U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 17May2001

CASE NO. **1999-DBA-20**

IN THE MATTER OF:
Disputes concerning the the
payment of prevailing wage rates and proper classification by:

ABHE & SVOBODA, INC.
General Contractor, Contractor,
and
JEWELL PAINTING, INC.
Subcontractor,
and
EDT CONSTRUCTION, INC.
Subcontractor
and

Proposed debarment for labor standards violations by:

JEWELL PAINTING, INC.

CASE NO. **1999-DBA-27**

IN THE MATTER OF:
Disputes concerning the

payment of prevailing wage rates and proper classification by:

ABHE & SVOBODA, INC.
General Contractor,

and
APPLIED COATINGS, INC.
Subcontractor,
and
BLAST ALL, INC.
Subcontractor

CASE NO. **1999-DBA-26**

IN THE MATTER OF:
Disputes concerning

payment of prevailing wage rates and proper classification by:

ABHE & SVOBODA, INC.
General

and
BLAST ALL, INC.
Subcontracor

CASE NO. **1999-DBA-25**

IN THE MATTER OF:
Disputes concerning the the
payment of prevailing wage rates and proper classification by:

SIPCO SERVICES & MARINE INC
General Contractor,
and
BLAST ALL, INC.
Subcontractor,
and
BLAST ALL, INC.
Subcontractor

CASE NO. **1999-DBA-23**

IN THE MATTER OF:
Disputes concerning the

payment of prevailing wage rates and proper classification by:

SIPCO SERVICES & MARINE INC
General Contractor,
and
A. LAUGENI & SON, INC.
Subcontractor,
and
BLAST ALL, INC.
Subcontractor

CASE NO. **1999-DBA-22**

IN THE MATTER OF:
Disputes concerning

payment of prevailing wage rates and proper classification by:

SIPCO SERVICES & MARINE INC
General Contractor,
and
L.G. DEFELICE, INC.
Subcontracor
and
BLAST ALL, INC.
Subcontractor

CASE NO. **1999-DBA-24**

IN THE MATTER OF:
Disputes concerning the
payment of prevailing wage rates and proper classification by:

GEORGE CAMPBELL PAINTING CORP.
General Contractor,

and
E. DASKAL CORP.
Subcontractor,

CASE NO. **1999-DBA-21**

IN THE MATTER OF:
Disputes concerning the
payment of prevailing wage rates and proper classification by:

SHIPSVIEW CORP.
General Contractor,

and
Proposed Debarment for labor standards violations by:

APPEARANCES:

John S. Casler, Esq.
Deputy Regional Solicitor

Paul Katz, Esq.
Senior Trial Attorney

Gail E. Glick, Esq.
Kelly Lawson, Esq.
Trial Attorneys
For the Complainant

Paul M. Lusky, Esq.
For Abhe & Svoboda
For Blast All, Inc.

Constantine Antipas, Esq.
For Jewell Painting, Inc.

Jane I. Milas, Esq.
For George Campbell Painting Corp.
and E. Daskal Corp.

Christos Deligiannidis (**Pro Se**)
For Shipsview Corp.

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER

SUMMARY

At issue in these consolidated cases are wages paid by the Respondents for work performed pursuant to contract specifications issued by the Department of Transportation, State of Connecticut ("CT-DOT") in the early nineteen-nineties. The contracts called for the cleaning and painting of various bridges located throughout the state (the "Violation Projects"). Federal funds, administered under the Federal Aid Highway Acts, were involved in the financing of these projects, thus making them subject to the requirements of the Davis Bacon and Related Acts ("DBRA"), 40 U.S.C. § 276, **et seq.**, 29 C.F.R. Part 5, and the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40 U.S.C. § 327, **et seq.** With the exception of E. Daskal Corporation ("Daskal"), none of the Respondents dispute that their performance under these contracts

was subject to the DBRA. **See** Respondents' Pre-Hearing Exchanges, ALJ Exhibits 7, 13, 20, 29, 35, 37, 38, 47, 54, 55, 64. The alleged violations were discovered as part of a United States Department of Labor ("DOL") compliance investigation which began in the early Spring of 1996 and was performed by James Peckham. (("JP"), 1997).[1] The central issue was, and is, the extent to which the Respondent bridge painting contractors paid their employees in accordance with the Wage Determinations ("WDs") made a part of these contracts. In addition, debarment is sought for two of the Respondents and their owners: Jewell Painting, Inc. ("Jewell") and Cameron Jewell, and Shipsview Corporation (Shipsview) and Christos Deligiannidis.

For Respondents Abhe & Svoboda, Inc. ("Abhe"), EDT Construction, Inc. ("EDT"), Jewell, Blast All, Inc. ("BA") and Shipsview, the vast bulk of the back wage computations stem from Complainant's determination that employees performing work on these bridge painting contracts should have been paid the rate for painters set forth in the applicable WDs. The Respondents' principal defense is that their employees were not working as painters, but rather as laborers or carpenters. The fact that the WDs reflect collectively bargained rates is undisputed. It is established law under the DBRA that to determine whether or not a particular employee should have been paid the painter rate, the nature of the employee's work has to be compared against the prevailing practice among unionized bridge painters in CT. **In re Fry Brothers Corp.**, WAB Case No. 76-6, CCH Labor Law Reporter, Wages-Hours, Administrative Rulings, §31,113 (1977); **U.S. ex rel. Plumbers & Steamfitters Local Union No. 38, et al. v. C.W. Roen Construction Co.**, 183 F.3d 1088, 1093 (9th Cir. 1999). As set forth below, the prevailing practice among unionized bridge painters in CT demonstrates that the work at issue in this consolidated proceeding was painters' work and, therefore, should have been paid at the prevailing wage rate for painters.

For Respondent George Campbell Painting Corp. ("GCPC"), the issue is significantly different. Peter Morris was GCPC's Project Superintendent on CT Department of Transportation ("CT-DOT") Project No. 94-170/171 (the "Gold Star Project"). Morris' testimony shows that GCPC does not dispute that the work in question is appropriately within the jurisdiction of the painters' craft. Morris testified that "a material handler is a journeyman painter, as a blaster or painter is a journeyman painter." (Morris 9587, 9689). GCPC, however, attempts to argue that it is excused from compliance with the WDs applicable to the Gold Star Project under a "side bar" agreement negotiated with the CT painters' union. (CX 219) GCPC's argument must be rejected, as a matter of law, because agreements between a union and a contractor to pay

[1]The name or initials of an individual, followed by a page number, refers to that individual's testimony during the Hearing.

lower rates than those specified in an applicable WD are invalid as a matter of law, and I so find and conclude. **Van Den Heuvel Electric, Inc.**, WAB Case No. 91-03 (1991).

Daskal paid its employees between $9 and $12 per hour for performing work on the Gold Star Project. These rates are not in accordance with any classification in the Gold Star WD. Daskal claims that the work performed by its employees was not covered under the DBRA. (CX 219, pp. 2-4) Daskal employees, however, clearly performed the work of "laborers or mechanics" on Gold Star, and I so find and conclude.

As noted above, this consolidated action is brought by the Complainant (or "Administrator") against seven contractors for work performed on various bridge painting projects in the State of Connecticut during the time period 1994 to 1996. As also noted above, the Administrator acts under authority granted by the DBRA to ensure that laborers and mechanics on federally funded projects (in this case, contracts with the Connecticut Department of Transportation) receive prevailing wage rates as set forth in the WDs attached to and incorporated into the contract documents.

FINDINGS OF FACT

There were forty-nine days of formal hearing held herein, between January 31, 2000 and August 6, 2000, over six hundred (600) documents are contained in this record and numerous witnesses testified before me in these seven consolidated complaints. However, these cases can be reduced to one simple issue: Are these bridge-painting projects a single trade job or are they so-called multiple trade jobs? In summary, I agree with and accept the Complainant's essential thesis that the Connecticut local practice leads ineluctably to the conclusion that the painting industry treats such projects as a single trade job and that carpenters or laborers do not tend painters in performing the myriad tasks on a bridge painting project. To accept the Respondents' arguments would result in a **de facto** repeal of the DBRA and create a judicial loophole allowing an aircraft carrier to pass through.

At the outset, I note that it is not my task to judge and/or determine the propriety or legality of the DBRA. Congress passed that statute, as well as comparable wage and hour statutes, many years ago, has kept those statutes on the books and has not repealed those statutes. Thus, my own opinion on the continued viability of those statutes is absolutely irrelevant and immaterial.

With that background in mind I shall now briefly summarize the projects in question and the work performed by the seven Respondents joined herein.

I agree with the Complainant's essential thesis that the local area practice in Connecticut establishes that the work performed by employees on the so-called violation projects (for whom back wages were assessed at the painter wage rate) was within the painters' work jurisdiction, and I so find and conclude.

George Campbell Painting Corp. ("Campbell" or "GCPC") was the general contractor on CONNDOT projects 94-170 and 94-171, the Gold Star Bridge.

The Gold Star bridges are located in New London County. The bridges cross the Thames River, from New London to Groton.

The contract for the northbound project was awarded on September 25, 1992 for the rehabilitation of the northbound Gold Star Bridge. Gold Star northbound is 5931 feet long. The contract value, as quoted in the Schedule of Prices, was $25,260,884.00. Abrasive blast cleaning and field painting, lead health and safety, and containment and collection of surface preparation debris comprised $17,700,000.00 of the total contract value. The remaining contract value of $7,560,884.00 consisted primarily of roadwork items required pursuant to the contract. As general contractor Campbell was responsible for all the work required under the contract.

The contract for the southbound project was awarded on October 19, 1992. The southbound bridge is 6362 feet long. The contract value, as quoted in the Schedule of Prices, was $23,400,000.00. Abrasive blast cleaning and field painting, lead health and safety, and containment and collection of surface preparation debris comprised $17,000,000.00 of the total contract value. The remaining contract value of $6,400,000.00 consisted primarily of roadwork items required pursuant to the contract. As general contractor Campbell was responsible for all work required under the contract.

The Gold Star project was the first bridge project in Connecticut to incorporate new lead health and safety regulations relating to the containment and collection of the debris resulting from the abrasive blast cleaning process.

Prior to Gold Star, CT-DOT did not require stringent collection of debris or monitor the collection process.

In the 1970's painting contractors simply brought ladders, cables and planks for access, and buckets of paint and painted. Very little blasting work was done. No containment was required. No cleaning work was required.

During the 1980s the State of Connecticut required blasting of the steel prior to painting and went to 75% containment involving a mesh type screen that hung from the bridge. There was very

little monitoring by the State. Then the regulations changed and the State required 100% containment.

The Respondents challenge the Limited Area Practice Survey ("LAPS") utilized by the Complainant to support its position that the bridge painting projects involved herein are single trade jobs and, **a fortiori**, the tasks cannot be the subject of a division of labor. Noteworthy is the thesis of counsel for Abhe and Blast All (BA) that the LAPS, as performed the Complainant, is fatally flawed and defective and cannot be used to modify retroactively previously issued WDs to eliminate classifications of labor for use on the applicable projects, especially as the Complainant is selectively enforcing the DBRA while ignoring the business practices of "some contractors who were violating the Davis-Bacon Act." (RX at 3)

Initially, I note that well-settled maxim of law, **i.e.**, **ignorantia legis non excusat**, is no defense in this administrative proceeding.

Counsel for Jewell submits that Respondents "are faced with the specter of true bureaucracy in its very literal sense: arbitrary rule by functionaries. This is not an area of science in which Mr. Peckham has uncovered some universal truth, a submission to which is inconvenient, but unavoidable. No, this is nothing more than an attempt to take an internal, confidential document, give it the force of law, then retroactively apply it."

Counsel for GCPC submits that the LAPS is not authorized in the present matter by any federal statute or regulation and is legally insufficient as not complying with the requirements of the Field Operations Handbook codified at §15f05, especially as the collective bargaining agreement (CBA) between the CCIA and the Connecticut Labors Union, effective April 1, 1991 through March 31, 1993, covers the work performed by employees of GCPC and Daskal and as the National Bridge and Tunnel Agreement (NBTA) authorizes payment of cleanup work by support personnel at less than the journeyman painters' rates required by the WDs. (**Id.** at 29-39)

I agree with Complainant that the LAPS was properly performed, that it is, in fact, authorized herein, that it legally satisfied Complainant's essential thesis that bridge-painting work is a single trade job, notwithstanding the many tasks involved in setting up the bridge for painting, gaining access to the site, preparing the surfaces for painting and then doing the actual painting. Case precedents cited by the Respondents are clearly distinguishable as relating, **inter alia**, to highway projects such as road reconstruction or construction or road resurfacing, projects that, in my judgment, are clearly multi-trade jobs. Such projects are clearly not similar to these being challenged by the Complainant herein.

Respondents, as experienced business people for many years,

clearly knew their obligations under the DBRA and under the contract specifications and under the schedule of prices, submitted their bids accordingly and took their chances in escaping detection. Moreover, that there may be other contractors violating the DBRA or other wage-hour laws likewise is no defense as this Court has no control over that aspect and as this Court has jurisdiction only over those cases in which a formal complaint is issued and the complaint is then referred to the Office of Administrative Law Judges, if the parties cannot voluntarily resolve the matter. Furthermore, complaints sometimes are issued against a firm or firms because of their potential deterrent value.

The Wage Appeals Board's 1977 decision in the **Fry Brothers** case is dispositive of ninety percent of the disputes in this proceeding. The Respondent in **Fry Brothers** claimed it appropriately classified, and paid, certain employees as laborers rather than carpenters. **Fry Brothers**, p. 6. The Board, in rejecting Respondent's argument, held that the case was "a classical case of misclassification of the work of employees covered by the Act." **Id.** at Holding No. 2. The Board, after establishing that the WDs reflected union rates, and finding that the disputed work belonged exclusively to the carpenters pursuant to local practice and the applicable collectively bargained agreements, upheld the Secretary's determination that Respondent's employees were misclassified and paid improperly. **Fry Brothers,** Holding Nos. 2, 5, 6, 8.

The critical issue in both **Fry Brothers** and this proceeding is the relationship of collectively bargained rates to their accompanying practices. Over twenty years ago, **Fry Brothers** conclusively decided that issue against Respondents. **See also Plumbers & Steamfitters,** 183 F.3d at 1092-93 (holding, after stating that the **Fry Brothers** test was "eminently reasonable," that "where the Department [of Labor] determines that the prevailing wage rate for an area derives from a collectively bargaining [sic] agreement, then the job classifications for that area must also be derived from that agreement.")

The continuing validity of the principles of law articulated in **Fry Brothers** is further illustrated by the Administrative Review Board's decision in **In the Matter of Johnson-Massman, Inc., Contractor**, ARB Case No. 96-02, 1996 WL 566043 (September 27, 1996). In **Johnson-Massman**, the Board held that, where circumstances like those present in this proceeding exist, disputed work should be paid at the prevailing rate for the trade which claims that work. **Johnson-Massman**, 1996 WL 566043 at *3. The Respondent in **Johnson-Massman** claimed that there was a "jurisdictional dispute" between the laborers and ironworkers unions and that it was justified in paying three employees the prevailing wage for laborers, rather than ironworkers, because the work they had performed fell within the "jurisdictional dispute." **Id.** at *2. The Administrative Review Board held that the issue had

to be decided based "upon the appropriate area practice for the disputed work." **Id.** The Board, after finding that the "substantial uncontroverted evidence of record support[ed] the conclusion" that the work at issue was claimed by the ironworkers' union, and had not been claimed by the laborers' union, concluded that the work should have been paid at the prevailing wage for ironworkers. **Id.** at 3.

The work at issue in this proceeding should have been paid at the prevailing wage for painters because (i) the prevailing wage rates were derived from union agreements; (ii) there is agreement among the CT painters', CT laborers' and CT carpenters' unions, as well as among union contractors performing work in CT, that the work at issue belongs to the painters; and (iii) the CT local area practice was to pay the painter wage rate for the disputed work.

A. The Applicable Wage Determinations Are Based On Union Rates

The wage rates set forth in the respective WDs are beyond dispute collectively bargained rates. (JP 2137, 2142, 2758-59, 2840, 2883-84). The rates for bridge painting are collectively bargained under the CT Statewide Bridge Agreement. (JP 2027-29; Murray 6030-31, 6038-39; Cieri 6347-55; CX 142-145.) This was established through the testimony of Wage and Hour Investigator Peckham and was never challenged by any Respondent witness during the course of this proceeding. It is axiomatic under the DBRA that when a federal WD is based upon collectively bargained rates, the DOL has the obligation to see to it "that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based." **Fry Brothers**, Holding No. 6.

B. The CT Unions, And Union Contractors Performing Bridge Painting Work In CT, All Agree That The Work At Issue Was Within The Painters' Jurisdiction

Among all the fact, non-party witnesses who testified at trial, there was no dispute whatsoever as to the work practices prevailing with the unionized sector of the CT bridge painting industry. Complainant presented the testimony of numerous painting company executives, painting union officials and long-term CT bridge painters. They were unanimously in accord that in CT the prevailing practice is that unionized bridge painting companies pay the appropriate craft rate not only for operating a paint or blasting gun, but also for all of the related work associated with mobilizing the material and work force, performing and cleaning up the bridge painting operation. This includes the totality of work processes which are, in the phraseology of Peckham, required to transform a rusty bridge into a newly painted bridge. (JP 4158)

As set forth below, Peckham's testimony and his investigative

findings were conclusively supported at trial by the testimony of Ken Murray, Business Representative and Business Manager of District Council 11, International Union of Painters and Allied Trades (IUPAT), and by the testimony of Dominic Cieri, also a Business Representative with District Council 11. District Council 11 is the IUPAT component with jurisdiction over all of CT, and thus all of the projects at issue in this case.

As detailed below, Peckham's testimony was also confirmed by that of Leonard Granell, Field Representative for Laborers Local Union 230, and by that of Robert Loubier, who was, during the relevant period, a Council Representative to the New England Regional Council of Carpenters. Additionally, Peckham's investigative findings were further confirmed by Frank White, a union official called by Respondents. White was the Business Manager, Financial Secretary and Treasurer of Laborers' Local 547, located in Groton, CT. White had been affiliated with Local 547 for 43 years and held various positions, including President, during his tenure with Local 547. (White 9799) White testified that the work on the Gold Star Project was within the jurisdiction of the painters, that his members do not work on unionized bridge painting jobs, and that union laborers do not even like working on bridges due to the height and the lead paint exposure. (White 9813, 9822-23, 9829)

Lou Shuman, during the relevant time period, was the Assistant to the President and Director of Labor Relations, Connecticut Construction Industries ("CCIA"), and served as the contractors' representative to collective bargaining negotiations with various trade unions. Shuman concurred in Peckham's investigative findings as to area practice based on his own expertise, as well as his consultations with executives of CT construction contractors experienced in bridge projects. (Shuman 7340-7361) Peckham's conclusions were further supported at trial by the testimony of three executives of A. Laugeni & Son, Inc. ("Laugeni"), Connecticut's largest unionized painting contractor, and by the testimony of Gene Wambolt, a ten-year employee and four-year supervisor for Michael J. Gresh Painting Co. ("Gresh"), a smaller unionized CT painting contractor. (Thomas M. Laugeni 7452-7641; Greg A. Laugeni 10313-82; Thomas G. Laugeni ("T. Laugeni Depo."), CX 209; Gene Wambolt 8880-9017)

In contrast to this overwhelming testimony, not a single fact witness testified that the disputed work at issue was within the jurisdiction of any CT union other than the painters. Despite a vigorous defense mounted by the seven attorneys from four separate law firms, no fact witness testified that within CT any of this work, as a matter of collectively bargained practice, was claimed by either the laborers' union or the carpenters' union. No CT union official was brought forth to testify that any union other than the painters claimed this work. Gregory Campbell, the President of GCPC, in fact conceded that he knew of no

jurisdictional disputes between CT painters and CT laborers or between CT painters and CT carpenters. (Campbell 9375) No CT employee testified that he had performed the disputed work under any collectively bargained agreement other than the CT Painters Statewide Bridge Agreement. As Mr. Granell of the Laborers Union summed it up, "[t]here are no gray areas." (Granell 7098) There can be no doubt that, under unionized Ct bridge painting practice, the work on the Violation Projects for which back wages were calculated is within the jurisdiction of the painters, and I so find and conclude.

C. CT Area Practice Was Consistent With The Jurisdictional Agreement Between The CT Painters, Laborers And Carpenters

The agreement among the unions, and among union contractors, is further illustrated by examining the pay practices on bridge painting projects in CT task by task. Complainant presented overwhelming testimony that on jobs where union workers were utilized, the prevailing Ct practice was to employ painters at the painter rate for rigging. (Murray 6032, 6234; Cieri 6361-62; Granell 7097, 7104; Loubier 7241; T. Laugeni 7461, 7467, 7496, 7501, 7511; JP 2027; Wambolt 8915; Campbell 9360-66) Numerous bridge painting employees, including Darrell Cecil, Kenneth Rowland, Justin Tetreault and Mark Verity testified that the term "rigging" includes assembling, moving and disassembling all cables, platforms and containments. (Cecil 1631; Verity 221; Rowland 831; Tetreault 1954-65) The fact that rigging includes all work related to assembling, moving and disassembling containments used on the Violation Projects was also confirmed by the testimony of Thomas G. Laugeni, Sr., Ken Murray and Dominick Cieri. (T. Laugen Depo., CX 209, p. 67; Murray 6039-40; Cieri 6361-62; CX 146)

The union practice in CT was to pay the painter rate to employees for performing all rigging work, including assembling, moving and disassembling containments, on bridge painting projects. (Granell 7104-05; Loubier 7223, 7232, 7234, 7288-89; T. Laugeni 7461, 7467, 7496, 7501, 7511, 7524, 7531, 7542; Wambolt 8895-98, 8915, 8930, 8933, 9009; Campbell 9360-66, 9396, 9402; Morris 9663-68, 9675-76; G. Laugeni 10326-28) Likewise the prevailing practice within the unionized sector was to pay the painter rate for grit collection and traffic control. (Murray 6098-99, 6265; Cieri 6504; Granell 7105, 7108, 7113; T. Laugeni 7461-62, 7467, 7479-80, 7501-04, 7511, 7525, 7531-32, 7557; Wambolt 8901, 8920-21, 8933, 8937; Campbell 9360-66; G. Laugeni 10328; JP 4284)

The detailed testimony of union bridge painters who had worked in the trade for years provides further confirmation of the fact that it was the prevailing practice to use union painters, paid at the painter prevailing rate, for all the tasks at issue in this proceeding. Robert Mennard was a veteran bridge painter of 25-30 years when he started working for GCPC as a union bridge painter on

the Gold Star Project. (Mennard 95) Among the other union bridge painting companies for whom he had worked were Dynamic Painting Corp. ("Dynamic") and Laugeni where, in addition to blasting and painting, his work duties included rigging, cleaning up sand, cleaning up grit and steel shot, and scraping old paint. Mr. Mennard was always paid the painter rate for all of his work tasks. (Mennard 97-114) He continued to be paid the painter rate when he became employed by GCPC as a union painter on the Gold Star Project. There, as a union painter, he performed the full range of tasks at issue including but not limited to: blasting, cleaning steel grit with brooms, and building and moving containments. He was paid the painter rate for all of this work. (Mennard 115-42) As a union painter on Gold Star, he was not paid a lower carpenter rate for the hours he spent assembling, moving and tearing down containments. (Mennard 134) Nor did he expect to be, since bridge painters, as he testified, have always put up anything on which they stand. (Mennard 134) As a union painter working for GCPC, he was not paid a laborer rate for the time he spent cleaning grit, even though this comprised almost two hours per shift. (Mennard 122). As a union painter on Gold Star, his rate was also not lowered for the hours he spent showering. (Mennard 144)

Mark Verity had also worked many years, prior to his employment on the Gold Star Project, as a bridge painter in CT rigging pick boards, cables, blasting lines, moving rigging and blasting equipment, and sweeping sand. Mr. Verity had always been paid the painter prevailing rate for that work. (Verity 185-96) From the time he started working for GCPC on the Gold Star Project in early 1993, he was primarily doing rigging, including setting up the Beeche platform. (Verity 196-98). For this, he used tools such as air ratchets, impact guns, wrenches, pliers and hammers, "a lot of basic hand tools and air tools." (Verity 198). These were clearly the tools of his trade as a union painter doing rigging work. Verity also used wrenches and ratchets to enclose platforms with tarps and used saws and screw guns to build and repair hundreds of wooden bulkheads. (Verity 203-05) These, too, were clearly tools of his trade. In addition, Verity moved containments, working as a team with co-workers, using chains as well as wrenches, clamps, and hammers. (Verity 224-30). For this work his employer, a signatory to the Statewide Bridge Agreement, always paid him the painter rate. (Verity 205, 208, 229-30). As a union painter on Gold Star, Verity was paid the painter rate when he performed traffic control, when he swept and shoveled grit (both before and after the advent of "material handlers"), and when he showered. (Verity 242, 324-25)

The fact that Mennard and Verity were paid the painter rate for their shower time on the Gold Star Project was consistent with the prevailing practice among union contractors in CT to pay for shower time at the prevailing wage rate for painters. By way of brief background, in early 1993, the CCIA and the CT-DOT entered into negotiations concerning payment of shower time. (Campbell

9265-66) As a result of those negotiations, the State agreed to reimburse Campbell one hour per day for decontamination, including shower time. (Campbell 9264-67) The CT-DOT further agreed to reimburse this time at the rate at which Campbell was actually paying the employee plus a mark-up. (Campbell 9267) Accordingly, when GCPC paid employees the painter rate for shower time, they were reimbursed at that rate by the CT-DOT. (Campbell Depo., CX 213, Exh. 13.)

Both Laugeni and Gresh also paid their employees the painter rate for shower time. (T. Laugeni 7560-61, 7564-65; Wambolt 8902, 8922) Given the work done by painters on bridge painting projects in CT, the decision by union contractors to pay shower time at the painter rate is the only logical pay practice. Put another way, when an employee becomes contaminated with lead paint residue as a result of his bridge painting duties, there is no legal (or logical) reason for not compensating that employee for the time spent washing off the residue at the same wage rate as he was paid for the time spent performing the tasks that generated that residue, and I so find and conclude.

