



In the Matter of:

**U.S. POSTAL SERVICE ANET
AND WNET CONTRACTS**

ARB CASE NO. 98-131

**Regarding Review and Reconsideration of
Wage Rates for Airline Captains and First
Officers, Wage Determination 95-0229 (Rev. 1)^{1/}**

(Formerly ARB CASE NO. 97-033)

DATE: August 4, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner United States Postal Service:

Donna S. Gillespie, Esq.; David A. Stanton, Esq., *United States Postal Service, Washington, D. C.*

For Petitioner Emery Worldwide Airlines, Inc.:

Hopewell H. Darnielle III, Esq.; Lawrence Z. Lorber, Esq.; Brett E. Bacon, Esq., *Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, Washington, D. C.*; Betty Southard Murphy, Esq.; David A. Grant, Esq., *Baker & Hostetler, Washington, D.C.*

For Petitioner Captain Hal Winters:

Steven K. Hoffman, Esq.; Judith M. Conti, Esq., *James & Hoffman, P. C., Washington, D. C.*

For Petitioner Evergreen International Airlines, Inc.:

Glenn G. Fuller, Esq.; Glenn L. Albus, Esq., *Evergreen Int'l Airlines, Inc., Washington, D.C.*

For Petitioner Kitty Hawk Aircargo, Inc.:

Scott W. Woehr, Esq., *Doyle & Bachman, Washington, D.C.*

For Petitioner Express One International, Inc.:

Jonathan B. Hill, Esq.; Curtis A. Ritter, Esq., *Dow, Lohnes & Albertson, PLLC, Washington, D. C.*

For Petitioner National Air Carrier Association, Inc.:

Edward J. Driscoll, *National Air Carrier Association, Inc., Washington, D.C.*

^{1/} This case has been recaptioned to simplify citation.

For Petitioner Regional Airline Association:

Walter S. Coleman, Deborah McElroy; *Regional Airlines Association, Washington, D.C.*

For Petitioner Department of the Air Force Headquarters Air Mobility Command:

Brig. Gen. Gilbert J. Regan, Esq.; Col. Michael R. Pikula, *Department of the Air Force, Scott Air Force Base, Illinois*

For Respondent Wage and Hour Administrator:

Ford F. Newman, Esq.; Leif Jorgenson, Esq.; Douglas J. Davidson, Esq.;
Steven J. Mandel, Esq; *U.S. Department of Labor, Washington, D.C.*

For Intervenor Air Line Pilots Association, International:

Eugene B. Granof, Esq.; Russell Bailey, Esq.; Jerry Anker, Esq., *Air Line Pilots Association, International, Washington, D.C.*

DECISION AND ORDER OF REMAND

This Service Contract Act case initially was brought before the Administrative Review Board through petitions for review filed by the U.S. Postal Service; Emery Worldwide Airlines, Inc.; Evergreen International Airlines, Inc.; Kitty Hawk Air Cargo, Inc.; Express One International, Inc.; the National Air Carrier Association, Inc; the Regional Airlines Association; Captain Hal Winters (a pilot employed by Ryan International Airlines, acting as an employee representative); and the Department of the Air Force Headquarters Air Mobility Command. These petitions all focused on the prevailing wage rates for airline captains and first officers set by the Wage and Hour Administrator's designee (Administrator) in a decision letter issued December 13, 1996. The wage rates are applicable to Postal Service contracts for transporting mail by air under two air transport contracts – the "ANET" and "WNET" contracts.

With limited exceptions not at issue in this case, service contracts entered into between the Postal Service and its service providers are subject to the Service Contract Act, as amended. 41 U.S.C.A. §351 *et seq.* (1994)(SCA or Act). All the petitioners argue that the wage rates in the Administrator's December 13, 1996 determination letter are incorrect. Generally, the Postal Service, the airline industry parties and the Air Force challenge the Administrator's prevailing wage rates as too high, while Capt. Winters challenges the wage rates as too low and argues that the Board should order the Administrator to revert to an earlier prevailing wage determination (WD-95-0029 (Rev. 1)) that had been issued for the Postal Service contracts in May 1996.

A second group of appeals challenges the Administrator's determination that pilots are not exempt as "learned professionals" under the Service Contract Act and the "Part 541" regulations implementing the Fair Labor Standards Act (FLSA) exemptions. *See* 29 U.S. C.A. §213 (1998); 41 U. S.C.A. §357(b); 29 C.F.R. Part 541 (1999).

Before the Board are two questions for decision. First, is the Administrator correct in finding that airline pilots are not “learned professionals” under the Labor Department’s regulations at 29 C.F.R. Part 541, and therefore are not exempt from the prevailing wage requirements of the Service Contract Act? And second, if airline pilots are not professionals under the Part 541 regulations, are the Administrator’s prevailing wage rates for the captain and first officer classifications an appropriate exercise of the Administrator’s discretion under the Service Contract Act?

In this decision, we first review the history and structure of the Postal Service’s air transport operations. We next review the procedural history of the case, and address outstanding motions. We then address the arguments relating to the “professional exemption” issue, and conclude with an analysis of the Administrator’s wage determination and the challenges raised by the Petitioners.

We have jurisdiction pursuant to 29 C.F.R. §§4.56 and 8.1(b)(1) and (6) (1999).

I. BACKGROUND: THE POSTAL SERVICE’S AIR TRANSPORT OPERATIONS

Although the Postal Service is a major user of air cargo services, it does not operate its own fleet of airplanes. Instead, the Postal Service enters into contracts with private airlines to transport mail by air. There are three major types of Postal Service air transport contracts: the ANET, WNET and CNET contracts. In addition to some special air transport contracts between certain pairs of cities, the Postal Service’s total air freight contracts were valued at approximately \$220 million in 1995. AR97^{2/} Tab L Exh. 20.

ANET Contract – The Postal Service’s Express Mail operations are handled through its “Eagle Network” under a contract referred to as the ANET. The Eagle Network was first established in 1986, with Eastern Airlines (a passenger carrier) providing air freight service to the Postal Service as a subcontractor to CF Air Freight. AR97 Tab L Exh. 22. Eagle Network services were transferred in 1987 to Evergreen International Airlines, Inc. (Evergreen). In an effort to gain greater control over its air freight needs, the Postal Service constructed its own air hub facility in Indianapolis. In 1992, the Postal Service awarded Evergreen a contract to operate the Indianapolis terminal facility (*i.e.*, the ground operations). *Id.*

In 1993, the Postal Service awarded the air transport portion of the operation, Contract ANET-93-01, to Emery Worldwide Airlines, Inc. (Emery). AR97 Tab L Exh. 20. The

^{2/} In this decision, the Administrative Record that was filed initially on the wage rate issue, ARB Case No. 97-033, is referred to as “AR97”; a Supplemental Administrative Record that was filed in the same appeal is referred to as “AR97-Supp”; and the Administrative Record filed on the professional exemption issue, ARB Case No. 98-131, is referred to “AR98.”

contract is for a 10-year period. The ANET is a year-round operation between Indianapolis and 38 spoke cities on the network. The system is large enough to handle peak volumes of Express Mail; to utilize the capacity of the system effectively, the ANET contract also handles about 8% of the Postal Service’s priority mail service during non-peak periods. *Id.*

The ANET contract operates only at night, with all planes arriving and departing at Indianapolis within a four-hour period. Most of the airplanes used on the contract are B-727s. On average, pilots on the ANET fly 55 hours per month. Although Emery holds the direct contract with the Postal Service, the actual operation of the airplanes is subcontracted to Ryan International Airlines (Ryan) and Express One International, Inc. (Express One). *Id.*

WNET Contract – In addition to the year-round ANET contract for national Express Mail operations based in Indianapolis, the Postal Service runs a second year-round air transport operation to provide service to the western portion of the country. This second contract, WNET-93-01, is a hub-and-spoke system with flights between an Oakland, California, air hub and twelve other cities. Like the ANET, the WNET is a night time operation. *Id.* Evergreen is the Postal Service’s contractor on the WNET contract. The cargo that is flown on the WNET planes is a mix of Express Mail, priority mail and first class mail. Evergreen Pet. at 4.^{3/} Although Evergreen owns a variety of airplane equipment,

^{3/} In this brief, references to pleadings submitted by the parties and intervenors are abbreviated as follows:

Pleadings from ARB Case No. 97-033

United States Postal Service’s Brief in Support of Petition for Review of Wage and Hour Division’s Wage Ruling (1/31/97) USPS Pet.

Memorandum of Emery Worldwide Airlines, Inc. in Support of Emery’s Petition for Review of the Wage-Hour Division’s December 13, 1996 Final Ruling Establishing Pilot Wages under the Service Contract Act (1/31/97) Emery Pet.

Memorandum of Evergreen International Airlines, Inc. in Support of Evergreen’s Petition for Review of the Wage and Hour Division’s December 13, 1996 Final Ruling Establishing Pilot Wages under the Service Contract Act (1/31/97) Evergreen Pet.

Statement of the Administrator in Opposition to the Petitions for Review (4/2/97) Admin. Stmt.

Pleadings from ARB Case No. 98-131

(continued...)

including twelve B-747s, a DC-8 and eight DC-9s, only DC-9 aircraft are used on the Postal Service's WNET contract. *Id.*

CNET and CNET Contracts— In addition to the year-round ANET and WNET operations, the Postal Service also awards special short term (two week) contracts for air transportation during the peak Christmas season, known as the CNET and CNET contracts. During 1995 and 1996, these contracts were awarded to Kitty Hawk Aircargo, Inc. (Kitty Hawk).

II. PROCEDURAL HISTORY

Since the early 1990's, the Postal Service's air transport services have been subject to a succession of SCA prevailing wage determinations issued by the Wage and Hour Division. Wage Determination WD-95-0229 (Rev. 1) was issued by the Division on May 16, 1996, and initially was provided to the Postal Service to be used in connection with the ANET contract.

The Postal Service and several airline industry parties objected to the wage determination, and submitted requests for review and reconsideration of the wage determination rates for captain and first officer, pursuant to 29 C.F.R. §4.56. The Air Force, which contracts for approximately \$70 million annually in air passenger and cargo services, also requested reconsideration. In addition to challenging the methodology that the Administrator used for determining the challenged wage rates, several parties argued that airline pilots are "professionals" within the terms of the Fair Labor Standards Act and its implementing regulations, and therefore exempt from SCA coverage. 29 U.S.C.A. §213; 41 U.S.C.A. §357(b); *see generally* 29 C.F.R. Part 541.

The Administrator issued his decision on the request for review and reconsideration in a December 1996 letter, modifying (and reducing) the captain and first officer wage rates. Although the Administrator's decision letter comprehensively responded to the wage rate issue, it did not address the professional exemption question.

