U.S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS

WASHINGTON, D.C. 20210

Date: October 1, 1969

Reply to Attn of: OCE

Subject: MEMORANDUM # 83

To: AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5

Re: Opinions and decisions on application of the Davis-Bacon and related Acts.

In keeping with the practice of transmitting copies of significant opinions and decisions for your information in carrying out your responsibilities in the administration of the contract labor standards provisions of the Davis-Bacon and related Acts, there is enclosed a copy of the Wage Appeals Board Decision and Order in Case No. 69-2 dated August 13, 1969.

Robert D. Moran, Administrator
Wage and Hour and Public Contracts Divisions

Enclosure

UNITED STATES DEPARTMENT OF LABOR

WAGE APPEALS BOARD

In the Matter of	:	
	:	
The applicability of the Davis-Bacon Act, as extended to the Federal Aid Highway Act, to the furnishing of borrow materials on Interstate Project No. I-10-2(16) 101, T.L. James and Company, Contractor; Rimmer and Garrett Inc., Lafayette Parish, Louisiana	:	WAGE APPEALS BOARD CASE NO. 69-2
	:	DATED: August 13, 1969

Joseph H. Kavanaugh, Esq.
Kavanaugh, Pierson, and Talley

for the Petitioner

Thomas X. Dunn, Esq.
Sherman and Dunn

for the Building and Construction Trades Department, AFL-CIO

George E. Rivers, Esq.
for the Solicitor

BEFORE: Oscar S. Smith, Chairman; Clarence D. Barker and Stuart Rothman, Members.

DECISION AND ORDER

I

This is a proceeding under Secretary of Labor's Order No. 32-63, as amended (29 F.R. 188, 761) following a petition filed on behalf of T. L James and Company and Rimmer and Garrett on April 16, 1969, from a decision by the Office of the Solicitor holding that work performed by Rimmer and Garrett, Inc. and J and J Contractors, Inc., on Federal Aid Project No. I-10-2(16)101 was subject to the Davis-Bacon provisions of the Federal Aid Highway Act codified in 23 U.S.C. 113 and, in turn, the Contract Work Hours Standards Act (40 U.S.C. 327 et seq.).

An oral proceeding was held by the full Board on June 20, 1969, during which interested persons were heard.

II

Bids for the project, Federal Aid Project No. I-10-2(16)101 (State Project No. 450-05-06), were received on February 16, 1966. The contract was awarded to T. L. James and Company, Inc. At that time T. L. James subcontracted portions of the work between stations 1035+00 and 1067+00 to Rimmer and Garrett. There is no dispute concerning the wages in connection with the work done by Rimmer and Garrett, Inc. as a subcontractor between stations 1035+00 and 1067+00, although the Solicitor attaches importance to the fact that the sand operations for the subcontract were supplied for the pits discussed below.

Concerning the sand operations between stations 1067+00 and 1140+91.46 on the same project, after considering supply bids from three other firms, T. L. James placed a "purchase order" with Rimmer and Garrett, Inc. to supply about 300,000 cubic yards of special borrow excavation (non-plastic), which was delivered to the job site and spot dumped by J and J Contractors, Inc. Rimmer and Garrett did no spreading and compacting. This was done by T. L. James. Rimmer and Garrett, Inc. furnished about 105,130 cubic yards of the material from its pits numbered 1 and 8, 1/ but the remaining material in the pits was found to be too fine in gradation to meet the specifications. Pits 1 and 8 had been opened before the letting of the contract for the area in question. The remainder of the material which was needed was furnished from a third pit (which is referred to as pit numbered 3) in the general area of pits number 1 and 8. About 154,441 cubic yards of sand was furnished from the pit numbered 3. Pit numbered 3 is said to have a long-life potential.

Rimmer and Garrett is presently supplying earth fill to T. L. James for a private construction project.

The Solicitor confirmed a decision by the Federal Highway Administration that Rimmer and Garrett was a "subcontractor" rather than an ordinary materialman in performing its work relating to the sand operation between stations 1067+00 and 1140+91.46, and was thus subject to the Davis-Bacon provisions of the Federal Aid Highway Act and the Contract Work Hours Standards Act. This is the Solicitor's decision challenged by the petitioner.

III

The petitioner argues in his petition that Rimmer and Garrett, is not a "subcontractor" within the meaning of this labor standard legislation because it is a material supplier rather than a subcontractor regarding the work involved. The argument is based on the following points:

1. Rimmer and Garrett had previously developed two pits, designated as pits 1 and 8, for commercial sales of sand and for use on construction of another Interstate project, which exposed these pits as a commercial source, and the petitioner at all times considered Rimmer and Garrett as a commercial supplier.

2. The yardage orders for the work done between stations 1035+00 and 1067+00 were based on embankment measure; however, the yardage ordered for work done between stations 1067+00 and 1140+91.46 was based on vehicular measure.

