

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 August 2004

Case No. 1995-SCA-26

In the Matter of

U.S. DEPARTMENT OF LABOR,

Complainant,

v.

J.N. MOSER TRUCKING, INC.,
d/b/a MOSER ENTERPRISES,
DONALD H. SCHLEINING, and
KIRSTY S. SCHLEINING,
Individually and Jointly,

Respondents.

DECISION AND ORDER ON REMAND

On December 1, 2000, the undersigned issued a Decision and Order in the above-captioned matter finding that the Respondent, J. N. Moser Trucking, Inc., ("Moser") had not failed, as alleged in the complaint of the U.S. Department of Labor ("DOL"), to compensate certain drivers for "bobtail" time. I did hold, however, that the Respondent had failed to compensate drivers for time spent in performing pre-trip inspections and ordered that the Respondent remunerate affected drivers. Finally, I found that unusual circumstances existed that did not warrant a three year debarment of the Respondent from performing government contracts as sought by the DOL.

On January 5, 2001, I issued a Supplemental Decision and Order, based on DOL's calculations, for the monetary amounts due to affected drivers for pre-trip inspections. DOL and Moser accepted the amount of \$71,482.84 as the total amount owing to its employees.

Thereafter, the DOL appealed my findings relating to bobtail time to the Administrative Review Board ("ARB"). On May 30, 2003, the ARB, in an all too familiar scenario, completely

reversed my findings adverse to the DOL, including those relating to credibility of witnesses.

Subsequently, Moser sued the DOL under the Administrative Procedures Act ("APA," 5 U.S.C. §§701-706) and the Declaratory Judgment Act (28 U.S.C. §2201) to challenge the findings of the ARB that it had violated the McNamara-O'Hara Service Contract Act of 1965 (41 U.S.C. §§351-358). Moser asked the United States District Court to set aside the ARB's determination as clearly erroneous and not in accordance with the law. Both sides moved for summary judgment under Fed. R. Civ. P., Rule 56, or alternatively, for judgment under Rule 52. After reviewing the parties' submissions and the administrative record, the Court granted Moser's motion for summary judgment and denied DOL's motion.

In its February 27, 2004 Order, the United States District Court concluded as follows:

Based on a review of the record as a whole, and after taking into consideration the important factor - - disregarded by the ARB - - that the [Administrative Law Judge] was in the unique position of assessing the credibility of witnesses who testified on the bobtail issue, this Court concludes that the ARB clearly erred when it determined that bobtail time under the circumstances of this case is compensable under the FLSA. This Court therefore vacates [DOL's] final order pursuant to Sections 706 and 39 and remands this case to [DOL].

In its order of remand the Court directed that the ARB act in accordance with its opinion. The Court also foreclosed the ARB, on remand, from tampering with credibility resolutions of the Administrative Law Judge. (Slip Op., p. 25, fn. 14) On May 18, 2004 the ARB, without acting on the Court's remand order, in turn remanded the matter to the undersigned for disposition stating that "[a]s the District Court has vacated the Department's final decision, we remand this case to the Administrative Law Judge to enter an order 'in accordance with [the District Court's] opinion.'"

It now appears that the only issue for resolution is addressed by the Court in its opinion at footnote 15 (Slip Op., p. 25). Therein, the Court notes that Moser had sought through a writ of mandamus under 28 U.S.C. §1361 ordering the release to it of funds being withheld by the United States Postal Service

in accordance with Section 352(a). However, the Court stated that Moser had failed to adequately address the matter before the Court and thus denied the relief sought. Notwithstanding, the Court in remanding the case to the ARB stated that the "[DOL] will be expected to deal with it appropriately on remand that has been ordered here."

The applicable regulation at 41 U.S.C. states:

Sec. 352. - Violations

- (a) Liability of responsible party; withholding payments due on contract; payment of underpaid employees from withheld payments

Any violation of any of the contract stipulations required by section 351(a)(1) or (2) or of section 351(b) of this title shall render the party responsible therefor liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation due to any employee engaged in the performance of such contract. So much of the accrued payment due on the contract or any other contract between the same contractor and the Federal Government may be withheld as is necessary to pay such employees. Such withheld sums shall be held in a deposit fund. On order of the Secretary, any compensation which the head of the Federal agency or the Secretary has found to be due pursuant to this chapter shall be paid directly to the underpaid employees from any accrued payments withheld under this chapter.

It is presumed that since the DOL, in its original complaint, alleged much broader violations of the Service Contract Act than ultimately found by the undersigned, any sums withheld as a result thereof were much larger than the \$71,482.84, that I ordered be paid to affected employees. I would hope that by now employees who were due compensation have been paid. However, I have no information in that regard. If affected employees have not yet been compensated due to the DOL's failure to cause the release of funds in such amount to do so, it would be obviously patently unfair to those recipients to receive the same amounts almost four years later without interest. Likewise it would be equally unfair to assess any penalties against Moser. Thus, my order below is fashioned to take that situation into account, if necessary. Accordingly,

It is ORDERED, that the DOL shall take immediate action to effect the release of any funds to Moser that may have been withheld pursuant to Section 352(a) as a consequence of the DOL's alleged violations of the Service Contract Act by Moser.

It is further ORDERED, that if the amount of \$71,482.84 has not yet been disbursed to affected employees as identified in my original Decision and Order, such employees shall be entitled to interest (at a rate to be determined by further order) on any amounts owing since the date of my Supplemental Decision and Order until the date of payment. The parties are directed to advise the undersigned, within twenty (20) days of the date of this order if this obligation has yet to be satisfied. If affected employees have yet to be paid, any interest on such unpaid amounts will be borne by the DOL and will not be assessed against Moser. Moser is directed to file a motion for appropriate relief in this regard, if necessary, within the time set forth above.

A

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Within 40 days after the date of the decision of the administrative law judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board pursuant to 29 C.F.R. Part 8, with a copy thereof to the Chief Administrative Law Judge. (6.20)