^{3/}(...continued)

Postal Service's Brief in Support of Appeal of the Wage and Hour Division's Ruling of September 16, 1998 (12/15/98)	USPS Brief
Brief of Employee Captain Hal Winters in Support of September 16, 1998 Wage and Hour Division Decision (1/12/99)	Winters Brief
Brief of Air Line Pilots Association in Support of Wage and Hour Division's Ruling of September 16, 1998 (1/12/99)	ALPA Brief
Joint Carrier Reply Brief in Opposition to the Acting Administrator's September 16, 1998 Decision on Remand	Jt. Reply

The Administrator's December 1996 decision was appealed to this Board through petitions for review filed by the Postal Service, Emery, Evergreen, Kitty Hawk, Express One, National Air Carrier Association (NACA), Dept. of the Air Force, and Capt. Winters pursuant to 29 C.F.R. §4.56(b). The case was docketed as ARB Case No. 97-033. In addition to challenging the modified wage rates for captains and first officers, the Postal Service, Air Force and airline industry parties (collectively, "the industry parties") again argued before this Board that the pilots employed on the Postal Service contracts were exempt professionals under the SCA, and that it therefore was improper for the Administrator to issue wage determination rates governing their compensation on the contract.

After the initial briefing, the Board concluded that it should consider the professional exemption question. However, because the Administrator had not issued a final decision on this issue, the Board remanded the matter to the Administrator with instructions to invite the parties to submit their views on this question, along with relevant documents. Remand Order, ARB Case No. 97-033 (July 23, 1997).

On September 16, 1998, the Administrator issued a supplemental decision on the professional exemption question. The Administrator found that airline pilots were not "professionals" within the terms of the Part 541 exemption regulations, and therefore properly were viewed as "service employees" subject to the prevailing wage protections of the SCA. This ruling was appealed by the industry parties. This new appeal was docketed as ARB Case No. 98-131. In conjunction with this appeal, the Board revived the earlier challenges to the December 1996 wage rate decision. The Air Line Pilots Association (ALPA) intervened in the case, solely with regard to the professional exemption issue.

Oral argument was held on June 24, 1999, in Washington, D.C.

By letter dated February 24, 2000, Emery withdrew its appeal on the professional exemption issue. By letter dated April 5, 2000, Emery withdrew its appeal of the Administrator's wage determination rates.

III. OUTSTANDING MOTIONS

As part of his brief in support of the Administrator's September 1998 decision on the professional exemption question, Capt. Winters attached two declarations by Ryan pilots purporting to show that their wages were reduced after missing work, thereby demonstrating that they were not paid on a "salary basis" as defined under the Part 541 regulations. Winters Brief Att. A & B. On January 26, 1999, a joint motion to strike these declarations and redact Winters' brief was submitted by the Postal Service, Emery, Kitty Hawk, Evergreen, NACA, and the Regional Airlines Association, on the theory that the attachments were not part of the administrative record in the case and therefore should not be considered by this Board, citing 29 C.F.R. §§8.1(d), 8.4(a)(7), and *Harbert International*, Case No. 91-SCA-OM-5, Sec. Dec. (May 5, 1992).

Because we do not rely on these materials in deciding the professional exemption issue (*infra*), we **DENY** the joint motion to strike because it is moot.

At oral argument, the Postal Service and the airline parties produced a chart entitled “Comparison of Compensation Drivers.” This chart purported to show that the “monthly flight hours” of pilots at major air carriers (including specifically UPS and FedEx) were sharply higher than the number of flight hours worked by pilots on the ANET and WNET contracts. Capt. Winters objected to the introduction of these charts, asserting that they were misleading because the figures for ANET and WNET pilots reflected only flight hours, while the figures for other pilots reflected “credited time,” which is different. At the hearing, the Board ruled that it would consider the charts only to the extent that they summarized material within the Administrative Record.

The Board subsequently received a Motion to Clarify the Record from Capt. Winters expanding on his objections to the airline industry’s chart, and offering his own new data to counter the claim that ANET and WNET pilots fly fewer hours. The new data was not part of the Administrative Record in the case, drawing objections from the Postal Service and several airline industry parties. The Administrator submitted a statement expressing support for Capt. Winters’ objection to the industry’s chart as misleading and beyond the scope of the material in the record, and expressing concern about the focus on “flight vs. non-flight” hours.

As discussed below, the Board views the number of hours worked by pilots at various airlines as potentially relevant to setting reasonable prevailing wage rates. Because the wage determination matter is being remanded to the Administrator, it is unnecessary to resolve this issue at this juncture. The Motion to Clarify therefore is **DENIED**.

IV. STANDARD OF REVIEW

The Administrative Review Board’s consideration of the Administrator’s decisions under the Service Contract Act is in the nature of an appellate proceeding. 29 C.F.R. §8.1(d). We review the Administrator’s rulings to determine whether they are consistent with the statute and regulations, and are a reasonable exercise of the discretion delegated to the Administrator. *Dep’t of the Army*, ARB Case Nos. 98-120 through 98-122 (Dec. 22, 1999), slip op. at 16 (citing *ITT Federal Services Corp. (II)*, ARB Case No. 95-042A (July 25, 1996) and *Service Employees Int’l Union (I)*, BSCA Case No. 92-01 (Aug. 28, 1992).

V. THE “PROFESSIONAL EXEMPTION” ISSUE

Although the professional exemption matter was not central to the initial challenges to the Administrator’s wage determination rates, we consider this question first because the *coverage* of pilots under the SCA appropriately is viewed as a threshold matter. If we were to conclude that the captains and first officers are professionals within the terms of the Part 541 exemption regulations, it follows that these workers would be excluded from SCA prevailing wage coverage for these occupations on the Postal Service’s air transport contracts.

In this section, we first review briefly the legal framework in which the exemption claim arises. Second, we reconsider and rescind a statement made by the Board in its July 1997 Remand Order, in which the Board opined that the Administrator would lack authority to issue a wage determination in the event that the airline pilots flying Postal Service routes were deemed “professionals” and exempt from SCA coverage. Third, we consider the merits of the exemption claim.

A. Statutory and regulatory context.

The Service Contract Act requires that “service employees” working on federal service contracts must be paid no less than the prevailing wage “in accordance with prevailing rates for such employees in the locality[.]” as determined by the Secretary of Labor. 41 U.S.C. A. §351(a). However, certain employees are excluded from SCA prevailing wage coverage by statutory definition:

The term “service employee” means any person engaged in the performance of a contract entered into by the United States . . .
(other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations)

41 U.S.C.A. §357(b) (emphasis added). Thus the statute exempts from coverage executive, administrative and professional employees *as those terms are defined in the Secretary’s FLSA regulations*. Stated differently, when enacting the Service Contract Act, Congress legislatively adopted the Secretary’s Part 541 regulations as the *statutory standard* for SCA exemption.

Sections 6 and 7 of the Fair Labor Standards Act (29 U.S.C.A. §§206 and 207) are the basic minimum wage and overtime requirements governing workers in the United States. Section 13(a)(1) of the statute exempts from these wage and overtime requirements

any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor] . . .)[.]

29 U.S.C.A. §213(a)(1).

Under this delegated authority, the Secretary of Labor has promulgated legislative regulations at 29 C.F.R. Part 541 that “define and delimit” the FLSA exemption categories. Subpart A of the Part 541 regulations (“General Requirements”) include concise tests for meeting the exemption requirements; Subpart B of the regulations expand on these tests by outlining the parameters of the exemptions. *See generally* 29 C.F.R. §541.99 *et seq.*

The Part 541 regulations recognize four general categories of professionals: persons in “learned professions”; “artistic professions”; teachers; and computer programmers.^{4/} 29 C.F.R. §§541(a)(1)-(4). The parties arguing that the airline captains and first officers on Postal Service contracts are exempt from SCA coverage assert that these workers are members of a “learned profession.”^{5/}

With regard to the “learned profession” exemption, the Part 541 regulations provide two alternative formulations – the “long test” and the “short test.” *See* 29 C.F.R. §541.3. Although there are several distinctions between the two tests, a key difference is that for a worker to be exempt under the long test, there must be proof that the employee’s work is “predominantly intellectual and varied in character,” and “is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.” 29 C.F.R. §541.3(c). Because it is doubtful that airline pilots could meet this particular element that is unique to the long test, the parties have focused on the requirements of the short test in their presentations to the Administrator and their briefs to the Board.

The short test is found as the second proviso within 29 C.F.R. §541.3(e). Under the short test, a worker will be exempt as a “learned professional” if the worker’s employment meets each of three tests:

1. The employee’s primary duty consists of “[w]ork requiring knowledge of an advance[d] type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes[.]” 29 C.F.R. §§541.3(a)(1), 541.3(e); *and*
2. The employee’s “work requires the consistent exercise of discretion and judgment in its performance[.]” §541.3(b) and (e); *and*

^{4/} The regulation providing for exempt professional status for computer programmers initially was mandated by Congress in 1990 (Pub. L. 101-583), and later codified by amending the statute in 1996. *See* 29 U.S.C. A. §213(a)(17).

^{5/} Emery also asserted that pilots are exempt as “executives” under the SCA and the Part 541 regulations. *See, e.g.,* AR97 Tab F at 11. In order to be exempt as an executive, a worker’s primary duty must be “the management of the enterprise in which he is employed or of a customarily recognized department o[r] subdivision thereof[.]” 29 C.F.R. §541.1(a). Airline pilots plainly do not meet this threshold test, and may not meet other essential criteria. *See* 29 C.F.R. §541(b)-(f).

3. The “employee . . . is compensated on a salary or fee basis at a rate of not less than \$250 per week . . . exclusive of board, lodging or other facilities[.]” §541.3(e).^{6/}

Failure to meet any one of the three elements of the short test means that an employee is “non-exempt,” *i.e.*, is not a “professional” under terms of the regulations or the SCA.

In analyzing the pilot exemption issue in this case, we note that “the [FLSA] §13(a)(1) exemptions are ‘construed narrowly against the employer seeking to assert them,’ and the employer bears the burden of proving that employees are exempt.” *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) and citing *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206 (1966).

B. Whether the Wage and Hour Administrator would be precluded from issuing prevailing wage rates for captains and first officers employed on the Postal Service ANET and WNET contracts, even assuming that some pilots might be deemed exempt as professionals.

In the Board’s July 25, 1997 Remand Order returning this case to the Administrator for a ruling on the professional exemption issue, the Board stated that “if the pilots and first officers providing services under [the Postal Service] . . . contract are exempt, the Department of Labor has no authority to issue a wage determination covering them[.]” Slip op. at 2 (citing *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981), for the proposition that an agency has no authority to act when it clearly lacks coverage over a matter.) Having reviewed the materials subsequently submitted by the parties to the Administrator and to this Board, we conclude that this declaration was overbroad under the circumstances of this case, and incorrect.

Of the three criteria of the professional exemption short test listed above, the first (“work requiring knowledge of an advanced type in a field of science or learning” etc.) reasonably is characterized as a threshold *categorical* test that addresses an employee’s generic occupational classification. That is, can the overall job classification be viewed as one of the “learned professions” based on its advanced educational requirements in a field of science or learning?