The foregoing evidence shows that work performed by union painters on bridge painting projects in CT covers a spectrum of activities. As Blast All employee Harvey Strausser stated, "in our union jobs all jobs are paint related in the blasting and painting operation." (Strausser 686) Strausser's opinion was shared by Gresh, as evidenced by Gene Wambolt's testimony that, as a union bridge painting contractor operating in CT, Gresh always paid him "[t]he same rate of pay, prevailing wage of the day, from the time we got there to the time we went home." (Wambolt 8922)

Even Gregory Campbell agreed that, with respect to "single trade" bridge painting projects, the CT painters' union claims jurisdiction over traffic control, grit collection, set-up work, and any containment work related to blasting and painting. (Campbell 9364-65) There is no dispute that, on "multi-trade" bridge construction or rehabilitation projects, bridge painters will sometimes work from platforms originally built for the work of another trade, rather than tear the platform down and build another.[2] There is likewise agreement that on such multi-trade jobs laborers will, in certain situations, be used to perform traffic control. (Murray 6242; Cieri 6503; Loubier 7219-20; Granell 7104-05; T. Laugeni 7499, 7500, 7526, 7542; Wambolt 8895-96) However, but for those limited exceptions, out of 10,609 pages of transcript there is not a single line of testimony that, on both

[2]Of all the Violation Projects, the only ones which can be characterized, during the investigative periods, as "multi-trade" in nature for craft jurisdictional purposes are the DeFelice/Blast All project (CT-DOT No. 83-219) and the SIPCO/Blast All project (CT-DOT No. 151-246/247). (JP 3678; **see also** Loubier 7289).

single and multi-trade projects, the work processes involved in getting from a rusty bridge to a clean, newly painted bridge are within the jurisdictional claim of any unionized craft other than the painters.

D. The Department's Limited Area Practice Survey Shows That The Employees On The Violation Projects (For Whom Back Wages Were Assessed At The Painter Wage Rate) Performed Work Within the Painters' Work Jurisdiction

The Wage Appeals Board has previously held that:

> When the Department of Labor determines that the prevailing wage for a craft derives from experience under negotiated agreements, the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based.

Fry Brothers, Holding No. 6.

Mr. Peckham, in response to finding what were perceived as widespread misclassifications of work on several bridge painting projects throughout CT, conducted, at the direction of his supervisors, a Limited Area Practice Survey (LAPS) during June of 1996. (JP 2110, 2115). Mr. Peckham was directed to perform this survey by Assistant District Director Kenneth Jackson of the Hartford Wage and Hour Office. While Mr. Peckham had never before performed this extensive a Limited Area Practice Survey, he regularly consulted with senior Wage and Hour personnel. These included his District Director, Dianne Miller, who had been the Regional Wage Specialist for five years, and Bill Pickett, the Regional Wage Specialist at the time this survey was done. (JP 2758, 3019, 4196-98, 4270) He also consulted with various DOL Wage and Hour National Office personnel who specialize in government contracts. (JP 2351, 2758, 5269-72) Mr. Peckham performed this survey in accordance with the procedures outlined in the Wage and Hour Field Operations Handbook (FOH) at Chapter 15f05(c). (JP 2107; CX 45)

In accordance with FOH Chapter 15f05(c)(1), Mr. Peckham first established that the applicable WDs on the Violation Projects contained union negotiated rates. (JP 2137, 2142, 2758-59, 2840, 2883-84). He explained that the WDs actually reference the applicable CT union local whose rates are reflected for the particular work classifications listed. For example, the classification for painting related to Bridge Construction shows in some instances as "PAIN0011," the abbreviation for District Council 11 of the International Brotherhood of Painters and Allied Trades, and in other instances as "PAIN0481," the abbreviation for one of the CT painters' union locals which negotiated agreements prior to

the formation of District Council 11. (JP 2136-43; CX 35-41, 43-44) Bill Pickett, Regional Wage Specialist, and Laima Ciguzis, a contract rates specialist with the DOL in the National Office, confirmed that the WDS, indeed, reflected union rates. (JP 2137-42)

After establishing that the WDs on the Violation Projects reflected union rates, Mr. Peckham, following FOH Chapter 15f05(c)(2), contacted representatives of the painters', carpenters', and laborers' unions -- the unions which might claim the work as within their jurisdiction -- "to determine whether the respective union[s] performed the work in question on similar projects in the county and in the period one year prior to the beginning of construction of the project[s] at issue." (CX 45).[3] In May 1996 Peckham spoke with Dominick Cieri, Business Representative of District Council 11, who informed him that painters did all the work on bridge painting projects, and that such work was covered by a separate statewide collective bargaining agreement called the CT Statewide Bridge Agreement. (JP 2027-29; Murray 6030-31, 6038-39; Cieri 6347-55; CX 142-145) Mr. Peckham, having reviewed the 1995-1997 Statewide Bridge Agreement, followed up with the painters' union and was told by Ken Murray, Business Manager of District Council 11, that the work described in the scope of work clause of the Agreement was inclusive of tasks relating to "rigging." (JP 2039; Murray 6134-36, 6138).[4]

In June 1996, Mr. Peckham contacted Leonard Granell, Field Representative for Laborers Local 230 in Hartford, CT. Mr. Granell told Peckham that union laborers neither performed work nor tended painters on bridge painting projects in the state; he also

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[3]Because the WDs reflected union rates, it was only necessary for Peckham to discover how union contractors divided up the work; the practice among nonunion contractors was irrelevant for determining area practice. (JP 2159; 2567, 4130, 5773-77). **Fry Brothers**, Holding No. 6.

[4] Although the term "rigging" did not appear in the scope of work clause of the 1995-1997 Statewide Bridge Agreement, the term (i) appeared in other sections of the Agreement, (i.e., Section 9) (CX 145), (ii) was described extensively in the first Statewide Bridge Agreement, dated 1973 (T. Laugeni Depo., CX 209, pp. 51-55; CX 142), (iii) was identified as consistently part of bridge painters' work by a long-term CT painting contractor (T. Laugeni Depo., CX 209, pp. 23-37), and (iv) was referenced in District Council 11's contemporaneous commercial or "Working Agreements" (CX 152, 153). The addendum adding the term "rigging" to the Statewide Bridge Agreement in May, 1996 did not signal a change or an expansion of what had traditionally been understood as painters' work. (CX 209, p. 67; Cieri 6361; Murray 6101; CX 146).

confirmed the painters' jurisdictional claims regarding all work on bridge painting projects in CT. (JP 2193-95; Granell 7095-98, 7104-09, 7129, 7149-51, 7155-57)

Mr. Peckham also contacted Robert Loubier, then Council Representative with the New England Council of Carpenters and Business Agent for Carpenters Local 43 in Hartford, CT. (Loubier 7199-7201). Mr. Loubier indicated that union carpenters were not involved with bridge painting projects. (Loubier 7223-37, 7288-89) He added that painters built their own access platforms on bridge painting projects, with the possible exception of large bridge construction or rehabilitation projects where other trades, such as ironworkers and masons, were employed to repair the structural steel or rebuild the concrete roadbed, clearly a multi-trade job. In that type of situation, painters, who typically work during the final phase of rehabilitation and/or construction projects, might use an access platform previously erected by carpenters for the other trades. (JP 2196-97; Loubier 7282-84)

In addition, Mr. Peckham reviewed the jurisdictional claims recited in the laborers' and carpenters' collective bargaining agreements, and going back as far as 1987, he confirmed that there was no conflict or overlap between the jurisdictional claims of the laborers' agreements and those of the painters. (JP 2201-12; Granell 7111-16; CX 168-170) Mr. Peckham also confirmed, though at a later point, that during the 1990's there was no conflict or overlap between the jurisdictional claims of the carpenters' agreements and those of the painters. (JP 2223-35; Loubier 7213-21; CX 171-172, 216).

In May 1996, Mr. Peckham had requested from Mr. Murray of District Council 11 the identity of bridge painting projects that had been performed by union painters in the same counties and during the one year period preceding construction on the projects then under investigation. (JP 2143, 2154; Murray 6164-69) Specifically, he sought names of projects from Middlesex County, where the Arrigoni Bridge project was located, between June 1993 and June 1994; projects from New Haven County, where the Mill River project was located, between April 1993 and April 1994; and projects from Windham and New London Counties, where the Old Lyme/East Lyme and Plainfield projects were located, between June 1994 and June 1995. (JP 2145; CX 75)

By June 1996, Mr. Peckham had received from Murray and Cieri lists of bridge painting projects provided to them by four signatory painting contractors: Laugeni of West Haven, CT; Gresh of East Windsor, CT; Old Colony Bridge Corp. of New Britain, CT; and Jupiter Painting Contracting Co. Inc. of Croydon, PA. (JP 2157-59; CX 177, 181, 185-186). None of these painting contractors were signatory with the laborers' or carpenters' union. (JP 2158, CX 209, pp. 69-70). From the lists they submitted, Peckham found that they had worked on numerous bridge painting projects in CT

spanning the time period 1991 to 1995, and that they employed on them only union painters,[5] be they journeymen, foremen or apprentices.[6] (JP 2177-81, 2193; CX 209, pp. 37- 41; CX 177, 181,185-186).[7]

As the FOH recommended that confirming information be obtained from the unions with collective bargaining representatives of management, Mr. Peckham consulted Lou Shuman, the assistant to the president of CCIA, the local contractors' bargaining representative for negotiating with the bricklayers, carpenters, ironworkers, laborers, operating engineers and teamsters. (JP 2354; CX 45). Mr. Shuman confirmed Peckham's findings, stating, as the union representatives already had, that the painters correctly claimed jurisdiction over the work on bridge painting projects. (JP 2362; Shuman 7352-61; CX 190).

By mid-1996, Mr. Peckham determined that the unions were all in agreement that the work relating to bridge painting in CT was, and had always been, within the painters' jurisdiction. (JP 2265-66, 3670, 3675, 5292).[8] Where there is agreement among the

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[5] Jupiter Painting's certified payroll records revealed that a handful of its employees doing bridge painting work were erroneously labeled as "Hazardous Material Handler" or "Laborer." (CX 134b, 136). The reference to "Hazardous Material Handler," as it happens, was inapt since, according to the WDs, that classification pertains to asbestos removal. (JP 2312-14). Some of these employees were union painters from Pennsylvania painters locals who were paid Pennsylvania painter rates; others were non-union employees who were also paid incorrectly for bridge painting work in Connecticut. (JP 2311, 2861). The duties performed by the non-union employees have no bearing on area practice in Connecticut where the WDs reflect only union wage rates. **Fry Brothers**, Holding No. 6.

[6] Union Teamsters and Operators were also occasionally used by A. Laugeni & Son. (CX 177).

[7] In identifying similar projects, Peckham was under no obligation to distinguish between "heavy" bridge projects (those over navigable waterways) and "highway" projects since only one rate had been negotiated and paid to painters on bridge painting projects in CT; this single rate was reflected in both the Statewide Bridge Agreement and the federal WDs. (JP 2157; Murray 6100-01; CX 35-44; CX 143-145).

[8] Limited tasks on bridge painting projects were performed by union Operators (mechanics and maintenance engineers) and union

parties, as there was here, proper classification of work has been established in accordance with FOH Chapter 15f05(c)(2), Limited Area Practice Survey. (JP 4202, 4328; CX 45) The conclusions reached by Mr. Peckham during his investigation were fully supported at trial when these same witnesses, as well as others called by Respondents, testified without contradiction that this case does not involve any jurisdictional disputes among the CT unions or the unionized CT contractors.

In Peckham's view, and as established at trial, he had fully satisfied the requirements of his FOH in that there was unanimity within the unionized CT bridge painting community as to area practice. Out of an excess of caution, however, Peckham was asked by his supervisors to further check his conclusions. (JP 2351-54) From early 1997 thereon, Peckham, with the assistance of Investigator Nancy DiPietro, fleshed out and corroborated information he obtained on comparable or similar projects identified for each of the Violation Projects. (JP 2269, 2351-53) Their comparisons involved analyzing progress reports and "hard cards" obtained from the CT-DOT to confirm the starting and completion dates, as well as the locations, for comparable projects. (JP 2317- 47; CX 75-85, 87- 96, 191-194).[9] Peckham and DiPietro also collected and reviewed entire sets of certified payroll records (and, in some instances, payroll logs) obtained from the union painting contractors and the CT-DOT for those projects identified as comparable. (JP 2270-2317, 2347-50; CX 123-30, 132-41, 178-80, 182, 184, 187-89, 264). They found no union laborers or union carpenters listed on these payrolls. (JP 2270, 2350, 2366) Peckham and DiPietro also analyzed contract specifications to ensure that work processes used on the comparable projects were similar to the work processes used on the Violation Projects. (JP 2348; CX 10-16, 18-25, 27-34) The steps taken by Peckham and DiPietro from early 1997 onward provided further confirmation of Peckham's initial finding that the prevailing practice was to pay the disputed work at the painter rate, and I so find and conclude.

II. IT IS CONTRARY TO CT LOCAL AREA PRACTICE, AND THEREFORE VIOLATIVE OF THE DBRA, TO PAY LABORER AND CARPENTER RATES FOR THE WORK AT

Teamsters. (JP 2266)

[9]Peckham also used bridge painting projects from adjacent counties, particularly where the duration and workforce size of those projects were similar. Given that area practice for bridge painting in CT is actually statewide practice, and that the FOH makes provisions for looking at contiguous counties in some circumstances, Peckham was not restricted to the same county or one-year period . (JP 2462, 2571, 3050-52, 4127, 4942-56; CX 45)

ISSUE

> Under established principles of Davis-Bacon administration, when the wage pre-determination schedule contains only one wage rate for the carpenter classification without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of the carpenters' craft into several parts measured according to the contractor by his assessment of the degree of skill of the employee and to pay for such division of the work at less than the specified rate for the carpenters' craft.

Fry Brothers, Holding No. 2. While practices differed somewhat from Respondent to Respondent, the bulk of the back wages at stake in this litigation involve efforts to whittle away at the prevailing wages in the applicable WDs by reclassifying painters' work into subgrades and then paying employees lower wages for performing tasks which should have been paid at the painter rate. Respondents' assignments of tasks traditionally performed by union bridge painters to other lower paid employees is contrary to the principles set forth in **Fry Brothers**, and I so find and conclude.

A. Respondents Improperly Divided Painters' Work Into Lower Paid Subgrades

Respondents, in contravention of the prevailing union practice in CT, attempted to reduce their labor costs by paying the laborer rate to employees for performing tasks which were integral to the process of getting bridges blasted and painted. For example, union contractor Laugeni paid the painter rate shown on the WD to employees who built the various containments used to protect the environment from the blasting and spraying operation. (T. Laugeni 7501)[10] Employees performing the same task for Respondent Abhe were only paid laborer rates. (Cecil 1636) An employee performing grit collection for Laugeni would have also have been paid the rate for painters contained in the WD. (T. Laugeni 7511) Employees performing the same task for Respondent Jewell were only paid laborer rates. (Tetreault 1855-56, 1870-71) Similarly, an employee performing traffic control for Laugeni would have been paid the painter rate for that work. (T. Laugeni 7504, 7555-56) Employees performing the same task for Respondent Shipsview were only paid laborer rates. (Rawlings 1399-1400; CX 229)

The Respondents in this case generally and for the most part paid the appropriate hourly rate to employees actually holding a spray painting gun in their hand or actually operating a blasting

[10]Laugeni performs the largest amount of bridge painting in CT. (JP 5524-25)

gun.[11] Thus, the primary issue in these proceedings is the appropriate rate Respondents should have paid employees when they did not have a spray gun or blasting tool in hand, but were instead performing other tasks required to transform a rusty bridge into a newly painted bridge. The principal tasks in dispute involve rigging, setting up to blast, cleaning spent debris, setting up to paint, doing traffic control and taking showers. There is strong and consistent agreement among painter, laborer and carpenter union representatives, and among unionized contractor representatives that, in the unionized sector, the foregoing work has always been performed by painters, and paid at the prevailing wage rate for painters, on bridge painting projects in CT, and I so find and conclude.

B. Respondents' Practice Of Paying Employees Lower Rates For Doing Certain Painters' Tasks Was Contrary To CT Local Area Practice

Certain unionized crafts in CT are "tended" by other, lower paid, unionized employees. Laborers' Representative Granell, a member of the Laborers Union since 1968, explained the concept of tending as utilized with CT masons and carpenters:

> When I say tend a craft, let's take the mason whom I tend in the entirety. I mix the mortar for the mason, I bring the brick to the mason, I build the scaffold for the mason, I clean up for the mason. I do everything for the mason except lay the brick or block. When I tend the carpenter, I take the sheetrock, which is basically what he uses. The ceiling tile, the metal studs, his lumber that he uses, I unload it off the trucks and I bring it to the approximate point of installation. Whether it be doors, or door bucks in buildings, I do that for the carpenter. When the material that has been used and (is) ready to go off the job site, the laborer cleans it, restacks it, puts it on the truck, and sends it out, that is whom I tend.

(Granell 7156) Granell made clear throughout his testimony that his union does not perform the same functions for bridge painters. (Granell 7097-98, 7105, 7109, 7151) Granell's testimony was confirmed by Frank White, who had been affiliated with the Laborers' Union for 43 years. White testified that union laborers do not tend painters. (White 9829)

The testimony of the laborer union witnesses pertaining to "tending" was confirmed by the testimony of Robert Loubier who, in addition to having served as Council Representative to the New

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[11]This general rule does not apply to Shipsview; Shipsview employees testified they were paid laborer rates for blasting and painting. **See infra**, pp. 52-53.

England Council of Carpenters, has been a union carpenter for 26 years, thirteen of which he spent as a union Business Agent. (Loubier 7199-7203) Loubier confirmed the testimony of Granell and White to the effect that, in CT, painters are not tended by other crafts, and that has been the practice since 1920:

> On a painting job, the painters go on and there's no work for the carpenter. So the painters build their own - - hook up their own scaffold, bring their material on the job. There is no other trade that, like a laborer, that services the painter. So the painter is responsible because it's a single trade job. The painter unloads his material, he builds his - - runs his own scissor lift, or spider lift, or builds his containment because our understanding with the 1920 agreement, if it was a single trade job, like just a painting job, like the Gold Star Bridge was four or $5,000,000, there was no carpenter work involved so the painter built his own scaffold, or whatever he used. So when we - - when I, as a business agent, look at a job and I see that it's just painting, then my understanding of the 1920 agreement was the painter has a right to build his own scaffold because he's the only trade on it. That's what we've been using for years.

(Loubier 7288-89) When the CT-DOT signs a contract with a contractor that calls for sandblasting and repainting a bridge, area practice in CT is that such a project is a single trade job. (Loubier 7290-91) This conforms exactly to Peckham's description of the process of turning a rusty bridge into a newly painted bridge, and I so find and conclude.

The pay practices of Respondents on the Violation Projects were identical to the concept of utilizing laborers and carpenters to "tend" bridge painters. Allowing Respondents to engage in such practices is directly contrary not only to the prevailing union practice in CT, but also to the governing case law and the legislative history of the DBRA. As stated by the Wage Appeals Board:

> If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.

Fry Brothers, Holding No. 6.

The rationale underlying the Board's decision in **Fry Brothers** is directly applicable to this proceeding because Respondents here, like the Respondent in **Fry Brothers**, are attempting to circumvent the provisions of the DBRA by classifying, and paying, employees in a manner contrary to the local area practice. The concerns expressed by the Board in **Fry Brothers** were echoed by Thomas G. Laugeni, Sr., the preeminent union bridge painting contractor in CT, during the 1995 negotiations with District Council 11 on the Statewide Bridge Agreement. There, Laugeni expressed his fear that CT union bridge painting contractors' ability to compete would be undercut by contractors paying laborer rates for aspects of the bridge painting process which were properly treated and paid as part of the painters' craft. (T. Laugeni Depo., CX 209, p. 67; G. Laugeni 10358; Murray 6102-03) The DBRA, which ensures a level playing field for all contractors by preserving the classifications and pay practices prevailing in local areas, was designed to prevent fears like those expressed by Laugeni from coming to fruition. **See Bldg. and Const. Trades' Dept., AFL-CIO v. Donovan**, 712 F.2d 611, 614, 624-28 (D.C. Cir 1983) (examining legislative history of the DBRA and stating that the fundamental purpose of the DBRA is to ensure that wages on federal construction projects mirror those locally prevailing).

A. GCPC's Pay Practices On The Gold Star Project After September 9, 1994 Violated The DBRA

1. GCPC Properly Paid Their Employees Painter Rates For Performing Painters' Work From May 1993 Through August 1994

GCPC had two contracts to complete approximately $48.8 million worth of work on the Gold Star Project. (CX 16a and b) Gold Star was the first non-experimental project in which the CT-DOT required "full containment." (Campbell 9103) The work performed by GCPC employees on Gold Star related solely to the process of blasting and painting the northbound and southbound sides of the Gold Star bridges. (JP 4218-19) Consistent with its contractual obligations, GCPC used systems on Gold Star to contain spent debris and, in certain areas, to provide access to perform the blasting and painting work. (Mennard 131; Verity 199-200) Containment components included, among other things: Beeche platforms, impermeable tarpaulins, wooden bulkheads and wooden "doghouses." (Mennard 124; Verity 196; Morris 9663)

Greg Campbell testified that there were no jurisdictional disputes between any trades on Gold Star. (Campbell 9378) His project supervisor, Peter Morris, testified that, apart from operating engineers, GCPC employed only journeyman painters and apprentices to perform work on Gold Star. (Morris 9587) GCPC painter employees working on Gold Star performed, among others, the following tasks: mobilizing, assembling, moving and disassembling containments (including pick boards and cables inside the

containments and doghouses), setting up to blast, operating blasting pots and recycling machines, blasting, cleaning spent debris, setting up to paint, painting, general clean up and traffic control. (Campbell 9331-33, 9364-65, 9394-9400; Morris 9662-65) GCPC employees used a variety of tools in performing their work on Gold Star, including C-clamps, wrenches, air ratchets, impact guns, pliers, hammers, nails, screws, screw guns, come-a-longs, ladders, plywood, saws, wire, shackles, brooms and shovels. (Campbell 9336; Morris 9666, 9674-75; Mennard 120-21, 126, 138; Verity 198, 203-05, 224-30, 239)

All of the GCPC employees worked together as a team to get the bridges blasted and painted. (Morris 9774) As part of that teamwork, GCPC employees did numerous tasks throughout the Gold Star Project. For example, employees who did the abrasive blasting also set up to blast, cleaned up spent debris, disassembled, moved and reassembled containments and did traffic control. (Mennard 115-30; Verity 235-41, Morris 9670)

From May 1993 through August 1994, GCPC employees spent over 99,000 hours doing the foregoing tasks on Gold Star. (CX 297A & B) GCPC paid only painter or painter apprentice rates to their employees for doing those tasks. (Mennard 139-41; Verity 205, 217-18, 223, 230, 237, 241, 324-25; CX 106) GCPC employees also took showers on a daily basis. Between May 1993 and August 1994, GCPC paid painter rates for showers. (Mennard 144; CX 106) GCPC's decision to pay painter rates to their employees on Gold Star is consistent with Greg Campbell's testimony that, on single trade bridge painting projects, CT painters claim all tasks associated with that work. (Campbell 9364)

2. GCPC Failed To Pay Painter Rates To All Employees Performing Painters' Work On The Gold Star Project After September 1994

On September 9, 1994, GCPC and District Council 11 entered into an agreement whereby GCPC could pay $16 per hour, plus the painters' union fringe benefit rates of $6.60 per hour, for employees who performed the job of "abrasive blast material remover." (CX 174) These employees were also referred to as "material handlers," and "painter sweepers." (CX 106) There was general agreement as to the history of the "side bar" agreement. GCPC, in preparing its bid, anticipated using lower paid painter apprentices for certain of the required tasks such as grit collection, clean up, and material handling. Due to the scale of the work performed on the Gold Star Project, at some point in the summer of 1994, District Council 11 exhausted its list of qualified apprentices and no longer had legally registered apprentices whom they could refer for work on Gold Star. (Murray 6141-42; Campbell 9208-11; Morris 9596-98; Cieri 6383-85)

In August or September of 1994, GCPC owner George Campbell

called a meeting with painter union officers to discuss the apprentice shortage. (Murray 6142-43; Cieri 6384-86) Campbell told the union attendees "that he was getting killed" financially on the job, that he was losing money, and that unless the painters union could help him he would start using union laborers to perform work which was traditionally done by painter apprentices. (Murray 6143-44) The resultant side bar agreement, which is in evidence as CX 174, lists the following duties for "abrasive blast material handler":

1. Cleaning grit for recycling and disposal.

2. Assisting in the maintenance and relocation of all equipment and materials associated with the containment, exclusive of the actual Rigging, Erecting, and Dismantling of containment or any other rigging not related to the containment.

3. Generally assisting in the performance of work done by the journeypersons, but in no way would work consist of painting applications or blasting operations.

a. <u>As A Matter Of Law, The Side Bar Agreement Was Improper</u>

During the side bar negotiations, the union anticipated that the agreement Campbell had asked for might run afoul of the DBRA:

> Well, we expressed that concern. Not only that, but plus the fact that if the Department of Labor came to the job investigating and decided that it wasn't laborer's rate or that it was painter's rate, then he might have to pay all the money. And he didn't seem to have a problem with that either, he said that whatever happens happens. But either we're going to give him the rate or he's going to hire laborers.

