



.....
 :
 In the Matter of :
 :
 : Case No. 82-SCA-127
 :
 MELTON SALES AND SERVICES, INC., :
 FLOYD F. MELTON, JOHN F. MELTON, :
 AND FLOYD L. MELTON, individually :
 and as officers thereof. :

William G. Skelly, Esq.
For Respondents

Joan M. Roller, Esq.
For Department of Labor

BEFORE: STUART A. LEVIN
Administrative Law Judge

DECISION AND ORDER

This matter arises under the McNamara-O'Hara Service Contract Act of 1965 (41 U.S.C §351 et seq.) and regulations promulgated and published by the Department of Labor at 29 C.F.R., Part 4 to implement the Act. At issue, are wage and fringe benefit underpayments totaling \$73,423.03 allegedly owed by respondents to 125 service workers employed as helpers pursuant to government contracts for the repair of portal and bridge cranes at the Philadelphia Navy Yard.

Hearings convened in this matter on April 3-6, 1984, and resumed from July 9-11, 1984. Thirty-four witnesses were called to testify, and 44 exhibits were offered and received into

evidence.¹ The Department of Labor filed its brief on September 24, 1984. On April 30, 1985, following several extensions, granted for good cause, respondents filed their brief. The findings and conclusions which follow are based upon a careful review of the record considered in its entirety, and arguments presented by the parties at the hearing and in briefs.

Findings of Fact

1. Respondent, Melton Sales and Services, Inc. is a New Jersey corporation with headquarters located at Jacksonville Road, Bordentown, New Jersey. Respondents, Floyd F. Melton, Floyd L. Melton, and John F. Melton are officers of throe corporate respondent. (Admitted)

2. The U.S. government awarded respondents the following contracts, each in excess of \$2500.00, to provide all labor, materials, and equipment necessary to repair certain portal and bridge cranes at the Philadelphia Navy Yard:

<u>Contract No.</u>	<u>Date of Award</u>
GS-03W-20067	January 18, 1978
GS-3DPR-91013	February 27, 1979 (Admitted)

3. Contract GS-03W-20067 was subject to Wage Determination #731054. (Rev. 4). Relevant job classifications, for purposes of this proceeding, under the wage determination, include: Heavy Construction Equipment Mechanic, Welder, Machinist, and Helper. The journeymen wage rate in each category was \$7.43 per hour including fringe benefits, and \$5.75 per hour for helpers. GX 1. Conforming wage and benefit rates were subsequently issued for Painters at \$6.32 per hour, and Electricians, Heavy Equipment Operators, and Machine Operators at \$7.43 per hour. GX 33, Tr. 9, 856, 862-63.

4. Contract No. GS-3DPR-91013 was subject to Wage Determination No. 78.1187. Pursuant to this Wage Determination, Journeymen rates for classifications other than Painters, rose to \$7.81 per hour including fringe benefits, Painters were conformed at \$6.32 per hour, and helpers rose to \$5.93 per hour. GX 2, 33, 37.

¹ Government exhibit, GX 18, submitted post-hearing is hereby admitted into evidence. Respondent's exhibits, RX 16-18, were withdrawn at the hearing, subject to respondents resubmitting them post-hearing, Tr. 1472, however, they have not been reoffered for inclusion in the record.

5. Both contracts were requirements-type agreements, and work on both continued through approximately January of 1981. The period covered by the Department of Labor's investigation, and during which the alleged underpayments arose, included January, 1979 through December, 1980. Tr. 851-52; GX 28, 29.

6. Mr. Richard Valentine was respondents' General Foreman and later Field Superintendent at the Navy Yard. Tr. 1321. He was responsible for organizing respondents' operations at the Yard and hiring the employees who worked on jobs associated with both contracts. Tr. 1321, GX 41 at 7-10. As work on Contract No. 20067 progressed, Mr. Valentine established various departments, including paint, welding, mechanical for bridge cranes, mechanical for portal cranes, electrical, and machinist departments. GX 41 at 7-14, Tr. 1321-22. Only the department heads were hired at journey men wage rates. All 125 other employees were hired as helpers, Tr. 1352-53, and eighteen of these individuals were subsequently promoted to the journey man's level. GX 41 at Appendix #1, D-3.

7. Between the wage rate paid to the journey men and the helpers, respondents recognized a classification of worker which they termed "lead man." According to Mr. Valentine, the lead man had no supervisory responsibility, and no other responsibilities beyond those of a helper. It was simply a classification which paid more than a helper's wage to individuals considered better workers, but who lacked the qualifications of a journey man. GX 41 at 54-55.

8. Sometime in early 1978, Mr. John Melton met with Mr. Francis McGrath, the Department's Regional Wage Specialist in Philadelphia. Mr. Melton sought advice concerning inter alia, the payment of wage rates below the journey man level to workers on government contracts. Mr. McGrath informed Mr. Melton, "if he were to use people on the contracts and was not going to pay them the journey man rate, that one of the best methods for dealing with this was to have someone in a bona fide apprenticeship program" Tr. 775. McGrath and Melton also discussed the use of "helpers," but McGrath cautioned that helpers could not be used to perform journey men's work, irrespective of their skill level, unless they were enrolled in a registered apprentice program. Tr. 776-77.

