



In the Matter of:

TESCO BUILDERS, INC.

ARB CASE NO. 05-102

DATE: October 31, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner:

Alan G. Ross, Esq., *Ross, Brittain & Schonberg Co., L.P.A.*, Cleveland, Ohio

For Respondent Administrator, Wage and Hour Division:

Joan Brenner, Esq., Ford F. Newman, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., *United States Department of Labor*, Washington, D.C.

DECISION AND ORDER OF REMAND

The Deputy Administrator (Administrator) of the United States Department of Labor's Wage and Hour Division held that the higher of two wage rates applied for work electricians had performed on a federally assisted town home construction project in Cleveland, Ohio. The wages paid to the electricians are subject to the minimum wage provisions of the Davis-Bacon Act (DBA or the Act).¹ Tesco Builders, Inc., the contractor liable for the higher wages, requested that we review the Administrator's decision. We vacate the decision and remand.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB or the Board) has jurisdiction to decide appeals from the Administrator's final decisions concerning DBA wage determinations.²

¹ 40 U.S.C.A. §§ 3141-3148 (West Supp. 2003). The regulations that implement the Act are found at 29 C.F.R. Part 1 (2007).

The Board's review of the Administrator's rulings is in the nature of an appellate proceeding.³ We assess the Administrator's rulings to determine whether they are consistent with the DBA and its implementing regulations and are a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Act.⁴ The Board generally defers to the Administrator as being "in the best position to interpret [the DBA's implementing regulations] in the first instance . . . , and absent an interpretation that is unreasonable in some sense or that exhibits an unexplained departure from past determinations, the Board is reluctant to set the Administrator's interpretation aside."⁵

BACKGROUND

1. The Legal Framework

The DBA applies to every contract of the United States in excess of \$2,000 for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works in the United States.⁶ It requires that contractors pay a minimum wage to the various classifications of mechanics or laborers they employ.⁷ The Administrator determines these minimum wages and publishes them as "Wage Determinations."⁸ The minimum wage rates contained in the wage determinations derive from rates prevailing in the area where the work is to be performed or from rates applicable under collective bargaining agreements.⁹ "Prevailing" wages are wages paid

² 29 C.F.R. § 7.1(b)(2007). See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

³ 29 C.F.R. § 7.1(e).

⁴ *Miami Elevator Co. and Mid-American Elevator Co., Inc.*, ARB Nos. 98-086, 97-145, slip op. at 16 (ARB Apr. 25, 2000). See also *Millwright Local 1755*, ARB No. 98-015, slip op. at 7 (ARB May 11, 2000); *Dep't of the Army*, ARB Nos. 98-120, 98-121, 98-122, slip op. at 16 (ARB Dec. 22, 1999) (under the parallel prevailing wage statute applicable to federal service procurements, the Service Contract Act, 41 U.S.C.A. § 351 *et seq.* (West 1987)), citing *ITT Fed. Servs. Corp. (II)*, ARB No. 95-042A (July 25, 1996) and *Service Employees Int'l Union (I)*, BSCA No. 92-01 (Aug. 28, 1992).

⁵ *Titan IV Mobile Serv. Tower*, WAB No. 89-14, slip op. at 7 (May 10, 1991), citing *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

⁶ 40 U.S.C.A. § 3142(a).

⁷ *Id.*

⁸ 29 C.F.R. Part 1.

⁹ 40 U.S.C.A. § 3142(b); 29 C.F.R. § 1.3.

to the majority of laborers or mechanics in corresponding classifications on similar projects in the area.¹⁰ A contractor will be liable for its subcontractor's failure to pay the minimum wage.¹¹

2. Chronology of Events

The Cuyahoga Metropolitan Housing Authority of Cleveland (CMHA), Ohio, awarded Tesco a contract to construct 98 new homes in a series of five attached town homes.¹² Tesco subcontracted electrical work for the project to BBC Electric.¹³ The wage determination for the project was designated General Decision OHO20022. This wage decision contained an hourly wage rate of \$31.18 plus \$9.16 in fringe benefits for electricians who work on projects “[n]ot including units built primarily for family residence, including mobile home parks, but including Residences exceeding 4 units under one roof.”¹⁴ The wage determination also contained an hourly rate of \$14.00 plus \$4.02 in fringe benefits for electricians who work on projects consisting of “[u]nits built primarily for family residence, including mobile home parks. Residences not to exceed 4 units under one roof.”¹⁵ The electrician wage rates derived from the rates contained in Local Union No. 38 of the International Brotherhood of Electrical Workers’ collective bargaining agreement (CBA), which the Wage and Hour Division determined were the prevailing residential wage rates in the local Cleveland area.¹⁶ BBC Electric paid the lower rate to the electricians who worked on the project.¹⁷

The CMHA believed that the higher rate applied. Thus, it sought the United States Department of Housing and Urban Development’s (HUD) assistance in obtaining a final determination from the Administrator as to which of the two wage rates applied.¹⁸ HUD requested that the Administrator make that determination.¹⁹ The Administrator

¹⁰ See 29 C.F.R. § 1.2(a)(1).

¹¹ See 29 C.F.R. § 5.5(a)(6).

¹² Tab K.

¹³ Tab E.

¹⁴ Tab I.

¹⁵ *Id.*

¹⁶ Tab A at 2; Tabs E-F.

¹⁷ Tab E.

¹⁸ Tab D.