(Murray 6145; **see also** Cieri 6386-87) In fact, no one from GCPC spoke to anyone from the DOL before GCPC started paying the material handler rate. (Campbell 9439-40)

GCPC used painter sweepers as substitutes for painter apprentices. (Bradham 415) The painter sweepers did a variety of tasks on Gold Star including assembling, moving and disassembling containments, setting up for blasting, blasting, cleaning up and recycling spent debris, mixing paint, spraying paint and touching up paint. (Johnson 336-47; Bradham 386-400, 408, 414, 416-17, 427-28; Peabody 437-43) Painter sweepers performed work primarily inside the containments. (Murray 6403; JP 5246) The painter sweepers were members of the CT painters' union, hence, GCPC paid all of their fringe benefits to the CT painters' union. (Campbell

9307) There is no dispute that the painter sweepers were "journeym[e]n painter[s], as a blaster or painter is a journeyman painter." (Morris 9689, 9587)

Notwithstanding the foregoing facts, GCPC argues that it was justified in paying the painter sweepers less than the prevailing wage for painters because the painters' union had agreed to the "side bar" agreement. (CX 219)[12] GCPC's argument, however, is unavailing as a matter of law. Under DBRA, the "side bar" agreement cannot supercede the work classifications and rates established in the applicable WD. Where an agreement between a union and a contractor calls for union employees to accept wages lower than those required under a collective bargaining contract, such an agreement is permissible since it concerns private rights which are within the control of the parties to the contract. However, where an agreement between a union and a contractor attempts to substitute a lower wage rate than the posted prevailing wage rate, such an agreement is not permissible since it involves rights governed by federal law which cannot be altered by contracts between private parties. (Otherwise a union firm could underbid its nonunion competitors for a contract and then work the job under a "sweetheart" renegotiation with its unionized employees.) The "side bar" agreement signed by District Council 11 and GCPC affected public rights guaranteed under federal law. As a matter of law, no agreement can authorize payment of rates lower than those specified in a WD, and I so find and conclude. **Van Den Heuvel Electric, Inc**., WAB Case No. 91-03, 1991 WL 523862, *2 (February 13, 1991).

Further, the "side bar" agreement does not confer recognition, formal or otherwise, on painter sweepers as a new job classification to be included in the WD. To use a class of laborers or mechanics, including apprentices and trainees, not listed in the applicable WD requires the approval of the Administrator of the Wage and Hour Division, as the case law and regulations mandate. 29 C.F.R. §5.5(a)(1)(ii) (A), (B), and (C); **Fry Brothers**, Holding No. 7; **In the Matter of Clark Mechanical Contractors, Inc.**, WAB Case No. 95-03, 1995 WL 646572 at *2 (September 29, 1995). GCPC never sought such approval from the Wage and Hour Administrator. Even if it had, in all likelihood it would not have prevailed precisely because a classification covering the duties of painter sweepers already existed in the WD

[12]It is undisputed that GCPC and District Council 11 negotiated concessions on Gold Star -- the most significant being that GCPC was not obligated to implement the wage increases contained in District Council 11's subsequent collective bargaining agreements. (Cieri 6531-32.) The union's rationale for agreeing to freeze the rate was that the Gold Star Project was to last for several years and, during that time, would provide continuous work for union members. (**Id**.)

-- namely, the painters, and I find and conclude.

Lastly, GCPC also cannot validate the reduced rate paid to painter sweepers by claiming they performed virtually the same job duties as the painter apprentices it previously utilized. In order to receive less than the journeyman rate set forth in a WD, apprentices must be registered in a program approved by the Bureau of Apprenticeship and Training or a recognized State apprenticeship agency, and trainees must be enrolled in a program approved by the Bureau of Apprenticeship and Training. **Fry Brothers Corporation**; **In the Matter of Kasler Corporation**, WAB Case No 90-03, 1991 WL 494720 at *3 (April 29, 1991); **Van Den Heuvel**, 1991 WL 523862 at *2; **see also In the Matter of Miami Elevator Co.**, ARB Case No. 98-086 (April 25, 2000). Those GCPC employees paid as painter sweepers were not certified as painter apprentices. In sum, there is no legal basis upon which GCPC can legitimize paying a reduced rate to those union painters labeled painter sweepers, and I so find and conclude.

b. <u>GCPC Did Not Comply With The Terms Of The Side Bar Agreement</u>

Even aside from the legal invalidity of the "side bar" agreement, the testimony of employees paid at the material handler rate establishes that GCPC violated the agreement itself by using painter sweepers to perform the full range of journeyman duties. (Johnson 336-46, 352; Bradham 389-98, 408, 411; Peabody 439-42, 456-57) Norman Johnson, a union journeyman painter for 28 years, was hired at the "sweeper" rate in November or December 1994. (Johnson 354-55; CX 106) This was the first time in 28 years as a journeyman painter that Johnson had not been paid the journeyman rate. (Johnson 355) He had in fact worked as a journeyman on Gold Star in 1972 and been paid the appropriate journeyman wage. In 1994, however, Johnson mixed paint at the "sweeper" rate, did touch up painting at the "sweeper" rate, changed filters at the "sweeper" rate and performed blasting at the "sweeper" rate. (Johnson 334-46). There was no difference between the work he was assigned as a so-called "sweeper" and the duties he performed during later periods when he was paid the journeyman rate. (Johnson 352, 372) These could and did involve the most difficult and demanding assignments:

> Well, the first night I was there it was raining and we had to climb this 60 foot ladder onto the catwalk and climb up on these cross-braces back-to-back, and crawl across them to get onto the wing. Onto a box beam and kind of hang down and get on that. It was raining, it was wet, and it was slippery.

(Johnson 350-51)

Calvin Bradham was also paid as a "sweeper." (CX 106)

However, despite his title, and corresponding lower wage rate, he performed a wide range of jobs on Gold Star which were typically performed by journeyman painters, including rigging cables, hanging staging, fixing blast hoses, and painting. (Bradham 389-397, 408-11) The foregoing jobs were spread around equally among all of the members of his crew. (Bradham 416) In his capacity as a "sweeper," Bradham also got his full share of the more dangerous parts of the job. For instance, one night while receiving the "sweeper" wage rate, he suffered a 65 foot fall as he worked to secure tarps on the bridge in the face of an approaching storm. (Bradham 386-87) With regard to the actual sweeping done by Bradham's crew on Gold Star, he testified on cross examination that although the crew consisted of employees paid at both the journeyman painter rate and the "sweeper" rate, no member of the crew did more sweeping than any other member. (Bradham 399-400, 416; **see also** Peabody 483)

The testimony adduced at trial proves that "sweepers" performed the full range of the tasks necessary to transform a rusty bridge into a freshly painted bridge. **See supra**. Accordingly, even assuming there had been any legality to the side bar agreement under the DBRA, which there was not, GCPC would still have violated the DBRA because it did not adhere to the terms of the side bar agreement, and I so find and conclude.

B. Daskal Violated The DBRA When It Failed To Pay Employees Prevailing Wages For Performing Laborers' and Operators' Work On The Gold Star Project

Daskal employees also performed work on the Gold Star Project. The primary work site of the Daskal employees was on the ground immediately under and adjacent to the Gold Star Bridge. (JP 2084-85) Daskal employees worked on the ground under the bridge throughout the job. (Verity 251) They handled waste, cleaned up and ran errands. (Verity 254) Daskal employees did not go up onto the bridge to perform their work and did not work inside the containments on Gold Star. (Campbell Depo., CX 213, p. 125; Daskal Depo, CX 214, pp. 13, 24; Morris 9645-46; JP 5522, 5970) . As part of their work, Daskal employees often went to the maintenance shop to obtain equipment. (Green 500-01) The maintenance shop was located on the ground between the two bridges. (CX 213, p. 128) Daskal employees also did ground preparation and site restoration, cleaned up hazardous waste on the ground under the bridge and disposed of barrels containing hazardous waste. (Green 542; Morris 9712)

Six Daskal employees also spent time driving the safety boat used in connection with Gold Star. (Campbell 9343-44; CX 59, 73) The safety boat was owned by GCPC. (Campbell 9343) Operating it was a pay item under GCPC's contract with the CT-DOT. (CX 213, p. 117)

Daskal had no foreman, supervisor or lead person present on the Gold Star Project. (Morris 9722) In 1993, the Daskal employees working on Gold Star reported to Peter Ennen, GCPC's site safety coordinator. (CX 213, p. 127) After Ennen left, Morris supervised the Daskal employees. (CX 213, pp. 126-27) Daskal employees working on the Gold Star Project were paid rates ranging from $9 to $12 per hour. (JP 2086)

Daskal asserts that the wages paid to its employees on Gold Star were legal because it was a service provider, rather than a subcontractor, and was therefore not required to comply with the prevailing WDs of the DBRA and the overtime provisions of CWHSSA. (CX 219, pp. 2-4.) Daskal's argument is specious. There is no "service provider" exemption to the DBRA. DBRA applies to all laborers or mechanics who come upon the site of work to perform services directly related to the prosecution of work to be performed and necessary for its completion. The test as to whether a contractor is governed by the DBRA is set forth by the regulation. Coverage depends upon the type and location of work performed by a contractor's employees.

The type of work covered is defined at 29 C.F.R. §5.2(m):

> The term *laborer* or *mechanic* includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial.

The work of Daskal employees at the Gold Star work site was clearly "manual or physical" in nature as distinguished from "mental or managerial." **See supra**.

A location is part of the "site of work" if it is

> the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site.

29 C.F.R. §5.2(l)(1) This regulation has been applied approvingly in a recent decision where there was much greater physical separation than in the present case. **In the Matter of Bechtel Construction Corp., et al.**, ARB Case No. 97-149, 1998 WL 168939 (March 1998). As noted by the Administrative Review Board, "It is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work." As confirmed in **Bechtel**, such work is covered under 29 C.F.R. §5.2(l)(1). **See also**

In the Matter of Vecellio & Grogan, Inc., WAB Case. No. 84-7 (October 17, 1984). Daskal employees worked on site directly under the bridges. Daskal's work was directly related to the contract goal of turning Gold Star from two rusty bridges into two newly painted bridges. **See supra**, pp. 30-31. There is a **prima facie** presumption that supporting activities associated with the primary project are covered by the labor standards provisions of the various acts. **United Construction Company, Inc.**, WAB Case No. 82-10 (January 14, 1983). Given the foregoing facts, the law required Daskal to pay employees in accordance with the WDs on the Gold Star Project,[13] and I so find and conclude.

While Campbell and Daskal submit that the investigation conducted by Mr. Peckham was flawed because it ignored a jurisdictional dispute between the Connecticut laborers' union and the painters; union, I cannot accept such thesis as there is no such jurisdictional dispute, especially as every fact, non-party witness who was asked about this issue, including Greg Campbell, testified that there was no such dispute. Moreover, both the carpenters' and laborers' representatives forthrightly testified that there was, in fact, an agreement, as shown by historical practice dating back to April of 1920, that carpenters and laborers **do not tend painters**. (In this regard **see** the testimony of Mr.

[13] Peckham determined that, with the exception of time spent operating the safety boat, Daskal employees should have been paid laborer rates. As to safety boat operators, Peckham determined that they should have been paid the federal prevailing wage for "power safety boat" operators. (CX 292; **see infra**, pp. 60-61) GCPC raises the additional defense that it was not required to pay that rate because the federal WD for New London and Groton County was missing the page that contained the "power safety boat" rate. The appropriate procedure in the event of a missing rate, however, is not to ignore the obligation to comply with DBRA, but rather to use the conformance procedure provided at 29 C.F.R. §5.5 (a)(1)(ii)(A). **See Matter of Biospherics, Inc.** ARB Case No. 98-141 (May 28, 1999) (addressing a comparable situation under the Service Contract Act). Daskal's argument also ignores the fact that GCPC was required to comply with the state prevailing WD for New London and Groton County and that document did contain a classification for "power safety boat" operators. (CX 292, item #35 of the state prevailing WD) The state classification for safety boat operators required payment of a higher rate than the federal wage rate used by Peckham to calculate back wages. In addition, the specification book obtained by GCPC contained federal WDs for other counties besides New London and the prevailing wage rate for "power safety boat," was included in those documents. (CX 292, p. 78m.) Provision of a safety boat was an integral part of GCPC's contracts with the CT-DOT. GCPC and Daskal had a clear obligation to comply with the DBRA. Even the most cursory search would have easily located the "missing" rate.

Loubier at pages 7288-89 and Mr. Granell at page 7156.) Nor does this proceeding somehow eliminate the laborers' classification from the wage determination because Mr. Peckham has, in fact, used the laborers' rate in his back wage computations for the Daskal ground crew.

Furthermore, while Campbell and Daskal submit that the posted wage rates in the Gold Star WDs have ben superceded and voided by the labor agreement Campbell and Daskal signed with the Painters' International Union, I also cannot accept that thesis because it is undisputed that those WDs are applicable to both Gold Star bridge projects by virtue of federal law and by contractual agreement, and I note that these Respondents do not and cannot cite a single case precedent supporting this extraordinary proposition.

Moreover, the totality of this closed record leads ineluctably to the conclusion that, at the time it performed work on the Gold Star, the George Campbell Painting Company knew or should have known that the National Bridge and Tunnel Agreement ("NBTA") allowed it to pay lower rates to its employees working on Gold Star.

Campbell also raises an estoppel defense and this defense will be further discussed below with reference to all of the Respondents joined herein. Daskal's defense simply is that their employees on Gold Star were not covered by the DBRA. However, this position cannot be accepted herein because of the significant decision of the Wage Appeals Board in **In the Matter of Bechtel Construction Corp, et al.**, ARB Case No. 97-149, 1998 WL 168939 (March 25, 1998), a case precedent controlling this litigation.

While Campbell and Daskal challenge the validity and sufficiency of the "limited area practice survey" (LAPS) performed by Mr. Peckham, it is well to keep in mind that these are proceedings under 29 C.F.R. §§ 5.11 and 5.12, but not under § 5.13. It is now well settled that in this § 5.11 proceeding, since the WD had already been issued and used in the bidding process, thereby establishing a contractual relationship between the federal government, the state of Connecticut and the Respondents, the number, nature and timing of projects surveyed is not a significant issue. Actually, the only critical issue in this §5.11 proceeding is whether and how the trades agreed in actual practice on the division of labor concerning the work at issue. The only analysis necessary in this proceeding is that required by **Fry Brothers, supra**. As found above, the Complainant's position must be upheld because the totality of this closed record leads inescapably to the conclusion that the established local area practice was to pay to the employees performing the disputed work at the WD rate for painters, and I so find and conclude, especially as there was no dispute among the trial witnesses - including all of the Campbell and Daskal witnesses - as to the legally determinative fact that the painters were the only union in Connecticut that claimed

jurisdiction over the work at issue herein.

I also agree with the Complainant that Campbell and Daskal have mischaracterized the testimony of their own witness, Frank White, because Mr. White at no time testified, nor can any such inference be drawn, that his laborers' union was ready, willing and able to supply laborers to Campbell **to do painting work** because, at that point, several years after the initial conversation between Mr. White and Campbell, Mr. White understood that workers were needed to do cleanup work on the ground (White, 9821-23), especially as most laborers are reluctant to work on bridges, at dizzying heights, one hundred (100) or more feet above roadways or navigable waters and as union laborers neither tend painters in any way nor do they claim or perform the work done by the painter/sweepers on Gold Star.

C. Abhe Violated The DBRA When It Failed To Pay Its Employees The Prevailing Wage For Painters For Performing Painters' Tasks On The Arrigoni, Mill River And OL/EL Projects

Abhe is a non-union company. (Svoboda 7909) During 1994 and 1995, it signed three CT-DOT contracts to complete work on Projects 82-252 ("Arrigoni"), 173-223 ("Mill River"), and 172-253 ("Old Lyme/East Lyme" or "OL/EL") (collectively, the "Abhe Projects"). Each contract was for bridge painting work and required "full containment." (CX 2, 4, 10, 11A, 12)

1. Abhe Employees Performed Painters' Work On The Abhe Projects

a. Work performed By Abhe Employees On The Arrigoni Project

Abhe began working on Arrigoni in approximately September 1994. (Svoboda 7831) The work involved transforming one rusty bridge into a newly painted bridge. Arrigoni was a single trade bridge painting project. (JP 3676-78, 4157) The Abhe containments on Arrigoni, like the GCPC containments on Gold Star, were used to contain spent debris and, in certain areas, to provide access for employees to perform the blasting and painting work. (Crysler 710) The containments on Arrigoni, like the containments on Gold Star, were composed of, among other things: Beeche containment platforms, impermeable tarpaulins, wooden bulkheads and wooden "doghouses." (Crysler 707-11, 738-39; Cecil 1659)

The Abhe employees working on Arrigoni also performed the same tasks as those performed by the GCPC employees working on Gold Star. Those tasks included mobilizing, assembling, moving and disassembling containments (including the pick boards and cables inside the containments as well as "doghouses"), setting up to

blast, operating blasting pots and recycling machines, blasting, cleaning spent debris, setting up to painting, painting, general clean up and traffic control. (Crysler 706-07, 711-12, 802; Cecil 1642-48, 1656-59; Svoboda 7831-33, 8212, CX 284; AX 16). Like the GCPC employees on Gold Star, the Abhe employees on Arrigoni used a variety of tools, including wrenches, hammers, nails, screws, screw guns, saws, brooms and shovels to perform their work. (Crysler 751; Svoboda 7859-62) Similarly, the Abhe employees, like the GCPC employees, took decontamination showers on a daily basis. (Svoboda 7863-64)

Further, on Arrigoni, as on Gold Star, the employees worked together as a team to get the bridge blasted and painted. (Cecil 1708) As stated by Gail Svoboda, all of the employees on Arrigoni "worked together" and "helped each other out." (Svoboda 8145) In the course of a day, it was not unusual for Abhe employees on the Arrigoni bridge to do seven or eight different types of tasks. (Svoboda 8181) Abhe's phase codes and time cards show that employees who did the abrasive blasting also set up to blast, cleaned up spent debris, disassembled, moved and reassembled containments and did traffic control, and I so find and conclude. (Svoboda 8182; AX 16; CX 284)

b. <u>Work Performed By Abhe Employees On The Mill River And OL/EL Projects</u>

Abhe was responsible for blasting and painting two bridges on Mill River and for doing most of the work on five bridges on the OL/EL Project. The crews on Mill River and OL/EL were considerably smaller than Abhe's Arrigoni work force. (CX 97, 103, 105) The containments installed and used by Abhe employees on Mill River and OL/EL were also different than those used on Arrigoni. Specifically, the containments installed by Abhe on Mill River and OL/EL were assembled by installing tarpaulins on a bridge, attaching the tarpaulins to the sides of a semi-trailer driven under the bridge section to be blasted or painted and then installing wooden bulkheads between the girders. (Svoboda, 7943, 7962, 7969)[14]

Despite the larger work force and different containments used on Arrigoni, the types of tasks performed by Abhe employees on Mill River and OL/EL were essentially the same as those performed by Abhe employees on Arrigoni. The employees on Mill River and OL/EL, like the Abhe employees on Arrigoni and the GCPC employees on Gold Star, performed the following tasks: mobilization, assembling, moving and disassembling containments, setting up to blast, operating blasting pots and recycling machines, blasting, cleaning

[14] As discussed below, Abhe employees also blasted and painted inside containments on OL/EL which were installed by BA.

spent debris, setting up to paint, painting, general clean up and traffic control. (Crysler 758-73; Cecil 1624, 1628-30; Svoboda 7942-49, 8142) Abhe employees on Mill River and OL/EL also took daily showers. (Svoboda 7973; Cecil 1639-40) In addition, Abhe employees who worked on Mill River and OL/EL, like the Abhe employees on Arrigoni and the GCPC employees on Gold Star, also testified that all the employees worked together as a "team." (Crysler 765; Cecil 1630, 1708) As part of that principle, on Mill River and OL/EL, as on Gold Star and Arrigoni, no employee performed just one job. (Cecil 1708; AX16; CX 284)

2. Abhe Paid Employees Split Laborer, Carpenter And Painter Rates For Performing Painters' Work On The Abhe Projects

Abhe employees were paid painter rates when they were either blasting or painting. (Svoboda 7862, 7906) Abhe, as a general rule, paid laborer rates for all tasks other than blasting or painting. Tasks paid at laborer rates included mobilization, assembling, moving and disassembling containments (including pick boards and cables), setting up to blast, operating a blasting pot and recycling machine when blasting was not occurring, cleaning and disposing of spent debris, setting up to paint, and traffic control. (Crysler 713, 748; Cecil 1636; Svoboda 7827, 7860-63, 7906, 7943-44, 7947, 7970-71, 7975; AX 16; CX 284) Additionally, Abhe paid carpenter rates for installing wooden bulkheads and for building "doghouses." (Svoboda 7824, 7861-62, 7942-43) Abhe may also have paid some operator rates, in addition to laborer rates, for mobilization work on Arrigoni and Mill River. (Svoboda 7863, 7949)

There were certain Abhe "core" employees who may have been paid painter rates regardless of what task they were performing. (CX 211, pp. 90, 176-77, 248-49) With the exception of "core" employees, however, Abhe's practice was to split employee wages according to the task which they were performing. (AX 16; CX 284)[15] For example, on a day when Brian Crysler spent three hours setting up to paint and ten hours painting on Arrigoni, he was paid laborer rates for the set up time and painter rates for the time spent painting. (AX 16; CX 284) Similarly, on a day when Klenton Williamson spent ten hours doing containment, mobilization and traffic control work and two hours doing blasting work on OL/EL, he was paid laborer rates for all his time that day except the two hours he spent blasting. (AX 16; CX 284) Additionally, even if an

[15]It is indeed ironic, as well as most interesting, that Abhe's core employees brought in from out of state were paid in a manner totally consistent with CT prevailing union practice, while the local CT workers were paid in violation of that practice, thereby leading to the obvious inference that Abhe knew very well its obligations under the contracts in question.

employee spent his whole day blasting, he still received a split wage because all employees exposed to lead were paid one hour a day at the laborer rate for shower time. (Svoboda 7863-64, 7906)

3. Abhe's Pay Practices Violated The DBRA

Gail Svoboda made the decision about what wage rates should be paid on the Abhe Projects before he submitted Abhe's bids to the CT-DOT. (Svoboda 8079, 8100, 8136; CX 211, p. 142) Svoboda had no pre-bid discussions with anyone about the appropriateness of these contemplated wage rates. (Svoboda 8079-80, 8101, 8136; CX 211, pp. 140-42) Instead, he decided what wage rates to pay by using his tools of the trade ("TOT") analysis. (Svoboda 8082, 8101, 8136) The pre-bid wage rates Svoboda intended to pay were the wage rates actually paid to Abhe employees who worked on the Abhe Projects. (Svoboda 8083, 8102, 8137)

Abhe claims it properly paid laborer and carpenter rates for certain tasks, such as cleaning spent debris and installing bulkheads, respectively, because those tasks used laborers' and carpenters' rather than painters' tools. (Svoboda 7800-01, 7824, 7827-28) Abhe's claim that its wage practices were appropriate because they were consistent with Svoboda's TOT analysis is erroneous as a matter of law. As a matter of law, Abhe's pay practices were required to comply with the DBRA. As discussed below, Svoboda's TOT analysis resulted in pay practices contrary to local area practice, and I so find and conclude.

a. Abhe's Decision To Pay Wage Rates Which Were Based Solely On Svoboda's TOT Analysis Of The Prevailing WD Was Erroneous

Svoboda's assertion that contractors on federal projects are entitled to make classification decisions based solely on their individual thoughts as to what "tool" belongs to what "trade" is fatally flawed in two respects. First, allowing such a practice would result in inconsistent applications that would eviscerate the purpose of prevailing wages. This conclusion is amply supported by the evidence in this proceeding. As Svoboda acknowledged, there are several tools on bridge painting projects which are used by many trades. (Svoboda 8047-48; Svoboda Depo., CX 211, p. 89) Reasonable people can, and do, differ, as to what "tools" belong to what "trades" on such projects. Indeed, different opinions occur in the same company as well as among different companies. While Gail Svoboda believed a blasting pot was a "painter's tool," and that setting up to spray and mixing paint was "painters' work," the Abhe foremen who supervised payroll for Abhe sometimes paid laborer rates for operating blasting pots and always paid laborer rates for all types of paint preparation work, including mixing paint. (Crysler 713; Svoboda 8160-61; AX 16; CX 284)

The evidence also illustrates stark differences in opinion

among contractors as to what "tool" belonged to what "trade." While Gail Svoboda paid painter rates to employees while they were blasting because he believed they were using "painters' tools," Shipsview's Christos Deligiannidis believed he could pay laborer rates for that work because anyone who was not holding a spray gun or brush was "not a painter." (Svoboda 7862; Deligiannidis Depo., CX 212, p. 53) Similarly, though Svoboda believes brooms and vacuums are laborers' tools, and paid the laborer rate to employees who used those tools on the Abhe Projects, Thomas M. Laugeni believes that on bridge painting projects brooms and vacuums are painters' tools and he therefore paid painter rates to employees when they used those tools on bridge painting projects. (Laugeni 7478-79; Svoboda 7839, 7862)

Second, even apart from the deficiencies discussed above, Abhe's argument must be rejected because it ignores the requirement under DBRA that contractors must comply with <u>local</u> WDS. As Svoboda acknowledged during the trial, while prevailing WDs vary "from state to state, [and from] county to county," the TOT analysis is "pretty consistent from state to state." (Svoboda 8059, 8057) For example, Svoboda testified that a paint brush is a tool of the painters in all 50 states. (Svoboda 8057) However, simply because a paint brush is a "painters' tool" in all 50 states does not mean that workers using paint brushes to paint bridges must be paid painter rates in all 50 states. For instance, in Michigan, the prevailing wage for workers using paint brushes to paint bridges is a laborer, rather than a painter, rate. (Svoboda 8075-76, 8201)

With reference to the defenses raised by Abhe & Svoboda, Inc. and Blast All, Inc. (both of which firms will be sometimes referred to collectively as ASBA in this section), at the outset I categorically reject the essential thesis of ASBA that there is a jurisdictional dispute regarding the work performed by their employees for the following reasons. No fact witness credibly described to a jurisdictional dispute involving the type of work performed on bridge-painting projects anywhere within Connecticut. Moreover, the union representatives responsible for negotiating and enforcing the Connecticut laborer, carpenter and painter collective bargaining agreements (CBA), as well as representatives from the union contractors and the CCIA credibly testified that no such dispute existed. There was a uniform consensus and an agreement, in existence since at least April of 1920, among the carpenter, laborer and painter unions, that carpenters and laborers **do not tend painters**. (Loubier 7288-89; Granell 7156; CX 216 at 3) In fact, that agreement was such an established practice that in the ensuing years there were "no gray areas." (Granell 7098)

I also note that ASBA's description of the disputed work, and the manner in which they have determined their version of the employee wage rates, is factually inaccurate and I accept Complainant's arguments on these issues.

