



In the Matter of:

**Disputes concerning the payment of
prevailing wage rates, overtime pay by:**

ARB CASE NO. 03-127

ALJ CASE NO. 1999-DBA-29

**ROYAL ROOFING COMPANY, INC.,
Prime Contractor,**

DATE: November 30, 2004

**With respect to laborers and mechanics
employed by the Prime Contractor on
Contract No. 052571-95-B-0010, Roofing
Projects for U.S. Postal Service, Sacramento,
California; Contract No. 443 CX8800-96-008,
Roofing Projects U.S. Department of Interior,
National Park Service, Yosemite National
Park, California.**

**ROYAL ROOFING COMPANY, INC.,
Subcontractor (J.A. JONES MANAGEMENT
SERVICES, Prime Contractor)**

**With respect to laborers and mechanics employed
by the Subcontractor on Contract No. N63378-95-D-5000
(former number N68378-D-5000) (Base Operating
Services/Job Order Contract at Various Federal
Installations in Nevada, Northern and Central
Regions of California and Marine Corps Air Station
at El Toro and Tustin, California for the U.S. Navy,
Public Works Center, Specific Project at Moffett Federal
Airfield, California.**

**ROYAL ROOFING COMPANY, INC.
Subcontractor (Brown & Root Corporation,
Prime Contractor, SERVICES, Prime Contractor)**

**with respect to laborers and mechanics
employed by the Subcontractor on Contract**

**No. DACA 05-94-D-0011, Base-wide
Construction Jobs for the Department of the Army,
Specific Project Re-roofing of Buildings at Camp Parks,
Pleasanton, California.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner Royal Roofing, Inc.:

**Mark R. Thierman, Esq., Micheline N. Fairbank, Esq., Thierman Law Firm,
Reno, Nevada**

For Respondent Administrator, Wage and Hour Division:

**Carol Arnold, Esq., Ford F. Newman, Esq., Steven J. Mandel, Esq., Howard
M. Radzely, Esq., Solicitor of Labor, U.S. Department of Labor, Washington,
D.C.**

For Intervenor Roofers Union, Local 81:

**Lisa W. Pau, Esq., Van Bourg, Weinberg, Roger & Rosenfeld, Oakland,
California.¹**

FINAL DECISION AND ORDER

The Davis-Bacon Act (DBA or the Act) and implementing regulations require federal construction contractors to pay predetermined prevailing wages.² Contractors may receive credit toward this obligation for contributions to fringe benefit plans that are reasonably related to the cost of the plan. The Act also permits contractors to pay properly registered apprentices less than journeymen.³ Royal Roofing made excessive contributions to a fringe benefit apprenticeship program and paid twelve unregistered apprentices less than journeymen. Therefore, Royal violated the Act.

¹ The Intervenor actively participated in the proceeding below and filed a notice of appearance before the Board. The Intervenor joined in the Administrator's Brief.

² 40 U.S.C.A. § 3142 (b) (West Supp. 2003); 29 C.F.R. § 5.5 (a)(1) (2004).

³ See 29 C.F.R. § 5.5 (a) (4) (i).

BACKGROUND

Royal was a non-union roofing contractor, and from September 1995 to July 1997 it performed roofing work on four federal construction projects in California that were subject to the Act's prevailing wage requirements. Administrative Law Judge's (ALJ) June 11, 2003 Decision and Order (D. & O.) at 3. During this time, Royal was one of approximately 35 contractor members of the Independent Roofing Contractors of California (IRCC), an organization of professional roofing contractors. *Id.* at 3-4. The IRCC established and operated the IRCC Training Trust Fund to provide funding for and administer a roofer apprenticeship training program (the Plan). Transcript (TR) 131-132. Participation in the IRCC Plan permitted the contractors to pay properly registered roofer apprentices considerably less than the DBA prevailing wage rate they paid to the journeymen roofers working on public projects. Employing apprentices enabled these non-union contractors to compete against union contractors for federal construction jobs which, in turn, created more work for their journeymen and apprentices. D. & O. at 3.

To graduate from the program and become journeymen, the apprentices had to attend 144 hours of classroom instruction, take some correspondence courses, and undergo 4,000 hours of on-the-job training. The apprentices trained year-round. D. & O. at 3-4.⁴

IRCC members made minimum monthly contributions to the Plan in either of two ways. Method A required that the contractor contribute \$.20 per hour for all hours worked (on both DBA and private work) by all employees (journeymen and apprentices). *Id.* at 4; Administrator's Exhibit (Adm. Ex.) F at 107-108. Under Method B, an IRCC member could contribute an amount based on the number of its apprentices enrolled in the Plan.⁵ *Id.* Furthermore, 40 percent of the IRCC members made voluntary contributions in excess of the required minimum monthly contribution. D. & O. at 4; TR 189, 191-192, 194. And the Plan did not require that contributions go to training. The money could also be used for Plan expenses. Moreover, the employees for whom the contributions were made had no say in whether to contribute to the Plan and had no access to the funds. D. & O. at 4.