On August 31, 1978, McGrath followed up his previous conversations with Mr. Melton by letter providing a definition for "Maintenance Trades Helper" derived from a list of definitions published by the Bureau of Labor Statistics. GX 25, 26. Tr. 279-80. A helper was defined as follows:

Assists one or more workers in the skilled maintenance trades, by performing specific or general duties of lesser skill, such as keeping a worker applied with materials and tools; cleaning working area, machine and equipment; assisting worker by holding materials or tools; performing other unskilled tasks as directed by journey man. The kind of work the helper is permitted to perform varies from

trade to trade: In some trades the helper is confined to supplying, lifting, and holding materials and tools and cleaning working areas; and in others he is permitted to perform specialized machine operations, or parts of a trade that are also performed by workers on a full-time basis.

9. Following his discussions with McGrath, Mr. Melton explored the possibility of establishing an apprentice program covering the work at the Navy Yard. Tr. 1246-47. He concluded, however, that an apprentice program at the Navy Yard was inappropriate, because the single-year requirements-type contracts were of insufficient duration to ensure completion of an apprentice program. Tr. 1257-58.

As a result, workers were hired and classified as journeymen or helpers based upon their experience, skills, and qualifications as revealed in their job applications and during the course of an interview usually with Mr. Valentine or a Department head. Melton, Tr. 7272-73, 1277-78, 1310; Valentine, Tr. 1322-23, 1330, 1332, GX 41 at 15-17. Respondents had no written job descriptions for classifying workers as journeymen or helpers, and upon making his classification decisions, Mr. Valentine did not consult the Bureau of Labor Statistics definition or any other written material until the summer of 1980 when he first saw the Dictionary of Occupational Titles. GX 41 at 15-16.

10. Respondents provided the mechanical and electrical workers at the Navy Yard with a written list of tools which journeymen were required to bring to the job. See eg., GX 14. According to Mr. Valentine, the same lists were provided to the helpers, on an informational basis, in the hope that they would acquire the tools, but helpers were not required to furnish tools as a condition of their employment. GX 41 at 82-83.

The following individuals, hired as mechanic or electrician's helpers, purchased the journeymen's tools for use at the job site: Elam, Tr. 44-45; Spitzner, Tr. 134-35; Hurley, Tr. 163-64; Hatlen, Tr. 206-210; Gallagher, Tr. 291; Lynch, Tr. 377-78; Spring, Tr. 445; Ferro, Tr. 473-74; Hatter, Tr. 508-09; Crowley, Tr. 555-57; Wyatt, Tr. 639-40; Stewart, Tr. 666; Jim Goloff, Tr. 698; Reimel, Tr. 732-33; Pera, Tr. 1062; Monaghan, Tr. 1102-03.

In addition, painter's helpers, machinist's helpers, and welder's helper's were advised, during the course of their employment interviews, or shortly thereafter, of the tradesmen's tools in their respective areas of employment. See Billups, Tr. 265; Black, Tr. 309-11; Laychock; Tr. 329-30; Nacci, Tr. 346-47; Grimm, Tr. 529; Welsh, Tr. 596-97; Harkins; Tr. 627-28; Franklin; Tr. 1080-81. In summary, virtually every worker, employed as a helper, called to testify in this proceeding felt obliged to provide the tools respondents listed at costs ranging from several dollars to approximately \$400.00, depending upon tools they possessed prior to joining respondents' workforce.

11. Employees who were classified as mechanics helpers used mechanic's tools to repair and replace shells, bushings, and bearings. They dismantled and reassembled cranes, ground and cleaned bearings and gears, and disassembled, cleaned, and reassembled trolleys. Tr. 166-67; 213-14, 509, 667. The helpers also ground drums and installed copper tubing for brake lines and foot pedals. Tr. 215. They installed drive shafts in the cranes, shimmed up bearings, adjusted brakes. Tr. 476-79, 498-502, 672. In the shop, helpers disassembled motors, cleaned them, installed new or rebuilt parts, and installed repaired or new motors on the cranes. Tr. 520-25; 642-43; 668, 726.