While ASBA attempt to create a jurisdictional dispute between the carpenters, laborers and painters by pointing to the self-serving and less-than-credible testimony of Gail Svoboda and Steve Bogan, their owners, they fail to mention the probative and persuasive testimony, under oath before me, by the Business Agents of the Connecticut carpenter and laborer unions, as well as by the Connecticut union contractor representatives.

As also noted and found above, Frank White, of the laborers union, was ready, willing and able to provide laborers on Gold Star to do clean-up work and waste disposal on the ground as most laborers were reluctant to climb up to and work on such "dizzying heights." On this issue Lou Shuman testified credibly before me (TR 7357, 7360), and I accept his uncontradicted testimony, especially as Tony Onorio and Charles LaConche were unable to identify any bridge-painting project on which union laborers performed acknowledged painting work.

While ASBA refuse to acknowledge one undisputed fact herein, I find and conclude that the totality of this closed record leads inescapably to the conclusion that union laborers do not tend painters, **e.g.**, they do not remove paint so the painter can repaint, do not unload materials for painters or do any building or cleaning or anything for the painter because laborers tend or assist only the carpenter and the mason. (Granell 7097-98, 7108) With reference to scaffolding work, work related to the erection, planking and removal of all scaffolds used only by bricklayers, masons and carpenters, and not for painters on a single-trade bridge painting project, may be done by laborers. (Granell 7131) I also find of little significance herein the fact that union laborers had lead abatement training available to them, not because they participated in single-trade bridge-painting projects, but because they needed that training for those rare occasions when they performed demolition work involving the removal of lead paint from areas in structural steel that had to be torch-cut. (Granell 7099-7101; Shuman 7419)

While ASBA allege that carpenters claim some of the work done on the bridge-painting projects, Robert Loubier, Business Agent for the Connecticut Carpenters' Union, credibly testified otherwise, namely that Connecticut union carpenters do not claim, and are not involved with, work on single trade bridge-painting projects. (Loubier 7223-37, 7288-89) Moreover, painting contractors used painters, rather than carpenters, to build their scaffolds (Loubier 7223), a practice also in effect since at least April of 1920. (Loubier 7288-89; CX 172 at 3, CX 215 at 3) Furthermore, the reliance by ASBA and their reference to multi-trade road building or highway construction/reconstruction projects is wholly irrelevant herein as these proceedings involve single-trade bridge-painting projects. The record herein is simply devoid of any evidence suggesting that the containments at issue were designed to be used by more than one craft, especially as this closed record

conclusively establishes that all of the containments on the Violation Projects were built **for the sole purpose of containing spent debris and/or providing access for blasting and painting operations on single-trade bridge-painting projects.**

With reference to the lack of a jurisdictional dispute between the laborers, carpenters and painters, as noted above, I find most dispositive the reluctance by Steve Bogan to sign the 1995-1997 Statewide Bridge Agreement (CX 146) because he knew that that agreement did, in fact, apply to and cover work for which he was using non-union laborers and carpenters to perform. He attended the meetings in May and June of 1995 at which the language to be included in CX 146 was discussed and he did not object to that language. (T. Laugeni Depo., CX 209 at 64-67; Greg Laugeni 10319-22; Cieri 6359-63; Murray 6101, 6126) Thus, it is apparent that Mr. Bogan refused to sign CX 146 or the **Addendum** because he knew that he would be obligated to pay the prevailing wage rates to all of his workers on the Violation Projects, thereby eliminating his essential and primary defense herein.

That Brunalli Construction may have used a composite crew is not dispositive because the fact that union laborers and carpenters were on the same payrolls as union painters does not, **ipso facto**, lead to the inference that the laborers and carpenters were working together on the same project and/or were tending the painters, as "tending" is used in the industry terminology. ASBA called no one from Brunalli to testify about the nature and extent of projects performed by the company and, in the absence of such explanation or testimony, I am prepared to draw the negative inference that such testimony would be adverse to that of ASBA.

Further support for the lack of a jurisdictional dispute herein is the forthright, probative and persuasive testimony of Lou Shuman, the management representative from the CCIA responsible for negotiating and enforcing the Connecticut laborers and carpenters CBAs. (Shuman 7363) Mr. Shuman is most knowledgeable about industry practices and I find his testimony to be worthy of special deference, especially as he did contact contractors that were large, "very active" and "labor relations savvy." (Shuman 7367) Mr. Shuman was quite specific with reference to the work done by CCIA member contractors on multi-trade construction projects involving road construction and rehabilitation work, such as Arboria, Blakeslee, Arpaia Chapman, Baier, Perini and Kiewit Eastern, as opposed to the work done by painting contractors, such as Brunalli, on single-trade bridge-painting projects. (Shuman 7418; Granell 7099-7100) While composite crews were used to perform various tasks on multi-trade road or highway construction projects, such is not dispositive herein as these consolidated proceedings boil down to one single issue, **i.e.**, what employee may do what work on single-trade bridge-painting projects and what should the wages be for such work.

Likewise, for the reasons stated above, the challenge by ASBA to the LAPS performed by Mr. Peckham must fail because all of the Respondents herein have confused a proceeding under 29 C.F.R. §§ 5.11 and 5.12 for alleged violations of the DBA and DBRA with a so-called conformance procedure brought pursuant to 29 C.F.R. §5.13. Respondents have used this real or feigned misunderstanding of these disparate regulations to pretend that the LAPS was used by Mr. Peckham to establish wage rates in this case rather than simply as an investigatory tool as part of the compliance investigation of the Respondents by Mr. Peckham. I agree completely with Complainant that conformance proceedings under 29 C.F.R. §5.13 have totally different record development procedures because conformance cases and reviews of WDs under §5.13 address decisions of the Wage and Hour Administrator acting in a decision making, as opposed to a prosecutorial, capacity, especially as review of such cases is limited to review of the materials before the Administrator or his designee, as well as the arguments of the party or parties seeking review and the arguments of counsel for the Administrator.

I also agree with the Complainant that the validity of Mr. Peckham's LAPS is not at issue herein. What is at issue are the pay practices of all of the Respondents joined in these consolidated proceedings. As also noted above, the significant decisions in **Roen, supra**, and **Fry Brothers, supra**, stand for the proposition that "although wage surveys are one way in which wage classifications may be established, they are not the only way." **Roen**, 183 F.3d at 1093. Moreover, an area practice survey is not necessary where the WD rates are based upon union negotiated rates. Likewise, "an area practice survey is not a prerequisite to the determination of prevailing wage rates or job classifications." **Roen**, 183 F.3d at 1094.

I also agree with the Complainant's position that even assuming, **arguendo**, that the LAPS was somehow flawed as, perhaps, not including appropriate comparable projects, Respondents' argument still lacks merit because it ignores the essential fact that any flaws in an investigation, real or imagined, major or minor, **do not absolve employers from their substantive responsibility to comply with the DBRA.** The Field Operations Handbook ("FOH"), a document that was mentioned many times during the trial, was issued to provide guidelines for Department compliance officers and does not have the force or effect of regulations binding on the Complainant. In this regard, **see Brennan v. Ace Hardware**, 495 F.2d 368 (8th Cir. 1974); **In the Matter of The Law Company, Inc.**, ARB Case No. 98-107 (Sept. 30 1999).

While ASBA cite several cases in support of their position that a jurisdictional dispute exists herein between the laborers, carpenters and painters, I agree with Complainant that those cases factually are clearly distinguishable, are inapposite and do not support the position of ASBA. Moreover, it is apparent that those cases cited by ASBA actually provide legal support for the

methodology used by Mr. Peckham in conducting his LAPS.

ASBA also submit that these proceedings have had the effect of modifying, **ex post facto**, and completely eliminating the respective classifications in the WDs. However, again ASBA rely on a conformance proceeding and such reliance is completely inapposite because at no time had the Complainant ever approved of the pay practices of any of the Respondents joined herein. This issue has been more fully discussed in the sections dealing with the Respondents' defense of equitable estoppel.

The foregoing facts show that, even assuming, *arguendo*, all reasonable parties would reach the same conclusions from a TOT analysis, a TOT analysis, standing alone, is inadequate because it is not always consistent with local area practice. Moreover, the evidence at trial shows that Abhe's reliance on Svoboda's TOT analysis resulted in classifications which were contrary to established local area practice. Abhe had an obligation to pay prevailing wages in accordance with the way the local unions classified the work. **Fry Brothers**, Holding No. 6. As discussed above, the CT laborers, carpenters and painters unions all agree that, during the relevant time period, it was the prevailing local practice to pay painter rates for virtually all of the work tasks done by Abhe's employees on the Abhe Projects, and I so find and conclude. **See supra**, pp. 5-23.[16]

D. EDT Violated The DBRA When It Failed To Pay Its Employees The Prevailing Wage For Painters For Performing Painters' Tasks On The Arrigoni Bridge

EDT, a non-union company (RX 34), provided and erected the containment devices on the two main trusses of the Arrigoni bridge. (Svoboda 7837, 7860, 8212; CX 205) EDT employees also collected spent debris on Arrigoni. (Nancy DiPietro ("ND") 4505). All of the work done by EDT was related to the goal of getting the Arrigoni bridge blasted and painted. (CX 205) There was no evidence that containments erected by EDT employees were intended for any purpose other than the work involved in blasting and painting the bridge. This is work which in CT is within the jurisdiction of the painters' union. The EDT employees listed on CX 63 were paid carpenter rates for assembling the Beeche platform, building the "doghouses," and installing bulkheads. (ND 4506) They were paid laborer rates for all other work they performed on Arrigoni. (ND 4506; CX 48, 63) EDT also paid employees laborer rates, and was reimbursed one hour per day, cost plus, based on

[16]As discussed above, Peckham determined that certain tasks, in accordance with local union area practice, should be paid at operator rates.

that rate, for shower time. (RX 42). The wage rates paid by EDT were improper because they were contrary to local practice, and I so find and conclude.

E. Jewell Violated The DBRA When It Failed To Pay Employees The Painter Prevailing Wage For Performing Painters' Tasks On The Arrigoni Project

Jewell, also a non-union company (Murray 6093-94; Cameron Jewell 10073), was responsible for blasting and painting the approach spans on Arrigoni. (Jewell, 9956, 9967-70; CX 206A, 206B) All of the work identified in the contracts between Jewell and Abhe related to the primary goals of removing lead paint, and blasting and painting the approach spans. (Jewell 10088; CX 206A, 206B)

1. Jewell Employees Performed Painters' Work On Arrigoni

Jewell primarily used "Ark" containments made of aluminum and put together on site. (Jewell 9952-53) Bulkheads, made of wood and metal, as well as impermeable tarpaulins, were also used as part of Jewell's containments. (Collette 1747-48; Jewell 9954) Jewell employees stood on the bottom of the Ark containment, as well as on scaffolding, when blasting. (Collette 1761) Jewell also used spider basket and "buggy" containments. (Collette 1751, 1753) The former consisted of spider baskets connected with boards, tarpaulins and bulkheads. (Collette 1751-52) The employees did the blasting and painting work while standing in the baskets. (Collette 1751-52). The buggy containment consisted of metal and wood, including bulkheads, and was in the shape of a box. (Collette 1754) Jewell employees stood on the floor of the buggy containment to blast and paint the handrails on Arrigoni. (Collette 1761)

Jewell employees did the following types of work on Arrigoni: mobilization, assembling, moving and disassembling containments (including pick boards and cables inside the containments), setting up to blast, operating blasting pots and recycling machines, blasting, grit collection, setting up to paint, painting, and traffic control. (Tetreault 1850-56, 1860, 1865, 1872-73; Jewell, 9965-66, 10004-06; CX 206A, 206B) Jewell employees also took showers on Arrigoni. (Jewell 10007)

The teamwork principle that prevailed on the Gold Star Project and on the Abhe Projects also existed among Jewell's employees; all Jewell employees working on Arrigoni helped out doing whatever work needed to be done. (Collette 1780) By way of example, employees who were excellent painters also assembled, moved and disassembled containments, set up to blast, blasted, cleaned spent debris and did traffic control. (Tetreault 1851-65, 1953-54)

2. Jewell Paid Employees Laborer Rates For Performing Painters' Work On Arrigoni

The only wage rates paid by Jewell were laborer and painter rates. (CX 98) Jewell paid painter rates when an employee had a blasting hose or spray gun in hand and when the blasting inspection was taking place. (Collette 1757, 1760-61; Tetreault 1870; JP 4926). For all other work, Jewell paid employees laborer rates. (Collette 1757; Tetreault 1870-71)

Cameron Jewell never signed, or reviewed, any CT collective bargaining agreements before determining what wage rates to pay on Arrigoni. (Jewell 10073) Nor did he have pre-bid discussions with CT unions about wage practices. (Jewell 10073) Instead, Jewell determined his Arrigoni wage rates by reviewing the prevailing WDs and conducting his version of a TOT analysis. (Jewell 9963-65)

Jewell's pay practices provide further evidence that relying on a TOT analysis to interpret wage decisions results in inconsistencies with local area practice. The fact that Jewell's pay practices were contrary to local area practice is evidenced by its payment of laborer rates for work which all of the CT unions agreed was painter work. Similarly, the inconsistent results of the TOT analysis among contractors is shown by the fact that Jewell paid laborer rates for installing wooden bulkheads and operating blasting pots while Abhe and BA, after conducting their TOT analyses, paid carpenter rates for installing wooden bulkheads, and both laborer and painter rates for operating blasting pots, and I so find and conclude.

F. Blast All Violated The DBRA When It Failed To Pay Its Employees The Prevailing Wage For Painters For Performing Painters' Tasks On The Mill River, OL/EL, SIPCO, Southington/Glastonbury And DeFelice Projects

In February 1993, BA signed CT painters' union collective bargaining agreements which expired in July 1995. (CX 158, 159, 160) Those are the only CT collective bargaining agreements to which BA has ever been a signatory. (Bogan 8703-04) BA had subcontracts with Abhe, SIPCO, Laugeni, and L.G. DeFelice, Inc. to perform work on the Mill River, OL/EL, SIPCO, Southington/Glastonbury and DeFelice Projects (collectively, the "BA Projects"). (CX 78, 79, 203, 204, 287B) With the exception of the SIPCO and DeFelice Projects, all of the BA Projects were single trade bridge painting projects. (JP 3678) With regard to SIPCO and DeFelice, all of BA's work on those Projects related to getting bridges blasted and/or painted. (Rowland 871-72; CX 287B)

1. BA Employees Performed Painters' Work On The BA Projects

BA blasted and painted Bridge No. 3016 on Mill River. (Bogan 7937, 8534; CX 1) In order to complete their work in accordance with the CT-DOT specifications, BA employees on Mill River were required to mobilize, assemble, move and reassemble containments, set up for blasting, operate the blasting pots and recycling machines, blast the bridge, collect spent debris, set up to paint, paint the bridge and do traffic control. (Strausser 641; Bogan 8538-39) All the work performed by BA on Mill River related to turning Bridge No. 3016 from a rusty bridge into a newly painted bridge. (CX 203) BA performed no steel work, no road bed construction, or any excavation or grading work on the Mill River Project.

The containments used by BA on Mill River consisted of a metal bracket, a wooden platform deck, flexible tarpaulins hung from the bridge and attached to all sides of the deck and wooden bulkheads. (Rowland 832, 835; Bogan 8724, 8837; BX 26) BA employees stood on the platform "deck" to blast and paint on Mill River. (Bogan 8729, 8789) BA employees on Mill River took daily decontamination showers. (Strausser 646) BA was reimbursed by CT-DOT based on both the laborer and painter rate for employee shower time on Mill River. (Bogan 8541, 8763; CX 285)

BA's contract with Abhe on OL/EL required BA to blast and paint Bridge No. 303 and to install containments on four other bridges which Abhe blasted and painted. (Bogan 8524-25, 8531-32; CX 1, 204) The work done by BA employees on Bridge No. 303 was identical in nature to the work done by BA on Mill River. Specifically, they mobilized, assembled, moved and reassembled containments, set up for blasting, operated blasting pots and recycling machines, blasted the bridge, collected spent debris, set up to paint, painted the bridge and did traffic control. (Rowland 860-66; Bogan 8528-30) Additionally, as with Mill River, the BA employees who performed the blasting and painting stood on the platform deck to perform that work. (Bogan 8789) The containments installed by BA for Abhe were the same ones that BA used to perform blasting and painting on Bridge Nos. 3016 and 303. (Bogan 8525)

BA blasted and painted approximately twelve bridge sites on the SIPCO Project. (Bogan 8578; CX 287B) Although BA's containments on the SIPCO Project were considerably larger than the containments on the Mill River and OL/EL Projects, they were of the same type and used essentially identical components. (Bogan Depo, CX 210, pp. 220-22) Similarly, although BA's crew on SIPCO was larger than its crew on Mill River and OL/EL, BA's SIPCO crew performed the same types of work tasks. (CX 210, pp. 222-23) Specifically, they mobilized, assembled, moved and reassembled containments, set up for blasting, operated blasting pots and recycling machines, blasted the bridge, collected spent debris, set up to paint, painted the bridge and did traffic control. (Bogan 8555-56, 8784, 8788) BA employees on the SIPCO Project also stood

on the "deck," or floor of the containment system, to perform blasting and painting work. (Bogan 8789) BA employees on SIPCO, like BA employees on Mill River and OL/EL, took showers. BA paid both painter rates and laborer rates to employees who took showers on SIPCO. (Bogan 8764; CX 233)

BA provided work platforms for Laugeni on the Southington/Glastonbury Project. (Bogan 8561-62; CX 1, BX 8) These were the same platforms used by BA in its containments on the Mill River, OL/EL and SIPCO Projects. (Bogan, 8561-62) Laugeni used the work platforms as the bottom of its containment structure and as the means of access for the areas it blasted and painted on the Southington/Glastonbury Project. (Bogan 8790) BA also installed bulkheads for some containments used by Laugeni and used Laugeni's equipment to perform traffic control so that Laugeni could access the areas being blasted and painted. (Bogan 8564, 8567) The evidence adduced at trial shows that the containments provided and erected by BA employees on the Southington/Glastonbury Project, like those used by BA on the Mill River, OL/EL and SIPCO Projects, were intended to be used solely for work which was within the jurisdiction of the painters' union, namely, blasting and painting bridges.

BA contracted with DeFelice to perform spot painting on CT-DOT Project No. 83-219 (the "DeFelice Project"). The spot painting was done through a "patch and match" method, which involved scraping, wire brushing, sanding and painting portions of bridges. (Rowland 871) Kenneth Rowland, a foreman on the DeFelice Project, testified that patch and match work was the only work performed on that Project by BA. (CX 270; Rowland 871-72)

As with the other Violation Projects, no employee performed just one task on the BA Projects. (Rowland 836, 865-67, 871, 1526-27; Bogan 8538-39, 8555-56) Rather, BA employees, like the employees on the other Violation Projects, worked together as a team to paint and blast the bridges. (Rowland 836, 865-67, 871, 1526-27; Bogan 8555-56, 8538-39)

2. <u>BA Paid Employees Laborer And Carpenter Rates For Performing Painters' Work On The BA Projects</u>

Steve Bogan decided what wage rates would be paid to all employees who worked on the BA Violation Projects. (Bogan 8635-36) Apart from internal BA employees, Bogan never spoke to anyone who influenced his decision. (Bogan, 8810-11) Bogan testified that he used a TOT analysis to interpret the prevailing WDS, as well as his experience at Alpha Avenue, when he decided upon wage rates for employees on the BA Projects. (Bogan 8243; CX 210, pp. 180-81) Bogan paid laborer and painter rates to employees on Mill River, OL/EL and SIPCO who performed the following tasks: mobilizing, assembling, moving and disassembling containments, setting up for blasting, collecting spent debris, setting up to paint, doing

traffic control and taking showers. (Strausser 636-48; Rowland 860-67, 1524-28, 1537-38; Bogan 8525, 8528-33, 8541, 8563; CX 233, 285, 287A) As a general rule, BA paid painter rates to all employees who did any blasting and painting, even where they were performing other tasks, but paid laborer rates to all employees who did no blasting and painting work. For example, Kenneth Rowland, who did blasting and painting work on the BA Projects, received painter rates for that work as well as for the time he spent cleaning up spent debris, assembling, moving and disassembling containments, doing traffic control, taking showers and doing various other tasks. (Rowland 831-36; CX 233, 285, 287A) By contrast, John Downing, who did not do blasting and painting on the Violation Projects, was paid laborer rates when he was cleaning up spent debris, assembling, moving and disassembling containments, operating blasting pots, doing traffic control, taking showers and doing various other tasks. (Stausser 642; Rowland 866-67, 1537; CX 233, 287A) However, with regard to at least one employee, Craig Tuttle, Bogan paid laborer rates for all of his time on the Mill River Project, even though he spent some of that time doing spot blasting, and I so find and conclude. (Rowland 1572; CX 287A)

Bogan also testified that he paid carpenter rates to certain employees when they worked with wood and when they used screw guns to put up tarpaulins because that was "carpenters' work," and because painters, in his opinion, did not have the skills necessary to put up the tarpaulins. (CX 210, pp. 175-76)[17] BA employees installed bulkheads and attached tarpaulins on the Mill River, OL/EL and SIPCO Projects. BA's certified payrolls show that BA paid certain employees split carpenter and laborer rates on the SIPCO Project. (CX 233). However, the certified payrolls also show that BA paid only painter and laborer rates for all work performed on the Mill River and OL/EL Projects. (CX 51, 53-57)

Bogan also testified that he paid Michael Sheffield and Randall Elkins carpenter rates for approximately ten percent of their time, which Bogan believed they spent installing bulkheads, on the Southington/Glastonbury Project. (Bogan 8568) The certified payrolls submitted by BA as BX 1 show 10 hours paid to Sheffield at the carpenter rate. (BX 1) The certified payrolls given to Investigator DiPietro by BA showed that BA paid only laborer rates to all employees who performed work on the Southington/Glastonbury Project. (CX 51, 53-57) BA failed to produce the certified payrolls on the Southington/Glastonbury Project during discovery, despite the fact that those documents had been requested by Complainant on December 2, 1999. The first time

[17] Bogan's testimony that BA employees who were paid painter rates did not have the skills to use screw guns to attach tarpaulins to the containment "decks" on the BA Projects is contradicted by the testimony of Harvey Strausser and Kenneth Rowland. (Strausser 638-39; Rowland 835-36, 860)

BA produced the certified payrolls on the Southington/Glastonbury Project to Complainant was when BA used the document during cross examination of former BA employee Kenneth Rowland. Given BA's repeated failure to produce relevant requested information which BA reasonably should have had within its possession, such as the foregoing certified payrolls as well as the subcontract agreements for the BA Projects,[18] it is likely that the certified payrolls given to DiPietro on the Southington/Glastonbury Project may have been incomplete. As a practical matter, the incomplete records work to BA's advantage. Although the certified payrolls submitted as BX 1 show that BA employees were working, and were improperly paid the laborer and carpenter rate, during the work week ending 4/27/96, DiPietro did not compute back wages for employees for any hours worked on the Laugeni Project during that week because BA had failed to provide her with relevant information. (BX 1)

3. BA's Pay Practices Violated The DBRA

BA's pay practices were inconsistent with local area practice in CT which, as discussed **supra**, required that tasks associated with bridge painting such as mobilization, assembling, moving and disassembling containments, operating blasting pots and recycling machines, setting up to blast, cleaning spent debris, setting up to paint, traffic control and shower time be paid at the prevailing wage for painters. BA's assertion that employees were paid correctly because its pay practices were based on Bogan's TOT analysis suffers from the same fatal flaws discussed above in reference to Abhe's and Jewell's pay practices. Indeed, comparing Bogan's TOT analysis to Svoboda's TOT analysis provides yet another illustration of how relying on a TOT analysis creates inconsistent results contrary to the purpose of the DBRA. Specifically, Bogan determined that, as a general rule, if an employee did blasting and painting, they should always be paid at the painter rate regardless of what task they were performing because they were a "painter." Thus, under Bogan's TOT analysis, once employees regularly began doing blasting and painting work, they were "painters" regardless of what tool they were using on a Project and he did not feel it was appropriate to drop their rate even if they were cleaning spent debris instead of actually blasting and painting.[19] By comparison,

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[18]Although Complainant requested copies of all contracts between BA and the prime contractors on the BA Projects in December 1999, BA never produced any such contracts to Complainant. The only contractual documentation produced by BA was correspondence between BA and Laugeni regarding BA's work on the Southington/Glastonbury Project and even that documentation was not produced until shortly before it was used by BA's counsel during the cross examination of Thomas Laugeni on May 17, 2000.

[19]BA, in effect, used lower paid employees to "tend" employees doing blasting and painting. As discussed **supra**, this practice is

Svoboda felt that even employees who did blasting and painting were entitled to the painter rate only when actually performing that work. **See supra**, pp. 36-39.