⁴ The ALJ stated that the Plan required 6,000 hours of on-the-job training. But the terms of the Plan itself specify that 4,000 hours are required for course completion. Royal Ex. 1 at 4.

⁵ For instance, the Plan's fee schedule required contractors employing 8 to 15 enrolled apprentices in a six-month period to pay an initial deposit of \$2,000, a monthly fee of \$750, and an annual fee of \$250. D. & O. at 4.

Royal contributed to the Plan according to Method B. D. & O. at 4. Royal deducted varying amounts from its apprentices' and journeymen's wages and contributed the monies to the Plan only during periods of DBA work; it did not make contributions during periods of private work. *Id.* at 3; TR 116. In addition to Method B's fee schedule assessments, Royal contributed excess amounts to the IRCC Plan.

Kristi Hollenbeck, a U.S. Department of Labor Wage and Hour Division investigator, examined Royal's performance under the DBA contracts for the period from January 1996 through August 1997 to determine whether Royal was paying its employees the prevailing wage. TR 42. Hollenbeck found that, in calculating how much to contribute to the Plan on behalf of each journeyman and apprentice, Royal subtracted the amount of the hourly cash wage it paid each employee plus the hourly cost of the health insurance benefit it provided the employee from the total amount of wages and fringe benefits the DBA required the employee to be paid. TR 52; 54-56. The amount Royal contributed to the Plan on behalf of the journeymen and apprentices varied from zero to \$6.99 per hour. Adm. Ex. I.

Hollenbeck also determined that only 16 of Royal's 28 apprentice roofers were registered as apprentices with California's Department of Industrial Relations, Division of Apprenticeship Standards (DAS). TR 61-70. And though she gave Royal the opportunity to verify the DAS registration of the 12 purported apprentices, the company did not do so. D. & O. at 5; TR 167-169.

Hollenbeck decided that the DBA credit Royal would receive for its contributions to the Plan should be calculated using the "annualization" principle whereby she divided the total amount of Royal's 1996 contributions by the total hours the employees worked on both public and private jobs during that year. She thus calculated that Royal was entitled to claim a \$.50 per hour Davis-Bacon credit for apprenticeship training. D. & O. at 5. In addition, Hollenbeck found that Royal violated the DBA by not paying the 12 unregistered apprentices full journeyman wages. By applying the \$.50 per hour annualization rate and then adding to it the wages the unregistered apprentices should have received, she computed Royal's total back wage liability to be \$76,245.55. Adm. Ex. I. The Administrator eventually ordered the contracting agencies to withhold that sum from Royal's contracts. Royal requested a hearing before an Administrative Law Judge (ALJ).

In his June 11, 2003 Decision and Order, the ALJ concluded that Royal violated the DBA because its contributions to the Plan were not reasonably related to the amount IRCC had spent for instructors, classrooms, and instructional materials. In fact, the ALJ found that Royal's contributions were not reasonably related even to IRCC's total expenditures which, in addition to the training costs, included legal and accounting expenses, and salaries. D. & O. at 8-9. Furthermore, the ALJ, like the Administrator, concluded that Royal's contributions must be annualized. Finally, the ALJ agreed with the Administrator that the 12 unregistered apprentices were entitled to receive journeyman wages for their DBA work. He accepted as correct the Administrator's \$76,245.55 back wage liability calculation and ordered the contracting agencies to turn

over that amount to the Administrator for payment of the back wages. Royal requested that we review the ALJ's Decision and Order.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to hear and decide appeals taken from ALJs' decisions and orders concerning questions of law and fact arising under the DBA and the numerous related Acts incorporating DBA prevailing wage requirements. *See* 29 C.F.R. §§ 5.1, 6.34, 7.1(b).