In addition to the above duties, the helpers performed such tasks as drilling holes, cutting bolts, tightening bolts, using cutting torches, and cleaning and grinding parts. Yet, the record shows that virtually none were required to fetch tools, clean up after a fellow worker, or run errands. To be sure, most of the employees had little prior experience in the mechanical trade, and supervisors were often available for consultation, as needed, but as one helper who learned enough about the trade on the job to become a foreman described his crew; they were mechanics, but not quite mechanics. Tr. 186.²

12. Employees who were classified as painter's helpers scraped, chipped, sanded, cleaned, and otherwise prepared surfaces using needle guns, knucklebusters, sanders, wire brushes, deck grinders and solvents. In addition, they applied metal bond, primer, and paint to prepared surfaces, using rollers and brushes. Tr. 264-75; 279-285; 331-39; 628-35. The employees performing the above-described duties had, for the most part, little or no prior experience in the painting trade. They were taught how to use the tools and instructed in methods of paint removal and surface preparation by the head of Paint Department, Homer Murray. Tr. 1012-19. Decisions respecting when a surface was adequately prepared, and whether metal bond, primer, or paint would first be applied were made by Mr. Murray in accordance with contract specifications. Tr. 1012-14; 1032-33.

As work on the project progressed, two former painter's helpers were promoted to supervisory levels. Thus, Wayne Dalton supervised a crew of 7 to 15 workers classified as helpers, and Lonnie Murray supervised a crew of 7 to 8 workers classified as painter's helpers. Tr. 1029-31. Approximately 30 workers were employed in the Paint Department, 3 were paid the painters wage rate, the rest were classified as helpers. Tr. 1035.

² This foreman also described his men as a crew of helpers, Tr. 181-85, including Frank Ferro, who like this foreman was promoted to foreman approximately seven months after he arrived at the jobsite. Tr. 474. Similarly, John Anderson, who had no experience as a mechanic prior to his employment with respondents, was promoted to the Journeyman's level approximately one year later. Tr. 1041.

13. Workers employed as helpers in the electrical department refurbished virtually the entire electrical systems on the cranes. They removed old motor control systems and resistor banks from the cranes and installed new resistors and switchboard controls. Tr. 5051, 135-36, 292-93, 380-85, 434-35, 448, 455, 463-64, 558, 561. They removed motors from the cranes, refurbished them and reinstalled them. Tr. 53, 78, 137-41, 380-81, 386-87, 427-28, 448-49, 560, 769-71.³ The helpers removed old cable, marked and installed new cable conduit, and new resistor banks. Tr. 54, 147, 292, 302, 380, 399-406, 559. In several instances, their work included preparation of and reading electrical diagrams or schematic plans, Tr. 51, 54, 57, 86, 87, 138, 155, 466, 562-63, 733, consulting the electrical code book, Tr. 86, and testing. Tr. 570-72, 578, 580.

Very few of the workers had prior experience in the electrical trades prior to their employment with respondents. But see, Tr. 379-80. None were required to fetch tools, run errands, or cleanup after another employee. The head of the Electrical Department, however, considered virtually all of the employees to be helpers, Tr. 1125-1132-33, 1136, and was available to instruct, lay out job assignments, consult, and test the work completed by his men. Tr. 74-75, See also, 1345.

14. Workers employed as welder's helpers used "torches" to cut and burn metal, and "sticks" to weld together metal parts. Susan Drew Graff was the first person respondents employed as a welder's helper. At the time, respondents employed no other welders at the job site. Tr. 101. Ms. Graff had previous experience as a welder at Bath Iron Works in Bath, Maine, Tr. 98.

Ms. Graff was required to purchase tools, Tr. 103, and performed both cutting and welding tasks as assigned. Tr. 104-06, 111. Prior to becoming a foreman for respondents in March, 1980, she interviewed, tested, and hired another welder's helper at the job site. Tr. 106, 345. She further testified that although the mechanics were using torches to cut and remove metal parts, initially only she was actually welding. Tr. 113. As the work progressed and the welding work increased others were hired as welders, Tr. 120-23, and one person, Ron Braxton, was hired as a helper. Tr. 106-114. Mr. Braxton, however, was taught to perform vertical welds in the shop. Tr. 107, 114.

The welders, in addition to cutting metal, refabricated handrails and ladders on crane booms, Tr. 347, 530-31, 597-98, welded teeth onto gears, Tr. 349-50, welded wedges to prevent

³ Technical repairs on motor commutators, armitures, bearings, and diode systems were sent to a subcontractor. Respondents' workers, for the most part, rewound and insulated field coils and removed, cleaned, and tested motor brushes. Tr. 79, 138-39, 152-53, 409-10, 427-29, 449, 458, 560, 583.

the boom from sliding while being repaired, Tr. 350, welded catwalks, sheevewheels, and slue gears. Tr. 598, 600-601, and selected their own welding rods and amperages. Tr. 353, 535.

15. Respondents' workers employed as machinist helpers operated milling machines, lathes, power saws, grinders, and hydraulic presses to manufacture parts for portal and bridge cranes, resize wheels, sharpen tools and to make bolts, rail clips, bushings, key stock, and threads. Tr. 238-39, 258; 311, 312, 323-24. The helpers made the parts from blue prints provided by their foreman, Tr. 239, 252; 311, laid out their own work, Tr. 240, 313-15 and measured tolerances using calipers, micrometers, depth gages, inside gages, and gage blocks. Tr. 241, 314-18.