In contrast to this first categorical issue, the second and third criteria of the short test are more *employee-specific* – *i.e.*, once it is determined that the employee’s primary functions are in an occupation that ordinarily qualifies for exempt status as a profession, does the *specific employee’s work* involve the consistent exercise of discretion and judgment, and is the *specific employee* compensated on a salary basis? These are questions of fact that can only be

^{6/} This third element of the professional exemption test, the “salary basis” test, generally does not apply to doctors, lawyers and teachers. See 29 C.F.R. §541.3(e)(first proviso) and §541.314.

resolved based on the work and working conditions of the individual employee. Thus, even if the occupations of airline captain or first officer met the threshold “advanced knowledge” test, it would not automatically follow that all pilots *per se* were exempt professionals. If an individual pilot’s duties *in fact* do not require the consistent exercise of discretion and judgment, or if an individual pilot *in fact* is not paid on a salary basis (as defined by the regulations), then the pilot would not be exempt under the Part 541 regulations and the SCA.

A brief illustration is helpful. Assume that a branch of the armed services has decided to contract-out the operation of a health clinic to a private contractor. The agency advises the Wage and Hour Division that an SCA wage determination is needed for the bid specifications, and that the clinic operator will employ several registered nurses on the job. The “registered nurse” occupation is recognized as one of the learned professions under the Part 541 regulations, and therefore could be exempt. 29 C.F.R. §541.301(e). Is the Wage and Hour Division authorized to issue a prevailing wage rate for registered nurses? Certainly – because the Division cannot possibly know in advance whether the service contractor will pay the nurses on a true “salary basis” (a requirement for SCA exempt status), or whether the nurses instead might be paid on an hourly basis (and therefore non-exempt). It therefore is essential that a wage rate be issued. Of course, if the nurses on the contract meet all three requirements of the Part 541 short professional exemption test (learned profession, consistent exercise of discretion and judgment, and salary basis pay), the SCA wage rate issued by the Division probably would not apply to them, because they would not be “service employees” within the SCA’s definition. 41 U.S.C.A. §357(b).

Similarly, the content of a pilot’s job and the mode of compensation are within the control of the various airlines bidding on a Postal Service procurement, and cannot be known to the Administrator in advance of a contract bid. Indeed, a contractor that pays its employees on a “salary basis” at the beginning of a procurement could change its payroll policies midway through the contract period, forfeiting any claim to exempt status for its pilots under the SCA. Because it is literally impossible for the Administrator to determine in advance that a job classification will meet all the criteria of the professional exemption test, the Administrator plainly has the authority and the duty to issue a prevailing wage rate for the position.^{7/} Whether the prevailing wage rate actually will be applied becomes an enforcement question that only can be resolved upon the facts of the case.

Thus the question whether pilots employed on the ANET and WNET contracts are exempt from SCA coverage as professionals is completely divorced from the Administrator’s authority to issue prevailing wage rates for the job classifications. The Administrator plainly had the legal authority to issue the wage determinations challenged in this proceeding. We

^{7/} Because the salary basis test typically is not applicable to doctors, lawyers or teachers, it is unclear under what circumstances SCA prevailing wage rates should be published for these professions. See 29 C.F.R. §541.3(e). This question is not before us in this case, and we therefore do not address it.

therefore rescind the contrary legal statement found in the Board's earlier Remand Order, recognizing that adjudicative bodies may revisit their own earlier legal conclusions in a pending case to correct errors without running afoul of the "law of the case" principle. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988).

C. Whether airline pilots flying on the Postal Service's ANET and WNET contracts are "learned professionals" as defined by the Part 541 regulations, and therefore exempt from SCA coverage.

In a society in which class lines are significantly blurred, in which status often is tied to occupation, and in which technology has added layers of complexity to jobs that self-evidently were viewed as "blue collar" (or "pink collar") only a generation ago, it comes as no surprise that workers who routinely are exhorted to be "professional" in performing their work want to be recognized as "professionals," as the word commonly is understood – that is, persons performing work of important value with skill and dedication. From secretaries to paralegals, truck drivers to crane operators, workers rightly demand recognition and respect for the importance of their work and the "professionalism" with which they perform it. Being viewed as "professional" in our society is a badge of honor. But achieving "professional" status *under the Fair Labor Standards Act and the Service Contract Act* is something quite different, for it means losing protection under our nation's most basic labor standards laws, which have guaranteed American workers an entitlement to minimum wage and overtime protections since 1938, and prevailing wage protections to workers on federal service contracts since 1965. Stated differently, "winning" professional recognition under the Part 541 regulations means "losing" important legal and economic rights. Of necessity, then, the professional exemption must be examined closely and construed narrowly.

None of the parties to this proceeding disputes the high level of skill needed to pilot a large jet airplane safely, and the expectation that captains and first officers will conduct themselves "professionally" in their work, as the term is used in common parlance. In addition to citing various definitions of the term "professional" from popular dictionaries, several of the parties supporting exempt "professional" status note that ALPA's Code of Ethics refers to pilots as "professionals" 32 times; the Bureau of Labor Statistics' Occupational Outlook Handbook – a Labor Department publication – similarly characterizes pilots as "highly trained professionals." AR98 Tab B Exhs. 17, 20. But in this dispute, we are not called upon to reach a general pronouncement about the worth of airline pilots or the importance of their work. The specific and limited question that we must answer is whether airline pilots are "learned professionals" under the SCA, *i.e.*, that they meet the tests of the Part 541 regulations. 41 U.S.C. §357(b).

1. *Whether the airline pilots primarily perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.*

As discussed above, the threshold question that must be answered under the “learned profession” exemption test is whether the captain and first officer job classifications require knowledge of an advanced type in a field of science or learning. 29 C.F.R. §541.3(a)(1). It is only after this categorical question is resolved in favor of exemption that it useful to consider closely the other criteria of the long or short exemption tests.

The Secretary’s Part 541 interpretive regulations provide helpful guidance. To qualify as a “learned profession” under the regulations, an occupation should have several characteristics, including, *inter alia*:

- “Knowledge of an advanced type in a field of science or learning” (29 C.F.R. §541.3(a)(1)) means that the profession is learned through a “prolonged course of specialized intellectual instruction,” rather than a general academic education or an apprenticeship. 29 C.F.R. §541.301(a), (d).
- Generally, “advanced knowledge” means knowledge that cannot be obtained at the high school level. 29 C.F.R. §541.301(b).
- Entry into the profession typically requires an advanced academic degree as “a standard (if not universal) prerequisite,” such as the fields of law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, and various types of physical, chemical and biological sciences (including pharmacy and registered or certified medical technologists). Although in some instances the professional training may consist of concentrated study lasting fewer than four years (*e.g.*, registered nurses who have been examined by state licensure boards), the examples of “learned professions” cited by the Secretary almost universally are entered following four years or more of higher education, with significant specialization. 29 C.F.R. §541.301(e)(1).

In arguing for exempt status for the ANET and WNET pilots, the industry parties (*i.e.*, Postal Service, Air Force and airline industry parties) correctly identify the “knowledge of an advanced type in a field of science and learning” requirement as central to the “learned profession” portion of this case, observing in their reply brief that

the critical issue which this [Administrative Review] Board must decide is whether, as a matter of law, the applicable Part 541 Fair Labor Standards Act . . . Regulations mandate that a job classification customarily require[s] a college or other advanced degree (or at least an amount of in-classroom teaching time equivalent to that required to earn such a degree) in order for the classification to be eligible for the professional exemption. WHD argues that the Regulations do so require. WHD therefore concludes that flying an aircraft simply “is not the type of work contemplated by the regulations for exemption as a professional

employee,” since the FAA regulations do not require a college or other advanced degree or specific comparable amount of classroom study.

Jt. Reply at 1-2 (citations omitted). The industry parties assert vigorously that the Part 541 regulations do not explicitly require that workers possess an advanced college degree to qualify for exempt professional status, and that the combination of sophisticated in-flight instruction and ground training that pilots ordinarily receive meets the regulatory standard for advanced and prolonged study.

The industry parties point to the initial and on-going education pilots receive in fields needed to fly a large jet aircraft, as required by FAA regulations found at 29 C.F.R. Part 121 (2000). An example of such a curriculum – the outline of the training program used by ANET subcontractor Express One – is found in the Administrative Record as AR98 Tab E Exh. 2. The industry parties assert that this type of “Part 121” training course, which in this instance is 182 hours in length, is sufficient to meet the “prolonged course of specialized instruction and study” characteristic of a learned professional. *See, e.g.*, USPS Brief at 10-11.

As further evidence of the pilots’ high degree of knowledge and skill, the industry parties note that the Postal Service and its contractors on the ANET and WNET contracts require that the airline captains maintain an “air transport pilot” (ATP) certificate issued by the Federal Aviation Administration (FAA).^{8/} This is the FAA’s highest certification level, and is described by the Postal Service in its brief as follows:

To receive an ATP certificate, a pilot must be a high school graduate (14 C.F.R. §61.151) and must pass a written test covering the following areas of his professional knowledge: the regulations relating to airline transport pilot certification; the fundamentals of air navigation and use of formulas, instruments, and other navigational aids, both in aircraft and on the ground, that are necessary for navigating aircraft by instruments; the general system of weather collection and dissemination; weather maps, weather forecasting, and weather collection and dissemination; elementary meteorology, including knowledge of cyclones as associated with fronts; cloud formations; National Weather Service Meteorological Handbook No. 1, as amended; weather conditions, including icing conditions and upper-air winds, that affect aeronautical activities; air navigation facilities used on Federal airways, including rotating beacons, course

^{8/} This reliance on the ATP certification in support of “pilot” exemption is diminished by the fact that it applies only to *captains* on the Postal Service’s contracts. *First officers* only are required to maintain the FAA’s lesser commercial pilot certificate.

lights, radio ranges and radio marker beacons; information from airplane weather observations and meteorological data reported from observations made by pilots on air carrier flights; the influence of terrain on meteorological conditions and developments, and their relation to air carrier flight operations; radio communication procedure in aircraft operations; basic principles of loading and weight distribution and their effect on flight characteristics. See 14 C.F.R. §61.153. The pilot must also pass a practical flying test covering such matters as preflight, takeoff, landing, instrument, inflight and emergency procedures. 14 C.F.R. §61.157.

USPS Brief at 9-10, n.4.

In addition to presenting evidence regarding the training provided to pilots flying on the ANET and WNET contracts, the industry parties also rely heavily on the Fifth Circuit's decision in *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, *reh'g den'd*, 714 F.2d 137 (1983), in support of their claim that pilots are "learned professionals" under the Service Contract Act. In *Paul*, a divided panel upheld a lower court decision finding that the pilot of a company twin-engine turboprop was a "learned professional" under the FLSA criteria, and therefore was exempt from the FLSA's overtime payment requirements. With regard to the first criterion of the FLSA exemption test (*i.e.*, knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study), the court majority in *Paul* acknowledged that the record included little information about Paul's training; however, the court took judicial notice of the FAA's ATP certificate requirements, *supra*, and – based solely on these FAA requirements and associated FAA testing materials – concluded that the knowledge learned while qualifying for the ATP certificate was "advanced" and the period of training "prolonged" within the terms of the Secretary's FLSA regulations. *Paul*, 708 F.2d at 172-73.