In reviewing an ALJ's decision, the Board acts with "all the powers [the Secretary of Labor] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b). *See also* 29 C.F.R. § 7.1(d) ("In considering the matters within the scope of its jurisdiction the Board shall act as the authorized representative of the Secretary of Labor. The Board shall act as fully and finally as might the Secretary of Labor concerning such matters."). Thus, "the Board reviews the ALJ's findings of fact and conclusions of law *de novo*." *Thomas & Sons Bldg. Contractors, Inc.*, ARB No. 00-050, ALJ No. 96-DBA-37, slip op. at 4 (ARB Aug. 27, 2001), *order denying recon.*, slip op. at 1-2 (ARB Dec. 6, 2001). *See also* *Cody-Zeigler, Inc.*, ARB Nos. 01-014, 01-015, ALJ No. 97-DBA-17, slip op. at 5 (ARB Dec. 19, 2003); *Sundex, Ltd. and Joseph J. Bonavire*, ARB No. 98-130, ALJ No. 1994-DBA-58, slip op. at 4 (ARB Dec. 30, 1999) and cases cited therein.

DISCUSSION

1. Royal's contributions to the IRCC apprenticeship training Plan violated the Act's prevailing wage requirements.

The Act requires contractors and subcontractors on federal construction projects to pay laborers and mechanics no less than the prevailing wages the Secretary of Labor has predetermined. 40 U.S.C.A. § 3142(b). Employers can meet this requirement by compensating employees with "any combination" of hourly cash (or basic) wages and "bona fide" fringe benefits. 40 U.S.C.A. § 3142(d). The Act permits a contractor or subcontractor credit toward this prevailing wage obligation for "*the rate of contribution* irrevocably made by a contractor or subcontractor to a trustee or to a third person" "*for defraying the costs* of apprenticeship . . . programs . . ." 40 U.S.C.A. §§ 3142(d), 3141(2)(B)(i) (emphasis added).

The Administrator urges us to affirm the ALJ's finding that Royal's contributions to the Plan were unreasonably excessive. Administrator's Brief at 13-20. Like the ALJ, the Administrator relies upon the "reasonably related" test found in *Miree Constr. Corp. v. Dole*, 930 F.2d 1536 (11th Cir. 1991). In *Miree* the court also examined the extent to which a contractor's contributions to an apprenticeship plan were creditable toward its Davis-Bacon prevailing wage obligations. The court held that "an employer may only receive Davis-Bacon credit for contributions that are reasonably related to the cost of the training provided." *Id.* at 1543.

The record fully supports the ALJ's finding that Royal disproportionately contributed to the Plan. Royal was only one of 35 employers participating in the IRCC Plan and, during the investigation period, employed only 28 out of approximately 275 (about 10%) apprentices enrolled in the Plan. But in 1996 and 1997 Royal deducted over \$234,000 from its employees' DBA wages and contributed the money to the IRCC Plan. This contribution funded more than one-third of the Plan's *total expenditures* during the period. And this amount constituted almost 90% of the total the IRCC spent on *actual training costs* during 1996 to 1997. D. & O. at 8; Adm. Ex. F at 127-128; Ex. G, H.

Not only were Royal's contributions to the Plan excessive, but the ALJ found that the "erratic and disorganized manner" in which Royal charged its employees with the contributions to the Plan further evidenced an unreasonable relationship between the contributions and the actual costs of training the apprentices. The record clearly demonstrates, and the ALJ found, that Royal deducted, without explanation, anywhere from zero to \$6.99 per hour from the wages of employees who were paid the same hourly rate. D. & O. at 3, 8-9.

Royal contends that because its contributions were irrevocably made to the IRCC Plan, it complied with the Act. Petitioner's Reply Brief at 4-7. *See* 40 U.S.C.A. § 3141(2)(B)(i) (Prevailing wages include the "amount of the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a fund, plan or [apprenticeship] program . . ."). As authority for its position that its IRCC Plan contributions should be fully credited, Royal points to *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995). There, the court rejected the Labor Department's argument that Mistick's irrevocable contributions to a fringe benefit plan were not entitled to Davis-Bacon credit because they were, in part, not reasonably related to the costs of providing benefits to its employees. But like the ALJ, we reject Royal's argument because the *Mistick* fringe benefit plan, and its administration, differed significantly from Royal's.

The Administrator argues, and the ALJ noted, that *Miree*, not *Mistick*, should apply because, like the situation here, *Miree* involved contributions to an apprenticeship program. In *Mistick*, on the other hand, the contractor established its own Davis-Bacon fringe benefit plan in addition to the other fringe benefits it was required to fund. It made weekly contributions to the plan only for employees working on public (DBA), not private, projects. Its contributions equaled the difference between the DBA prevailing wage and the cash wage it paid to the employees on private work. Like Royal's, its contributions were irrevocable, but, unlike Royal's, they were placed in an employee's own interest-bearing trust account.⁶ And, unlike Royal's employees, Mistick employees

⁶ Royal and IRCC refer to their Plan as a trust, but the record demonstrates that the Plan did not operate as a trust fund for the use and benefit of the employees. TR 211-212.

