



**In the Matter of:**

**CRADLE OF FORESTRY IN AMERICA  
INTERPRETIVE ASSOCIATION**

**ARB CASE NO. 99-035**

***In re: Special Use Permits Issued  
by the United States Department of  
Agriculture Forest Service***

**DATE: March 30, 2001**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For Petitioner Cradle of Forestry in America Interpretive Association:*

Grant B. Osborne, Esq., *McGuire, Wood & Bisette, P.A., Asheville, North Carolina*

*For Respondent Wage and Hour Administrator, U. S. Department of Labor:*

Leif G. Jorgenson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,  
*U.S. Department of Labor, Washington, D.C.*

*For Intervener National Forest Recreation Association:*

John J. Callahan, Esq., Donald R. Dinan, Esq., *Hall, Estill, Hardwick, Gable, Golden  
& Nelson, P.C., Washington, D.C.*

### **FINAL DECISION AND ORDER**

The Cradle of Forestry in America Interpretive Association (“CFIA”) petitioned this Board for review of a final ruling of the Wage and Hour Acting Administrator (“Administrator”) issued pursuant to the McNamara-O’Hara Service Contract Act of 1965 (“SCA”), as amended, 41 U.S.C.A. §351 *et seq.* (West 1987), and its implementing regulations at 29 C.F.R. Parts 4, 6 and 8 (2000). CFIA challenges the Administrator’s determinations that (1) the SCA applies to Special Use Permits issued by the Forest Service, U.S. Department of Agriculture, for the maintenance and operation of campgrounds, and (2) the SCA prohibits the use of volunteer workers. For the reasons stated below, we affirm the Administrator’s ruling.

## **BACKGROUND**

The Forest Service is responsible, *inter alia*, for the administration of the lands in the National Forest System and the management of natural resources within the principle of multiple use and sustained yield. 36 C.F.R. §200.1(c)(2) (2000). Management includes planning, coordinating, and directing the national resource programs of timber, range, wildlife, recreation, watershed and mineral areas. *Id.* Pursuant to the Granger-Thye Act of 1950, 16 U.S.C.A. §580(d) (West 2000), the Forest Service authorizes the use of public land and structures by private individuals and entities by issuing Special Use Permits (“SUPs” or “permits”). *See* 36 C.F.R. §251 *et seq.*

Organized in 1972 in North Carolina, Petitioner CFIA is a nonprofit corporation. Pet. for Rev. at 9-10; *see also* Pet. Exh. R, CFIA Articles of Incorporation. CFIA manages 26 campgrounds and day-use areas on various Forest Service lands in the eastern United States. To manage these sites, CFIA depends not only on its paid employees, but also on a staff of “volunteer hosts.” These campground volunteer hosts register and collect fees from campers, clean the campsites after the campers depart, perform minor clerical duties, ensure that bathroom facilities are clean and properly supplied, and provide information on the campground and available recreational activities. In return for performing these duties, the volunteer hosts (typically a retired couple living in their own recreational vehicle) receive free admission to the campground, free “hook-up” to water, sewer and electrical power, free use of laundry facilities, and a 20% discount on purchases at retail sales outlets operated by CFIA.

In February 1997, the Forest Service issued five SUPs to CFIA allowing it to maintain and operate five recreation facilities in the Allegheny National Forest in Pennsylvania. In March 1997, two competitor firms objected to the selection of CFIA on the grounds that it used unpaid volunteers in violation of the Fair Labor Standards Act (“FLSA”). After requesting an opinion regarding the applicability of the FLSA to SUPs, the Forest Service was informed by DOL officials that the FLSA issue was moot because the SCA applied to the SUPs, and the SCA did not permit the use of volunteer workers. Based on these opinions, the Forest Service in April 1998 requested CFIA to come into full compliance with the SCA, and further noted that it would not automatically renew CFIA’s permits at the end of the season, but instead would reopen the SUP packages for bidding after the prospectus was modified to incorporate the SCA prevailing wage requirements.

In September 1998, CFIA requested that the Administrator reconsider the matter. By letter dated November 19, 1998, the Administrator issued the final ruling at issue in this action. The Administrator ruled that the SCA applies to the Forest Service’s SUPs, and further, that the employees utilized by CFIA in providing services under the SUPs were “service employees” within the meaning of the SCA.

CFIA timely appealed the Administrator’s ruling to this Board. By Order of January 25, 1999, this Board, by establishing a briefing schedule, indicated that it would hear the appeal. *See* 29 C.F.R. §8.9(a). In March 1999, the Board granted the National Forest Recreation Association the right to intervene in the proceedings.