In support of its finding that Paul was FLSA-exempt as a "learned professional," the court also relied on opinion letters issued by the Wage and Hour Division:

[W]e are persuaded that Paul performed exempt professional work. The Wage and Hour Division, whose interpretations are entitled to "great weight," has, without vacillation, been unwilling to take a contrary position for at least fifteen years. While the Division has noted that "pilots as a class cannot be considered exempt professional employees on an industry wide basis," see Application of Policy (Flight Personnel), 6 Lab. Rel. Rep. (BNA) 92:653-54 (1976), it also has stated that it will take "no action" against a defined subclass of pilots of which Paul is a member. That is, an assertion of exempt status by the

employer of any pilot with Paul's rating and experience level would not be opposed[.]

Id. at 173-74 (footnote and additional citations omitted).

In citing *Paul*, the industry parties argue that the multi-engine 727s and DC-8s flown by pilots on the Postal Service ANET and WNET contracts are considerably larger and more complex than the relatively small plane flown by Paul. Moreover, the record in the case before this Board includes more specific data concerning pilot training than apparently was before the *Paul* court. In their view, it therefore follows that the same analysis that resulted in the Fifth Circuit's conclusion that Paul was an exempt "learned professional" under the FLSA applies with even greater force to the ANET and WNET pilots under the SCA.

The Administrator, ALPA and Capt. Winters^{2/} argue that while pilots are highly skilled, the training required to become a pilot simply doesn't meet the "knowledge of an advanced type in a field of science or learning" standard for being a "learned profession." For the reasons discussed below, and based on the record before us, we believe that these parties have the better argument, and we therefore conclude that the airline pilot occupations (captain and first officer) do not meet the specific requirements of this first threshold element of the professional exemption test.

The text of the Part 541 regulations is the obvious starting point. Although the industry parties are correct that the definitional language at 29 C.F.R. §541.3 (exempt professional's primary duty consists of work requiring knowledge of an advanced type in a field of science or learning customarily acquired through prolonged course of specialized intellectual instruction or study) does not, by its terms, *require* a college degree or comparable instruction, the industry parties virtually ignore the regulation at 29 C.F.R. §541.301 when making their argument. This latter regulation carefully explains that to be exempt, a professional's training must be advanced and specialized, as distinguished from a general academic education or apprenticeship. 29 C.F.R. §541.301(a). The knowledge must be

in a field of science or learning. This serves to distinguish the professions from the mechanical arts where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

29 C.F.R. §541.301(b). Finally, while the regulations recognize that some members of a profession may not hold an advanced degree,

^{2/} Capt. Winters did not independently address the "advanced knowledge" issue in his brief to the Board, but instead adopted the argument presented by ALPA.

The requisite knowledge . . . must be customarily acquired by a prolonged course of specialized intellectual instruction and study. . . . The word “customarily” implies that in the vast majority of cases the specific academic training is a prerequisite for entrance into the profession. It makes the exemption available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry, etc., but it does not include the members of such quasi-professions as journalism in which the bulk of the employees have acquired their skill by experience rather than by any formal specialized training.

* * * * *

The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced degree is a standard (if not universal) prerequisite.

29 C.F.R. §541.301(d), (e)(1) (emphasis added).

With the Administrator, we believe that the language of the regulation is clear that for an *occupational classification* to be deemed eligible for “learned profession” status, some form of advanced, formal, specialized academic training (or its equivalent) is a prerequisite. The professions explicitly identified in the regulations almost all require specialized college-level or even graduate-level study; to the extent that the Administrator recognizes any lesser standard for a “professional” occupation, the minimum requirement identified in the regulations (specifically, for registered nurses) is for a shortened, intense, specialized college-type academic program coupled with registration by a state examining board. 29 C.F.R. §541.301(e)(1). Although the regulations recognize that some *individuals* working in a professional occupation occasionally may acquire their knowledge through learning outside a formal academic environment, or may not achieve the academic degree that is customary in their field, it is evident that formal specialized academic training in a field of science or learning is a threshold prerequisite for recognizing an occupational category as a profession under the FLSA regulations.

Based on the extensive record in this case, there can be no doubt that the airline pilot occupation does not meet this test. In a statement submitted to the Administrator as part of the remand of this case, ALPA offered the following observation (with supporting evidence) about the wide-open nature of the pilot profession:

No airline requires a basic, much less an advanced, academic degree in aviation or piloting as a prerequisite to employment as an airline pilot. In fact, it is rare that a college degree of any

sort is required. Only seven airlines out of the 167 covered in the Air, Inc. “Airline Information and Address Directory” – a directory compiled for pilot job applicants – require a four-year degree as a hiring prerequisite. . . . The petitioner in this case, Emery Worldwide Airlines, Inc., not only does not require its pilots to hold a college degree in any subject, but apparently does not require that they hold even a high school degree. Similarly, Emery’s subcontractors, Ryan International and Evergreen International Airlines, do not require college degrees of their pilots.

AR98 Tab C at 2. Although some Emery and Ryan pilots have college degrees, none of the parties to this case disputes the general proposition that most pilots do not enter the occupation through formal academic training.^{10/}

Which brings us to the analysis used by the 2-member panel majority in the Fifth Circuit’s *Paul* decision, which is relied upon so heavily by the parties supporting exempt status for airline pilots in this case. On the “learned profession” question, the *Paul* panel majority focused entirely on the FAA’s requirements for obtaining an ATP license, and concluded that a pilot holding an ATP certificate necessarily possessed “knowledge of an advanced type in a field of learning that was acquired by a prolonged course of specialized intellectual instruction and study.” 708 F.2d at 172. The court reached this conclusion even while acknowledging that there was no evidence in the trial record documenting the level of training “customarily” required to become ATP-certified. *Id.* at 171. Stated differently, the court (1) took judicial notice of the FAA’s ATP certificate requirements, (2) concluded that persons who held ATP certificates possessed knowledge of an advanced type, and (3) inferred that this knowledge must have been acquired through training that met the academic requirements associated with the “learned profession” exemption. *Id.* at 171-73. In addition, the court concluded that the Wage and Hour Division’s long-standing “non-enforcement” policy regarding FLSA overtime requirements for various workers in the aviation industry, as manifested through various Wage and Hour Opinion Letters, supported a finding of exempt professional status. *Id.* at 173-74.

Like the Administrator, we respectfully disagree with the *Paul* majority’s analytical approach and conclusion, for several reasons.

^{10/} The attachments to Emery’s submission to the Administrator (AR98 Tab D) clearly show that neither Emery nor Ryan require advanced degrees in order to be a pilot, and that most pilots do not have such degrees. According to the ALPA’s tabulation of the Emery data, 46 out of 127 Emery captains (36%) have full college degrees, of which 9 are in aviation or an arguably related field; 98 out of 173 Emery first officers (57%) have full college degrees, of which 57 are in aviation or an arguably related field; 16 of Ryan’s 41 captains (39%) have full college degrees, of which 7 are in aviation or an arguably related field; and 29 of Ryan’s 42 first officers (69%) have full college degrees, of which 1 is in aviation or an arguably related field. ALPA Brief at 4-5, n.2.

First, as discussed above, it is clear that the regulation at 29 C.F.R. §541.301 requires an examination of *how* members of an asserted profession typically acquire their “advanced knowledge in a field of science or learning.” The regulation plainly contemplates that entry into exempt professions “customarily” involves four or more years of advanced, specialized academic instruction, with only slightly lower academic training requirements required for registered nurses.^{11/} We agree with the Administrator that a close analysis of the specialized academic training provided to members of a job classification is a threshold step in determining whether the occupation generically meets the professional exemption test. Consequently, we share the view of the dissenting opinion in *Paul* that it is analytically incorrect to “work backwards” from the level of an employee’s knowledge and skill in order to infer that the occupation requires the kind of advanced academic instruction contemplated by the regulations. 708 F.2d at 175 (Randall, J., dissenting).^{12/}

Additionally, there is the matter of the Wage and Hour Division’s “non-enforcement” opinion letters, which must be analyzed in this case in connection with *both* the FLSA regulations and the SCA.

^{11/} This view – *i.e.*, that a specialized college degree is required to meet the Part 541 “learned profession” test – has been shared by most of the courts that have decided professional exemption cases under the FLSA. *See, e.g., Fife v. Harmon*, 171 F.3d 1173 (8th Cir. 1999) (“airfield operations specialists” not exempt professionals, even though required to have either (a) bachelor’s degree in aviation management or a related field, (b) four years of full-time experience in aviation administration, or ©equivalent combination of academic training and on-the-job experience; while knowledge was deemed to be advanced, it was the product of general academic instruction or apprenticeship); *Reich v. State of Wyoming*, 993 F.2d 739 (10th Cir. 1993) (game wardens exempt as professionals, where degree in biology, wildlife management or similar field required); *Dybach v. State of Florida Dep’t of Corrections*, 942 F.2d 1562 (11th Cir. 1991) (probation officers not exempt professionals, even though required to have 4-year college degree, because educational requirement was general and not specialized); *Quirk v. Baltimore Co., Md.*, 895 F.Supp 773 (D. Md. 1995) (paramedic not a professional, notwithstanding advanced training, absent college degree).

In the rare instances in which courts have found employees possessing merely a general college education to be professionals, these holdings typically have involved occupations with mandatory state licensure requirements that require some minimal amount of specialized college-level instruction. *Rutlin v. Prime Succession, Inc.*, 200 WL 992110 (6th Cir. July 20, 2000) (funeral director deemed professional where licensure requirement included college-level instruction in science courses); *Owsley v. San Antonio Independent School District*, 187 F.3d 521 (5th Cir. 1999), *cert. denied* 120 S.Ct. 1423 (2000)(athletic trainers deemed professionals where licensure requirements mandated specific career-related courses at college level).

^{12/} We decide the professional exemption question in this case based on the plain meaning of the Part 541 regulations. We note, however, that if these regulations were ambiguous, we would defer to the Administrator’s reasonable interpretation of them. *Auer v. Robbins*, 519 U.S. 452, 457 (1997); *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

As the majority in *Paul* correctly observes, for many years the Wage and Hour Division has adopted a non-enforcement position under the FLSA overtime provisions with respect to some salaried pilots. *Id.* at 173, n.4, citing Lab.L.Rep. (CCH) ¶25,210.80; *see also* Opinion WH-133 (May 25, 1971) *available at* BNA WH Manual 99:1069; Opinion WH-303 (Jan. 20, 1975), BNA WH Manual 99:1185; Opinion WH-357 (Sept. 2, 1975), BNA WH Manual 99:1218. In some of these opinion letters, the Division has observed that certain pilots or other aviation employees come “within the spirit” of the FLSA’s executive, administrative or professional exemptions, and that the Division therefore would not attempt to enforce FLSA requirements so long as the pilots met certain salary requirements.