1/ The location of these pits is indicated in Exhibit A of the Solicitor's statement, which is appended hereto.

3. It is standard practice that Rimmer and Garrett contact potential contractors before the letting of contracts in order to quote prices for the supply of materials to them; this procedure is industry practice for most suppliers of material of this nature.

4. About 240,000 cubic yards of granular material have been supplied to various firms in the area from the pits in question, thus rendering the pits a commercial source of granular material.

The Solicitor's main arguments in response may be summarized as follows:

1. Rimmer and Garrett, Inc. was a "subcontractor" because it had undertaken to perform a part of the requirements of the prime contract.

2. Reliance is placed upon (a) section 5.2(g) of the Secretary of Labor's Regulations, Part 5 (29 CFR 5.2(g)), which defines the term "construction" for purposes of administering Davis-Bacon Act and its related acts as including all types of work done on a building or work at the site thereof, and (b) upon judicial interpretation of the term "subcontractor" as used in the Miller Act.

3. The Davis-Bacon Act, as remedial legislation, is entitled to a liberal construction.

4. The Department has held in the past that where a facility, such as a batch plant or quarry, is set up or opened in the vicinity of a covered construction site for the purpose of serving the needs of a particular covered construction contract, the operator of the facility is considered a "subcontractor" under the Davis-Bacon Act. The serving of more than one construction contracts that are "so interrelated in time and geography" as to constitute an "inseparable" project is treated in the same way, and the operator of the facility is thus regarded as a "subcontractor."

IV

The prime contract awarded T. L. James covers the construction of Interstate Highway I-10 between station 1035+00 and ending at station 1140+91.46. T. L. James in turn awarded the contract for the granular fill required between stations 1035+00 and 1067+00 to Rimmer and Garrett. This award included prosecution of the work on the right of way in addition to supplying the necessary fill material. For this work Rimmer and Garrett took the required fill from two borrow pits, numbered 1 and 8, that had been opened for the construction of another portion of Interstate Highway I-10 performed by a subsidiary of T. L. James. With respect to the necessary granular fill between stations 1067+00 and 1140+91.46, the fill material was purchased from Rimmer and Garrett under a "purchase order" which did

not require the prosecution of any specified work in the right of way by Rimmer and Garrett, other than to dump the material at the right time and place to meet T. L. James' sequence of construction operations.

The crux of the petitioner's petition appears to be the following:

When T. L. James reached the second area of construction between stations 1067+00 and 1140+91.46, it questioned whether borrow pits numbered 1 and 8 would continue to be suitable. Accordingly, T. L. James requested prices from alternative sources -- from three established sand and gravel companies as well as from Rimmer and Garrett.

In a copy of a letter, T. L. James submitted in support of its position dated March 11, 1969, and addressed to its counsel, Kavanaugh & Bell, the company stated:

> "The first three sources were located east of the project, near the Lafayette airport, and Rimmer & Garrett were located west of the project. We did not feel that because of the fact that Rimmer & Garrett had subcontracted a section of the work, they could not act as a supplier on another separate and distinct section of the project. We therefore felt that they would not be required to pay truck drivers hauling this material a higher rate of pay than any of the other commercial sources who were interested in supplying the sand."

The Wage Appeals Board agrees with T. L. James that the fact that Rimmer and Garrett had been a subcontractor on an earlier portion of the work would not alone preclude Rimmer and Garrett from acting as a materialman on another and distinct section of the project, if acting as such a materialman was independently justified on its own considerations. The fallacy of the petitioner's position is that under the facts of this case, if one of the three "sand and gravel companies" had been the successful bidder for the second section and had done what Rimmer and Garrett did; namely, opened pits numbered 1 and 8, and then borrow pit numbered 3 in contemplation of supplying the necessary fill for Federal Interstate highway construction in the locality, that company would have been a "subcontractor" under the prime contractor and not a materialman.

The Wage Appeals Board is not impressed with the concentration the Solicitor and the Petitioner both put upon their respective views of the definition of subcontractor and materialman, taken from different environments and different conditions. The Wage Appeals Board approaches the issue presented by looking first at the specified work in question.[2/]

2/ At the hearing the Bureau of Public Roads asked that the Board in resolving the instant dispute to provide the Bureau with guidelines which will enable it to make practical determinations of the question of when employees who perform the work of supplying the necessary fill for highway construction are within the protection of the Davis-Bacon provisions of the Federal-Aid Highway Act and when they are not. The Wage Appeals Board suggests that the Bureau of Public Roads will find some guidance in the approach to the problem as herein discussed.