## DISCUSSION

### **I. SCA Coverage**

The SCA provides for coverage of “[e]very contract . . . entered into by the United States . . . the principal purpose of which is to furnish services in the United States through the use of service employees . . . .” 41 U.S.C.A. §351(a). SCA-covered contracts must provide for payment of prevailing minimum wages and fringe benefits as determined by the Administrator pursuant to a delegation of authority by the Secretary of Labor. *Id.* The Administrator determined that the SUPs issued by the Forest Service to CFIA for the maintenance and operation of campgrounds were contracts for furnishing services through the use of service employees, and therefore the SUPs were contracts covered by the SCA.

CFIA challenges the Administrator’s determination by arguing that the SCA does not apply because the special use permits are not contracts within the meaning of the SCA but are merely “revocable licenses.” CFIA argues at length that the necessary elements of a contract are not present, including an argument that the SUPs are not mutually binding as the Forest Service promises nothing and may terminate the permit at will.

We disagree and instead concur in the Administrator’s determination that the SUPs at issue are contracts covered under the SCA. We reach this conclusion noting first the Ninth Circuit’s admonition in *Menlo Service Corp. v. United States*, 765 F.2d 805 (9th Cir. 1985), that we

must be guided not only by the general stricture that remedial labor statutes like the Service Contract Act are to be liberally construed [citation omitted], but also by the legislative intent that “service contract” be construed broadly. In passing the Act, Congress clearly intended to close a gap in the otherwise comprehensive net of federal contract legislation.

765 F.2d at 809.

CFIA argues that the SUPs cannot be contracts because they are “permits” or “licenses.” Such characterization is of no legal import with regard to whether they are “contracts” within the meaning of the SCA. As the Department of Labor’s interpretive regulations note, neither the form of the agreement nor the terminology used to describe it is determinative of whether an arrangement between a federal agency and an outside entity is a “contract” for SCA purposes. “This remedial Act is intended to be applied to a wide variety of contracts . . . [and] the nomenclature, type, or particular form of contract used . . . is not determinative of coverage.” 29 C.F.R. §4.111(a).

A contract is “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.” Restatement (Second) of Contracts §1 (1979). The Forest Service SUPs meet the Restatement definition of a “contract.” On

their face, the SUPs contain the mutual promises of the parties: the Forest Service promises the permit holder use of Government land and structures, and the permit holder promises to maintain and operate the campgrounds. Furthermore, breach of these mutual promises will give rise to legal remedy. *See, e.g.*, 36 C.F.R. §251.60(a), §251.82(a)(8). Based on the record before us, we agree with the Administrator that the SUPs are “contracts.”

The SUPs also meet the second and third requirements of SCA coverage, namely, that the SUPs’ *principal purpose* is the furnishing of services through the use of *service employees*. 29 C.F.R. §4.111; *see AFL-CIO v. Donovan*, 757 F.2d 330, 345 (D.C. Cir. 1985). “[T]he Act does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services.” 29 C.F.R. §4.11(a). In the instant case, the SUPs require CFIA to maintain and operate various campgrounds for use by the public. The list of maintenance and operation chores to be performed by the permit holder make clear that the *principal purpose* of the contract is the furnishing of services to the camping public. Admin. Rec., Tab Y at p. 10-11. For example, the permit holder must provide the following services: collecting fees from campers, painting playground equipment, staining picnic tables, clearing drainage ditches, removing brush, providing mowing and trimming equipment, etc. Finally, the SCA defines “service employee” as any person engaged in performing the contract requirements. 41 U.S.C.A. §357(b). The persons used by CFIA to carry out the above-described contract requirements are *service employees*, and thus, the third element of SCA coverage is also met.

## **II. CFIA’s “Volunteer Hosts”**

Having concluded that the special use permits were subject to the SCA, the Administrator ruled that all non-exempt persons performing work under the contract are “service employees” under the SCA and that “all non-exempt persons . . . performing contract work . . . must be paid in accordance with the SCA provisions.” Admin. Rec., Tab C, p. 2. CFIA challenges this ruling by arguing that because the SCA does not *expressly* prohibit the use of volunteers, they may be used. Pet. for Rev. at 24. In further support of its position, CFIA argues that use of volunteers is permitted under the Fair Labor Standards Act (“FLSA”), 29 U.S.C.A. §201 *et seq.* (West 1998). While we do not necessarily agree with CFIA’s conclusion that the FLSA would permit the use of “volunteer hosts,” we need not resort to the FLSA for guidance.