For the most part, the work of the machine shop did not require output with tolerances closer than 5/1000 of an inch, Tr. 1218, and much of the work involved repetitive duplication. Tr. 1225. The supervisor of the shop testified, however, that the closest classification to "helper" usually employed in a machine shop is "machine operator", and his helpers were machine operators. Tr. 1220-21, 1212-13, 1219. None were required to fetch tools or materials for other workers, run errands, or clean-up after others. Tr. 243; 319.

16. Many of the duties respondents assigned to the helpers were substantially similar to the duties which might be assigned to an apprentice. GX 40 at 142. Respondents, however, did not have a bona fide apprenticeship program in place to cover the work on these two contracts at the Navy Yard. Tr. 1307-08.

17. The employees classified by respondents as helpers performed substantive work of journeymen. Although they were supervised by a journeyman foreman, none of the employees were involved in assisting a tradesperson. None were involved in supplying another worker with materials and tools. None were involved in cleaning work areas, machines and equipment, other than cleaning up after themselves. And none were engaged in assisting another worker by holding materials and tools. Tr. 45, 102, 134-35, 164, 210, 309-10, 329-30, 346, 377-78. Respondents' helpers were, however, required to have their own set of tools and were required to use them. Tr. 60-61, 142, 171, 218, 243, 274, 296-97, 319, 335-36, 352, 452, 512, 534, 567, 606, 631, 647-748.

The helpers received on-the-job training from respondents, Tr. 45-46, 58, 143, 331-32, 387, 648, 670, and those employees who learned the quickest were promoted to leadmen, a position which paid more than a helper's wage but less than the journeyman's rate. A few ultimately were promoted to foremen. When they were promoted to the position of foremen, their wages rose to the journeymen rate. Tr. 106-07, 165, 335, 391-92, 474, 480, 567-68, 737.

18. Respondents failed to post the wage determinations at the worksite and did not discuss the wage determinations with their employees. Many employees, therefore, did not

know that they were classified as helpers and assumed that they were getting the rate of pay for their respective trades. Tr. 44, 102, 134, 163, 207, 264, 290, 309, 329, 346, 377, 445, 473, 507-08, 529, 555, 596, 627, 639, 698, 734.

19. The Department of Labor Compliance officer initially concluded that 100% of the time worked by persons classified as "helpers" should have been paid at the journey man's rate. Tr. 866. Following discussions with respondents and the employees, the Compliance Officer agreed to modify his determination by allocating a portion of the time worked by each employee to helper chores. The formula he eventually used allocated 30% of the time spent by painters, machinists, and electricians to helper's work; 50% to mechanics helper, and 10% to welder's helper. The remainder of the time worked by the employees, listed in Appendix A, was classified at the journey man level. Tr. 866, GX 28, 29.

Because respondents failed to classify as journeymens' work any of the duties performed by employees it classified as helpers, company records failed to distinguish time spent, for example, cleaning grease and bird droppings from a surface from time spent applying metal bond, primer, or paint to a surface. Thus, the Compliance Officer acknowledged that the time allocation formula he employed was merely an estimate of time spent performing helper's work by the employees in each trade. Tr. 867-70; See also, Tr. 837-41.

20. The Dictionary of Occupational Titles (DOT) provides detailed definitions describing the duties performed by helpers in various occupations including painters, electricians, machinists, construction equipment and maintenance mechanics. RX 20. The Introduction to the DOT, however, includes the following caveat:

In using the Dictionary, one should note that the U.S. Employment Service has no responsibility for establishing the appropriate wage levels for workers in the United States, or setting jurisdictional matters in relation to different occupations. In preparing job definitions, no data were collected concerning these and related matters. Therefore, the occupational information in this edition cannot be used as determining standards for any aspect of the employer-employee relationship. RX 20 at XV.

Discussion

I.

Upon review of the record considered in its entirety, I conclude that respondents misclassified as helpers those who performed journeymens' work on these contracts. Respondents contend that, in classifying the workers, they relied upon the BLS definition of "maintenance trade helper" and the Dictionary of Occupational Titles (DOT) to clarify the duties

of a helper in specific trades. Aside from the fact that the DOT contains a specific admonition, noted by the Wage Appeals Board in Fry Brothers Corp.,⁴ against using it in resolving jurisdictional matters in relation to different occupations or determining standards for any aspect of the employer/employee relationship, respondents' contention is otherwise lacking in merit.

The record shows that, during the period 1979-1980, respondents' Field Superintendent was primarily responsible for hiring and classifying workers at the Navy Yard. Yet, respondents provided him with no written job classification instructions, nor did they provide him with a copy of either the BLS or DOT definitions of a helper. Indeed, the Field Superintendent first saw a copy of the DOT in the summer of 1980, and, thus, his testimony further tends to attenuate the impact of assertions that respondents' relied upon a document which expressly disclaimed its value as means of classifying workers.

