *general* use of this fixed 3 worker/2 contractor standard when deciding whether there is sufficient wage data to publish a wage determination rate is not

at issue in this proceeding. However, the Administrator would import this same fixed standard to the determination whether the available private sector data is “sufficient” under 29 C.F.R. §1.3(d), *i.e.*, whether data from federally-funded projects should be excluded from consideration when calculating a wage determination because there is adequate data from privately-funded projects. In light of the facts before us in this case (in which data from six plumbers on privately-funded work has resulted in wage data on 505 other plumbers being excluded entirely from consideration), it is our view that the Administrator’s wholesale reliance on the fixed 3 worker/2 contractor formula is misplaced because large amounts of relevant wage data on federally-funded projects are excluded based solely on a *de minimis* showing of data from privately-funded jobs.

This Board’s predecessor, the Wage Appeals Board, addressed a similar issue in *Southeast Idaho Building and Construction Trades Council, AFL-CIO*, WAB Case No. 86-22 (Feb. 4, 1987), a case in which Wage and Hour had concluded that there was insufficient construction data in two rural counties from which to issue a wage determination under 29 C.F.R. §1.7(b). Section 1.7(b) provides that if there is insufficient wage data available in a rural county to issue a wage determination, the Administrator is authorized to enlarge the geographic scope of the survey area to include adjacent rural counties. In *Southeast Idaho*, the Administrator had decided to consider only wage data from privately-funded projects in the locality when determining the sufficiency of data, and to exclude data from federally-funded projects as part of the survey analysis. After concluding that the data only from privately-funded projects was insufficient to support the issuance of a wage determination, the Division expanded the geographic scope of the survey area to include other surrounding rural counties in the state. In a divided decision, the Wage Appeals Board rejected this approach, finding that:

in the first instance all wage data should be collected whether on private or public construction projects. It is not until after compiling wage rate data can it be determined whether to exclude Federal and federally-assisted projects subject to the Davis-Bacon prevailing wage requirements.

Southeast Idaho, slip op. at 4. In short, the Board held in *Southeast Idaho* that it is only after the Administrator reviews *all* the relevant data before the Division (*i.e.*, data that is within the scope of the survey in terms of time, type of construction, geographic area, etc.), whether from federally- or privately-funded projects, that the Administrator can make a determination concerning the sufficiency of wage data under Section 1.7(b). In *Southeast Idaho*, the Board remanded to the Wage and Hour Administrator to issue separate prevailing wage determinations for the two counties in question, based on data from both private and federally-funded projects that were included in the survey.

In this decision, we conclude that the Administrator similarly must consider all the data before the Wage and Hour Division when determining the sufficiency of wage data under Section 1.3(d). The record before us indicates that after conducting the Allegheny County residential construction survey, the Division had before it survey responses documenting wages

paid to six plumbers on privately-funded residential construction projects, and 505 plumbers on federally-funded residential construction projects. Allegheny County, which includes the city of Pittsburgh, Pennsylvania, has a population of approximately 1.3 million.^{6/} Based on these facts, it is our finding in this case that the very limited wage data on plumbers working on privately-funded projects was insufficient under 29 C.F.R. §1.3(d), and that the Administrator therefore should have considered the wage data from plumbers on federally-funded projects when issuing Wage Determination PA960013, Mod. 1

The decision of the Wage and Hour Administrator denying petitioner's Request for Review and Reconsideration is hereby **REVERSED**, and this matter is **REMANDED** to the Administrator for issuance of a new wage determination pursuant to this decision.

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member

^{6/} Bureau of the Census, U.S. Dep't of Commerce, 1990 CP-1-40, *Census of Population, General Population Characteristics, Pennsylvania*, 1 (1992).