In each of these opinion letters, the Administrator is careful in declaring only that he “will take no enforcement action” with regard to these employees; the Administrator never opines that he actually views pilots as meeting any of the exemption tests. In other words, the opinion letters at most represent a statement of the Wage and Hour Division’s enforcement policy or allocation of limited prosecutorial resources, not a substantive declaration that pilots or any flight employees actually meet the “learned profession” test – or, for that matter, any other Part 541 exemption.

Curiously, it appears that the majority in *Paul* leaps from these Wage and Hour opinion letters to conclude that if the Division has chosen not to enforce FLSA overtime requirements for pilots, it is a reflection of the Division’s view that pilots do not need such protections *and therefore are exempt professionals under the FLSA*. 708 F.2d at 174-75. But as the dissent in *Paul* correctly notes, although the Division repeatedly has adopted a non-enforcement position, “it has never exempted those pilots. Indeed, it has consistently declined to do so.” *Id.* at 175. We believe this is a fair reading of the opinion letters regarding whether the Administrator ever has viewed pilots generally as exempt professionals under the FLSA. Plainly he has not, and the parties making this link seriously misconstrue the import of the non-enforcement position.

Furthermore, in this proceeding it is extremely important to note that the same Wage and Hour Division pilot opinion letters declaring a non-enforcement policy under the FLSA explicitly state that the non-enforcement “position does not apply to employees, including pilots and copilots, subject to the provisions of the Service Contract Act, the Davis-Bacon Act, and the Contract Work Hours and Safety Standards Act” Opinion WH-357, *supra*. Thus, even if we were to agree with the *Paul* decision’s interpretation of these opinion letters with regard to FLSA coverage, it is abundantly clear that the Administrator has never intended these opinion letters to exempt pilots from SCA coverage.

The preponderance of the evidence supports the sentiment expressed in the ALPA Code of Ethics (submitted for the record by Emery), which states that “[a]n Air Line Pilot will remember that his is a profession still largely dependent on the proper training of apprentices by masters of the art during regular operations. . . .” AR98 Tab B Exh. 17 at 2-3. Although charged with an extraordinary degree of responsibility, the training of airline pilots in this country typically does not revolve around specialized college-type academic instruction, but

more-closely resembles the classic apprenticeship model – a “structured, systematic program of on-the-job supervised training” coupled with a program of related instruction. 29 C.F.R. §29.4 (1999). We therefore conclude that the occupations of captain and first officer do not meet the regulatory criteria for exemption under the Part 541 regulations, and therefore do not meet the statutory criteria for exemption under the SCA.

The impulse to characterize airline pilots as “professionals” is strong and understandable. In addition to the airline pilot’s tremendous responsibilities, there is a certain mystique that surrounds the job – the image of the uniformed flight crew confidently navigating huge, complex planes along the airways. And the disastrous consequences of pilot error are fixed in the public imagination, with the potential for loss of many lives and property. But is it not true that these types of responsibilities are shared with other workers in the transportation industry, differing for airline pilots only by degree? What of the ship captain in stormy weather piloting an oil tanker, or a ferry? What of the passenger bus driver on a rainy highway, or the truck driver or train engineer hauling radioactive waste or other hazardous materials? In each case, these workers are charged with operating complex equipment and using knowledge and skill to make critical split-second decisions, drawing on their training and expertise; if they err, there may be catastrophic danger to life, property and the environment. While the public should expect a high degree of training for these workers, and the highest degree of diligence – *i.e.*, that they should be “professional” in their approach to their work – is this enough to make each of them “professionals” under Part 541, and therefore exempt from SCA protection?

In light of the goals of these protective statutes, the text of the Secretary’s regulations, and the record before us, we find that airline pilots are not members of a “learned profession” under the Part 541 regulations, and therefore are not exempt from Service Contract Act coverage.

2. *Whether airline pilots meet the “consistent exercise of discretion and judgment” and “salary basis” criteria of the professional exemption short test.*

Because we have concluded that airline pilots do not meet the first criterion of the 3-part short test, it is not necessary for us to reach a definitive conclusion regarding the two other elements of the test. However, we discuss briefly a significant problem in trying to address either of these two criteria as part of this wage determination proceeding.

As discussed above, the “advanced knowledge” criterion involves a generic examination of the airline pilot classifications, which the Board reasonably can evaluate based on general evidence of the pilot occupation as a whole. However, the second and third criteria of the professional exemption short test are more particularized, *i.e.*, does an individual pilot actually exercise discretion and judgment consistently, and is the pilot compensated on a salary basis?

Wage determination cases reach the Administrative Review Board by means of a direct appeal from policy determinations made by the Wage and Hour Administrator. Although parties to the underlying proceeding submit evidentiary material to the Administrator, and we evaluate the reasonableness of the Administrator's decision in light of the overall record, there is no formal evidentiary proceeding, no opportunity for adversarial testing of the evidence, and no formal fact finding. Procedurally, then, the opportunity to engage in rigorous development of an evidentiary record is severely limited in a wage determination case, particularly when contrasted with enforcement cases that are litigated under the SCA regulations at 29 C.F.R. Part 6 Subpart B (1999), which provide for a formal evidentiary hearing before an administrative law judge.

The Administrative Record in this case illustrates the dilemma that we would confront if we needed to reach the "discretion and judgment" and "salary basis" tests. *See* 29 C.F.R. §541.3

The airline industry parties offer extensive argument (with various supporting exhibits and declarations) to show that pilots constantly exercise discretion and judgment in their work, having ultimate authority with respect to all critical flying decisions. On the other hand, Capt. Winters argues that flying airplanes is a routine task governed by air traffic control personnel, flight manuals, autopilots and checklists – also supported by exhibits and declarations. Virtually all these materials focus generically on the work of pilots, without the kind of particularized inquiry that is needed to reach a finding that specific workers are exempt professionals. The Administrator does not address the "discretion and judgment" issue at all in his opinion letter, and none of the parties have had an opportunity to cross-examine their adversaries' declarants or challenge the adversaries' exhibits. As a practical matter, based on the record assembled in this wage determination challenge, it would be unrealistic for the Board to attempt the kind of fact-finding needed to reach this question.

Similar problems exist with regard to the salary basis test. The industry parties assert that the ANET and WNET pilots are compensated on a salary basis, but it is unclear whether their supporting materials address the pay practices at each and every one of the airlines that work on the Postal Service contracts – again, the kind of particularized inquiry that would be necessary to make a "salary basis" finding. The Administrator argues that the airlines failed to submit the kind of detailed payroll information that would be needed to reach the salary basis question; the industry parties cry foul, asserting that the Wage and Hour Division actively discouraged them from submitting such data. Capt. Winters has submitted extra-record declarations from Ryan pilots challenging Emery's claim that Ryan's pilots never are docked for losing work time; oddly, the claim that Ryan pays its pilots on an hourly basis is made by a management official at a different company. Like the discretion and judgment issue, it would be extraordinarily difficult to reach this question without a proper evidentiary hearing.

In short, even if we had concluded that airline pilots as a class met the "advanced knowledge" element of the exemption short test, we are doubtful we could reach a final

determination regarding the second and third elements based on the record normally developed during the review and reconsideration of a wage determination.

VI. THE ADMINISTRATOR'S WAGE DETERMINATIONS

A. The SCA wage determination process.

Under the Service Contract Act, the Secretary of Labor or his authorized representative (*i.e.*, the Wage and Hour Administrator) is responsible for determining "wage rates to be paid the various classes of service employees in the performance of [a federal service contract] . . . in accordance with prevailing rates for such employees in the locality[.]" 41 U.S.C.A. §351(a).^{13/} Both the statute and judicial precedent indicate that the Administrator's authority to determine prevailing wages under the SCA is wide-ranging:

The Administrator's discretion under the Service Contract Act is perhaps at its broadest when the Administrator is issuing prevailing wage schedules. . . . Like its sister statute, the Davis-Bacon Act, nowhere does the SCA prescribe a specific methodology to be used by the Secretary or her designee, the Administrator, when determining the prevailing wage. Perhaps the clearest indicator of the very great deference owed to the Secretary and the Administrator when determining prevailing wage rates is the clear body of case law holding that the substantive correctness of wage determinations is not subject to judicial review. *United States v. Binghamton Construction Co.*, 347 U.S. 171, 177 (1954) (under the Davis-Bacon Act); *Commonwealth of Virginia v. Marshall*, 599 F.2d 588, 592 (4th Cir. 1979) (under the Davis-Bacon Act); *AFGE v. Donovan*, 25 Wage & Hour Cas. (BNA) 500, 1982 WL 2167 at *2 (D. D.C. 1982), *aff'd* 694 F.2d 280 (D.C. Cir. 1982) (table) (under the Service Contract Act). Judicial review "is limited to due process claims and claims of noncompliance with statutory directives or applicable regulations." *Commonwealth of Virginia* at 592 (citing *Califano v. Sanders*, 430 U.S. 99, 109 (1977)).

Dep't of the Army, slip op. at 25.

^{13/} In certain situations involving follow-on federal service contracts at worksites where employees work under the terms of a collective bargaining agreement, the SCA wage determination rate is the collectively-bargained rate, and not the "prevailing in the locality" rate. 41 U.S.C.A. §§351(a)(1), 353(c). None of the parties has suggested that the special provisions related to unionized workforces are at issue in this case.

Prevailing wage determinations are developed by the staff of the Wage and Hour Division. In this work, the Division most commonly relies on data from wage surveys conducted by the Bureau of Labor Statistics (BLS), but may also rely on other data sources, both from other government agencies as well as from private sources. 29 C.F.R. §4.51(a). The Division generally uses data showing the *median* wage rate paid to an occupation; however, under special circumstances suggesting that the median wage rate may not properly reflect prevailing local rates, the Division may rely on the arithmetic *mean* (average) of the wage rates. 29 C.F.R. §4.51(b).

In addition to the explicit guidelines found in the SCA regulations, the Board has noted that “the Administrator has wide discretion to adopt practical, pragmatic approaches that promote the efficient administration of the Act, so long as these choices . . . [are] not inconsistent with the statute and . . . [are] sufficiently justified.” *Dep’t of the Air Force SAF/AQCR Eastern Regional Office*, ARB Case No. 98-125 (May 26, 2000), slip op. at 10, citing *D.B. Clark III*, ARB Case No. 98-106 (Sept. 8, 1998); *Dep’t of the Army, supra*; *McDonald’s Corp.*, BSCA Case No. 92-02 (Sept. 30, 1992); *Service Employees Int’l Union, AFL-CIO, CLC (“SEIU I”)*, BSCA Case No. 92-01 (Aug. 28, 1992).