When the particular government agency invites bids for construction of a segment of a Federal-Aid Interstate Highway, what is it customary for the successful highway contractor to do in the prosecution of the work with his own organization or with other organizations usually and normally related to him in the construction of a highway? Unless the successful bidder is entirely a broker, he customarily will perform some of the work with his own organization and he will have associated with him, either regularly or in the particular case, someone else who will do other parts of the work that he does not do with his own forces. Specifications for highway work will require that the right-of-way be built to certain levels. In the construction of a highway over low land, this will require that material be brought in from borrow pits off the right-of-way.[3/] In some instances it may require that waste or excess material be removed to disposal areas. The question is: -- what is the usual and normal practice in the roadbuilding industry where a large amount of removal of cut material on placing suitable fill is necessary for the completion of the work? Is the fill normally and usually obtained from a commercial quarry or from a sand and gravel supplier in commercial amounts, or is the normal and usual practice for the highway contractor to prosecute the work by either opening borrow pits for waste areas with his own forces or assigning the work to some other party who is in the better position to open such pits or areas than he is in?

The Wage Appeals Board believes that the opening of the necessary borrow pits or waste areas to fulfill the project's requirements is considered a part of the construction activity. The necessary "cut and fill" to obtain the specified elevation of the job, and the employees who do that work, have normally and traditionally been considered as engaged in the construction of the project.[4/]

We start therefore with the situation that, based upon experience in the construction industry where but for the contemplated construction of a highway project in the locality, borrow pits or waste areas would not be opened, the opening of such pits or areas primarily in and substantially devoted to the prosecution of the highway work will establish a "prima facie" case that the work performed in connection with the borrow pits or waste areas is a part of the

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3/ It makes no difference for this determination whether the borrow pit is on the right of way, adjacent to it, or some distance from it.

4/ The Wage Appeals Board is also in agreement with the Solicitor ". . . where several covered (prime) contracts collectively serve the interest of a major project and are so interrelated in time and geography as to constitute an inseparable part thereof, an activity set up or opened primarily to serve, simultaneously or in succession, the needs of any one or more of these contracts is deemed to constitute the work of a subcontractor."

construction activity of the project, and the employees who do the work are entitled to the same protections accorded the construction workers elsewhere on the project. In this regard, the concept of "the site of the work" is a matter of minor or no significance. The work performed at the borrow pit or the waste area is as much a part of the site of the prosecution of the work as the right-of-way itself.

Now this "prima facie" case, based as it is upon what is the normal practice and what is the generally understood situation in the construction industry, is only a "prima facie" situation. It is not conclusive. It may be explained, and it may be rebutted. In making each wage determination or in determining whether the standards of the Davis-Bacon and related acts are applicable, the Department of Labor and the agency have an obligation to examine each case on its own facts to see whether there are special circumstances which take the situation out of the normal rule. And if an aggrieved party believes that the Department or the agency has not properly applied the rule in the particular case he would have the right to explain the situation and to establish that the usual practices in the industry did not obtain in the particular case.

Have facts been presented in this "record" that preponderate that Rimmer and Garrett was anything but a subcontractor? We think not. 5/ With respect to the instant case, the Board concludes that the petitioner has not sustained the burden of submitting facts which would create substantial doubt whether Rimmer and Garrett operated as a subcontractor or a materialman in this case.

In view of our analysis, we believe that it makes no difference, standing alone, that the earth fill delivered to the site was measured "on the truck" and not "on the embankment."

5/ In what ways could the "prima facie" case be rebutted? The Wage Appeals Board thinks that the following situations, under appropriate circumstances, standing alone or together, could raise serious questions whether the supplier was not a true materialman:

(1) A showing that in the particular locality, in bidding a job, prime contractors do not normally contemplate that necessary highway cut and fill will be performed by the successful bidder or by a similar highway construction organization.

(2) The type of fill required is of such an unusual nature or is so restricted in the locality that the only way the prime contractor can get it is from operators who control the sole sources of supply and who will supply it only under their own normal and usual methods of doing business as commercial operators.

(3) The amount purchased is truly in a commercial quantity from an established quarry operated by a commercial operator under his own normal and usual practices.

(4) Other differentiating circumstances .

The Wage Appeals Board does not have to evaluate under the circumstances of this case whether any such facts alone or together would be sufficient. We do not have such a case before us.

The argument may be made that in particular cases the supplier, an established sand and gravel pit operator, could elect if he wished to use an existing pit from which he had been selling to others instead of opening a new pit for the prime and substantial purpose of supplying the contemplated highway project in the locality. That may be so. An established commercial sand and gravel operator might do so and that would raise questions for another determination, but that is not what Rimmer and Garrett did here. In the disposition of this case, we do not have to contemplate what might have been but what did take place here. Each case must be resolved on the basis of its own facts and circumstances to determine whether the employees in question should be considered laborers and mechanics engaged in construction activities or whether they should be considered some other kind of employees.

ORDER

The decision of the Solicitor is affirmed.