Continued . . .

could direct a trustee to disperse funds in their accounts to pay for hospital and medical care, pensions, occupational injuries or illnesses, unemployment benefits, accidents, insurance, etc. Furthermore, when the employee left Mistick, he could withdraw the balance of the trust account in cash. *Mistick*, 54 F.3d at 902, 904.

In *Mistick* the court noted the “critically different facts” in *Miree* and refused to apply its “reasonable relationship” test because Mistick’s contributions did not exceed, but equaled the benefits the employees received. “The one-to-one ratio between employer contributions on behalf of an employee and value received by the employee cannot be deemed unreasonable.” *Id.* at 904.

Therefore, since the fringe benefit plan in *Mistick* and the IRCC apprenticeship Plan here are significantly different, we have applied the *Miree* “reasonable relationship” standard. Thus, we agree with the Administrator and the ALJ and find that Royal’s contributions to the Plan were excessive and that Royal thereby violated the Act.

But neither the Administrator nor the ALJ calculated the back wage liability according to a reasonable relationship between Royal’s contributions to the Plan and the benefits its employees received from the Plan. On this appeal, the Administrator informs us that though she had requested the ALJ to apply either the Plan’s \$.20 per hour or its flat rate monthly fee in determining the reasonable amount of credit Royal could claim, she did not submit corresponding back wage computations to the ALJ. Brief at 18-19. Even so, at one point the ALJ suggested a “reasonably related” test to determine Royal’s DBA credit (and the consequent back wage liability). He reasoned that since Royal had employed ten percent of the apprentices enrolled in the Plan for 1996, it could reasonably claim a DBA credit of ten percent of the plan’s total expenses.⁷ Nevertheless, the ALJ eventually accepted Hollenbeck’s \$76,245.55 back wage calculation. In short, since neither the parties nor the ALJ has provided us with a back wage calculation which reflects a reasonable relationship between the contributions and the benefits, we, too, as discussed below, will accept the Hollenbeck calculation.

2. The ALJ correctly held that the annualization principle applies in determining the DBA credit to which Royal is entitled.

Royal funded the apprenticeship Plan solely from wages the journeymen and apprentices earned on DBA projects. But the Plan’s costs and benefits did not occur solely during DBA work. Rather, the Plan provided continuous, year-round training to the apprentices. Therefore, Royal was paying a disproportionate amount of the Plan’s

⁷ According to this formula, Royal would be entitled to a \$74,603.70 DBA credit for 1996-97, an amount that represents ten percent of the Plan’s total 1996 and 1997 expenditures, not just the training expenses.

cost out of wages earned on DBA work, thus underpaying the workers for DBA work. *See Cody-Zeigler, Inc. v. Administrator, Wage and Hour Div.*, ARB Nos. 01-014, 015, ALJ No. 97-DBA-17, slip op. at 16-18 (ARB Dec. 19, 2003).

To remedy this situation, the ALJ held that the “annualization principle” must be applied. The ALJ again relied on *Miree*, where the court held that “if an employer chooses to make contributions to a year-long training program . . . as part of its Davis-Bacon compensation package, such contributions can only be credited on an annualized basis.” *Miree*, 930 F.2d at 1546. The annualization method calculates an employer’s DBA credit by dividing its annual “creditable contributions” to the fringe benefit plan by the total number of hours the employees work on both public and private projects during that year. Creditable contributions, in the context of an apprenticeship program, are those that are “reasonably related to the cost of the training provided.” *Id.* at 1543.

Royal contends that annualization should not apply because the apprenticeship program is not a “yearly benefit.” Petitioner’s Reply Brief at 7-8. But this argument has no merit since the IRCC plan, with its 4,000 hour on-the-job training and 144 hour classroom instruction requirements, clearly contemplates year-round training. It benefits apprentices who aspire to journeyman status. And it benefits the journeymen because non-union employers like Royal, by employing apprentices at lower wages, are able to compete with union roofers and thus successfully bid on more jobs. Therefore, we hold that Royal’s DBA credit must be calculated according to the annualization method. *See Cody-Zeigler*, ARB Nos. 01-014, 01-015, slip op. at 18.