The SCA defines “service employee” to include “any person engaged in the performance of a contract [covered by the SCA],” except those individuals who are employed in a *bona fide* executive, administrative, or professional capacity, “regardless of any contractual relationship that may be alleged to exist between a contractor . . . and such persons.” 41 U.S.C. §357(b); *see* 29 C.F.R. §4.150 - §4.156. CFIA acknowledges that its “volunteer hosts” are engaged in the performance of CFIA’s obligations under the Forest Service SUPs, and does not argue that its “volunteer hosts” work in a *bona fide* executive, administrative or professional capacity. Accordingly, we conclude that the campground “volunteer hosts” used by CFIA are covered “service employees,” who must be paid in accordance with the requirements of the SCA.

### **III. The “Concessionaire Exemption” Question**

On appeal to this Board, CFIA and Intervener National Forest Recreation Association raise for the first time a claim that CFIA should be viewed as a concessionaire exempt from SCA coverage pursuant to 29 C.F.R. §4.133(b) (exempting certain concessionaire contracts “principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public”). This question was not presented to the Administrator, and was not decided by the Administrator; therefore, it is not appropriately before us. 29 C.F.R. §8.1(b) (ARB has jurisdiction to hear and decide appeals from final decisions of the Administrator); *U.S. Dep’t of State*, ARB No. 98-114 (Feb. 16, 2000) (declining to consider wage determination issue presented for the first time on appeal to the Board which previously had not been addressed and decided by the Administrator).

Although we agree with Member Brown (writing separately, *infra*) that the Board has the authority to remand a case to the Administrator to consider an issue that surfaces during an appeal, there is no reason to do so in this case. None of the parties have asked for such a remand, and we see no reason to compel the parties to continue litigating an issue involuntarily. Moreover, the Administrator already has signaled in a letter to the Forest Service that the applicability of the concessionaire exemption can be examined on a case-by-case basis in the future. *See Admin. Rec.*, Tab A. Accordingly, the parties have been provided with a clear roadmap for addressing this question, if they choose to do so, and the Board can revisit this issue when it is presented properly.

In urging a remand to consider “an issue of potentially far-reaching scope and public impact,” *infra* at p.7, our colleague unfortunately would have the Board repeat the same mistake that occurred when the *U.S. Postal Service ANET and WNET Contracts* case was remanded to consider whether airline pilots were exempt “learned professionals” under the Labor Department’s 29 C.F.R. Part 541 regulations, and therefore exempt under the SCA. *U.S. Postal Service ANET and WNET Contracts*, Case No. 97-033, ARB Remand Order (July 25, 1997). The Board’s remand prompted extensive and time-consuming litigation addressing the question whether the airline pilot classification *generically* was an exempt classification under the SCA. When the case once again was appealed, the Board acknowledged that the question that had been remanded could not be addressed generically, but only could be resolved on a case-by-case basis relying on the kind of evidence developed in a formal evidentiary hearing. *U.S. Postal Service ANET and WNET Contracts*, Case No. 98-131, ARB Dec. and Ord. of Rem., slip op. at 11-12, 23-24 (Aug. 4, 2000). Similarly, whether Forest Service SUPs are exempt from SCA coverage as concession contracts would need to be evaluated based upon the specific services being offered at each site.

### **CONCLUSION**

We affirm the Administrator’s final ruling, namely that the SUPs in question are contracts subject to the SCA and, thus, that CFIA may not use “volunteer hosts” to fulfill its obligations under

the Forest Service's special use permits.

**SO ORDERED.**

**PAUL GREENBERG**

Chair

**CYNTHIA L. ATTWOOD**

Member

**E. Cooper Brown, Member, concurring in part and dissenting in part:**

I agree that the Forest Service SUPs in the instant case constitute covered contracts within the meaning of the SCA. At the same time, I am strongly of the opinion that the Board should remand this case to the Administrator for a determination of whether the SUPs are nevertheless exempt from the requirements of the SCA pursuant to the Department of Labor's concessionaire exemption at 29 C.F.R. §4.133(b).<sup>1/</sup>

In cases arising under the SCA involving a final decision of the Administrator over which the Board has appellate jurisdiction pursuant to 29 C.F.R. §8.1(b), we have previously acknowledged the Board's plenary authority to review all questions raised by the Administrator's final decision, "constrained only by the requirement in 29 C.F.R. §8.9(b) that findings of fact may not be reversed when they are supported by a preponderance of the evidence. Given the broad authority granted to the Board under 29 C.F.R. §8.1(b), the Board has the power to determine its own jurisdiction as well as that of the Administrator." *U.S. Postal Service ANET and WNET Contracts*, ARB No. 97-033, ARB Remand Order (July 25, 1997), slip op. at 2.<sup>2/</sup>

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<sup>1/</sup> 29 C.F.R. §4.133(b) states in relevant part:

The Department of Labor, pursuant to section 4(b) of the Act, exempts from the provisions of the Act certain kinds of concession contracts providing services to the general public, as provided herein. Specifically, concession contracts (such as those entered into by the National Park Service) principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. This exemption is necessary and proper in the public interest and is in accord with the remedial purpose of the Act.