Further, BA's application of the TOT analysis, like Abhe's, suffers from internal inconsistencies. Although Bogan testified that a blasting pot is a painters' tool, he paid laborer rates to Joe Burdy and John Downing for all of their work on the Mill River and SIPCO Projects, respectively, even though both of them spent time on those Projects operating the blasting pots. (Strausser 642; Rowland 862; Bogan 8636-37; CX 233, 287A) Similarly, though Bogan characterized Burdy as his "head mechanic," he chose to pay him laborer rates, rather than operator rates, for all of his work on the Mill River and OL/EL Projects. (Bogan 8537; CX 51, 53-57, 287A)

Bogan's other defense, that his practices were proper because they were based on practices that took place at Alpha Avenue, is equally unavailing. By Bogan's own admission, Alpha Avenue was an "experimental" project. (Bogan 8714-16, 8390-91) Alpha Avenue involved the use of an entirely wooden structure, comparable to a house or a barn, which was totally unlike any other containment structure at issue in this proceeding. (Bogan 8723; BX 22). The reason CT-DOT changed the specifications on Alpha Avenue after it was originally bid was to determine what types of problems and flaws would arise in connection with the new specifications, and to monitor possible loopholes in those specifications, before the Gold Star Project came out to bid. (Bogan 8715-16, Bogan Depo., CX 210, p. 68). Put another way, the CT-DOT used Alpha to do "piloting and testing for the Gold Star Bridge." (Bogan 8391, 8714-16) Lastly, Rotha, the contractor who assembled the containments on Alpha Avenue, is a concrete, not a bridge painting, contractor, a fact which Steve Bogan struggled to avoid admitting at trial. (Bogan 8716; CX 210, p. 50) In short, a review of all relevant facts shows that Alpha was really the only "different" technology described during the entire proceeding, and I so find and conclude.

G. Shipsview Violated The DBRA When It Failed To Pay Its Employees The Prevailing Wage For Painters For Performing Painters' Tasks

Shipsview is a non-union contractor. (Murray 6093) In 1994, Shipsview contracted with the CT-DOT to complete all work on Project No. 171-213 (the "Project"). (CX 9) All of the work performed by Shipsview employees on the Project related to transforming numerous rusty bridges into newly painted bridges, and I so find and conclude. (CX 9, 18)

1. Shipsview Employees Performed Painters' Work

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improper under the DBRA.

Shipsview primarily used chain link fence containments attached to bridges with cables for containments. (Deligiannidis Depo., CX 212, pp. 51, 61-63) These containments also included tarpaulins and wooden bulkheads. (CX 212, pp. 51, 62-63). The chain link fence served two purposes: it provided access for employees to do the blasting and painting work and it also provided support for the sides of the funnel tarps which contained the spent debris. (CX 212, pp. 51, 63-66) On the Meriden and Crooked Street bridges, Shipsview also used containments composed of one or two trucks enclosed with tarpaulins. The tarpaulins were tied to the bridge railing and fell straight to the ground. (CX 212, pp. 87-88, 120-24) In those containments, blasting and painting areas were accessed from the truck inside the tarpaulins. (CX 212, pp. 89-90, 120) Shipsview employees performed the following tasks: mobilization, assembling, moving and disassembling containments, setting up to blast, operating blasting pots and recycling machines, blasting, cleaning spent debris, setting up to paint, painting, and traffic control. (Andrews 951-52, 955; Rawlings 1368-69, 1376-79, 1383-84, 1399-1402; Flynn 1433-37, 1443; DeChambeau 6648-50; Bayna 6709-17 ; CX 212, pp. 96-97) Shipsview employees also showered daily. (CX 212, pp. 97-99)

2. <u>Shipsview Paid Employees Laborer Rates For performing Painters' Work On The Shipsview Project</u>

Christos Deligiannidis determined wage rates to be paid to his employees on the Project before he submitted his bid. (CX 212, p. 38) The rates Deligiannidis determined pre-bid were the rates in effect throughout the Project. (CX 212, pp. 40-41) Deligiannidis never signed or reviewed any union contracts before he determined what wage rates to pay. (CX 212, pp. 45-46) He did not speak to any union representatives, contractors or DOL employees about whether his wage rates were appropriate. (CX 212, pp. 149-50) Deligiannidis used his personal experience to interpret the applicable WD. (CX 212, p. 42) He testified that being a "painter means you paint" and that "you hold a brush [], a spray gun, a roller." (CX 212, p. 43). However, Shipsview's employees were not always paid painter rates even when painting with a brush, spray gun or roller. Richard Rawlings spent 40 percent of his time using a brush and roller to paint while he worked on Bridge No. 3400C. (Rawlings 1369) Rawlings also spent approximately 20 to 30 percent of his time using a brush and roller to paint on Bridge No. 3321. (Rawlings 1383). Though, under Deligiannidis' definition, Rawlings was performing painters' work, he was paid laborer rates for all of his work on the Project. (Rawlings 1372; CX 229) Floyd Andrews, Richard Flynn and Ceferino Bayna also used brushes, rollers and/or spray guns to paint bridges on the Project. (Andrews 955; Flynn 1433, 1461; Bayna 6712, 6714) They, like Rawlings, were also paid laborer rates for all of their work on the Project. (CX 229)

When employees did sometimes receive the painter rate when painting, Shipsview still split their rate. While they received

painter rates when they were painting, they would receive laborer rates for all other work they performed. (CX 212, pp. 161-62) For example, Ed Lada was paid 8.5 hours at the painter rate and 31.5 hours at the laborer rate during the week ending May 11, 1996. (CX 212, pp. 161-62, Depo Ex. 5) The split rate practice was consistent with Deligiannidis' policy that anyone who was not actually painting should be paid a laborer rate. (CX 212, pp. 37-38, 53)[19]

Deligiannidis also testified that he believed blasting was laborers' work and that, where the classification on his certified payroll stated "laborer," those employees could have been doing blasting work. (CX 212, p. 76). The testimony of Richard Rawlings and Ceferino Bayna shows that Shipsview did in fact pay laborer rates for blasting work. Both Rawlings and Bayna testified that they did blasting work on the Project and that they received laborer rates for performing that work. (Rawlings 1376-79; Bayna 6709, 6721; CX 229) Deligiannidis also paid most of his employees laborer rates for shower time. (CX 212, pp. 97-99)[20]

As discussed above, the local area practice in CT was to pay the prevailing wage for painters for all of the work performed by Shipsview employees on the Project. **See supra**, pp. 5-23. Shipsview violated the DBRA when it failed to pay wage rates which were in accordance with local area practice in CT, and I so find and conclude.

IV. COMPLAINANT PROPERLY COMPUTED BACK WAGES AGAINST RESPONDENTS FOR THEIR WORK ON THE VIOLATION PROJECTS

In computing back wages for employees on the Violation Projects, Peckham, DiPietro and Investigator Joyce Enright utilized

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[19]Shawn Frederick was paid in a different manner than the other Shipsview employees for part of his work on the Project. Deligiannidis determined that Frederick should be paid $12 an hour, which was lower than the prevailing wage of $16 an hour for laborers, for performing work as a "groundsman" on the Project. (CX 229) When Frederick was performing work for which he received $12 per hour, Deligiannidis believes Frederick was "probably on the ground mixing paint and helping around, I guess." (CX 212, p. 155) Deligiannidis did not consider mixing paint to be painters' work. (CX 212, p. 155)

[20]Shipsview employed certain "core" employees on the Project. (CX 212, p. 67) The core employees received painter rates for all of their work, including their shower time. (CX 212, pp. 97-98) Deligiannidis believes that, although CT-DOT originally reimbursed employee shower time at the laborer rate, when Deligiannidis realized what the CT-DOT was doing, he spoke to them and they began reimbursing him at the painter rates for the employees to whom he paid that rate when they took showers. (CX 212, pp. 97-99)

the Respondents' certified payroll records and transcriptions thereof, the applicable federal WDS, the applicable fringe benefit rate according to the particular painters' local commercial agreement, and, in very limited situations, information provided by the employees. (JP 3190-93, 3289, 3314, 3385-93, 3412-13, 3423-24, 3449; ND 4381-82, 4494-96, 4509-4513; Enright ("JE") 6804, 6824-25, 6843-44; CX 35-44, 51, 53-58, 97-98, 102-103, 105-107, 199, 227-31, 233, 267, 270-72, 287A, 290-91, 296)[21] The transcriptions and computations for each contractor on each project are reflected in the Wage Transcription and Computation sheets (WH-55 forms) and, in some instances, accompanying computerized spread sheets. (JP 3203, 3315, 3393-94, 3430, 3492-93; ND 4421-28; JE 6850, 6917-23; CX 46- 49, 51-52, 54-60, 231) Each Summary of Unpaid Wages (WH-56 form) summarizes the total back wages calculated for each employee and also reflects the total amounts assessed against each Respondent for minimum wage and overtime violations. (JP 3279-82, 3378-81, 3408-09, 3447-48, 3501-03; ND 4466-4489, 4520-22; JE 6887-88, 6932-35; CX 61-64, 66-74, 232)[22]

A. Complainant Properly Computed Back Wages Against Abhe, EDT and Jewell

Investigators Peckham and DiPietro based their computations on the conclusion that all of the following tasks should have been paid at painter prevailing wage rates on the Arrigoni Bridge, OL/EL and Mill River Projects: mobilizing, assembling, moving and disassembling containments (including the pick boards and cables inside the containments as well as "doghouses" on Arrigoni), setting up to blast, operating blasting pots and recycling machines, blasting, cleaning spent debris, setting up to painting, painting, general clean up and traffic control, and I so find and conclude. (JP 3233-3234, 3358, 3436-37; ND 4495-4509)

In computing back wages for violations on the Arrigoni Bridge, OL/EL and Mill River Projects for employees performing the above tasks for Abhe, Jewell, and EDT, Peckham and DiPietro assessed the difference between the base wages and fringe benefits they were paid for all hours worked at either the laborer rate or carpenter

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[21]There is no single fringe benefit rate for bridge painters which applies statewide and, thus, no single fringe benefit rate is expressed in either the Statewide Bridge Agreement or the WD; rather, the fringe benefit rate varies according to the local commercial agreements. (JP 3205; CX 46-49, 51-60)

[22]Detailed explanations and examples of the Investigators' computations for each of the contractors on the Violation Projects are provided in the Appendix annexed to Complainant's post-hearing brief.

rate, and the base wages and fringe benefits they should have been paid at the painter rate. (JP 3206, 3318-20, 3394-3401, 3436; ND 4495-4509; CX 46- 49, 52). Peckham and DiPietro based their calculations for Abhe, Jewell and EDT employees at Arrigoni on an hourly rate of $31.70 (base rate of $25.10 and fringe benefit rate of $6.60). The hourly rate was reduced from the listed rate of $31.85 because $0.15 of the otherwise applicable $6.75 fringe benefit portion was allocated to a non-*bona fide* fund and, therefore, unenforceable. (JP 3205-06, 3341-42; CX 46- 48)[23]

In computing for overtime violations on the Arrigoni Bridge, OL/EL and Mill River projects for employees of Abhe, Jewell and EDT, Peckham and DiPietro assessed the difference between the half-time premium paid at either the laborer or carpenter base rate, and the half-time premium that should have been paid at the painter base rate for all overtime hours worked. (JP 3206-07, 3319, 3341-42, 3394, 3399, 3445; CX 46- 49, 52). In those instances where the Respondents Abhe and Jewell had incorrectly calculated the half-time premium for the painter rate by combining the base wage rate and the fringe benefit rate, instead of using the base wage rate alone, Peckham credited half-time premium overpayments made by those Respondents. (JP 3238-39, 3341-55) This credit was given only for those work weeks where misclassifications occurred.[24] No credit or offset was made at all for EDT since none of its employees were paid the painter rate at any time. (CX 48, 102)

Peckham also assessed back wages for Abhe employees on Arrigoni Bridge, OL/EL and Mill River who were paid at the laborer rate and should have been paid at the mechanic and maintenance engineer rates (power equipment operator categories). (JP 3208, 3439-3443; CX 46, 49, 55) Peckham raised all Abhe employees on the Abhe Projects who were listed as doing “equipment repair” on Abhe’s phase codes up to the mechanic and maintenance engineer rates. (JP 3190; CX 46, 49, 52, 61, 64, 67; AX 16)

The DBRA minimum wages assessed for Abhe employees working on Arrigoni total $407,139.84. The CWHSSA overtime wages for Abhe

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[23]The applicable rate in the WD for bridge painting work on the Arrigoni Bridge project was $31.85, representing a combined hourly base rate of $25.10 and fringe benefit rate of $6.75. (JP 3205-06; CX 35, p. 15)

[24]In some weeks, half-time overpayments completely offset misclassification half-time back wages where misclassified, underpaid overtime hours were less than a particular percent of the overpaid half-time hours. The percent in this case is equivalent to the ratio of the overpaid hours to the underpaid hours differential. (JP 3248-60)

employees working on Arrigoni total $29,609.16. (CX 46, 61)[25]

The DBRA minimum wages assessed for EDT employees on the Arrigoni Bridge Project total $84,524.67. (CX 48, 63). The overtime wages assessed, under CWHSSA, for EDT employees working on Arrigoni total $6,662.17. (CX 48, 63)

In addition to Jewell misclassification computations, Peckham also computed back wages for those Jewell employees who were paid $175.00, as a lump sum, for eight hours of work and, thus, were paid an improper prevailing wage rate. To do this, Peckham utilized a listing of $175.00 checks (from 1995 only) which Jewell assembled and sent to him in September 1996. (JP 3289; CX 101) He also utilized copies of various $175.00 checks he received from Jewell's counsel in 1997. (JP 10405-06; JX 5-6)[26] Peckham transcribed the $175.00 amounts for each employee with an annotation as to the check number. (CX 47, 101) For each $175.00 check, Peckham allocated 8 hours of work to the employee's time recorded in the work week preceding the date of the check's issuance. The 8-hour allocations reflected either overtime or straight time hours, depending on the overall number of hours recorded for the particular employee's work week. (JP 3319-20; CX 47) In computing straight time DBRA wages for those employees who received $175.00 checks, Peckham determined that they were entitled to the difference between the $21.88 hourly rate they were actually paid ($175.00 divided by 8 hours) and $31.70, the hourly painter rate, multiplied by 8. (JP 3320; CX 47) In computing CWHSSA back wages, Peckham computed the half-time premium for those $175.00 checks representing overtime hours using the painter base rate of $25.10. (JP 3341- 46; CX 47). The DBRA minimum back wages assessed for Jewell employees total $582,793.62. (CX 47, 62)[27]

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[25]The investigative period applicable to Abhe, Jewell and EDT on the Arrigoni, Old Lyme/East Lyme, and Mill River projects is July 1994 to July 1996. (JP 3195)

[26]A comparison of the checks annexed as Exhibit 3 to Lowell Passons' deposition shows that Jewell failed to submit to Peckham a complete listing or set of $175.00 checks paid to its employees over the course of their work on Arrigoni. (Passons Depo., CX 289, Exh. 3) For example, while the list of 1995 "expense" checks provided to Peckham lists Passons as receiving, at most, only one $175 check per week in 1995, Exhibit 3 to CX 289 shows that Passons received two $175 checks on July 9, 1995, July 23, 1995, September 10, 1995 and September 17, 1995. (CX 209, pp. 59-60, 63-64, 70-71; Exh. 3) Consequently, Peckham's computations understate the amount due Jewell employees.

[27]There is one Jewell employee, Al Twarowski, for whom Peckham computed back wages at the mechanic and maintenance engineer rate (power equipment operator categories), rather than the painter

Overtime back wages assessed under CWHSSA for Jewell employees total $69,028.26. (CX 47, CX 62)[28]

Calculations for employees of Abhe and BA at OL/EL are based on an hourly rate of $32.70: a fringe benefit rate of $6.60 per hour and a base rate of $26.10. The rate is reduced from the listed rate of $32.85 because $0.15 of the otherwise applicable $6.75 fringe benefit portion was allocated to a non-*bona fide* fund and, therefore, unenforceable. (JP 3394; ND 4384-85; CX 49, 51, 54- 57)[29] The DBRA back wages assessed for Abhe's employees on OL/EL total $33,218.34. Overtime back wages assessed under CWHSSA for Abhe's employees on OL/EL total $2,469.24. (CX 49, 64)

Peckham and DiPietro based their calculations for Abhe and BA Mill River employees on the non-spray rate of $30.20 ($23.67 wage rate and $6.53 fringe benefit rate). The reduction of $0.15 per hour in the fringe benefit rate for a non-*bona fide* fund was not applicable on Mill River. (JP 3433; ND 4388; CX 38, 51-52, 54-57)[30] DBRA wages assessed for Abhe employees on Mill River total $97,694.64. Overtime wages assessed under CWHSSA for Abhe employees working on Mill River total $9,409.34. (CX 52, 67)

B. Complainant Properly Computed Back Wages Against GCPC And Daskal

Peckham properly based his back wage computations for GCPC employees on the conclusion that the tasks performed by those employees listed on the certified payroll records for the Gold Star Project as material handlers or painter sweepers ("MH/PS") should have been paid at the painter prevailing wage rate. Those employees listed as MH/PS were paid an hourly rate of $22.60, reflecting a $16.00 base rate and $6.60 fringe benefit rate. (JP

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rate. (CX 47, 62) Twarowski was a mechanic who worked for Jewell on Arrigoni. (Collette 1813)

[28]Back wages were assessed for the investigative period July 1994 to July 1996, inclusive of the period in May, 1995 when Jewell employees were carried on Abhe's payroll since they continued to be supervised and directed by Jewell, and their hours continued to be recorded by Jewell foremen. (JP 3301, 3350-51)

[29]The applicable rate in the WD for bridge painting work on the OL/EL project was $32.85, representing a combined wage rate of $26.10 and fringe benefit rate of $6.75. (JP 3387-88, 3391, 3397; CX 36, p. 15, CX 37, p. 6-7)

[30]The applicable WD lists two rates for bridge painting work on the Mill River project, both them union rates: $33.70 for spray painting only and $30.20 for all other work. (JP 3423-24; CX 38, p. 15)

3470-71; CX 106) In assessing minimum wages, Peckham computed the difference between the non-spray painter prevailing wage rate of $30.20 and the MH/PS rate of $22.60, for all hours worked by employees listed as MH/PS. (JP 3470-74; CX 58)[31]

In assessing overtime for violations found on Gold Star for MH/PS employees, Peckham computed the difference in half-time premium between what was paid at the $16.00 MH/PS hourly base rate and what should have been paid at the $23.60 non-spray painter hourly base rate for all hours of overtime worked. (JP 3473; CX 58) In computing overtime back wages for MH/PS employees, Peckham credited half-time premium overpayments made by the contractor for non-statutory overtime hours. (JP 3471-73, 3478-79; CX 58) The DBRA minimum wages due to GCPC Gold Star employees totaled $251,586.40. The CWHSSA overtime wages assessed for GCPC Gold Star employees totaled $19,256.50. (CX 58, 72)[32]

Investigator Peckham based his computations for employees of Daskal on the conclusion that they qualified as laborers or mechanics on a DBRA-covered project and were, therefore, entitled to a prevailing wage rate in accordance with their classification of work. Peckham based his calculations for Daskal employees working as a ground crew on the laborer hourly rate of $22.30 ($16.00 base rate and $6.30 fringe benefits). (JP 3513, 3520; CX 42). Daskal employees working as a ground crew had been paid hourly rates ranging from $9.00 to $11.00 per hour. (JP 3524; CX 59) In assessing minimum wages for the Daskal ground crew, Peckham computed the difference between the laborer prevailing wage rate of $22.30 and the rate actually paid by Daskal for all hours worked. (JP 3513-14; CX 59).[33] In computing overtime for Daskal ground crew, Peckham computed the difference in the half-time premium between what was paid between the $9.00 and $11.00 hourly rate and $16.00, the laborer hourly base rate, for all overtime hours worked. (JP 3522; CX 59) In computing overtime, Peckham credited half-time premium overpayments made by the company for non-statutory overtime hours. (JP 3513; CX 59)

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[31]The applicable WD lists two rates for bridge painting work on the Gold Star Project, both union rates: $33.70 for spray painting only and $30.20 (representing a combined wage rate of $23.60 and fringe benefit rate of $6.60) for all other work. (JP 3450-51, 3455-57, 3471; CX 42, p. 78-b)

[32]The investigative period applicable to GCPC on the Gold Star Project was July 1994 to July 1996. (RX 10)

[33]In computing back wages for Daskal ground crew and safety boat operators on the Gold Star Project, Peckham relied on applicable WDS, information obtained from employees, and Daskal payroll records, since the company did not maintain certified payroll records for the projects. (JP 3510, 3514)

Daskal employees working as safety boat operators were paid an hourly rate ranging from $10.00 to $12.00 per hour. (JP 3524; CX 59) Peckham based his calculations for these employees on the WD rate for "Power Equipment Operator (Heavy and Highway), Class 17" with an hourly rate of $25.66 ($17.81 base rate and $7.85 fringe benefits). (JP 3516; CX 42, CX 292) In assessing minimum wages for safety boat operators, Peckham computed the difference between the Safety Boat Operator rate of $25.66 and whichever rate was paid by Daskal for all hours worked. (CX 59) In assessing overtime violations for safety boat operators, Peckham computed the difference in the half-time premium between what was actually paid employees and $17.81, the Safety Boat Operator base rate, for all overtime hours worked. (CX 59) Peckham credited half-time premium overpayments made by the company for non-statutory overtime hours. (CX 59)

The DBRA minimum wages assessed for Daskal on the Gold Star Project total $242,135.11. The overtime back wages assessed, under CWHSSA, for Daskal employees on the Gold Star Project total $8,779.05. (CX 59, 73)

C. Complainant Properly Computed Back Wages Against BA

BA calculations, performed by DiPietro, are based on Peckham's conclusion that the types of work performed by BA employees working on the BA Projects, **supra**, should have been paid at the painter prevailing wage rate. (ND 4877-79; **see also** ND 4370-73, 4379, 4459) For all BA Projects, the minimum wage computations assess the difference between the wages and fringe benefits employees were paid for all hours worked at the laborer rates, and the wages and fringe benefits they should have been paid at the painter rates. (ND 4415-49; CX 51, 53-57) Some of the BA minimum wages on the SIPCO Project are also based on the difference between the wages and fringe benefits employees were paid for all hours worked at the carpenter rate and the wages and fringe benefits they should have been paid at the painter rate. (CX 51, 53-57)

Calculations for BA's OL/EL and Mill River employees are based on an hourly rate of $32.70 and $30.20, respectively. Calculations for BA's employees on the SIPCO and Southington/Glastonbury Projects use an hourly rate of $32.70 (base rate of $26.10 and fringe benefit rate of $6.60);[34] the rate is reduced from the listed rate of $32.85 because $0.15 of the otherwise applicable $6.75 fringe benefit portion was allocated to a non-bona fide fund

[34]The WD rate for bridge painting on the SIPCO project (CT-DOT No. 151-246/247) and Southington/Glastonbury Project (CT-DOT No. 171-250) was $32.85, representing a combined hourly wage rate of $26.10 and fringe benefit rate of $6.75. (CX 39A, p. 15; CX 40, p. 8-9; CX 53)

and, therefore, unenforceable. (CX 51, 53-57) Some of the BA calculations for the DeFelice Project use the non-spray rate of $30.20 ($23.67 hourly wage rate and $6.53 fringe benefit rate). (CX 51, 53-57)[35]

In computing overtime back wages on the BA Projects for employees of BA, DiPietro assessed the difference between the half-time premium paid at the laborer and/or carpenter rate, and the half-time premium that should have been paid at the painter rate for all overtime hours worked. (CX 51, 53-57) The DBRA minimum wages assessed for BA employees on OL/EL total $10,310.28. The overtime assessed under CWHSSA for BA employees on OL/EL total $130.38. (CX 51, 54-57, 66)

DBRA minimum wages assessed for BA Mill River employees project total $7,633.07. Overtime wages assessed under CWHSSA for BA's employees working on Mill River total $1,350.47. (CX 51, 54-57, 68)

The DBRA minimum wages assessed for BA employees working on the SIPCO Project total $40,501.67. Overtime wages assessed under CWHSSA for that project total $1,962.18. (CX 51, 54-57, 69)

DBRA minimum wages assessed for BA employees working on the Southington/Glastonbury Project total $3,093.05. Overtime back wages under CWHSSA for BA employees on the Southington/Glastonbury Project total $82.66. (CX 51, 54-57, 70)

DBRA minimum wages assessed for BA employees on the DeFelice Project total $265.20. Overtime under CWHSSA for BA employees working on the DeFelice Project total $26.85, and I so find and conclude. (CX 51, 54-57, 71)[36]

D. Complainant Properly Computed Back Wages Against Shipsview

Shipsview calculations, performed by Enright, are based on Peckham's conclusion that the types of work performed by Shipsview employees working on the Shipsview Project, **supra**, should have been paid at the painter prevailing wage rate. (JE 6830-33) Enright's back wage misclassification computations are based on Peckham's conclusion that all of the work performed by Shipsview employees on the Project should have been paid at the painter prevailing wage rate, and I so find and conclude. (JE 6830-33)

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[35]The WD lists two (union) rates for bridge painting on the DeFelice project: $33.70 for spray painting and $30.20 for all other work. (CX 41, p. 15)

[36]The BA investigative period on the BA Projects is September 1994 to September 1996. (BX 5)

Minimum wage computations for Shipsview misclassification violations assess the difference between the base wages and fringe benefits employees were paid for all hours worked at the laborer rate, and the base wages and fringe benefits they should have been paid at the painter wage rate. (JE 6832; CX 60, 231) Enright used the non-spray rate of $30.20 ($24.45 hourly wage rate and $5.75 fringe benefit rate). (JE 6844-45)[37] Overtime computations for Shipsview misclassification violations assess the difference between the half-time premium paid at the laborer base rate and the half-time premium that should have been paid at the painter base rate for all overtime hours worked. (CX 60, 231)

Misclassification back wages were computed for the following individuals: Bamford, Bohannon, Booker, Cameron, Coley, Cormier, Cosme, Davakos, DeGregorio, DosSantos, Elefterios, Fappiano, Ferreira, Frederick, Halloran, Hatzie, Hubina, Karvounis, Lada, Lang, Lima, Monast, Oden, Panesis, Pelletier, Peterson, Rawlings, Salka, Saroukos, Tahtinen, Thornton, Woods, and Zettergreen. (CX 60, 74, 224, 231, 232) Enright credited Shipsview for all payments on the certified payroll records, including pension contributions. (JE 6857)

Enright also computed back wages due to Shipsview's failure to pay the following employees for all their hours worked: Bayna, Currier, DeChambeau, Andrews. (CX 60, 228, 231, 267, 272, 296) For these employees, Enright based her computations on reconstruction of hours from employee interview statements, time cards, diaries and work logs. (CX 60, 119, 227, 228, 231, 267, 271, 272, 290, 291, 296)[38] These hours were computed at painter wage rates, with overtime where applicable. (CX 60, 231) Where an employer's payroll records are incomplete or inaccurate, a compliance officer must necessarily make reasonable inferences about the extent of violations and may have to reconstruct hours of work or other payroll information, and I so find and conclude. **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946); **In the Matter of Trataros Construction Corp.**, WAB Case No 92-03 (April 28, 1993); **In the Matter of R.C. Foss & Son, Inc. and Atlantic Painting Co., Inc.**, WAB Case No 87-46 (December 3, 1990).