The ALJ “accepted” Investigator Hollenbeck’s finding that Royal is entitled to an annualized credit of \$.50 per hour toward its DBA obligations. D. & O. at 9-10. The annualization rate is found by dividing contributions “*reasonably related to the cost of the training*” by the total hours worked on all projects. But since Hollenbeck did not have information about how much the IRCC had spent for its apprentice training when she made this calculation, she could not determine how much of Royal’s 1996 contributions reasonably related to the costs the IRCC expended for training the apprentices. Thus, she only “estimated” the annualization rate (for 1996) by dividing Royal’s *total* 1996 Plan contributions by the hours the journeymen and apprentices worked on all 1996 projects. TR 58-61; Adm. Ex. Q.

The ALJ, on the other hand, did have evidence of how much the Plan spent in 1996 (and 1997). *See* Adm. Ex. G (and H). Therefore, in calculating the annualization rate, the ALJ might have applied his ten percent theory. That is, since Royal employed approximately ten percent of the apprentices enrolled in the Plan, it could reasonably contribute only ten percent of the Plan’s total expenses. Thus, he could have divided this amount by the total hours all of the employees worked on all 1996 projects and come to a truer annualization rate. But in the end, the ALJ decided to “accept” Hollenbeck’s estimated annualization rate and, ultimately, her \$76,245.55 back wage liability. D. & O. at 8-10.

Though the Administrator points out that using the Hollenbeck estimate results in a “very generous” credit to Royal, she nevertheless requests that we affirm the ALJ’s decision to apply the \$.50 annualization rate and his (and Hollenbeck’s) back wage liability computation. Brief at 31. Accordingly, we will affirm that Royal is liable for \$76,245.55 to its apprentices and journeymen.⁸ On the other hand, we are quick to point out that an employer should receive DBA credit only for contributions reasonably related to the cost of the fringe benefit, not estimates thereof.

3. The 12 unregistered apprentices are entitled to receive journeyman wages for the DBA work they performed.

Generally, DBA employers must pay their laborers and mechanics the predetermined prevailing wage rate. 40 U.S.C.A. § 3142(b). A Department of Labor regulation that implements the DBA prescribes an exception to the general rule:

- (i) *Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau

29 C.F.R. § 5.5 (a)(4)(i).

Investigator Hollenbeck requested that the California Department of Industrial Relations, Division of Apprenticeship Standards (DAS), inform her whether the 28 employees Royal classified and paid apprentice wages were registered as apprentices during the period she was investigating. DAS had approved the IRCC apprenticeship plan. D. & O. at 10. DAS responded that only 16 of the 28 purported apprentices were registered during the time in question. As a result, Hollenbeck determined that Royal had underpaid 12 of the apprentices because, being unregistered, they were entitled to the journeyman wage rate. 29 C.F.R. § 5.5 (a)(4)(i); TR 61-62; Adm. Ex. L. Two months after conferring with Royal’s lawyer about her calculations, Hollenbeck wrote to him that she would adjust the back wage amount owed to the 12 workers if Royal could show they were registered apprentices at the time the Davis-Bacon work was performed. Adm. Ex. M (November 26, 1997 letter from Hollenbeck to Mark R. Thierman).

⁸ This amount includes the additional wages owed to the unregistered apprentices, as discussed below.

Royal argues that it was permitted to pay the 12 workers less than the journeyman prevailing wage. Royal can succeed on this argument if it can show that, during the work on the four DBA projects, the 12 employees were registered as apprentices with DAS. Royal is responsible for registering apprentices. See *North Star Indus., Inc.*, WAB No. 92-02, slip op. at 6 (Sept. 30, 1992); *Bronx Park I*, WAB No. 80-6, slip op. at 6-7 (April 16, 1984); *Tollefson Plumbing and Heating Co.*, WAB No. 78-17, slip op. at 2-4, 6-8 (Sept. 24, 1979).⁹ But Royal did not present proof to the Administrator or the ALJ that the 12 workers were registered with the DAS. D. & O. at 10; TR 164-168. Therefore, we find, as did the ALJ, that these employees were entitled to be paid journeyman wages for their work on the DBA projects.

CONCLUSION

By taking DBA credit for its unreasonable contributions to the Plan, Royal underpaid its employees for DBA work and, thus, violated the Act. Furthermore, since the apprenticeship training was a year-round benefit to both apprentices and journeymen, Royal's DBA credit must be calculated according to the annualization principle. Finally, because Royal did not register 12 roofers as apprentices, those employees are entitled to receive journeyman wages for their DBA work. Thus, the Administrator shall distribute \$76,245.55 according to the ALJ's June 11, 2003 order.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

⁹ The Wage Appeals Board (WAB) issued final agency decisions before the ARB was created in 1996.