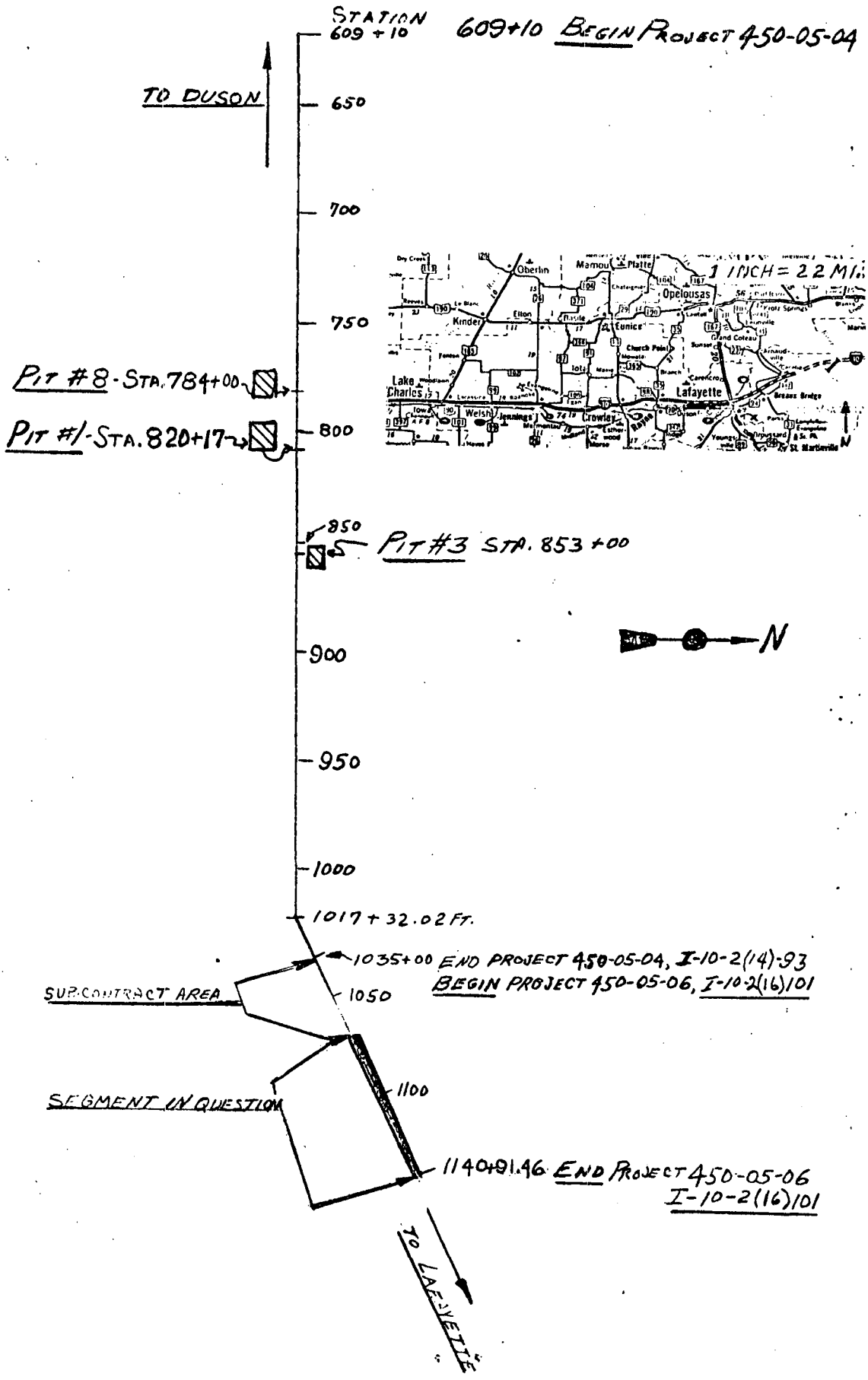
OSCAR S. SMITH, CHAIRMAN

CLARENCE D. BARKER, MEMBER

STUART ROTHMAN, MEMBER

WAGE APPEALS BOARD

EXHIBIT A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609+10 BEGIN PROJECT 450-05-04
TO DUSON
650
700
750
PIT #8 - STA. 784+00
PIT #1 - STA. 820+17
800
850
PIT #3 STA. 853+00
900
950
1000
1017+32.02 FT.
1035+00 END PROJECT 450-05-04, I-10-2(14)-93
BEGIN PROJECT 450-05-06, I-10-2(16)101
1050
SUB-CONTRACT AREA
1100
SEGMENT IN QUESTION
1140+91.46 END PROJECT 450-05-06
I-10-2(16)101
TO LAFAYETTE
1 INCH = 2.2 MI.
Oberlin
Mamou
Opelousas
Kinder
Eunice
Lake Charles
Lafayette
Crowley
Jennings
Welsh
N