Enright also computed back wages where Shipsview failed to pay proper overtime to the following employees: Flynn, Cormier, and

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[37]The WDs list two (union) rates for Shipsview bridge painting: $33.70 for spray painting and $30.20 for all other work. (CX 43, p. 15; CX 44, p. 9)

[38]Enright did not compute back wages for Richard Rawlings' shorted hours since she was not apprised of them prior to his testifying. (Rawlings 1372, 1380, 1424-26)

Tuomala. (CX 60, 227, 290, 291)[39] Here, Shipsview paid all hours worked -- including overtime hours -- at the straight time rate. On the basis of employee interview statements and records, Enright determined that the certified payroll records understated the number of hours they worked in all overtime work weeks. To establish the actual number of hours worked, she multiplied the number of hours over 40 presented on the certified payroll records by 1.5.[40] She then calculated the half-time premium due, at the painter rate, for the recomputed overtime hours. (CX 60, 227, 290, 291)

Enright made her initial back wage computations between December 1996 and July 1997. (JE 6836-37) The certified payroll records submitted in May and December 1996 were the only time and pay records submitted to her by Shipsview during the entire period of her investigation, notwithstanding that she requested all time and pay records maintained by the company on the project. (JE 6801-15; CX 107) Subsequent adjustments were made to Enright's

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[39]Enright neglected to compute the overtime back wages due Jeffrey Cormier; thus the half-time premium due for Cormier is not reflected in the total back wages assessed against Shipsview.

[40]Enright was questioned on cross examination about this aspect of her computations, using as an example a work week where the certified payrolls showed 48 hours of work, with the overtime paid at time and a half. She had determined that the pay shown on the certified payrolls was actually for 52 hours of work at straight time. (JE 7711) The computation described by Enright derives from a standard mathematical truism. No matter what an employee's rate of pay, where employees are paid straight time for all hours of work, overtime compliance can be mathematically feigned if an employer reduces actual overtime hours by one third and then purports on his records to pay those hours at time and a half. *See Martin v. D. Gunnels, Inc.*, 119 Lab. Cas. (CCH) §35,535, pp. 47645, 47646 (C.D. Calif. 1991) (describing this method of record falsification.)

> The system can be demonstrated by using a 52 hour work week, as in the cross examination, and using a $20 per hour straight time rate for simplicity of computation:
>
> (a) 52 hours times $20/hr. equals $1040 total pay, but this is in violation of the law, because the 12 overtime hours have been paid at straight time.
>
> (b) The same $1040 gross amount can be paid the employee, while feigning compliance:
>
> (i) 40 hours straight time x $20 = $800.
>
> (ii) 8 hours (12 actual hours reduced by one third) x $30 (time and one half $20/hr.) equals $240.
>
> (iii) $800 plus $240 = $1040.

initial set of computations on the basis of information obtained through discovery. (JE 6919-23) She made adjustments for the following individuals to correct for transcription or computational errors: Bayna, Currier, DeChambeau, Fappiano, Ferreira, and Lumley. (JE 6919-23).[41] Significant discrepancies between the certified payrolls submitted to Complainant in discovery and those provided to Enright during her investigation required Enright to make additional adjustments to her calculations. Those adjustments reflected the omissions and deletions she discovered in the certified payroll records originally submitted to her during her investigation. (CX 107, 229) As part of those adjustments, Enright computed additional hours at the painter rate -- hours which were not recorded on the certified payrolls she received but which were recorded on the set of certified payroll records Shipsview submitted to Complainant during discovery -- for the following people: Currier, Fappiano, Frederick, Hatzie, Karvounis and Monast. (JE 6919-32, CX 107, 229, 230, 231)

The DBRA minimum wage back wages assessed for Shipsview employees total $127,694.95. (CX 60, 231, 232) The overtime back wages assessed under CWHSSA for Shipsview employees total $20,226.18.[42] (CX 60, 231, 232)[43]

V. RESPONDENTS' CHALLENGE TO THE APPLICABILITY OF THE WAGE DETERMINATIONS MUST BE REJECTED AS A MATTER OF LAW

Respondents BA and GCPC assert that they were entitled to pay laborer rates and, in the case of BA, also carpenter rates in certain circumstances, because the Violation Projects involved "new technology." (CX 218, 219) As discussed below, this argument suffers from two fatal flaws. The first flaw is that the assertion constitutes a challenge to the applicable WDs. Since BA and GCPC never challenged the WDs before they submitted their bids, or at any other time prior to the commencement of legal action by the Secretary, their challenge is impermissible as a matter of law. **Fry Brothers**, Holding No. 5. The second flaw is that, as set forth below, "full containment" did not involve "new technology," but was merely an evolutionary step in a process already covered under the painter classification in the applicable WDs, and I so find and conclude.

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[41]Initially, Bayna's misclassified hours of work were not calculated at the painter rate. (CX 60)

[42]Due to an adjustment in Floyd Andrews' half-time premium calculations, the CWHSSA total that appears on CX 232 was adjusted from $20,790.18 to $20,226.18, pursuant to Enright's testimony on May 9, 2000. (JE 6933-35, 6857-60)

[43]The Shipsview investigative period on CT-DOT No. 171-213 is October 1994 to October 1996. (CX 74, 232)

A. Respondents Failed to Make Any Pre-Bid Challenge To The WDS

Respondents claim that "full containment" required the use of new technology. Since "new technology" was allegedly required, Respondents assert that the job content upon which the painters' classification in the applicable WDs were based could not have covered the work at issue in this proceeding. It is undisputed that none of the Respondents made any pre-bid challenge to the WDs. Respondents' "new technology" argument is, in essence, a challenge to the applicable WDs. Respondents' argument, however, ignores the fact that any challenge to the applicable WDs needed to have been made before such WDs became the basis upon which bids were taken. **Fry Brothers**, Holding No. 5; **In the Matter of Clark**, 1995 WL 646572, at *2; **Tele-Sentry Security, Inc. v. Secretary of Labor 119 Lab. Cas.** (CCH) ¶ 35, 534 (D.D.C. 1991), (citing **Universities Research Ass'n v. Coutu**, 450 U.S. 754 [1981]); **Pizzagalli Construction Co.**, ARB 98-090 (May, 1999). As a matter of law, challenges to WDs are not permissible during enforcement proceedings, and I so find and conclude. **Fry Brothers**, Holding No. 5.

B. Union Contractor Practices In The Early 1990's Demonstrates That The Painter Classification Covers The Work Practices At Issue

BA and GCPC contend that the work performed by their employees involved "new technology," or, more specifically, an increase in restrictive requirements for the containment and collection of lead paint debris generated during the blasting process. (CX 218, 219) There is no question that lead containment requirements did indeed become more restrictive during the early nineteen-nineties and that they remained so throughout the contract periods at issue. (T. Laugeni 7459) However, a review of relevant facts shows that the "full containment" standard did not involve "new technology." To the contrary, "full containment" used work processes already long familiar to the industry. As illustrated below, to the extent that the work involved under "full containment" bridge painting projects was different than work involved under, for example, 75 percent containment, those differences were simply continuous evolutions in a longstanding process.

There is no dispute that contractors who were signed with the CT painters union, such as Laugeni and Dynamic, performed work pursuant to 75 percent containment specifications before CT-DOT implemented the "full containment" standard in 1993. (Mennard 97; JP 3040-42, 3061-63; CX 21, 82) The evidence shows that many of the allegedly "new" tasks BA and GCPC claim were required by the "new technology," such as recycling and collecting grit, had in fact been performed by Laugeni employees pursuant to the 75 percent containment standard. Moreover, when Laugeni employees performed work pursuant to the 75 percent standard -- work similar to that

paid at laborer and MH/PS rates by BA and GCPC, respectively -- they received the painter prevailing wage. (T. Laugeni 7551-54)

Laugeni performed blasting and painting work under the "75 percent containment" standard on CT-DOT Project No. 161-191 (the "Waterbury Project") in the early 1990's. (T. Laugeni 7551-52; T. Laugeni Depo., CX 209, p. 21; JP 3042, 3061-63; CX 21, 82) Laugeni used an 85 percent mesh tarp to contain the blasting and painting area. (T. Laugeni 7552; CX 209, p. 30) The blasting abrasive used by Laugeni on Waterbury was so-called "Black Beauty." (T. Laugeni 7752; CX 209, pp. 29-30). Laugeni employees used vacuums, shovels and brooms to collect grit from the blasting process on the Waterbury Project. (T. Laugeni 7553; CX 209, pp. 30-32). In addition to the foregoing work, Laugeni also performed traffic control, using crash trucks, flashing arrows, cones, and warning signs, on the Waterbury Project. (T. Laugeni 7555-56). Approximately five or six of Laugeni's employees spent about two hours a day performing traffic control on the Waterbury Project. (T. Laugeni 7555-56). All Laugeni employees received the prevailing wage for painters for all of their work on the Waterbury Project. (JP 3077-78; T. Laugeni 7553-54, 7557)

Dynamic also performed blasting and painting work on the Waterbury Project in the early 1990's. (Mennard 97; JP 3042, 3061-63; CX 21, 82) The work tasks and equipment used by Dynamic in fulfilling the specifications were essentially identical to the work tasks and equipment used by other contractors on later "full containment" projects. Specifically, during the blasting process on Waterbury, Dynamic, like the Respondents on the Violation Projects, used steel shot, blasting hoses, compressors, negative air machines, and IPEC machines. (Mennard 102-05) The IPEC machines consisted of a blasting pot and a vacuum system which recycled the steel grit. (Mennard 105-06) Dynamic used cables and pick boards to access the areas it blasted on Waterbury. (Mennard 101) Dynamic also used special "environmentally safe tarps" to hold the negative air within the containment and to contain the steel shot used in the blasting process. (Mennard 102-03) It took four or five men at least half a day to set up the cables, pick boards and tarps. (Mennard 104) Once the cables, tarps and pick boards were set up, it took a crew of six people approximately a full additional day to set up all equipment necessary to begin the blasting operation. (Mennard 107)

After the blasting was finished, the Dynamic employees used a big vacuum, as well as buckets, to clean up the steel shot inside the containments, which was then recycled through the IPEC machine. (Mennard 108, 110) Employees spent approximately two to three hours cleaning up steel grit per shift. (Mennard 109) After the blasting process was completed, Dynamic employees set up a painting pot, ran paint hoses into the containment, and mixed paint. (Mennard 109) Setting up to paint on Waterbury took a crew of about five or six men approximately an hour. (Mennard 109).

Dynamic employees were paid the prevailing wage for painters to perform all of the work described above. (Mennard 104, 107, 109-111; JP 3076)

The facts set forth above show that, prior to 1993, bridge painting contractors signed with the CT painters' union paid the painter prevailing wage for all tasks related to bridge painting, including, among others, containment and grit collection work. Moreover, the pay practices used by Laugeni and Dynamic were identical to GCPC's initial pay practices on the Gold Star Project, CT-DOT No. 94-170/171. Gold Star was the first non-experimental "full containment" project in CT. (Campbell 9103; Bogan, 8714-16, 8390-91) From May 1993 through September 1994, GCPC, like Dynamic and Laugeni on Waterbury, paid only journeyman painters or painter apprentice rates for all tasks related to bridge painting, including containment and grit collection work. (Mennard 139-141; Verity 205, 217-18, 223, 229-30, 237, 239, 241, 325; Morris 9587; CX 106, 297A & B)

Respondent BA argues that practices under the 75 percent containment, and GCPC's practice on Gold Star from May 1993 through August 1994 are essentially irrelevant because BA used "new technology" when it performed "full containment" work. Specifically, BA asserts that its use of brackets, specially treated two-by-fours and impermeable tarpaulins was a "new" system and, therefore, pay practices used by other contractors on previous bridge painting projects were not applicable to BA. (CX 218) BA's argument, however, overlooks the key issue as to whether its "new" system altered the existing agreement among CT unions that painters claimed all work processes involved in transforming a rusty bridge into a newly painted bridge.

A review of the facts in this case demonstrates that BA's "new" containment system did not result in any jurisdictional changes among CT unions regarding which craft claimed the work performed by BA's employees on the violation projects. By way of example, the fact that BA's containment system was different because it involved using "specially treated wood" did not alter the conclusion of Granell, the Laborers union representative, that laborers do not "tend" painters, laborers do not unload materials, and laborers do not build, clean or do anything else for the painters. (Granell 7097-98) Similarly, Loubier, the CT Carpenters union Business Agent during the relevant period, testified that "we don't build containment for single crafts like the painters. He builds his own." (Loubier 7234) Accordingly, even assuming, **arguendo**, that BA's method of containment was a "new" engineering method, that method did not alter the agreement among the CT painters, laborers and carpenters unions that painters on bridge painting projects build their own containment and do their own clean up work, and I so find and conclude.

BA's argument that its "new" system justified its pay

practices is also defective for another reason. While BA's containment system may have used different components than those used by Dynamic and Laugeni on the Waterbury Project, and those used by GCPC on Gold Star, the purpose of all of the containments -- to contain some amount of spent debris -- was identical. To accept BA's argument that it was justified in ignoring well established area practice because its own containment allegedly involves a different design will invite future contractors to unilaterally invalidate WDs every time one of them decides it has taken a significant step in an evolving work process. For example, Abhe could argue it was entitled to pay its employees different wages than those paid by BA to its employees because Abhe's Beeche containment system was larger and more complicated than the system used by BA. Allowing such a result would be inimical to a primary purpose of the DBRA, **e.g.**, to ensure a level playing field by subjecting all contractors to the same rules, and I so find and conclude.

The work performed, and wages paid, by Dynamic, Laugeni and GCPC on the Waterbury and Gold Star Projects, from the early 1990's through August 1994, shows that the painter classification in the WDs at issue included all work done by Respondents' employees for whom back wages at the painter rates were calculated. Accordingly, Respondents' assertion that "full containment" required "new technology" must be rejected. There is nothing in the DBRA, or in the implementing regulations, that permits a contractor to ignore classifications in a WD because that contractor used an idiosyncratic approach to fulfill evolving contractual requirements, requirements which involved a difference in degree rather than kind. If a change in contract specification means that a 1994 bridge painting job is going to be more labor intensive than a comparable job would have been in 1990, a responsible contractor should adjust his bid accordingly rather than plan on circumventing the WD which is included in the bid documents, and I so find and disclose.

VI. RESPONDENTS' ESTOPPEL DEFENSE MUST BE REJECTED AS A MATTER OF LAW

Each of the Respondents herein has introduced wage checks prepared by the CT-DOT. Presumably, the purpose of introducing those wage checks was to support an assertion that Complainant is estopped from seeking back wages. The argument, however, is defective as a matter of law because Respondents have not met, and cannot meet, their burden of showing "affirmative misconduct" by a government agency, as is required under the law. **Dantran, Inc. v. U.S. Dept. of Labor**, 171 F.3d 58 (1st Cir. 1999), a matter over which this Administrative Law Judge presided. Indeed, Respondents have not even met the minimal requirements necessary to prove a traditional estoppel defense against a non-government entity.

A. Equitable Estoppel Is Not Permissible In This

Proceeding Because Respondents Cannot Prove Affirmative Misconduct By A Government Agency

In 1999, the First Circuit Court of Appeals forcefully reaffirmed the long-established rule that a party seeking to raise estoppel against the sovereign must, at the very least, demonstrate that government agents have been guilty of affirmative misconduct. **Dantran**, 171 F.3d 58. The First Circuit stated that "[i]f estoppel against the government possesses any viability (a matter on which we take no view), the phenomenon occurs only in the most extreme cases." **Id.** at 66. The First Circuit's **Dantran** decision is consistent with Supreme Court precedent. The Supreme Court has never estopped the United States from enforcing the laws, even when this has resulted in loss of Social Security benefits, **Schweiker v. Hansen**, 450 U.S. 785 (1981), loss of citizenship, **Montana v. Kennedy**, 366 U.S. 308 (1961), or loss of crops, **FCIC v. Merrill**, 332 U.S. 380 (1947). **See also Office of Personnel Management v. Richmond**, 496 U.S. 414 (1990) (discussing estoppel and public funds).

The First Circuit's decision in **Dantran** is the most recent case, and, in my view, the controlling authority regarding the burden of proof required to sustain a claim of estoppel against the government. There is, however, a ten year old government contracts case involving the issue of equitable estoppel, presently under appeal, which awaits an American Dickens (**see Bleak House**). **Griffin, et al v. Reich**, 956 F. Supp. 98 (D.R.I. 1997), also a matter over which this Administrative Law Judge presided. The District Court's decision in that case suggests that the standard for affirmative misconduct "appears to be only moderately demanding." **Griffin**, 956 F. Supp. 98. As support for this conclusion, the **Griffin** decision cites another District of Rhode Island case, **United States v. Ortiz-Perez**, 858 F. Supp. 11, 12-13 (D.R.I. 1994), **aff'd**, 66 F.3d 307 (1st Cir. 1995) (unpublished opinion). **Ortiz-Perez**, however, is a case where the District Court of Rhode Island declined to find equitable estoppel against the government. It is therefore difficult to read much into the First Circuit's affirmance, without a published decision, of that decision in favor of the government. **Ortiz-Perez** also cites **Akbarin v. Immigration and Naturalization Serv.**, 669 F.2d 839 (1st Cir. 1982), an older First Circuit case setting forth the "minimum requirements" for an equitable estoppel defense against the government. The **Akbarin** decision resulted in a remand rather than an actual, appealable, finding of estoppel. Complainant respectfully suggests that, to the extent that **Ortiz-Perez** and **Dantran** may be inconsistent, the far more recent and more explicit **Dantran** rule should be followed,[44] and I so find and conclude.

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[44] Though all of the events in the present litigation took place in CT, within the jurisdiction of the Second Circuit, **Dantran** and **Griffin** are the most recent federal

In a December 7, 1999 decision on remand in **Griffin**, a subsequent Administrative Law Judge found for Griffin, the employer, as to one of the three areas where estoppel was at issue and for the DOL on the other two. **Griffin**, Decision and Order on Remand. That decision is now in turn on appeal to the Administrative Review Board.

Given the First Circuit's decision in **Dantran**, Complainant believes that the District of Rhode Island decision in **Griffin** was incorrect in finding that the estoppel defense was potentially available therein. Indeed, since the District Court used a lower burden of proof in deciding for the employer than is required by the First Circuit's decision in **Dantran**, it is Complainant's view that the recent **Griffin** decision will be overturned on appeal.

In sum, controlling legal authority requires Respondents to prove "affirmative misconduct" by a government agency. Respondents cannot meet that burden. There has been no suggestion whatsoever that any representative or agent of either CT or the United States committed any act with the intent to deceive any Respondent, which was the test applied by the First Circuit in **Dantran**. 171 F.3d at 67. Rather, in this case, as in **Dantran**, "[i]n a nutshell, there is not the slightest whiff of affirmative misconduct." Therefore, under the most recent case to revisit estoppel in a government contracts context, since there is no affirmative misconduct, there is no equitable estoppel, and I so find and conclude. **Id.**

B. Actions By The CT-DOT Do Not Form The Basis For A Showing Of Equitable Estoppel Against Complainant

Respondents also submit that the well-settled doctrine of Equitable Estoppel should be applied to bar the Complainant in these consolidated claims because the state contracting agencies not only failed to act to correct these violations on these bridge projects but actually approved these violations by site inspections and so-called labor wage checks. Furthermore, Respondents submit that any decision by the Complainant to eliminate the laborers' and carpenters' classifications on bridge painting projects in Connecticut should have prospective application only as it is most unfair to apply those retroactively.

I disagree (1) as Congress has entrusted enforcement of the DBRA and other such wage laws to the Administrator, (2) as the Administrator has full authority to interpret, administer and enforce such laws, (3) as the Administrator cannot delegate ultimate enforcement thereof to any other entity and (4) as the actions or non-actions of the State of Connecticut in inspecting

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court discussions of estoppel in the context of DOL's enforcement of government contract statutes.

the work sites and in performing the labor wage checks cannot and does not, in this particular scenario, constitute equitable estoppel.

This Administrative Law Judge, in so concluding, accepts the thesis of the Complainant that neither the Administrator nor the State of Connecticut are guilty of any **affirmative misconduct** herein.

Initially, I note that the inspectors visiting the various sites apparently did not perform in-depth inspections in verifying the information furnished them by the employees and it is arguable whether the inspectors understood the legal ramifications of the DBRA and the issues involved in these proceedings.

Complainant and Respondents cite the landmark decision of the U.S. Court of Appeals for the First Circuit in **Dantran, Inc. v. U.S. Dept. of Labor**, 171 F.3d 58 (1st Cir. 1999) and it is obvious that the parties have extracted their own rule of law therefrom and have applied it to this factual scenario.

However, I was the presiding judge in that case and clearly the facts in **Dantran** are nowhere similar to the actions or non-actions of CT-DOT. For example, **Dantran** involved a Department of Labor compliance officer who had previously examined the practices of that company and, after the investigation was completed, sent to the company a letter approving of its practices, although the officer testified before me that he had orally advised the company to change the procedure by which its employees were paid. I rejected that testimony and held that the Department was estopped from prosecuting the company because it had sent the letter of approval to the company. My decision was based solely on the facts of that case.

On the other hand, in the case at bar there was no affirmative action by the Department prior to the complaints to and the investigation by Mr. Peckham. The Respondents, as experienced business people, knew their obligations under the DBRA, somehow managed to have their business practices not challenged by CT-DOT and now want this Court to also sanction their practices by invoking equitable estoppel, and this I cannot do.

I candidly indicate at this point that I was initially inclined to accept the Respondents' position on equitable estoppel, thereby negating any possible debarment, until the appearance of the so-called "smoking gun" at the hearing, a matter of such import and I am most surprised that there is no mention of this fact in any of the post-hearing pleadings. What is that fact? It is simply the reluctance of Steve Bogan to sign the state-wide CBA for 1995-1998 that defined and included "rigging" for the first time because he knew that if he signed that CBA, he would be giving legitimacy to the LAPS, to the investigation of Mr. Peckham and

that he would have to pay journeyman painters' rates to all workers on a single trade bridge-painting project. This reluctance on the part of Mr. Bogan also gives the lie to the so-called "tools-of-the-trade" analysis because accepting, **arguendo**, the Respondents' thesis on the question of "TOT" versus a single trade bridge painting project, there should have been no reluctance on the part of any of the Respondents, especially Mr. Bogan who was a member of the committee dealing with negotiating that CBA, to sign the DBA or the subsequent Addendum that now defined and included "rigging" in the CBA. Mr. Bogan knew that he could not sign that CBA, and especially its Addendum, without changing the method by which he paid his workers. Again, candidly speaking, it was that reluctance that led me to conclude that equitable estoppel does not apply herein on the violations involved and on the back wage computations. The only issue remaining is whether debarment applies and, if so, the extent thereof, and that issue will be discussed below.

The Administrative Review Board and its predecessor, the Wage Appeals Board, repeatedly have emphasized that when interpreting DBRA labor standards questions, the contracting agencies and their officers have no ability to make an authoritative determination; this power is reserved to the Secretary of Labor and her designees. **The Law Company, Inc.**, **Dick Enterprises, Inc.**, ARB Case No. 95-046A (Dec. 4, 1996); **Swanson's Glass**, WAB Case No. 89-20 (Apr. 29 1991); **More Drywall, Inc.**, WAB Case No. 90-20 (Apr. 29, 1991); **Arbor Hill Rehabilitation Project**, WAB Case No. 87-04 (Nov. 3, 1987); **Tolleson Plumbing and Heating**, WAB Case No. 78-17 (Sept. 24, 1979); **Metropolitan Rehabilitation Corp.**, WAB Case No. 78-25 (Aug. 2, 1975). In none of the foregoing cases was a contracting agency's determination contrary to that of the DOL found to excuse non-compliance under equitable estoppel or any other theory. Additionally, the paramount authority of the Secretary of Labor in administering the DBRA was recently reaffirmed by the Administrative Review Board in **Thomas and Sons Building Contractors, Inc.**, ARB Case No. 98-164, slip opinion at 8 (October 19, 1999).

Complainant, not the CT-DOT, is the paramount authority in administering the DBRA. Respondents' estoppel claims are based on actions taken by representatives of the CT-DOT. If Respondents' estoppel claim is upheld by this Court, that ruling would negate the classification appeal procedures in 29 C.F.R. Part 5. Put another way, a contractor would be foolish indeed to go through those regulatorily mandated procedures if a casual conversation with, or even inaction by, a local representative of the contracting agency could accomplish the same result. **Fry Brothers**, Holding No. 7; **In the matter of United States Army**, ARB Case No. 96-133 (July 17, 1997). In over 10,000 pages of transcripts, there is no evidence suggesting that Complainant had, either expressly or implicitly, approved of the Respondents' pay practices in CT. Moreover, all of the Respondents candidly conceded that they at no

time attempted to contact the Wage and Hour Division of the Department to clarify any concern about the WDs. I also find this fact to be most telling herein.