B. The Bureau of Labor Statistics’ surveys of wage rates paid to airline captains and first officers, and the Administrator’s 1996 wage determinations.

The aviation industry is regulated by the Department of Transportation (DOT). Large air carriers operate pursuant to certificates of public necessity and convenience, and are referred to as “certificated air carriers.” Under DOT regulations, certificated carriers with annual revenue exceeding \$1 billion are characterized as “major” carriers; airlines with annual revenues from \$100 million to \$1 billion are characterized as “national” carriers; and carriers with annual revenues under \$100 million are deemed “regional” carriers.^{14/} 14 C.F.R. Part 241 Sec. 04(a) (2000).

The Bureau of Labor Statistics conducted wage and fringe benefit surveys of workers employed by certificated airline carriers in 1980, 1984, 1989, and 1995. AR97 Tab H Exhs. 2, 3, 4, 5. The BLS surveys appear to have used a variety of different methods for collecting and reporting data. For example, the 1980, 1984 and 1995 BLS surveys included data from both passenger and cargo airlines, while the 1989 BLS survey excluded cargo carrier data. The 1980 and 1984 surveys appear to have reported data only on an “all-carrier” basis, while

^{14/} At the time of the 1989 BLS Survey, the “national” carrier category included carriers with revenues between \$75 million and \$1 billion, and airlines with revenue under \$75 million were viewed as “regional” carriers. *See, e.g.*, AR97 Tab H Exh. 3. According to a note in that survey, the Department of Transportation during that period further subdivided regional carriers into two categories: large regionals and medium regionals. However, for statistical purposes BLS recognized only a single regional airline category. *Id.*, Exh. 3 n.2.

the 1989 and 1995 surveys reported both all-carrier data and data from industry sub-categories (major, national and regional carriers). The 1989 survey included break-out data on captains and first officers based on the number of “credited flight hours” actually flown per month; other surveys (including the 1995 survey) did not. One constant among all the surveys, however, was that data on captain and first officer salaries were reported as a “monthly salary” amount, rather than the hourly wage typically used in the BLS area wage survey program. *Id.*

Employment in the airline industry is dominated by the major carriers. According to the 1995 BLS survey, 86.7% of all captains are employed by the major carriers, 9.4% by the national carriers, and only 3.9% by the regional carriers.^{15/} The relative levels of employment among the various classes of airlines were not significantly different in 1989. AR97 Tab A p.3. The major air carriers primarily include the passenger airlines (*e.g.*, United Airlines, Delta, American, etc.), but also include FedEx and UPS. It is undisputed that the median and mean wage rates for captains and first officers paid by the major carriers are dramatically higher than the rates paid by the national and regional carriers.

The Wage and Hour Division has issued various wage determinations over the years establishing prevailing wage rates for captains and first officers. A tabulation of some of the pilot wage rates that were issued by the Administrator between 1989 and 1996 was submitted by Emery and is found at AR97 Tab H Exh. 1. Some of the early SCA wage determinations for pilots specified minimum hourly wage rates (rather than monthly salaries); these wage determinations were not limited to flying large jets, but also included other pilot jobs such as aerial spraying.

Beginning in 1992, the Administrator began issuing wage determinations to the Postal Service for employees “Employed on U.S. Government contracts for aircraft services operating large multi-engine aircraft such as the B-727, DC-8, and the DC-9.” The 1992 wage determination (WD-92-0397) specified a \$4,327 monthly salary for captains and \$3,103 monthly salary for first officers, based on the 1989 BLS airline industry survey. (The methodologies used for determining these and subsequent wage determination rates are discussed below). For several years, subsequent revisions of this wage determination all included the same monthly wage rates for these two job classifications – *i.e.*, they were all based on the 1989 wage data – including a wage determination issued as late as March 1996 (WD 95-0229). In other words, the captain and first officer SCA wage rates for flying “large multi-engine aircraft” ultimately were unchanged for fully four years between 1992 and early 1996, and were based on increasingly-outdated data. *Id.*; *see also* AR97 Tab H Exhs. 1A-1J; AR97 Tab L Exhs. 1-5.

^{15/} The proportionate employment of first officers among the major, national and regional carriers is not materially different. *See* AR97 Tab H Exh.2.

A new revision of the wage determination, WD-95-0229 (Rev. 1), was issued on May 15, 1996, initially to be applied to the Postal Service’s ANET contract. This wage determination was based on the newly-available 1995 BLS airline industry wage survey. In addition to using new data, the Administrator used a different methodology for calculating the prevailing rates compared with the prior wage determinations. The new data and new methodology increased the minimum salaries for captains to \$8,843/month, and for first officers to \$4,967/month. AR97 Tab H Exh. 1. This substantial increase in the prevailing wage rates – more than doubling the captain rate, and increasing the first officer rate by 60% – prompted several parties to request review and reconsideration of the wage determination pursuant to the procedures found at 29 C.F.R. §4.56. AR97 Tabs C, L (Postal Service); E, F, H (Emery); I (Express One); J, M (Regional Airlines Association); K (Air Force); N (Kitty Hawk).^{16/}

After considering the submissions of the parties, the Administrator issued his December 13, 1996, decision letter (AR97 Tab A), revising and reducing the wage determination rates for captains on the ANET and WNET contracts to \$7,316/month, and for first officers to \$4,314/month. Although the Administrator continued to use the 1995 BLS survey as the basis for these revised wage rates, he calculated these wage rates by using yet another methodology for analyzing the BLS data. In addition, the Administrator decided that a different methodology should be applied to establish wage rates for the CNET and CNNET contracts, producing a captain wage rate of \$5,550/month and a first officer rate of \$3,059/month on those contracts.^{17/} AR97 Tab A.

Thus, between May 1992 and December 1996 the Administrator issued the following wage rates for captains and first officers flying “large multi-engine jets” on government service contracts:

	May 1992- March 1996	May 1996	Administrator’s December 13, 1996 decision on reconsideration - ANET and WNET contracts	Administrator’s December 13, 1996 decision on reconsideration - CNET contracts
	WD-92-0397 through WD-95-0029	WD-95- 0029 (Rev. 1)		

^{16/} The Administrator’s decision letter also indicates that requests for review were received from or on behalf of Evergreen and NACA. AR97 Tab A.

^{17/} The wage rates for the CNET contract have not been challenged in the Petitions for Review. We include some information concerning the CNET rates because these rates are addressed in the Administrator’s December 1996 decision letter at issue in this proceeding, and because this information is useful in understanding the Administrator’s approach to issuing wage rates.

Captain salary	\$4,327/mo.	\$8,843/mo.	\$7,316/mo.	\$5,550/mo.
First Officer salary	\$3,103/mo.	\$4,967/mo.	\$4,314/mo.	\$3,059/mo.

The Administrator offered the following explanation in his December 1996 final decision letter describing, analyzing and justifying the various methodologies that had been used, proposed or considered by the Wage and Hour Division over the years for setting the prevailing wage rates for pilots and first officers on the Postal Service ANET and WNET contracts. Because the Administrator's rationale is discussed in detail in the Discussion section below, paragraph numbers have been added for ease of reference:

[¶1] [The March 1996 wage determination, WD 95-0229, and its predecessors were] based on a January 1989 BLS survey of the air transportation industry. The wage rate for Captains, \$4,327 per month, was calculated by computing a weighted average of the median rates for national carriers and regional carriers, respectively. The . . . SCA WD rate for the First Officer [in these pre-May 1996 wage determinations], \$3,103 per month, was based solely on the national carrier median. In reviewing the records, we were unable to determine the rationale for using a weighted median to compute the Captain wage rate, or why a different methodology was used to establish the First Officer's rate.

[¶2] Because several parties have questioned the necessity of changing the methodology previously used to establish the prevailing rates for flight crew personnel, we again considered using a weighted median; however, we have rejected that approach because it does not yield a statistically reliable measure of central tendency. Because the median is not an arithmetic measure, a weighted average of the median rate from two or more separate groups may not bear any relationship to the median of the combined groups. If two groups are to be combined in this manner, it would be more appropriate to use the mean since a weighted average of the means from the two groups would, in fact, be the mean for the combined groups. If the weighted mean methodology had been used in 1989, the rate for Captains would have been \$5,082 per month.

[¶3] As indicated above, the second methodology used previously to establish the SCA rate for First Officers was to adopt the median rate for national carriers. Had this methodology been used to establish the Captain rate in 1989, the

Captain rate would have been \$4,839. Based on information that you [*i.e.*, the Postal Service] and other parties have submitted, however, we do not believe that using data only from national carriers is an appropriate methodology in this case. As you have indicated, both national and regional carriers perform work on this contract and, at a minimum, data from both regional and national carriers should be considered. In any event, the most recent BLS survey [*i.e.*, the 1995 survey] does not provide a median rate for national carriers and this methodology could not be replicated with the most recent survey.

[¶4] *The key issue in the reconsideration request is whether data from major carriers should be used to establish the SCA prevailing rate and, if so, the extent to which major carrier data should be used.* You have indicated that the type of service solicited by the Postal Service is directed toward the provision of aircraft and crews that are operated by specialist airlines, and not one of your contracts for dedicated air services is held by a major carrier. Thus, you contend that a WD which includes wages paid by major carriers would not reflect the wages prevailing in the industry which performs the work. Moreover, the Postal Service's entire dedicated air program is less than half the annual revenue level of a major carrier. Furthermore, you contend that passenger carriers and integrated carriers (*i.e.*, cargo carriers that provide both air and ground transportation delivery services) should be considered separate from "dedicated" cargo carriers similar to those used under the Postal Service contracts.

[¶5] The pilots have stated that the WD should be based on the all carrier data and should reflect a wage rate derived by using a statistical measure of central tendency from those companies eligible to bid. They further contend that the wage determination process should not differentiate between companies based on the amount of revenue produced by an air carrier. They note that the Postal Service's primary competitors for express mail service, Federal Express and the United Parcel Service, are both major carriers.

[¶6] *Although we believe it is significant that major carriers do not perform any of the contract work for the Postal Service, we believe that the comparison of the Postal Service express mail delivery service to Federal Express and UPS is a compelling factor requiring that some major carrier data be used to establish the prevailing rate for this contract.* The current wage

determination being challenged [*i.e.*, the May 1996 wage determination] utilizes data from all carriers; however, rather than using the all carrier median or mean rate, we adopted the low end of the middle range (*i.e.*, the 25th percentile rate) as the prevailing rate. *We adopted the low end of the middle range methodology in recognition of the fact that the all carrier data are skewed heavily toward the major carriers.* By using the low end of the middle range we gave some weight to the data for major carriers while attempting to adjust for the skewed nature of the all carrier data.