<sup>2/</sup> In *U.S. Postal Service*, the Board remanded the matter to the Wage and Hour Division for an initial determination on whether professional exemption from SCA coverage applied to the particular employees therein claiming the exemption. In that case, after the initial briefing upon appeal, the Board concluded that it should consider the professional exemption question. However, because the Administrator had not issued  
(continued...)

In the instant case, the Petition for Review, as amended, raised the question of whether the Special Use Permits herein at issue are exempt from SCA coverage pursuant to the concessionaire exemption, 29 C.F.R. §4.133(b).<sup>3/</sup> The Department’s regulations expressly direct the Board to “*pass upon the points raised in the petition* upon the basis of the entire record before it.” 29 C.F.R. §8.9(b) (emphasis added). I believe we should address the concessionaire issue; however, because this issue was not initially addressed by the Administrator, the Board does not have before it the evidentiary record necessary to make a fully informed decision.

The record on appeal indicates that Wage and Hour’s Office of Enforcement Policy declined to render a blanket concessionaire exemption for special use permits of the type at issue here on the grounds that the specific requirements and authorized operations may vary from permit to permit and site to site. Accordingly, Wage and Hour suggested that it would be more appropriate if it were to receive a request for a ruling “with respect to a particular SUP.”<sup>4/</sup> A case involving particular SUPs is now before us, but the record on appeal does not contain sufficient information upon which to determine whether the *principal purpose* of the services rendered under the SUPs are those set out as requirements for a concessionaire exemption.<sup>5/</sup> 29 C.F.R. §4.133(b).

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<sup>2/</sup>(...continued)

a final decision on the issue even though the parties had (unlike in the instant case) raised the issue with the Administrator, the Board remanded the case to the Administrator for a ruling on that question.

<sup>3/</sup> In addition, Intervener National Forest Recreation Association raised the “concessionaire exemption” issue as one of its major arguments against applying the SCA to the SUPs. See Reply Brief of Intervener National Forest Recreation Association to Petition for Review, April 16, 1999.

<sup>4/</sup> Letter from Ethel P. Miller, Office of Enforcement Policy, Wage and Hour Division, to Richard W. Paterson, U.S. Forest Service, Nov. 23, 1998 (Admin. Rec., Tab A), in response to Mr. Paterson’s request to Wage and Hour of August 12, 1998 (Admin. Rec, Tab J).

<sup>5/</sup> This lack of an evidentiary record is not surprising, given the manner in which this case initially arose – as a competitor’s complaint that CFIA was violating the Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*

This case involves an issue of potentially far-reaching scope and public impact.<sup>6/</sup> Consequently, I do not believe the question of SCA coverage should be left as the majority's decision now leaves it. This matter should be remanded to the Administrator for a ruling on whether the concessionaire exemption applies to the particular SUPs at issue. In remanding the *U.S. Postal Service* matter to Wage and Hour for an evaluation of the exemption issue, the Board opined that "no purpose would be served and it would be administratively inefficient not to decide this issue in the context of this proceeding . . ." *U.S. Postal Service*, Order of July 25, 1997, slip op. at 2. The same reasoning applies here. Indeed, I find the need for a remand here just as compelling, if not more so, than it was in the *Postal Service* case. Not only are the interests of the parties and of the Department best served by remand (including bringing the issue of SCA coverage with regard to the instant SUPs to a final resolution), but because the issue itself is of such potential magnitude and consequence, the public's interest will be best served by resolving the concessionaire exemption question in as expeditious a manner as possible – which would result were this case now remanded to the Administrator.

**E. COOPER BROWN**  
Member

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<sup>6/</sup> The Intervener National Forest Recreation Association argues that affirming the Administrator's ruling in this case "would have far-reaching consequences" and "would mean that every type of business operating under a permit on government lands, including, but not limited to, campground and other concessionaires, miners, loggers and agri-business (including those with grazing permits) would be covered by the SCA and be forced to pay prevailing wages and additional benefits." Intervener's Brief, at 7.