Further, even assuming, **arguendo**, that this Court could consider the CT-DOT's actions, which I do not do, it is Complainant's position that actions taken by the CT-DOT do not support a finding of estoppel. It is undisputed that agents of the CT-DOT reviewing Respondents' payrolls would have known that some of Respondents' employees were being paid under classifications other than journeyman bridge painters. However, the only evidence adduced at trial regarding the qualifications of inspectors hired by the CT-DOT indicates that the inspectors conducting the wage checks may very well not have been sufficiently familiar with appropriate area practice to have evaluated the proper classification of employees. Specifically, in regard to companies retained by the CT-DOT to monitor environmental issues, Bogan, Operations Manager for BA, testified that they used "inexperienced, cheap help' which "usually arrive[d] on a job site with no formal training at all." (Bogan 8818-19) As this testimony is credited, it is certainly possible, and even likely, that the CT-DOT inspectors conducting the wage checks may also have been "inexperienced cheap help" who did not have sufficient knowledge to understand and enforce the requirements of the DBRA. Respondents presented no evidence of the extent to which any of the wage inspectors had the background to effectively evaluate area practice issues or how in-depth were those labor checks. The CT-DOT inspectors may have simply checked the payrolls to ensure that the wages being paid matched the WD rates for the category in which employees were listed. In sum, the actions of or reports prepared by or on behalf of the CT-DOT do not provide a basis for equitable estoppel, and I so find and conclude.

C. Respondents Cannot Fulfill The Requirements Necessary To Prove Even A Traditional Equitable Estoppel Defense

There is yet another reason why an estoppel defense is unavailable to Respondents. Even in traditional estoppel cases, not involving the government, "the party claiming estoppel must have relied on its adversary's conduct 'in such a manner as to change his position for the worse.'" **Heckler v. Community Health Services of Crawford**, 467 U.S. 42, 59 (1984) (quoting J. Pomeroy, *Equity Jurisprudence,* § 805, p. 192, S. Symons Ed. 1941). There is not the slightest suggestion that any of the Respondents changed their pay practices to their detriment as a result of the actions or inactions of either the CT-DOT or the DOL. There is no testimony that any of the Respondents changed any pay practices whatsoever on the basis on any advice, erroneous or otherwise, from anyone. Thus, even aside from the issue of estoppel against the government, these parties lack one of the critical elements of proof to establish a traditional estoppel defense, and I so find

and conclude.

VII. SHIPSVIEW, CHRISTOS DELIGIANNIDIS, JEWELL PAINTING AND CAMERON JEWELL SHOULD BE DEBARRED FROM OBTAINING ANY CONTRACT SUBJECT TO THE DBRA FOR A PERIOD OF NO LESS THAN THREE YEARS

Under 29 C.F.R. § 5.12(a)(1), a contractor, its officers, and any entity in which the contractor has a substantial interest are subject to debarment for willful or aggravated violations. The Supreme Court has held that a violation of the Fair Labor Standards Act, 29 U.S.C. §201 **et seq.**, is willful if an employer knew or showed reckless disregard as to the matter of whether its conduct was prohibited. **McLaughlin v. Richland Shoe Corp.**, 486 U.S. 128, 133 (1988). As set forth below, Shipsview, Christos Deligiannidis, Jewell Painting and Cameron Jewell should be debarred because they engaged in willful and aggravated violations of the DBRA, and I so find and conclude.

A. Shipsview And Deligiannidis Engaged In Willful And Aggravated Violations Of The DBRA

Shipsview's previous investigations for DBRA violations establish knowledge of its obligations under the DBRA. (CX 215) Despite that knowledge, Shipsview and Deligiannidis made a conscious decision to again violate the provisions of the DBRA. As set forth below, the willful and aggravated nature of their violations is illustrated by overwhelming testimonial and documentary evidence.

Pursuant to the DBRA, Shipsview was required, under penalty of perjury, to submit true and accurate certified payrolls. Deligiannidis testified, under oath, that it was his belief that the certified payrolls submitted to the CT-DOT were accurate. (Deligiannidis Depo., CX 212, p. 132) His testimony, however, was contradicted by numerous Shipsview employees who testified that it was Shipsview's "regular" practice to pay employees for less hours than the employees actually worked and/or to pay employees straight time for overtime hours. (Andrews 984; Flynn 1424-26; DeChambeau 6652, 6686; Bayna 6722-23, 6744, 6759; Tuomala 10499) The employee testimony is amply supported by the documentary evidence contained in the record. For example, there is a discrepancy of at least three to four hours per day between Ed DeChambeau's daily diary of hours worked on the Project and the certified payrolls submitted to the CT-DOT. (CX 229, 271) Similarly, Floyd Andrews' time cards show that he worked significantly more hours than were reflected on the certified payrolls. (CX 119, 229)

The fact that the certified payrolls submitted to the CT-DOT are false is also illustrated by comparing employee hours shown as being worked on those documents with employee hours listed as being worked on the Daily Inspector Reports on the Project. While the

earliest payroll submitted by Shipsview on the Project is for the week ending October 8, 1994, the daily inspection reports from the Shipsview Project show Shipsview employees working on the Project in June and July 1994. (CX 229, 263A)

Moreover, throughout the Project there is a pattern of significant discrepancies between Shipsview's certified payrolls and the Daily Inspector Reports. The back of each of the Inspection Reports dated 1/20/95, with the notations 292F and 292D at the bottom right hand corners, lists Jeff Tuomala as a Shipsview employee who worked on the Project on that date. (CX 263A). However, on the certified payroll records for the week ending 1/21/95, Jeff Tuomala is not listed as having worked on the Project on 1/20/95. (CX 229)

The back of the Inspection Report dated 1/20/95, with the notation 292D at the bottom right hand corner, also lists B. DeGregorio as a Shipsview employee who worked on the Project on that date. (CX 263A). However, on the certified payroll records for the week ending 1/21/95, B. DeGregorio is not listed as having worked on the Project on 1/20/95. (CX 229) The back of each of the Inspection Reports dated 3/21/95, with the notations 352D and 352(f) at the bottom right hand corners, lists Chris Pelletier as a Shipsview employee who worked on the Project on that date. (CX 263A). However, on the certified payroll records for the week ending 3/25/95, Chris Pelletier is not listed as having worked on the Project on 3/21/95. (CX 229) The back of the Inspection Report dated 4/20/95, with the notation 382K at the bottom right hand corner, lists C. Pelletier and M. Worthington as Shipsview employees who worked on the Project on that date. (CX 263A) On the certified payroll records for the week ending 4/22/95, C. Pelletier and M. Worthington are not listed as having worked on the Project on 4/20/95. (CX 229) The back of the Inspection Report dated 4/30/95, with the notation 392K at the bottom right hand corner, lists C. Pelletier as a Shipsview employee who worked on the Project on that date. (CX 263A) However, on the certified payroll records for the week ending 5/6/95 C. Pelletier is not listed as having worked on the Project on 4/30/95. (CX 229)

The back of the first page of a five page Inspection Report dated 5/20/95, with the notations 412K, 412K-1, 412K-2, 412K-3 and 412K-4 at the bottom right hand corners of the pages, lists M. Carnevale, J. Lumley, B. DeGregorio and A. Ferreira as Shipsview employees who worked on the Project on that date. (CX 263A) Comparing the certified payroll records for the week ending 5/20/95, M. Carnevale, J. Lumley, B. DeGregorio and A. Ferreira are not listed as having worked on the Project on 5/20/95. (CX 229) The back of the first page of a two page Inspection Report dated 5/20/95, with the notations 412-D and 412-D-1 at the bottom right hand corners of the pages, lists C. Pelletier, D. Tahtinen, A. Ferreira and J. Lumley as Shipsview employees who worked on the Project on that date. (CX 263A) On the Certified payroll records

for the week ending 5/20/95,C. Pelletier, D. Tahtinen, A. Ferreira and J. Lumley are not listed as having worked on the Project on 5/20/95. (CX 229)

The back of the Inspection Report dated 5/20/95, with the notation 412-F at the bottom right hand corner, lists J. Tuomala and J. Currier as Shipsview employees who worked on the Project on that date. (CX 263A) However, on the certified payroll records for the week ending 5/20/95, J. Tuomala and J. Currier are not listed as having worked on the Project on 5/20/95. (CX 229) The back of the Inspection report dated 5/30/95, which has the notation 422-D at the bottom right hand corner of the front page, lists C. DeGregorio and E. Booker as Shipsview employees who performed work on the Project on that date. (CX 263A) On the Certified payroll records for the week ending 6/3/95, C. DeGregorio and E. Booker are not listed as having worked on the Project on 5/30/95. (CX 229) The narrative on the second page of a three page inspection report dated 8/18/95, with the notation 502-D at the bottom right hand corner of each page, describes specific tasks done by V. Elenis on the Project on that date. (CX 263A) Comparing the certified payroll records for the week ending 8/19/95, V. Elenis is not listed as having worked on the Project on 8/18/95. (CX 229)

The narrative on the second page of a three page Inspection Report dated 8/28/95, with the notations 512-D, 512D-1 and 512D-2 at the bottom right hand corner of the pages, describes V. Elenis as the “acting foreman” on the Project on that date, but on the certified payroll records for the week ending 9/2/95, V. Elenis is not listed as having worked on the Project on 8/28/95. (CX 229, CX 263A) The narrative on both pages of a two page inspection reported dated 8/28/95, with the notations 512K and 512K-1 on the bottom right hand corners of the pages, describes work being performed on the Project by J. Finn. (CX 263A). However, on the certified payroll records for the week ending 9/2/95, J. Finn is not listed as having worked on the Project on 8/28/95. (CX 229) The back of the first page of each of two Inspection Reports dated 10/17/95, with the notations 562-D, 562D-1, 562-K and K- at the bottom right hand corners of the pages, lists E. Booker as a Shipsview employee who performed work on the Project on that date. (CX 263A) However, on the certified payroll records for the week ending 10/21/95, E. Booker is not listed as having worked on the Project on 10/17/95. (CX 229)

The foregoing facts demonstrate that, for the duration of the Project, Shipsview and Mr. Deligiannidis engaged in willful and aggravated violations of the DBRA. That conduct, standing alone, warrants debarment, and I so find and conclude.

The appropriateness of debarment is further supported by evidence showing that Shipsview and Deligiannidis continued to engage in egregious misconduct during the Secretary’s investigation of the Project. Enright specifically requested that Deligiannidis

provide her with copies of all time cards used on the Project. (JE 6803) Deligiannidis told her the time cards were not available. (JE 6802-03) During his deposition, Deligiannidis testified that he did not produce the time cards because they were "stolen." (Deligiannidis Depo., CX 212, pp. 138-39) His testimony conflicts with that of Shipsview employees who worked on the Project as well as with Ginette Cram, his bookkeeper, who all testified that they had no knowledge of any time cards being stolen. (Cram Depo., CX 295, pp. 52-54; Andrews 996-99; Tuomala 10573)

Shipsview's and Deligiannidis' continued misconduct is also shown by the fact that there were several significant discrepancies between the certified payrolls given to the Secretary and the certified payrolls submitted to the CT-DOT. (CX 107, 229, 230, 230A) On their face, the discrepancies appear to be the result of deliberate deletions. (CX 230, 230A) For example, on page two of the certified payrolls given to the Secretary for the week ending September 23, 1995, there are entries under the deductions columns even though there is no employee name or listing of hours worked in the corresponding columns. However, while page two of the certified payrolls submitted to the CT-DOT for the week ending September 23, 1995 contains identical deductions, it also contains the name of an employee, as well as the hours worked, which correspond to the entries under the deduction columns. (CX 107, 229, 230)

Deligiannidis denied any knowledge as to who was responsible for creating the documents submitted to Enright. (CX 282) Cram testified that she did not create the certified payrolls given to Enright and also that she had no explanation regarding why those documents were different from the certified payrolls submitted to the CT-DOT. (CX 295, pp. 135-149) Deligiannidis attempted to justify the redactions on CX 229 by stating that the omissions may correspond to employees who were paid from Delfi, rather than Shipsview, checks. As an initial matter, this justification ignores the fact that Delfi checks were not produced for all employees shown on CX 229 but are missing from CX 107. For example, George Karvounis is listed as having worked the week of 8/19/95 on CX 229 but he is not listed for that corresponding work week on CX 107, nor did Shipsview produce any Delfi checks showing payments to Karvounis for that week.

Moreover, as a legal matter, Shipsview's justification is nonsensical. Deligiannidis testified that the certified payrolls showed how much work was done by employees <u>on the Project</u>. (Deligiannidis Depo., CX 212, p. 131) Enright requested <u>all</u> documents concerning hours worked by employees on the Project. (JE 6801-07; CX 266, 268) Despite that request, Enright received redacted certified payrolls which did not contain all hours worked by employees on the Project. (CX 106, 229, 230) Enright also never received any copies of Delfi checks from Shipsview or Deligiannidis. (JE 6836) Finally, bookkeeper Cram testified that

the only reason employees would have been paid with Delfi checks would have been lack of funds in regular Shipsview bank accounts. (CX 295, pp. 81-85) All employees obviously should have been listed on certified payrolls for all hours they worked on the project, regardless of which of the company's checking accounts happened to be solvent on pay day.

Shipsview seeks to avoid debarment by attacking the credibility of former Shipsview employees who testified at trial. This strategy must fail because, as discussed above, the employees' testimony is most credible and is supported by undisputed documentary evidence.

Shipsview attempts to avoid liability on the misclassification issue by Complainant that the CT laborers claimed the work at issue and that Complainant's position modified Shipsview's contract retroactively. I note that Shipsview takes the most extreme position of any of the Respondents in this proceeding, claiming the right to pay even blasting work at the laborer rather than the painter rate. Shipsview's arguments, in my judgment, lack merit and cannot be accepted.

Shipsview also alleges that Complainant failed to negotiate in good faith to resolve this proceeding. DBRA case law, however, mandates a three-year debarment where, as here, a contractor has engaged in pervasive record falsification to conceal under payments to employees. **A. Vento Construction**, WAB Case No. 87-51, 1990 WL 48312 (Oct. 17, 1990).

ARGUMENT

I. DEBARMENT IS APPROPRIATE

A. Undisputed Evidence Shows That Shipsview And Deligiannidis Engaged In Willful and Aggravated Violations Of The DBRA

Shipsview contends that the evidence against it relating to the issue of debarment consists of "false statements" from "non-credible witnesses" and that there is "no credible evidence" to support Complainant's debarment case. Shipsview further asserts that the entire case against it is the result of a union conspiracy. Debarment cases under DBRA frequently involve credibility disputes. The process of resolving those disputes is inherently troubling in that investigating agencies as well as ultimate adjudicators are without first hand knowledge of the facts in dispute. In an investigation, however, where *all* of the employee information indicates problems with the employer's pay practices, the Wage and Hour Division, charged by statute with enforcing DBRA, has the responsibility to follow the employee

allegations to a conclusion. In the investigation of Shipsview, it was not simply one or two or three union inspired trouble makers whose statements indicated violations. As Investigator Enright conducted her investigation she found that "[t]he responses to the interviews, 100 percent of the responses, indicated a problem of some kind with their pay." (Enright 6825) These problems related to both classification and hours of work issues.

A standard step taken by Wage and Hour where there are disputes about hours worked is to check the original time records against the employer's payroll. That was not possible in this case, as Shipsview has maintained throughout that original time records were stolen from its Hartford off-site facility. **See** CX 212, Deligiannidis Depo., pp. 138-39.

Fortunately, here there is ample independent evidence in the record that confirms the employee allegations that they were systematically shorted on their hours of pay. Shipsview's union conspiracy theory provides no explanation for the severe and persistent contradictions between its certified payrolls and the Daily Inspector Reports maintained by the CT-DOT. **See** CB, pp. 81-83 (providing a detailed and damning analysis of the clear, regular and recurring shorting of hours on Shipsview's payrolls when compared with CT-DOT records). Those Reports provide irrefutable substantiation for the employees' testimony that it was Shipsview's regular practice to "short" employees on their hours. Additionally, even apart from the CT-DOT records, the employee testimony is amply supported by documentary evidence they provided which evidence is in the record. For example, as noted above, there is a discrepancy of at least three to four hours per day between Ed DeChambeau's daily diary of hours worked on the Project and the certified payrolls submitted to the CT-DOT. (CX 229, 271) Similarly, Floyd Andrews' time cards, the only actual Shipsview time cards (copies) available to be examined in this proceeding, show that he worked significantly more hours than were reflected on the certified payrolls. (CX 119, 229)

Shipsview's union conspiracy theory also totally ignores the fact that Shipsview produced two separate sets of certified payrolls to Complainant. When the two sets of records are compared, page for page, it is clear that the original set of payrolls had been altered by deletion prior to being given to the government's investigator. Shipsview was unable to provide any cogent explanation for the discrepancies between the payrolls given to Enright during her investigation (CX 107) and the certified payrolls given to Complainant during discovery. (CX 229) **See** CB, pp. 84-85.

B. The Case Law Cited By Shipsview Supports Complainant's Position

Shipsview cited three cases in support of its argument that it

should not be debarred. None of those cases support Shipsview's position. **Federal Food Service, Inc. v. Donovan**, 685 F.2d 830 (D.C. Cir. 1981) involves a situation where the D.C. Circuit adjudged the violations at issue to have been accidental and "virtually **di minimus**" (sic). For the reasons discussed above, Shipsview's violations were clearly not **virtually de minimis**, and I so find and conclude again. **Mastercraft Flooring, Inc. v. Donovan**, 589 F.Supp. 258 (D.C. D.C. 1984) is similarly inapt. In **Mastercraft**, the administrative law judge made findings of fact establishing an *employee* effort to falsify time records. While **Federal Food Service** and **Mastercraft** were Service Contract Act cases involving a different ("unusual circumstances") standard, under either the SCA standard or the DBRA standard, debarment would not have been appropriate given the facts found. However, the CT-DOT Daily Inspector Reports establish beyond dispute that Shipsview's falsification of records was not caused by the employees.

The third case cited by Respondent, **McAndrews Co.**, WAB Case No. 86-32 (March 26, 2987), provides direct support for Complainant's position. In **McAndrews**, the Wage Appeals Board reversed the administrative law judge's decision denying debarment, holding that "intentional, pervasive falsification of [certified] payroll records" must be sanctioned by debarment.

Debarment is an essential factor in compelling compliance with the statutes' goals and, therefore, protects the integrity of the statutory scheme. **Janik Paving & Construction Inc. v. Brock**, 828 F.2d 84, 91 (2d Cir. 1987). Moreover, debarment ensures complying contractors that their violating competitors will not achieve an unfair advantage or escape sanction while warning those who contemplate underpaying their employees that the cost of doing so exceeds the so-called advantage gained. Both legal integrity and business practicibility make debarment an essential enforcement mechanism, and I so find and conclude with reference to the debarment sought herein against Jewell Painting, Inc. and Shipsview Corp., and their respective presidents.

The facts set forth above show that Shipsview and Deligiannidis deliberately deprived employees of wages to which they were entitled, falsified certified payroll records and hindered a federal investigation by, among other things, deliberately redacting information regarding employee hours and wages on the Project from documents given to the Secretary during her investigation. Shipsview's willful and egregious actions mandate debarment, and I so find and conclude. **See Janik Paving & Const. Inc. v. Brock**, 828 F.2d 84, 93-94 (2d Cir. 1987). A contractor found to be in aggravated or willful violation of the DBRA must be debarred for a period not to exceed 3 years from receiving any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. §5.1. 29 C.F.R. §5.12(a)(1); **Marvin E. Hirchirt d/b/a M&H Construction Co.**, WAB Case No 77-17 (October

16, 1978); **A. Vento Construction**, WAB Case No. 87-51 (Oct. 17, 1990). Debarment must also extend to any contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor has a substantial interest. 29 C.F.R. §5.12(a)(1).

B. Jewell Painting And Cameron Jewell Engaged In Willful And Aggravated Violations Of The DBRA

Cameron Jewell understood that certified payrolls submitted to CT-DOT were supposed to have the proper number of hours on them. (Jewell 10094) Despite his knowledge, he made a deliberate decision to submit certified payrolls that, by his own admission, were not "true and accurate." (Jewell 10094-95) Specifically, the certified payrolls consistently reflected that employees worked eight hours less than they had actually worked. (Jewell 10092) It was Jewell's regular practice to pay employees for the eight hours missing from the certified payrolls, but actually worked by the employees, in separate "expense" checks. (Tetreault 1878-86; Passons Depo., CX 289, p. 31) This practice was so prevalent that it became a "joke" among Jewell's employees. (Tetreault 1924) The expense checks were, as a general rule, payment of eight hours of overtime at a straight time rate. (Collette 1770; CX 289, pp. 31, 36-37). Jewell's policy of utilizing expense checks to pay employees overtime hours at straight time rates directly benefitted the company at the expense of its employees. Further, as Cameron Jewell admitted during the trial, his use of the expense checks also benefitted the company by allowing it to improperly reduce workers' compensation, social security and unemployment insurance taxes. (Jewell 10095)

Cameron Jewell's deliberate decision to violate the DBRA by underpaying employees and submitting falsified certified payrolls shows a willful disregard for his obligations under the law. Jewell's disdain for his legal obligations is also shown by the manner in which he handled employee pension contributions. Cameron Jewell understood that he was supposed to hold employee pension money "in trust" for the employees. Despite that understanding, he chose to use employee pension contributions to fund Jewell's operations. (Jewell 10083)

Further, Cameron Jewell's continuing bad faith, like Deligiannidis', also manifested itself through a deliberate attempt to hide Jewell's improper conduct from the Secretary. Cameron Jewell admitted that employees performing work on Arrigoni used a time clock for some period of time during July 1994 and July 1996 and that time cards were punched by employees. (Jewell 9984-85, 9991, 10081) Lowell Passons, Jewell's supervisor on Arrigoni, testified that the employee time cards used in connection with the time clock were accurate and included all hours worked by employees. (CX 289, p. 37) During his investigation, Peckham repeatedly requested that Jewell produce original time cards.

(Peckham 3285-89) However, Jewell never produced the original time cards. (Peckham 3288-89; JX- 2)

Although Jewell finally admitted the purpose of the expense checks at the hearing on July 31, 2000, the facts show that, prior to that date, Jewell engaged in a pattern of activity designed to mislead Peckham with respect to the purpose of the expense checks. Peckham first heard about the expense checks from the employees during May of 1996. (JP 2059) Shortly thereafter, he sent Cameron Jewell a letter requesting "a full accounting of all expense checks given to employees on the Arrigoni job." (JX 1) That letter also requests that Cameron Jewell state the reason for each check, if available. On September 29, 1996, in response to Peckham's request, Cameron Jewell produced a list of expense checks from 1995 with the words "out of town" next to each entry (other than Passons, which stated "pickup truck"). (CX 101)[45] With the exception of Passons, none of the employees listed on CX 101 were from CT. (CX 98, 101). After Peckham received CX 101, he continued his efforts to obtain expense checks from Jewell. (JP 10413-14). Jewell's counsel finally produced additional expense checks on February 11, 1997. (JX 5- 6) A number of the expense checks produced by Jewell's counsel were 1995 checks that were paid to Jewell employees who were in fact from CT. None of the 1995 expense checks to CT residents had been included in Cameron Jewell's 1996 list to Peckham. (Jewell 10105-10132; CX 101, 300-305) Moreover, at the time Jewell's counsel produced the expense checks, and in a subsequent letter dated February 17, 1997, Jewell represented to Peckham through counsel that the expense checks represented a "reasonable per diem room and board allowance." (JX 5, JX 6, p. 2.)[46]

Cameron Jewell also engaged in several other additional acts which were designed to impede both the Secretary's investigation, and resulting prosecution, of Jewell's conduct on the Arrigoni Project. For example, when Cameron Jewell learned that Passons had filed a complaint about Jewell, and that Peckham was investigating Jewell's pay practices on Arrigoni, Cameron called Passons, told him his complaint could cause Cameron some "serious trouble," and asked Passons to recant his complaint. (CX 289, pp. 95-96) When Passons said he could not say he had lied in his complaint because it was not a lie, Cameron Jewell asked him "just not to pursue the

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[45]The September 1996 letter stated that Jewell was "trying to compile 1994 [expense checks] as quickly as possible." (CX 101) Despite his request for all expense checks, Peckham, never received a list of 1994 expense checks.

[46]Complainant is not in any manner suggesting that counsel for Jewell Painting was aware of this record falsification at any time other than immediately prior to the day of Cameron Jewell's testimony in court.

complaint." (CX 289, p. 96) In a subsequent phone call to Passons, Cameron Jewell wanted to know how he could make Passons "go away." (CX 289, p. 97) Passons responded that he would cease pursuing his complaint if Jewell paid him the $1,444 he owed him for back insurance and medical expenses. (CX 289, pp. 97-98) Jewell paid Passons the $1,444 as a "settlement" in late May 1996. (CX 298)

With the commencement of trial, Cameron Jewell again contacted Passons to indicate that he was "in danger of losing his certification, his ability to bid for DOT jobs, and he wanted [Passons] to sign a statement saying that the $175 payments that he was giving [Passons] were payments for a truck." (CX 289, pp. 99-100; Jewell 10101-02)[47] Cameron Jewell then sent Passons a sworn statement he wanted him to sign which would confirm that the $175 payments were for Passons' pickup truck. (CX 289, pp. 99-100, CX 299) Passons refused to sign the document because it was untrue and he did not want to perjure himself to aid Cameron Jewell. (CX 289, pp. 100-01)

Initially I reject the essential thesis of Jewell that the misclassification violations as alleged by the Complainant are not supported by the totality of this closed record or by pertinent case precedents at the Wage Appeal Board or at the appellate circuits, especially as neither the WDs nor Jewel's reliance upon the so-called tools-of-the-trade (TOT) analysis authorize or sanction the payment of laborer rates for those employees performing painting work. Moreover, Jewell's assertion that using laborers to perform painters' work was consistent with local practice is not only not supported by this closed record but also is contradicted by this record.

Jewell submits that the applicable WD on the Arrigoni project authorized Jewell to use laborers simply because that classification was listed in the WD. However, that position cannot be accepted herein because, as the numerous WDs in evidence show, it is standard CT-DOT procedure to include multiple classifications in the WDs even though those classifications may not necessarily be relevant to the work required under a particular contract. Thus, simply because a job classification is contained in the WD does not automatically make it an appropriate selection - especially where the contractor, at its peril, has made no inquiry into local area practice.