[¶7] *Upon further review, however, we have concluded that this methodology still results in a rate that is skewed toward the rates paid by major carriers.* The most recent BLS survey shows that 86.7 percent of all Captains are employed by the majors, 9.4 percent are employed by nationals, and 3.9 percent are employed by regionals. These percentages are consistent with the percentages derived from the 1989 BLS survey. *Based on these percentages it is clear that even at the 25th percentile, the rate is still primarily a rate paid by major carriers.*

[¶8] Rather than using the low end of the middle range methodology, we have concluded that a more appropriate rate for the Captain and First Officer wage rates would be a *simple average of the means of regional, national, and major carrier data.* The rate based on these data is straight forward [*sic*], continues to utilize the BLS survey data, and gives additional weight to data from regional and national carriers. By using a simple average, we use a methodology that is not dominated by any group. *The influence of the major carrier data is reduced in recognition of the fact that these data are strongly influenced by large passenger airlines.* At the same time, major carrier data are considered in recognition of the fact that some major carriers are engaged in air transportation of correspondence and packages. *In addition to reducing the influence of major carrier data, this methodology increases the influence of regional carrier data* in recognition of the fact that regional carriers comprise a larger portion of the contract air transportation marketplace than their overall 3.9 percent would indicate. The revised methodology results in a wage rate for captain of \$7,316 per month and a wage rate for First Officer of \$4,314.

[¶9] Finally, while we have concluded that the use of some major carrier data is appropriate for the contracts in question

because of the similarities between the USPS express mail service and the services provided by Federal Express and UPS, we do not believe that the same methodology is necessarily appropriate for other smaller short term contracts for air transportation services. For other small limited service contracts, including the Postal Service's CNET or Christmas time contracts, the average mean of nationals and regionals will be utilized to establish the SCA prevailing wage rates for Captain and First Officer. Under this methodology, the wage rate for Captain is \$5,550 and the wage rate for First Officer is \$3,059.

AR97 Tab A (emphasis added).

C. The requirement that SCA prevailing wage rates be tied to worker classifications, not employer size or industry.

As noted above, employment in the airline industry is dominated by the “major” airlines, *i.e.*, companies with annual revenues exceeding \$1 billion (including all the major passenger airlines, plus FedEx and UPS). The BLS wage survey shows that wage rates paid by the major airlines generally are much higher than the rates paid by the national and regional carriers.

The chief argument of the Postal Service and airline industry parties is that the ANET and WNET contracts call for “dedicated air cargo services” that are provided only by national and regional carriers, and that it therefore is inappropriate for the Administrator to include wage data from the major carriers when developing the wage determination. In support of this claim, they assert that “the [1965] legislative history clarifies the intent of the SCA that DOL ‘take a realistic view of the type of service contract intended to be covered by the determination.’” Emery Pet. at 30, quoting Sen. Rep. No. 948, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Admin. News 3737, 38.^{18/} They note that there are only 27 domestic carriers offering “all-cargo line haul air transportation services,” and that

^{18/} We note that Emery and some other parties take this quotation out of context. The text is offered in their briefs as standing for the proposition that *wage determination rates* should be calculated in reference to the “type of service contract” to be performed under the federal procurement. This is misleading. In fact, the full sentence from the Senate Report states that “The Secretary *in determining the locality* for such purpose would take a realistic view of the type of service contract intended to be covered by the determination.” (emphasis added). In context, therefore, all that can be said is that the Administrator should consider the type of service contract when determining the *locality* covered by the wage determination. The parties have identified no language in the SCA legislative history that supports their proposition that wage determination rates should be based on narrow industry subdivisions. We also note that the locality covered by the wage determination is not at issue in this case.

these companies are “the only available source of offerers for the ANET/WNET contracts.” USPS Pet. at 13-14 (emphasis supplied).^{19/}

Working from the premise that wage data from the major carriers should be excluded when calculating the wage determination, the Postal Service and industry parties argue that the case should be remanded to the Administrator with instructions to conduct a new wage survey limited to the “contract air cargo” industry. Alternatively, these parties suggest that the Administrator either should revert to the March 1996 wage determination rates (based on the 1989 data), or adopt new wage rates based on the 1989 data for national and regional carriers (excluding major carrier data) with an upward adjustment for inflation. *See, e.g.*, AR97 Tab L Att. 12A; Emery Pet. at 39-40.

Even though the airline industry parties object strongly to the results that the Administrator reached when issuing both the May 1996 wage determination rates (WD 95-0229 (Rev. 1)) and the reduced rates in his December 1996 final decision letter, in both instances the Administrator clearly manipulated the BLS airline industry wage data to de-emphasize the role of wage rates paid by major carriers, and to add weight to the wage rates paid by national and regional carriers. In recounting the history of the pilot wage determinations, the Administrator noted that the original 1992 wage determinations were based solely on wage data from the regional and national carriers (although the methodologies used to compute the captain and first officer rates differed) – ignoring entirely wage data from the major carriers, which employ the vast majority of pilots. Dec. 1996 decision letter, *supra*, ¶1 The Administrator declined to use this same approach when issuing the May 1996 wage determination (based on updated 1995 BLS data), having concluded that the method used previously for computing the captain rates (a weighted average of the median rates for captains at regional and national carriers) was deficient, and noting that the 1995 BLS survey did not publish a median rate for pilots at national carriers anyway because of a lack of data.^{20/} *Id.* ¶¶2, 3.

The Administrator then acknowledged the competing arguments of the industry parties and Capt. Winters with regard to the May 1996 wage determination’s methodology – the industry parties arguing that major carrier data should be omitted entirely, with Capt. Winters arguing that the wage determination rates should be based on the full universe of air carriers eligible to bid on the Postal Service contracts (*i.e.*, the all-carrier data). *Id.* ¶¶4, 5. The Administrator offered a bow to both arguments, suggesting that (1) it is significant that no major carriers hold Postal Service ANET or WNET contracts, but (2) some wage data from major carriers should be considered, because FedEx and UPS – both major carriers – should

^{19/} We note that Express Mail originally was moved on the ANET contract by Eastern Airlines, a major passenger airline. AR97 Tab L Exh. 22.

^{20/} Attached to Emery’s Petition for Review is the Declaration of Mary Garvin, Managing Director, Price Waterhouse (dated 1/31/97), demonstrating that wage rates paid by the national carriers can be derived mathematically from the other data published by BLS.

be viewed as competing services to Express Mail. In an effort to strike a balance, the Administrator observed that his May 1996 wage determination relied on the all-carrier data, but deviated from the usual practice of using the median or mean (average) wage rate from the BLS survey (29 C.F.R. §4.51(b)), instead adopting “the low end of the middle range” (25th percentile) as the prevailing rate. The Administrator chose this non-standard benchmark in order to reduce the influence of the major carrier wage data, although “the rate is still primarily a rate paid by major carriers.” *Id.* ¶6.

On reconsideration in December 1996, the Administrator finally shifted methodology again in an effort to reduce further the influence of major carrier data by giving “additional weight to data from regional and national carriers . . . in recognition of the fact that regional carriers comprise a larger portion of the contract air transportation market than their overall 3.9 percent would indicate.” The Administrator’s solution was to average the mean captain and first officer wage rates of the three air carrier groupings which had the intended effect of further reducing the influence of the major airline data on the wage rates. Dec. 1996 decision letter, *supra*, ¶8.

In sum, at each turn the Administrator adopted a non-standard wage determination methodology that focused on the differing kinds of *employers* in the air carrier industry. Even though it appears that the Administrator has assumed that the work of “operating large multi-engine aircraft” is the same throughout the aviation industry, he has declined to focus on the wages to the *employees* without regard to the industry segment in which they work.

But this approach flatly contradicts the long-standing positions of the Administrator, this Board and this Board’s predecessors. Under the Service Contract Act, the Secretary is charged with determining the “wages to be paid the *various classes of service employees*. . . in accordance with prevailing rates for such employees in the locality.” 41 U.S.C. §351(a) (emphasis added). It was the consistent view of this Board’s SCA predecessors (*i.e.*, the Deputy Secretary and the Board of Service Contract Appeals) that the prevailing wage inquiry must focus on the work performed by an employee classification across all industries, not just the particular industry in which an employee worked. For example, in *Federal Savings and Loan Insurance Corp.*, the Deputy Secretary observed that:

The Administrator's reliance on the BLS cross-industry data was correct under MOSCA and the regulations. Neither the statute nor the regulations restricts the employment data base of the wage survey to classifications within a single industry. Rather, they refer to various occupational classes of employees (who may work in a number of industries) in a locality.

87-SCA-WD-4 (Sept. 28, 1990) , slip op. at 11; *accord General Services Administration, Region 6, Case No. 86-SCA-WD-12* (Jan. 27, 1988). Consistent with this approach, the Board of Service Contract Appeals expressed strong skepticism in rejecting a wage determination sharing some conceptual similarities to the one before us in this case, with the

Administrator proposing to set prevailing fringe benefit rates by using data geared to the fringe benefits paid by small employers, rather than all-employer fringe benefit data. *Service Employees Int'l Union, AFL-CIO, CLC (SEIU II)*, BSCA Case No. 93-08 (Sept. 23, 1993).

With the notable exception of the *SEIU I* and *II* cases (involving the SCA national fringe benefit rates applicable to most job classifications, rather than wage rates applicable to a single classification), the Administrator repeatedly has urged this Board and its predecessors to reject wage data that focus on a single industry, in favor of using cross-industry data such as the BLS wage surveys.^{21/} In each instance, this Board has accepted the Administrator's position that using all-industry data is more consistent with the requirements of the Act. In *Federal Savings and Loan Insurance Corp.*, *supra*, the Deputy Secretary even quoted the Administrator: "[P]atently, the overall occupational classification of service employees is more significant in the determination of prevailing duties and comparable local wages than the industry in which the services are performed." *Id.* at 12, quoting Administrator's Response brief at 11 (emphasis provided by the Administrator). *See also Dep't of the Air Force SAF/AQCR Eastern Regional Office*, slip op. at 14; *Dep't of the Army*, slip op. at 19; *General Services Administration, Region 6*, *supra*.

The Administrator cannot have it both ways, arguing one day that the SCA requires the Board to consider only cross-industry or all-employer data, then reversing course without a sound explanation and issuing wage determinations that pick and choose among data and methodologies based on which employers are most likely to bid on a procurement. While the Administrator has very broad discretion to fashion prevailing wage determinations, that discretion must be exercised with some measure of consistency; otherwise, the entire process risks being labeled arbitrary and result-driven. When an agency interprets a statute or regulation inconsistently, without offering a sound rationale for its shift in approach, the agency inevitably will receive less deference by a reviewing body. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 689 (1991) ("As a general matter . . . the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *Molycorp, Inc. v. U.S. Environmental Protection Agency*, 197 F.3d 543, 546 n.1 (D.C. Cir. 1999) ("To be sure . . . if an agency took a position in an enforcement proceeding in district court that was clearly inconsistent with a prior enforcement policy statement, we would not be surprised if a district court's reaction would be

^{21/} In fact, the Administrator makes precisely this argument in the present case when countering the industry parties' argument that the wage determination should be based solely on data from the air cargo industry. *See Admin. Stmt.* at 21-22. It is difficult to reconcile this argument with the rationale advanced in support of the Administrator's December 1996 wage determination, which "takes into consideration that the flight crews of some major carriers (UPS and Federal Express) perform the same type of services that are performed by flight crews under the Postal Service contracts." *Id.* at 16. This latter statement plainly is directed toward the nature of the *employer's business* (*i.e.*, delivering mail or other cargo), rather than the services provided by the employees – flying multi-engine jet aircraft.

unfavorable.”); *Batanic v. Immigration and Naturalization Service*, 12 F.3d 662, 666 (7th Cir. 1993) (no deference given when agency offers inconsistent interpretations of statute).