Respondents argue, however, that the employees whom they hired lacked the knowledge, skills, experience, and competence to perform all of the duties and complete all of the assignments which an employer might expect a seasoned journeyman to accomplish. They contend further that many of the tasks their crews were assigned, no journeyman could be required to perform. A journeyman painter, they note, for example, would not be expected to use knucklebusters. to the extent their crews used them or scrape droppings from areas in preparation for priming or painting.

The record supports respondents' contention that their workers, for the most part, lacked the knowledge and experience of journeymen in all aspects of the various trades employed at the Navy Yard. They were, however, expected to perform many of the functions and duties of a journeyman⁵ in addition to those which might properly qualify as helper's work. Respondents' painter helpers, for example, spent substantial portions of their time priming and painting surfaces, their "welder helpers" welded metals, their "electrician helpers" wired crane controls, relays, resistors, and lights, while the "machinist helpers" operated machines in producing parts needed on the job, and the "mechanic helpers" repaired motors and assembled cranes.

Taking into consideration the background and experience of the workers and the job duties to which they were assigned, perhaps the best description of their duties and their status would be that of an apprentice. Mr. Melton, in fact, seemed to concede as much in his deposition. Yet, no apprentice program was approved at the Navy Yard site for these workers, and the helper classification in the wage determinations here in issue cannot substitute for an apprentice program.

⁴ CCH Labor Law Reporter, Wages-Hours, Admin. Rulings, Paragraph 31,113 at 42,761.

⁵ Bureau of Labor Statistics Job Lists 1-5.

Key to the definition of a helper is that the worker so classified assist the tradesman. Those classified as helpers by respondents, received job assignments from the foreman, but carried out their jobs largely on their own. When a difficulty arose, the foreman directed and instructed the crew in solving the problem, but a journey man is no less a journey man when he carries out the instructions or accepts the guidance of his superiors. And when, as here, such instructions to a "helper" are sufficiently detailed and frequent to constitute training, in the absence of an apprentice program, the "helper" is no less a journey man. Moreover, these "helpers" carried and held no materials for journeymen, they cleaned-up after themselves and no others, ran no errands, and handed no tools to anyone else. To the contrary, they performed journeymens' work, using journeymens' tools which they were required to purchase at their own expense.

Respondents further argue that the Compliance Officer failed to call all of the employees as witnesses in this proceeding. They note that it classified helpers as "helpers," not helpers to a particular trade, and helpers were, from time to time, assigned to different departments. As such, respondents contend that the Compliance Officer engages in mere speculation when he assigns to a trade any helper who did not testify or was not mentioned by another witness. Similarly, respondents argue that the Compliance Officer seeks retroactive elimination of the helper classification, and that the allocation of helper time to various trades, in the computation of back wages, is arbitrary, capricious, and a denial of due process.

Whether an employee remained in one department during his tenure with respondents or received assignments from various departments during the course of his employment is problematic. Having established a pattern of practice and course of conduct pursuant to which respondents classified the workforce as either foremen, leadmen, or helpers, and having further established that "helpers" in every department were assigned journeyman work, it was unnecessary for the Compliance Officer to call as a witness each of respondents' 125 employees. If the pattern established by the thirty-four witnesses who testified at the 7-day hearing failed to reflect the totality of respondents' workforce, or if individual exceptions existed, respondents were afforded every opportunity to develop the record in these respects. They were provided with computation sheets identifying each employee, the wage underpayment allegedly owed to each employee, and the right to cross-examine the Compliance Officer in regard to the method of computation as it applied to each employee. Respondents, however, adduced no error of computation involving any worker sufficient to undermine the reliability of the craft assignment allocated to each worker by the Compliance Officer. See, Structural Services, Inc., WAB 82-13 (1983); Glenn Electric Co., Inc., WAB 79-21 (1983).

Nor do I find persuasive respondents' contention that the Compliance Officer seeks to nullify the "helper" classifications, and acts in an arbitrary and capricious fashion when he allocates, on a percentage basis, time spent performing journeyman's work by workers in each trade. The Department of Labor does not argue, and indeed it is not here found, that helper work

was not performed at this job site. The wage determinations included a "helper" classification, and the record, in general, supports respondents' assertion that much of the work appropriately could have been accomplished by helpers. What this record cannot support, however, is respondents' practice of allocating virtually all of the work to helpers.

Respondents further assert a denial due process arising out of an arbitrary and capricious allocation of helper versus journey man time by the Compliance Officer. The argument is devoid of merit.

Respondents' books and records made no distinction between hours worked or the hourly wage rate of workers performing both journey man and helper duties. As such, no concessions for helper time need be made. The Compliance officer was free to compute each employee's wage at a rate consistent with the journeyman's classification for all hours worked. 29 C.F.R. 4.169.