Nor is Jewell helped by its reliance on the so-called TOT analysis because while a TOT analysis is consistent in its application regardless of locale, local area practice may very

[47]Passons stated that he was contacted in March, 2000; Jewell testified that he sent the proposed sworn statement in January, 2000. (CX 289, pp. 99-100; Jewell 10101-02)

considerably from state to state, as was demonstrated by the testimony of Gail Svoboda before me. As a fundamental premise of DBRA is the protection of local area labor standards, the concept of a universally applicable TOT analysis is totally at odds with this premise, and I so find and conclude.

Furthermore, it is undisputed that laborers do not tend painters, but tend only two crafts, the carpenter and the mason. (Granell 7097-98, 7104-05, 7108) Thus, with reference to laborer and painter jurisdictional issues, "There are 'no gray areas'." (Granell 7098)

Nor may Jewell rely upon the doctrine of equitable estoppel to defend itself against the Complainant's charges and the sanction of debarment as Jewell is unable to point to, and the record does not reflect, any affirmative governmental misconduct herein. In this regard, **see Dantran, Inc. v. U.S. Dept. of Labor**, 171 F.3d 58 (1st Cir. 1999), a matter over which this Administrative Law Judge presided.

I also reject Jewell's position that Complainant's case is based solely on the LAPS because (1) Jewell also confuses this proceeding brought under 29 C.F.R. §§ 5.11 and 5.12 with a conformance proceeding brought under 29 C.F.R. §5.13 and (2) the LAPS is not the issue on trial herein but what is at issue are the egregious business practices of the Respondents, knowingly flouting their obligations and responsibilities under the DBRA and under the contracts on which they freely and willingly entered bids based upon the specifications and the schedule of prices. The undisputed evidence shows that the established local area practice is to pay the WD painter rate for all work processes involved in transforming a rust bridge into a newly-painted bridge, and I so find and conclude.

As noted above, the LAPS performed by Mr. Peckham is not on trial herein - what is on trial is simply whether or not the pay practices of the Respondents violated the DBRA, and dispositive of this issue is the most significant decision in **U.S. ex rel. Plumbers & Steamfitters Local Union No. 38, et al. v. C.W. Roen Construction Co.**, 183 F.3d 1088 (9th Cir. 1999). In **Roen**, that Court stated, "Although wage surveys are one way in which wage classifications may be established, they are not the only way," and "an area practice survey was not necessary where wage determination rates are based on union negotiated rates." Therefore, in such situations, "An area practice survey is not a prerequisite to the determination of prevailing wage rates or job classifications." **Roen**, 183 F.3d at 1093-94. Moreover, the totality of this closed record leads to the conclusion, and is consistent with the conclusion reached by Mr. Peckham when he performed the LAPS, that it was the established local practice to pay the painter wage rate for the work at issue. While Jewell's counsel labored mightily and valiantly to defend his client, there simply is no credible, or

probative evidence countering the Complainant's case, and I so find and conclude.

Nor does this proceeding result in the elimination of the laborer classification from the WD because the Complainant has consistently maintained that the classification of "Laborer" is appropriate in specific limited situations, **e.g.**, where employees were **exclusively** performing ground clean-up duties, like the Daskal ground crew on the Gold Star projects or where employees **on multi-trade** projects were erecting platforms designed to be used by more than one craft, as opposed to the single-craft bridge-painting project.

I also reject as incorrect and without legal or factual foundation Jewell's proposed back wage computations because this closed record reflects, and I so find and conclude, that Complainant properly computed the back wages due to the employees and that Complainant properly gave Jewell credit for overpayments made to its employees, **i.e.**, Complainant credited Jewell with those overpayments **only for those work weeks** where Jewell was making underpayments - that is, when Jewell paid the laborer rate to employees performing painter work and/or when it underpaid employees using the $175 checks. In this regard, **see** 29 C.F.R. §§ 5.5(a)(1); **Roland Electrical Co. v. Black**, 163 F.2d 417 (4th Cir. 1947). Moreover, the alternate back wage computations - proposed by Jewell in appendix A to its brief - cannot be accepted herein because the methodology utilized contains critical errors in its basic assumptions, the most important of which is the erroneous assumption that Jewell's employees were properly classified as either laborers or painters, an argument that has already been rejected above. Thus, as Jewell's computation methodology is completely arbitrary and is provided without any explanation therefor, it is not probative or persuasive an is unworthy of credence, and I so find and conclude.

In view of the foregoing, I find and conclude that the totality of this closed record leads to the conclusion that the established union practice in Connecticut was to treat the work performed by Jewell employees on the so-called Violation Project as painters' work. Thus, Jewell's employees should have been paid at the WD rate for painters. In this regard, **see In re Fry Brothers Corp.**, WAB Case No. 76-6, CCH Labor Law Reporter, Wage -Hours, Administrative Rulings, §31,113 (1977). While Jewell concedes and characterizes its misdeeds simply as "technical violations," the binding precedents cited above require that this Administrative Law Judge impose a three-year debarment when, as here, a contractor has falsified certified payrolls to conceal underpayments to employees as part of a persistent pattern of practice. In this regard, **see, e.g., A. Vento Construction**, WAB Case No. 87-51, 1990 WL 48312 (Oct. 17, 1990).

Jewell attempts to downplay the seriousness of its violations

by describing its scheme of paying $175.00 for eight hours of work as a "voluntary arrangement" and by stating that its practice of understating employee hours worked on the certified payroll records was an "unintended by-product" of that arrangement, or at most "a technical violation."

As noted above, Jewell gave employees separate $175.00 checks which represented payment for eight hours they had worked on Arrigoni. Thus, Jewell intentionally and deliberately avoided paying employees the correct prevailing wage rate and Jewell's characterization of the unreported hours on the certified payroll records as simply an "unintended by-product" of the $175.00 pay scheme is grossly self-serving and disingenuous and cannot be accepted by this Administrative Law Judge to justify Jewell's actions. Likewise, I reject Jewell's position that it did not alter its certified payroll records, but merely misrepresented them when the records were first prepared and submitted to the CT-DOT.

Jewell also submits that debarment is not appropriate herein because of the "lapse of time between the relevant events and the imposition of a debarment penalty." However, I cannot accept this defense as Jewell has failed to prove "actual prejudice as a result of the passage of time." In this regard, **see In the Matter of KP&L Electrical Contractors, Inc.**, ARB Case. No. 99-039, 2000 LW 739932 (May 31, 2000).

In view of the foregoing, Jewell's actions, taken individually or collectively, exemplify the type of misconduct that Congress sought to address by the sanction of debarment. **See Janik**, 828 F.2d at 90-91 (while debarment can be a "serious blow" to firms specializing in government business, it may be the only realistic way to deter contractors from willfully violating the DBRA, based on an objective weighing of costs and benefits.") **See also A. Vento Construction Co.**, WAB Case No. 87-51, 1990 WL 88312 (Oct. 17, 1990)(DBRA cases involving "typical aggravated or willful violations," such as "falsification of the certified payroll" warrant imposition of the three-year debarment period).

The foregoing facts demonstrate that Jewell engaged in an egregious pattern of willful and aggravated violations of the DBRA which began in July 1994 and continued up until Passons' deposition in June 2000. Jewell's and Cameron's actions mandate debarment, and I so find and conclude. **See Janik Paving & Const. Inc. v. Brock**, 828 F.2d 84, 93-94 (2d Cir. 1987). Any contractor found to be in aggravated or willful violation of the DBRA must be debarred for a period not to exceed 3 years from receiving any contracts or subcontracts subject to any of the statutes listed in 29 C.F.R. §5.1. 29 C.F.R.§5.12(a)(1); **Hirchirt, supra**; **A. Vento Construction, supra**. Such debarment must also extend to any contractor or subcontractor or any firm, corporation, partnership, or association in which such subcontractor has a substantial interest. 29 C.F.R. §5.12(a)(1).

CONCLUSION

This case is about the heart and soul of the protections afforded to local area wage rates and practices under the DBRA. It arose out of CT contracts for the cleaning and painting of several bridges throughout the State. The central and most hotly contested issue throughout this proceeding is whether the workers employed on those contracts should have been paid the painter rates specified in the WDs which are a part of the contracts. Respondents have never disputed that the rates set forth in those WDs derive from collectively-bargained agreements. Because the rates were derived from the unionized sector, as a matter of long established law the jurisdictional classifications must be derived from the unionized sector as well. **Fry Brothers, supra**; **C.W. Roen, supra**.

The testimony was unanimous and undisputed that the work processes at issue in this case are within the jurisdictional claim of the CT painters union. There was no testimony whatsoever even suggesting that the work processes were claimed by the CT laborers or carpenters unions. As stated by Laborers' representative Leonard Granell, "There are no gray areas." (Granell 7098) There can be no doubt that a union worker performing these work processes for a unionized firm such as Laugeni or Gresh would have been paid as a painter for all of the disputed work at issue, including but not limited to time spent assembling, moving and disassembling containments, setting up to blast, cleaning up spent debris, setting up to paint, doing traffic control and taking decontamination showers.

This case is not about a gray area. It is about an attempt by primarily out of state contractors to "come on the project site...[,]" to "divide the work of the ... craft into several parts" "and to pay for such division of the work at less than the specified rate ...." **Fry Brothers**, Holding No. 2. As previously stated by the Wage Appeals Board:

> **If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.**

Fry Brothers, Holding No. 6. (Emphasis added)

I find most surprising the statement by counsel for Abhe and Blast All on pages 1 and 2 of his post-hearing brief.

Those statements are most surprising because that is exactly

what was in the mind of his client, Steve Bogan, who continually refused to sign the 1995-1998 state-wide collective bargaining agreement and the Addendum (herein "CBA") because he knew that the projects in question were single-trade bridge painting projects and that he would be required to pay the painters' prevailing wages for the work in question for those tasks involved herein. If Mr. Bogan believed otherwise, he would not have been reluctant to sign that CBA and the Addendum.

While the Respondents allege uncertainty and/or confusion in the proper wage rate to be paid their employees, the Respondents, unlike the proverbial ostrich with its head in the sand, had the obligation to ensure that its employees were being paid the proper wage rates and, if there were really any uncertainty or confusion, they had the obligation to contact the nearest Wage and Hour Office of the Department to ascertain their obligations under the DBRA and the WDs in question. But they did not do so, and they did so at their peril, and the result is this proceeding. However, the Respondents, in my judgment, are sophisticated business people who knew their obligations herein but who, when the bidding costs thereafter escalated, decided to take their chances on escaping detection by the Wage and Hour Division. In this regard, **see Double Eagle Construction, Inc.**, 93-DBA-14, CCH Labor Law Reports, Administrative Rulings, ¶ 32,316 (ALJ Decision June 13, 1994). The Respondents made no attempt to clarify any uncertainty and/or confusion and Respondents, by misclassifying and underpaying their workers, proceeded at their peril, thereby bringing about these consolidated proceedings. It is too late for the respondents to complain that somehow they have been singled out for prosecution - it is their own business practices that necessitated these proceedings, not any competitor or employee complaints.

I agree with Complainant that the Respondents could use laborer or carpenter rates to pay for those services on multi-trade road projects or for the ground workers of Daskal, for example, but the Respondents cannot pay those rates to workers who are tending painters on a single-trade bridge-painting project, as such would contravene the local area practice in Connecticut, a practice in effect since at least April of 1920.

I also reject Respondents' equitable estoppel defense because a fair and objective review of this closed record does not establish any affirmative governmental misconduct. In this regard, **compare Griffin, et al. v. Reich**, 956 F.Supp. 98 (D.R.I. 1997), **with Dantran, Inc. v. U.S. Department of Labor**, 171 F.3d 58 (1st Cir. 1999). I am the presiding Administrative Law Judge in both of those cases and I am very familiar with the factual patterns in both cases and, in passing, I will state for the record that the facts presented herein do not rise to the level of those presented in **Griffin** and **Dantran**. Thus, I reiterate that equitable estoppel is not available to any of the Respondents joined herein because of the absence of any affirmative governmental misconduct. I would

also note that the cursory wage checks performed under the auspices of the Connecticut DOT do not, in my judgment, constitute affirmative governmental misconduct because the Department of Labor is the final arbiter of the requirements, obligations and responsibilities under the DBA and the DBRA. Moreover, a prior investigation of Blast All by the Hartford, Connecticut Wage and Hour Division does not create an equitable estoppel defense because, in my judgment, "there is not the slightest whiff of affirmative (governmental) misconduct," to quote the words of the First Circuit Court in **Dantran, supra** at 67.

I also agree with the Complainant that the Respondents' position that Mr. Peckham should have segregated out certain work is not appropriate herein because there is no jurisdictional dispute as all of the work in question was painters' work, involved work tending painters and was performed, **inter alia**, on the bridges and in containment. As noted above, Mr. Peckham did segregate out certain work by Daskal employees because their duties, unlike that of the other employees of the Respondents, were limited to ground work consisting of unloading, carrying materials and cleaning up. Respondents had the opportunity to identify any other employees with comparable duties to the Daskal ground employees and they were unable to do so. Thus, there was no need for Mr. Peckham to segregate out any other employees and/or hours from his back wage computations.

I also agree with the Complainant that the totality of this closed record, notwithstanding Respondents' last-minute effort to cloud the record though the filing of RX 60, leads to the conclusion that those union painting contractors had properly registered their apprentices with the appropriate state and federal division. it is also apparent that apprentice and journeymen painters performed the disputed work on the Violation Projects. Thus, these Respondents inaccurately portray the work of grit collection and disposal, traffic control and containment as primarily the domain of painter apprentices. Were the situation otherwise, I might have been able to accept Respondents' argument on this issue.

In view of the foregoing findings of fact, this Administrative Law Judge, having reviewed the entire record and the parties' post-hearing pleadings, now makes the following:

CONCLUSIONS OF LAW

1. When a wage determination schedule contains only one wage rate for a craft or trade classification without intermediate rates, it is not permissible for contractors to divide work of that craft into subparts and pay for portions of that work at lesser rates. **Fry Brothers Corporation** (Wage Appeals Board, 1977).

2. When wage determinations are derived from experience under negotiated agreements, such wage determination must carry with them the classifications of work according to job content upon which the wage rates are based. **Fry Brothers Corporation** (Wage Appeals Board, 1977); **In the Matter of Trataros Construction Corp.**, WAB Case No 92-03 (April 28, 1993).

3. The use of any class of laborers or mechanics, including apprentices and trainees, not listed in the applicable wage determination requires specific approval of the Administrator of the Wage and Hour Division. 29 CFR §5.5(a)(1)(ii) (A), (B), and (C); **Fry Brothers Corporation** (Wage Appeals Board, 1977); **Clark Mechanical Systems**, WAB Case No. 95-03 (1995).

4. Any challenge to the applicable wage determinations must come before such wage determination becomes the basis upon which bids are taken. **Fry Brothers Corporation** (Wage Appeals Board, 1977); **Clark Mechanical Systems**, WAB Case No. 95-03 (1995); **Tele-Sentry Security, Inc. v. Secretary of Labor**, 119 CCHLC § 35, 534 (D.D.C. 1991), citing **Universities Research Ass'n v. Coutu**, 450 U.S. 754, 101 S. Ct. 1451 (1981); **Pizzagalli Construction Co.**, ARB 98-090 (May, 1999); **In re Millwright Local 1755**, 2000 WL 670307, ARB No. 98-015 (May 11, 2000); **see also I.C.A. Construction Corp. v. Reich**, 60 F.2d 1495, 1499, fn 9. (11th Cir. 1995).

5. Challenges to wage determinations are not permissible during enforcement proceedings. **Fry Brothers Corporation** (Wage Appeals Board, 1977).

6. If a contractor who is not bound by the practices applied under prevailing negotiated agreements is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who have established the locality wage standard. **Fry Brothers Corporation** (Wage Appeals Board, 1977); **Tele-Sentry Security, Inc. v. Secretary of Labor**, 119 CCHLC § 35, 534 (D.D.C. 1991); **See also** discussion of legislative history in **Bldg. & Const. Trades' Dept., AFL-CIO v. Donovan**, 712 F.2d 611, 625 (D.C. Cir. 1983).

7. In order to receive less than the journeyman's rate set forth in a Wage Determination, apprentices must be registered in a program approved by the Bureau of Apprenticeship and Training or a recognized State apprenticeship agency, and trainees must be enrolled in a program approved by the Bureau of Apprenticeship and Training. **Fry Brothers Corporation** (Wage Appeals Board, 1977); **Kasler Corporation**, WAB Case No 90-03 (1991); **Van Den Heuvel Electric, Inc.**, WAB Case No. 91-03; Also **In the Matter of Miami Elevator Co.**, ARB Case No. 98-086 (Apr. 25, 2000).

8. Final responsibility for classifying laborers lies with the Department of Labor and not with the contracting agency on the project. **Fry Brothers Corporation** (Wage Appeals Board, 1977), citing **Fry Brothers Corp. v. Department of Housing and Urban Development**, 77 CCHLC; **Tele-Sentry Security, Inc. v. Secretary of Labor**, 119 CCHLC § 35, 534 (D.D.C. 1991) §33,306 (D.N.M. 1975).

9. When the wage determination for a project contains only one wage rate for a craft without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of that craft into several parts measured by his or her assessment of the degree of the skill of the employee and to pay for such division of the work at less than the specified rate for the craft. **Fry Brothers Corporation, supra**.

10. Reliance on an oral statement by a local official does not create compliance with the Davis Bacon Related Acts. **Fry Brothers Corporation** (Wage Appeals Board, 1977).

11. The provisions of a collective bargaining agreement cannot serve to authorize payment of rates lower than those specified in an applicable wage determination. **Van Den Heuvel Electric, Inc.**, WAB Case No. 91-03 (1991).

12. A wage determination for a particular craft or trade does not operate as a guaranty that labor will be available at a "prevailing" rate. **United States v. Binghamton Const. Co.,** 347 U.S. 171, 74 S. Ct. 438 (1954).

13. The Connecticut Department of Transportation did not and does not have authority to approve changes in classifications and rates. **In the Matter Of The Law Company, Inc.**, ARB Case No 98-107 (Sept. 30 1999).

14. The Administrative Review Board and its predecessor, the Wage Appeals Board, repeatedly have emphasized that when interpreting Davis-Bacon labor standards questions, the contracting agencies and their officers have no ability to make an authoritative determination; this power is reserved to the Secretary [of Labor] and her designees. **Thomas & Sons Building Contractors, Inc.**, ARB Case No. 98-164 (Oct. 19, 1999), citing **The Law Company, Inc., Dick Enterprises, Inc.**, ARB Case No. 95-046A (Dec. 4, 1996); **Swanson's Glass**, WAB Case No. 89-20 (Apr. 29 1991); **More Drywall, Inc.**, WAB Case No. 90-20 (Apr. 29, 1991), **Arbor Hill Rehabilitation Project**, WAB Case No. 87-04 (Nov. 3, 1987); **Tolleson Plumbing and Heating**, WAB Case No. 78-17 (Sept. 24, 1979); **Metropolitan Rehabilitation Corp.**, WAB Case No 78-25 (Aug. 2, 1975); **Sentinel Electric Company**, WAB Case No. 82-9 (September 13,

1978).

15. Any such modification or conformance would have to be in accordance with the provisions of 29 C.F.R. §5.5.

16. The first requirement of the applicable regulations is that no such modification or conformance can be approved if the work in question is already performed by a classification of workers identified in the wage determination. 29 C.F.R. §5.5(a)(1)(v)(A)(1).

17. If a bidder believes that the classifications or wage rates listed in a wage determination are incorrect, it is incumbent upon the bidder to challenge the substantive correctness of the wage determination prior to the award on the contract, in order 'to insure that competing contractors know in advance of bidding what wage rates must be paid so that they may bid on an equal basis.' **The Law Company**, citing **In re Kapetan, Inc.**, WAB Case No 87-33, Sep. 2, 1988, **slip op.** at 8 and the cases cited therein.

18. The regulations place on those seeking government contracts an obligation to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents. Should those wage standards appear to be incomplete or incorrect the would-be contractor or subcontractor is obligated to challenge their accuracy prior to the opening of bids or the award of a contract. This procedure guarantees fairness to all bidders and assures the full benefit to the government of the procurement process. **In the matter of Clark Mechanical Contractors, Inc.**, WAB Case No. 95-03 1995 WL 64572 (DOL W.A.B. 1995).

19. It is firmly settled that a party seeking to raise estoppel against the sovereign must, at the very least, demonstrate that government agents have been guilty of affirmative misconduct. **Dantran, Inc. v. U.S. Dept. of Labor**, 171 F.3d 58 (1st Cir. 1999).

20. Affirmative misconduct requires something more than mere negligence, such as an intent to mislead respondents about their obligations. **Dantran**.

21. The regulations relating to enforcement by the Secretary of Labor of the Davis Bacon and Related Acts are set forth in the Code of Federal Regulations at 29 C.F.R. Parts 1 and 5.

22. The Department of Labor's Field Operations Handbook is not published in 29 C.F.R. Parts 1 and 5 or any other part of the Code of Federal Regulations.

23. The Field Operations Handbook was issued to provide guidelines for Department of Labor compliance officers and does not have the force or effect of regulations binding on the Complainant. **Brennan v. Ace Hardware**, 495 F.2d 368 (8th Cir. 1974); **see also The Law Company, Inc.**, ARB Case No 98-107 (Sept. 30, 1999).

24. A location is part of the "site of work" if it is the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the site. 29 C.F.R. §5.2(l)(1); **In the Matter of Bechtel Construction Corp., et al.**, (ARB Case No. 97-149, 1998 WL 168939 (March, 1998).

25. There is a **prima facie** presumption that supporting activities associated with the primary project are covered by the labor standards provisions of the various acts. **United Construction Company, Inc.**, WAB Case No. 82-10 (January 14, 1983).

26. The term ***laborer*** or ***mechanic*** includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. 29 C.F.R. §5.2(m).

27. Where an employer's payroll records are incomplete or inaccurate, a compliance officer must necessarily make reasonable inferences about the extent of violations and may have to reconstruct hours of work or other payroll information. **In the Matter of Trataros Construction Corp.**, WAB Case No 92-03 (April 28, 1993); **In the Matter of R.C. Foss & Son, Inc. and Atlantic Painting Co., Inc.**, WAB Case No 87-46 (December 3, 1990); **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946).

28. Any contractor found to be in aggravated or willful violation of the Davis Bacon Related Acts must be debarred for a period not to exceed 3 years from receiving any contracts or subcontracts subject to any of the statutes listed in 29 Code of Federal Regulations §5.1. 29 Code of Federal Regulations §5.12(a)(1); **Marvin E. Hirchirt d/b/a M&H Construction Co.**, WAB Case No 77-17 (October 16, 1978); **A. Vento Construction**, WAB Case No. 87-51 (Oct. 17, 1990).

29. Such debarment must also extend to any contractor or subcontractor or any firm, corporation, partnership, or association in which such subcontractor has a substantial interest. 29 Code of Federal Regulations §5.12(a)(1).

Accordingly, in view of the foregoing **Findings of Fact and Conclusions of Law**, I issue the following:

ORDER

1. It is therefore **ORDERED** that the Administrator, Wage and Hour Division, U.S. Department of Labor, shall pay to the employers identified on the respective WH-55s and HW-56s those amounts identified thereon and as summarized in the **Summary of Back Wages Due**, attached hereto as **APPENDIX A** and which is incorporated herein by reference.

2. It is also **ORDERED** that the Administrator shall take the necessary steps to place on the ineligible list for the full three-year period, pursuant to the provisions of 29 C.F.R. §5.12(a)(1), the following firms and individuals:

(a) Jewell Painting, Inc., and Cameron Jewell, as well as any firm, corporation, partnership or association in which such contractor, subcontractor or individual has a substantial interest.

(b) Shipsview Corp. and Christos Deligiannidis, as well as any firm, corporation, partnership or association in which such contractor, subcontractor or individual has a substantial interest.

A

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jl

NOTICE OF APPEAL

Within 40 days of the administrative law judge's decision, an aggrieved party shall file a petition for review with the Administrative Review Board under 29 C.F.R. §6.34 with a copy to the Chief Administrative Law Judge. If a Petition for Review of the administrative law judge's decision is filed with the Administrative Review Board, the Chief Administrative Law Judge shall promptly transmit the record of the proceeding.

If an aggrieved party files a petition for review with the Board, the judge's decision is inoperative unless and until the Administrative Review Board either declines to review the decision or issues an order affirming the decision.

APPENDIX A

SUMMARY OF BACK WAGES DUE

Respondent (Project)	Type	Exhibit	Amount
ABHE (ARRIGONI)	DBRA	CX 46	$407,139.84
	CWHSSA	CX 61	$ 29,609.16
EDT (ARRIGONI)	DBRA	CX 48	$ 84,624.67
	CWHSSA	CX 63	$ 6,662.17
JEWELL	DBRA	CX 47	$582.793.61
	CWHSSA	CX 62	$ 69,028.26
ABHE (OL/EL)	DBRA	CX 49	$ 33,218.34
	CWHSSA	CX 64	$ 2,469.24
ABHE (MILL RIVER)	DBRA	CX 52	$ 97,694.64
	CWHSSA	CX 57	$ 9,409.34
GCPC (GOLD STAR BRIDGE)	DBRA	CX 58	$251.586.40
	CWHSSA	CX 73	$ 8,779.05
BLAST ALL (OL/EL)	DBRA	CX 51	$ 10,310.28
	CWHSSA	CX 54-57 CX 66	$ 130.38
BLAST ALL (MILL RIVER)	DBRA	CX 51	$ 7,633.07
	CWHSSA	CX 54-57 CX 68	$ 1,350.47
BLAST ALL (SIPCO)	DBRA	CX 51	$ 40,501.67
	CWHSSA	CX 54-57 CX 69	$ 1,962.18
BLAST ALL (SOUTHINGTON/ GLASTONBURY)	DBRA	CX 51	$ 3,093.05
	CWHSSA	CX 54-57 CX 70	$ 82.66
BLAST ALL (DEFELICE)	DBRA	CX 51	$ 265.20
	CWHSSA	CX 54-57 CX 71	$ 26.85
SHIPSVIEW	DBRA	CX 60	$127,694.95
	CWHSSA	CX 231 CX 232	$ 20,226.18
	TOTAL		$2,057,583.30