We reject the methodology underlying the captain and first officer wage determination rates in the Administrator’s December 1996 final decision letter, because the methodology is an unreasonable departure from the long-standing view of the Administrator, this Board and earlier designees of the Secretary that the SCA’s prevailing wage requirement must focus on the work performed by employees, *regardless* of the nature of their employer’s industry. Because we reject this methodology, we therefore remand this matter to the Administrator to issue a new wage determination based upon cross-industry data.

We note that on remand the Administrator still exercises very substantial discretion when determining the prevailing wage rate for captains and first officers, based on the data that are before him. All that we hold in this section is that the Administrator’s wage determination cannot be based on a methodology contrived to favor wage rates paid by one section of the aviation industry over rates paid by another.

D. Other arguments and matters raised in the wage determination challenge.

The Board is mindful of the very long time that this case has been pending before different levels of the Department, and the need to reach a final, acceptable conclusion to this wage determination dispute. In an effort to promote a speedy resolution to this matter, we evaluate several subsidiary issues that have been presented by the parties.

1. *The number of hours worked by ANET and WNET pilots may be considered by the Administrator when issuing a revised wage determination.*

One of the strongest concerns expressed by the industry parties has to do with the number of hours worked by pilots on the ANET and WNET contracts compared with many of the pilots at major airlines, particularly the passenger carriers:

The average number of hours flown per month by pilots under the ANET-93-01 contract is 55 hours. Basically, it is a four-hour nighttime cargo operation. Pilots do not have extended layovers and may return home after their night’s work. The average number of hours flown per month by major carriers is higher than for regional and national carriers. According to Future Aviation Professionals of America (FAPA) data, the guaranteed minimum number of hours per month for pilots of [one] major integrated carrier, UPS, is 75.

USPS Pet. at 17-18 (citations omitted). Capt. Winters disputes this representation in papers that were filed after oral argument.

If the industry parties' claim of reduced work hours for pilots on the ANET and WNET contracts is accurate, this information might be considered by the Administrator on remand. The Service Contract Act mandates the payment of prevailing wages for work actually performed, not a windfall payment for workers whose jobs require less-than-normal work time, yet who are paid a monthly salary at a prevailing rate based on survey data observations that include employees who work much longer hours.^{22/}

On this score, the Administrator appears to be hampered by the format of the 1995 BLS wage survey data, which reports monthly salaries for captains and first officers without any break-out of the numbers of hours actually worked. This stands in contrast to the 1989 BLS survey, which reported captain and first officer salaries based on "bands" of work hours (70-75 hrs./month, 75-80 hrs./month, etc.). In the future, the type of data tabulation produced by BLS in 1989 might offer a useful tool for resolving this hours-of-work problem.

In the absence of this type of hours-of-work break-out, if the Administrator determines that pilots on the ANET and WNET contracts *in fact* work fewer hours than most of their counterparts in the airline industry, the Administrator would be free to consider issuing wage determination rates based on the 1995 BLS all-carrier data for captains and first officers, but discounted to reflect the reduced work hours. In this regard, we note that the captain and first officer wage rates in WD-0229 (Rev. 1), based on the "low end of the middle range" (25th percentile) for all carriers, could be viewed as a reasonable (if imperfect) proxy for the reduced hours allegedly worked by the ANET and WNET pilots.

2. *The universe of airline carriers that typically bids on USPS air cargo contracts is irrelevant to setting prevailing wages.*

As discussed above, the industry parties make much of the fact that although all certificated air carriers are eligible to bid on the Postal Service air cargo contracts (including the major air carriers such as the passenger airlines, UPS and FedEx), experience shows that only national and regional air carriers participate in the Postal Service operation. They advance this argument in support of their claim that wage rates should be based only on a survey of wages paid by the air cargo industry.

This argument is unpersuasive and, in our view, circular. The fact that the high-wage major carriers do not bid on Postal Service work begs the question, "Why?" The industry parties apparently assume that the large carriers have no interest in this work, but it is entirely

^{22/} Ordinarily, the Wage and Hour Division issues wage determinations based on hourly wage rates, thereby avoiding precisely this problem. At oral argument, the parties advised the Board that the work of captains and first officers involves not only flight time, but also a variety of duties before and after flight; as a consequence, the Board was advised that the Administrator's monthly salary approach is more appropriate for airline pilots. We note, however, that collective bargaining agreements between ALPA and some major passenger carriers appear to use hourly wage rates for pilots. See AR97-Supp Tab H, attachments.

possible that they are uninterested because they cannot compete at the wage levels that have been set by the Administrator on these contracts since the early 1990s. This is yet another reason why wage determinations based on a narrow subdivision of an industry should be disfavored.

3. *The alleged greater efficiency of UPS and FedEx that results from using larger aircraft is irrelevant.*

The Administrator focused on the presence of UPS and FedEx among the roster of major carriers in his rationale for including major carrier wage data in his methodology. In response, the industry parties argue that the comparison is unfair because UPS and FedEx use larger, wide-body aircraft than the Postal Service's contractors, and therefore are more efficient (*i.e.*, UPS and FedEx pilots can be paid higher wages because each airplane hauls more cargo). In the view of the industry parties, this is further justification for excluding major carrier data.

We disagree. The goal of the Service Contract Act is to insure that service workers on federal contracts are paid no less than the prevailing wage. By setting wage floors, the statute plainly anticipates that federal contracts will gravitate toward those contractors that are able to perform the required work most efficiently, whether through the contractor's superior managerial skill or capital investments that improve the productivity of labor. To be sure, the Postal Service's air cargo contracts are not typical SCA service procurements; still, we see no merit to the plea that captain and first officer wage rates on Postal Service contracts should be kept low compared to rates paid in the overall aviation industry (*i.e.*, the all-carrier wage data) merely because other employers are more efficient than the Postal Service's vendors.^{23/}

4. *The argument that higher wage determination rates on the ANET and WNET contracts will prove disruptive of the contractors' labor relations is outside the scope of this SCA proceeding.*

Several of the Postal Service's air carriers note in their submissions to the Administrator and their briefs to this Board that the existing wage determination rates already are higher than the wage rates that they normally pay to their pilots flying on non-federal contracts, and that the "high" SCA wage rates create significant labor relations problems for them because they must pay workers on multiple wage tiers. *See, e.g.*, AR97 Tab B Exh. 12 (Affidavit of K. Good).

^{23/} Although the *greater efficiencies* relating to the type of equipment used cannot serve as a justification for lower wage rates, there is always the possibility that employees who use advanced equipment may occupy a *different job classification*. This is a question of fact that is not before us in this case; however, based on collective bargaining agreements in the record, it appears that the marketplace routinely assigns relatively greater value to pilots who fly larger aircraft. *See, e.g.*, AR97 Tab B Exh. 9; AR97 Tab D; AR97-Supp Tab H, Declaration of Jerold Glass (with attachments).

Under the SCA, the Secretary is required to determine prevailing wage rates. It is not at all surprising that the prevailing wage rate for any given job classification might be *higher* than some vendors might ordinarily pay their employees on non-federal work, just as the prevailing wage rate may, for other vendors, be *lower* than their customary pay scale. Although we recognize the difficulty that this might pose for the employer, it is beyond the scope of the Labor Department's concern in this case. There are a variety of options available to the business community to address this dilemma, and we are confident that resourceful employers in the aviation industry will find appropriate means for addressing such problems as they arise.

Similarly, contrary to the argument raised by some of the parties, the Administrator is under no obligation to issue wage determinations that reflect entry-level wage rates for an occupation. While it is true that the Wage and Hour Division sometimes has subdivided an occupational classification into multiple levels of skill and responsibility, reflecting the differing tasks that are performed as workers mature into journeyman status (*see, e.g., Raytheon Systems Co., ARB Case No. 98-157 (Apr. 26, 2000)*), there is nothing in the Service Contract Act supporting the notion that the prevailing wage should be geared to entry-level wages; to the contrary, the entire concept of *prevailing* wage rates requires that such rates should be the result of an analysis of wages paid to *all* employees in a given job classification, regardless of seniority or tenure.

VII. CONCLUSION

Based upon the record before us, we find that airline captains and first officers are not learned professionals within the terms of the Secretary's Part 541 exemption regulations. Therefore, we affirm the Administrator's determination that pilots are "service employees" covered by the SCA under the statutory definition found at 41 U.S.C.A. §357(b). We deny the Postal Service, airline industry and Air Force petitions for review on this issue.

With regard to the wage rates for the pilot and first officer classifications found in the Administrator's decision letter of December 13, 1996, we conclude that the Administrator's methodology and the resulting wage determination rates are contrary to the statute and inconsistent with the decisional law of this Board and its predecessors. To the extent that the various petitions for review seek rescission of the December 1996 wage rates, they are granted and this matter is remanded to the Administrator to issue new wage determination rates for captains and first officers in accordance with this decision.

The petition of Capt. Hal Winters specifically has urged the Board to reinstate the wage rates found in the pre-December 1996 wage determination, WD-95-0029 (Rev. 1). However, these wage rates *de facto* were withdrawn by the Administrator. They do not represent a "final decision of the Administrator" (29 C.F.R. §8.2(b)), and therefore are not before us. Although we disagree with the *rationale* that was advanced by the Administrator in support of WD-95-0029 (Rev. 1), if the Administrator determines that pilots and first officers on these procurements routinely work significantly fewer hours than their counterparts at most other

air carriers, he may conclude that wage rates such as these (based on all-industry data, but discounted) would be a reasonable approximation of prevailing rates for the ANET and WNET contracts, in light of the record before him.

In remanding to the Administrator to issue a new wage determination, we emphasize that we do not direct the Administrator to conduct any new surveys in order to issue a new wage determination for the Postal Service contracts; indeed, given the protracted length of this proceeding, conducting a new survey arguably would work an unnecessary hardship on the workers and the Postal Service contractors by adding further delay. The Administrator is encouraged to issue a new wage determination based upon the ample material already in the record, as well as any other material that the Administrator may find useful.

The Administrator is urged to issue a new wage determination expeditiously, consistent with this Decision. The Administrator is further **ORDERED** to submit a report to this Board on the status of this matter every thirty days.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member