In according respondents credit for helper time, the Compliance officer acknowledged the imprecision of his formulation, yet, the concession was predicated upon a work allocation formula based on information provided by respondents' officials and employees. Thus, the record demonstrates that the Compliance Officer had a rationale and reasonable basis for his decision. Moreover, respondents are hardly in a position to insist upon greater precision when their books and records shed no light upon the issue. See Glenn Electric Co., Inc., supra. Although the decision to accept less than the regulation might require is a matter which rests within the Department's sound enforcement discretion, I otherwise find no arbitrary or capricious infringement of respondents' due process rights in the manner in which the Compliance Officer agreed to reduce respondents' liability.

For all of the foregoing reasons, I conclude that respondents misclassified and underpaid the workers listed in Appendix I in amounts therein shown in violation of Sections 2(a)(1), 2(a)(2) and 2(b)(1) of and Section 4.6 of the Regulations. I further conclude that respondents failed to maintain adequate and accurate records of their employees' work classifications in violation of Section 4.6(g) of the regulations.

II.

Respondents argue that unusual circumstances justify relief from the debarment provisions of Section 5(a) of the Act. They emphasize that they sought and obtained a definition of the helper classification from the Department of Labor, and note that it permitted helpers to perform "unskilled tasks as directed by journeymen" and to perform "special machine operations, or parts of a trade that are also performed by workers on a full time basis." Respondents contend that they relied upon this definition in good faith, while the Department of Labor breached their good faith by changing the definition of the helper classification in the enforcement phase of this case. Respondents further note that they have no history of prior violations of the Act, kept

adequate records and made them available upon request, cooperated during the investigation, and that any liability to which they may be subjected results from the disposition of bona fide legal issues of doubtful certainty.

Relief from the debarment provisions of the Act is appropriate. upon a showing by the contractor that "unusual circumstances" warrant such relief. In Quality Maintenance Co., SCA 119 (Dec. 12, 1973), and Washington Moving and Storage Co., SCA 168 (March 12, 1974) several of the most significant criteria relating to the existence of "unusual circumstances" were set forth. The progeny of these decisions have applied the criteria to a variety of fact situations, but the threshold for granting such relief in every case begins with the absence of a culpable disregard for the Acts requirements.

Respondents make much of the fact that they sought advice from the Wage and Hour Division concerning the use of helpers on the job, but, as the record shows, they largely ignored it or sought to circumvent it. They were advised that when helpers performed journeymens' work they were entitled to journeymens' wages. They were told that a worker's job duties, not his skill levels, should be used to determine his classification. They were admonished that the helper classification was not a training position, and that helpers should not be trained in a craft unless registered as apprentices. Yet, none of this advice was heeded. To the contrary, employees were hired and classified based primarily on their skill and experience, irrespective of the jobs they would be required to perform. And, they were trained on the job, in the absence of an apprentice program.

The record further shows that respondents were given a written definition of a "maintenance trade helper," but failed to pass it along to those responsible for making hiring and classification decisions which respondents knew or should have known were being made, not by job function, but on the basis of competence criteria which the Wage and Hour Division had previously advised them were largely irrelevant in determining the appropriate wages. Respondents further adopted an organizational and pay structure which virtually eliminated the journeymen classification except at supervisory levels. All nonsupervising employees were paid as either helpers or leadmen, and both were below journey men levels.

While respondents argue that many of these jobs required unskilled labor, it must be noted that virtually all of the contract work performed by respondents at the Navy Yard site, whether skilled or unskilled, was carried out in this fashion. The fact that the totality of the work required to complete these contracts would not employ every skill or tap every resource a journeyman in a particular craft might possess does not diminish the skill work which is required to the level of a helper's chore. Thus, respondents' helpers did not merely perform parts of trades on this job, using their own tools, they performed virtually every aspect of the physical requirements and many of the judgmental aspects of each trade necessary to complete contract requirements.

For all of the foregoing reasons, it is difficult to accept the notion that respondents, in good faith, interpreted either the language or the spirit of any helper definition as permitting them to perform the extensive crane repair work called for by these contracts using a few foremen to convey orders to crews of helpers. Under the circumstances reflected in this record, it is not the Department of Labor which deprived respondents of the benefit of a helper classification, but the contractor which, through classification abuses, withheld from its workers the compensation to which they were entitled in accordance with the journey men rates designated in the wage determination. See, Atec, Inc., SCA 1181 (1980).

Nor did the advice respondents' received from the Wage and Hour Division raise bona fide legal issues of doubtful certainty. The underlying legal principles here at issue are fairly straightforward. Respondents were told that helpers provide assistance to journey man. See BLS definition. When helpers are not assisting, but are instead spending substantial time performing journeymens' work on their own, they must be paid the journey man's wage. See Franlau Corp., WAB 70-5 (1971); F.S.G. Contracting Corp., 22 WAB 11 (1976); Dickey Construction Co., CCH Wages-Hours, Admin. Rulings, Para. 31,358 (1980); Air Matic Mechanical Contractors, 82-SCA-51 (ALJ Dec. 1984); Atec, Inc., SCA 1181 (ALJ Dec. 1981); Charwill Construction Co., Inc., CCH Wages-Hours, Admin. Rulings, Para. 31,411 (1981).⁶ If they are performing journeymens' work in training, they must be paid a journeymens' wage in the absence of an approved apprentice program. Fry Brothers Corp., CCH Wages-Hours, Admin. Rulings, Para. 31,113 at fn. 3; H.G. Toll Co./Atlantic Electric Inc., 79-DBA-210 (1979); Triple B, CCH Wages-Hours, Admin. Rulings, Para. 31,345 (1980), Soule Glass and Glazing Co., CCH Wages-Hours, Admin. Rulings, Para. 31,355 1979 ; Clevenger Roofing and Sheet Metal Co., WAB 80-9 (1982). When the employee works in different capacities performing the duties of both helper and journey man, the employer must keep a record of the hours worked in each capacity, or be prepared to pay the highest rate for all hours worked. 29 C.F.R. §4.169.

Respondents were provided with advice and assistance sufficient to apprise a reasonably prudent businessman of the limitations inherent in the use of helpers. Yet, they sought to accomplish the performance of this contract using primarily a helper workforce in contravention of the advice they obtained. See, Atec, Inc., supra. In so doing, they test not a legal issue of doubtful certainty, but the underlying spirit of the Act and its implementing regulations.⁷

⁶ It should be noted that cases involving wage determinations which fail to include a helper classification or include classifications for unskilled laborers rather than helpers, frequently raise questions analogous to those raised by respondents. The underlying rationale articulated by such cases, that the work performed not the experience or competence of the employee principally determines classification, is equally applicable here.

⁷ Although contending that this case raises legal issues of doubtful certainty, it must
(continued...)

For all of the foregoing reasons, I, therefore, find that respondents' management organization and pay structure, consisting only of supervisors, leadmen and helpers, their reliance on skill and experience criteria, rather than job duties in determining compensation, the training and tool acquisition policies applied to the workforce, and the pattern and practice of assigning craft work to helpers in all departments on a regular and routine basis, constitute willful neglect of their responsibilities under the Act. Relief from debarment, under such circumstances, is inappropriate.

Finally, the Department seeks debarment of the corporate respondent and three individuals. Floyd F. Melton is the founder and President of the corporation. At all times relevant to this proceeding, he resided in Florida, and the record shows that he had, for the most part, turned over the operation of Melton Sales and Services, Inc. to his sons John and Floyd L. Melton. His contact with the business appears to have been limited to once-a-week telephone conversations with his sons.

The Secretary of Labor addressed analagous circumstances in Ventilation Engineers, Inc., 22 WH 706 (1974), and concluded:

The respondents were responsible for the conduct of their managers, who were their agents, to see to it that employees were not deprived of the wages due them under the Act. This responsibility did not cease because one of the respondents, the President of the corporation, was absent from the country during the performance of the contract. They had the obligation to provide responsible management and to check on the administration of the contract in order to be assured that employees were being paid in accordance with the contract and the Act. Having failed to do so, they may not now rely upon the failings of their own management to excuse themselves from their lack of proper diligence in monitoring the administration of the contract. Murcole, Inc., et al., No. SCA-195-198, decision of the Administrative Law Judge, April 10, 1974, pages 4-5. If a contractor were permitted to escape the responsibility for complying with the Act's minimum wage and other labor standards in this manner, it would nullify the sanction provided in Section 5(a) and vitiate the Act.

I conclude that Floyd F. Melton is responsible for the decision of those with whom he entrusted the day-to-day operations of the corporate respondent.

⁷(...continued)

be noted that respondents' 67 page posthearing brief argues neither that the issues raised are matters of first impression, (Compare, Mires and Scarlett, 83-SCA-63 (ALJ Dec. 3/30/84, Suppl. Dec. 4/16/84)), nor does it cite a single case which, either directly, by analogy, or inferentially, supports any of respondents' contentions.

As previously noted, John Melton and Floyd L. Melton ran the operations of Melton Sales and Services. Although it appears that John Melton established or approved the management and pay policies at the Navy Yard, Floyd L. Melton, as a Vice President of the company, shares the business and its operations with his brother and must share responsibility for the consequences of corporate decisions and policies implemented in violation of the Act. Ventilation Engineers, Inc. Supra; Spruce-up Corp., 22 WH 772, aff'd. in part and remanded on other grounds, 22 WH 1250 (1976); U.S. v. Sancolmar Industries, 20 WH 829 (E.D.N.Y., 1972).

Respondents have failed to demonstrate "unusual circumstances" sufficient to warrant relief from the debarment provisions of the Act; Accordingly:

ORDER

IT IS ORDERED that Melton Sales and Services, Inc., and Floyd F. Melton, John Melton, and Floyd L. Melton, individually, and as officers of the corporate respondent, be debarred from government contracting in accordance with the provisions of Section 5(a) of the Act; and

IT IS FURTHER ORDERED that the sum of \$73,423.03 shall be paid to the Department of Labor from funds withheld under contracts No. GS-03W-20067 and GS-3DPR-91013 for distribution to the employees listed and in the amounts designated in Appendix I, hereto annexed.

Any of said amounts not distributed to the employees listed in Appendix I or their legal representatives, within three years of the date of receipt of the withheld funds, due to the inability to distribute said funds, shall be conveyed into the Treasury of United States as miscellaneous receipts. The balance, if any, of amounts withheld, in excess of the total amount here due, shall be paid to the Contractor..

STUART A. LEVIN
Administrative Law Judge

Dated: NOV 18 1985
Washington, D.C.

SAL:jeh

APPENDIX I

NAME	GROSS AMOUNT DUE
James Algood	\$ 40.75
Mark Ambach	84.06
John Anderson	1,527.52
Rizosro Armonio	875.67
Benjamin Arrojo	373.38
Edgardo Arrojo	1,736.09
Robert Arvin	697.48
Derek Bailey	76.71
Robert Bell	1,244.94
Wayne Harold Beneke	181.42
Jay Billups	204.13
Michael Billups	31.40
Andrew Black	795.52
James Blackwell	743.61
Wayne Bowers	121.69
Christopher Bradley	26.41
Ronald Braxton	393.22
Jerome Brooks	668.14
Wayne Caffarel	11.94
Wayne Capizzi	381.40
Arthur Caple	907.92
Randy Carlson	20.34
Robert Clark	27.49
Jacques Cooper	140.19
Joseph Creegan	21.57
James Crowley	1,672.34
Wayne Dalton	324.18
Robert Deck	104.16
Michael Ditizio	285.30
Susan Drew	1,469.62
Rodger Dunigan	43.18
Anthony Elam	2,465.40
Darrell Ellsworth	253.34
Frank Ferro, III	1,539.57
Douglas Fitzpatrick	522.20
Thomas Flemming	44.18
Bruce Fort	1,231.45

Joseph Francks	1,239.44
Henry Franklin	797.98
Robert Gallagher	131.77
William Gibson	157.87
Charles Goloff	2,146.34
Donald Goloff	433.30
Joseph Goloff	254.50
Maurice Goloff, Jr.	619.89
Arnold James Graham, Jr.	91.57
Thomas Grimm	2,706.21
Richard Grouser	315.60
Duane Guidry	19.66
Pedro Guillen, Jr.	221.80
Michael Hanly	136.67
Bruce Harcum	13.54
Philip Harkins	427.03
Harry Harrawood	106.88
Jesse Hatten	637.55
Clarence Hatter	254.00
Robert Hemingway	75.79
Jeff Holland	356.37
Thomas Hollyday	262.32
Jefferson Hurley	385.87
Flavio Imperioli	102.95
Tommie Lee Isaac	54.80
Manuel Javier	31.87
Richard Johnston	159.84
Alton Jones	77.12
Joseph Jones	77.30
Numeriano Judal	66.88
Michael Karbett	2,253.21
Anton Kerler	1,237.10
James Kirkwood	387.09
Bradford Koah	67.43
Richard Krache	24.37
Thomas Laurilliard	692.01
Robert Laychock	248.11
Alan Levin	308.32
Richard Lynch	1,079.21
Benjamin Mangaser, Jr.	51.73
Joe Marigliano	842.29

Benjamin Martin	84.77
Harry Matsinger, Jr.	162.43
Ronald Maynard	78.42
Joseph McGoldrick	631.08
James Milligan	46.14
Paul Mitchell	133.32
Daniel Monaghan	915.51
James Moran	15.04
Michael Moriarty	45.99
Lonnie Murray	237.34
Vincent Nacci	1,245.73
Vincent Nieman	1,512.49
Stephen Noonan	281.98
Aljosa Olic	652.91
Carl Olson	41.77
Douglas Osborne	275.29
William Otto	503.02
Joseph Parker	667.65
John Pera	966.47
Frank Pierce	536.21
Ron Plummer	74.26
Robert Reese	203.34
Joseph Reimel	2,166.68
Anthony Rod	169.68
Leo Royer	321.23
Nicholas Simmons	880.72
Laurence Sims	949.96
Neal Sims	241.20
Edward Smith	1,449.69
Stephen Spring	931.91
Mark Spitzner	1,939.20
Timothy Steele	1,990.03
Michael Stewart	1,846.86
Peter Toritto	1,986.07
James Torres	610.19
Gerald VanCarpels	61.72
Francisco Velasquez	78.87
Glenn Villamor	88.43
Darvin Walston	125.02
Leonard Wehrli	1,646.51
Robert Weiss	20.16

Bryan Welsh	2,452.55
Frank Williams	117.51
Virgil Williams	1,353.51
Richard Wyatt	1,662.52
Charles Young	87.56
Samuel Young	92.60

TOTAL:	<u>\$73,423.03</u>
--------	--------------------