¹⁹ Tab C.

contacted Local 38, requesting that it provide “wage payment data from contractors who employed electricians at the higher Local 38 payrate” for similar town house projects in the local Cleveland, Cuyahoga County area.²⁰ In response, Local 38 forwarded five WD-10 forms (Report of Construction Contractor’s Wage Rates) to the Administrator, all of which showed that contractors had paid the higher rates on five other town house or apartment projects.²¹

The Administrator issued a final determination on March 21, 2005.²² Relying on the holding in *Fry Bros. Corp.*, a 1977 Department of Labor Wage Appeals Board (WAB) decision,²³ the Administrator stated that where the relevant “wage determination rates are derived from a CBA,” as in this case, “local area union practices ... determine the proper classification and wage rate applicable to the work in question.”²⁴ The Administrator noted that Local 38 had provided evidence that showed that electricians were paid the higher rate on four other similar town home projects. Local 38 had also “explained that the higher rate should apply” to the project at issue because it involved the construction of “more than four units under one roof.” Furthermore, citing no authority, the Administrator found that “although rooflines may vary, a row of town homes is a single structure.” Consequently, the Administrator held that the higher rate applied. Tesco timely petitioned the ARB to review the Administrator’s final determination.²⁵

DISCUSSION

1. The Parties’ Arguments

In arguing that the Administrator erred in deciding that the higher rate applies, Tesco points out that the Administrator relied solely upon the information that Local 38 provided and did not even request information or a response from Tesco. Tesco also quarrels with the Administrator’s unsupported finding that even though their rooflines varied, the various buildings comprising five attached town homes are single structures under one roof, and, therefore, the higher rate applies.²⁶ Tesco contends that since the

²⁰ Tab F.

²¹ Tab H.

²² Tab A.

²³ WAB No. 76-06 (June 14, 1977).

²⁴ Tab A at 2.

²⁵ *See* 29 C.F.R. § 7.2.

Administrator did not rely upon an architect's expert opinion or even the architectural plans for the town homes, this finding is unreasonable.²⁷

In response, the Administrator argues that “[i]n cases such as this, where union rates provide the basis for establishing a wage determination rate, it was appropriate, under *Fry Brothers*, for Wage and Hour to seek information from Local 38 as to the rates paid on recent similar projects in the locality.”²⁸ And since that information proved that the electricians received the higher rate, the Administrator argues that he properly concluded that the higher rate applied here.²⁹

2. *Fry Brothers* does not apply.

As we noted earlier, in his March 21, 2005 final determination letter, the Administrator wrote that in cases such as this, “we *must* look to local area union practices to determine the proper classification *and wage rate* applicable to the work in question. *See Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1976).” (Emphasis added). And as noted above, the Administrator also argued in his brief that, under *Fry Brothers*, it was appropriate to ask Local 38 for information “as to the rates paid” to determine which rate applied.

But the Administrator misreads *Fry Brothers*. The issue in *Fry Brothers* was which classification of worker should perform a certain job, carpenters or laborers, and thus whether the contractor was liable for carpenter wages or laborer wages.³⁰ The Wage Appeals Board held that where, as here, prevailing wage rates contained in a wage determination are based upon a CBA, proper classification of work duties under the wage determination must be determined according to the area practice of the unions that are party to the CBA.³¹ *Fry Brothers* does not instruct the Administrator to ask local union

²⁶ As noted earlier in the text, according to the wage determination for this project, the \$31.18/\$9.16 electrician wage applied for “Residences exceeding 4 units under one roof.” Tab I.

²⁷ Tesco Brief at 3-7.

²⁸ Administrator’s Brief at 9.

²⁹ *Id.* at 8-10.

³⁰ *Fry Bros.*, slip op. at 1.

³¹ *Id.*, slip op at 17 (“When the Department of Labor determines that the prevailing wage for a particular 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.*”) (emphasis added); *see also Lang Land Clearing, Inc.*, ARB Nos. 01-072, 01-079, ALJ Nos. 1998-DBA-001 through -006, slip op. at 24 (ARB Sep. 28, 2004);

officials which wage rate within a classification applies, but only to clarify which classification applies. Thus, the Administrator's argument that he "must look to local area union practices to determine the proper classification *and wage rate* applicable to the work in question" constitutes an unwarranted extension of the *Fry Brothers* holding.

Here the parties do not dispute the fact that the job at issue was properly classified as electrician work. The issue here is not who is classified to do electrician work, but rather which of the two electrician wage rates applies to the town house project. Therefore, *Fry Brothers*, a classification case, does not apply to this case, a wage rate case. As such, *Fry Brothers* cannot support the Administrator's determination.

3. *Brunetti Construction*

In *Brunetti Construction*, the Wage Appeals Board addressed the same issue that this case presents.³² A subcontractor performed electrical work on a Federal Housing Administration (FHA) renovation project. The applicable wage determination contained two electrician wage rates derived from collective bargaining agreements. One rate for about \$7.00 per hour was "applicable to the construction of all units built primarily for family residence, not to exceed 4 unit apartments." A higher electrician's wage of about \$13.00 per hour applied for "other residential construction." The subcontractor paid the electricians the lower rate. The Administrator determined that the higher rate applied. A Department of Labor Administrative Law Judge ruled in favor of the subcontractor. The Department of Labor Assistant Secretary for Employment Standards reversed the ALJ, and the subcontractor appealed to the WAB.³³

The contractor and subcontractor argued that the lower rate applied because an FHA official had advised the subcontractor at a preconstruction conference that according to the FHA definition of "buildings," the project consisted of family residences of 4 units or less. Therefore, the subcontractor argued, it was justified in paying the lower rate. The WAB rejected this argument, stating that the FHA definition of "building" does not "establish local area practice or contract interpretation with respect to the meaning of 'family residence not to exceed 4 units.'" The WAB refused to accept the FHA official's definition of a "building" when "such a declaration is unsupported by concrete on-site construction data."³⁴

The Administrator argued that since the electrician union's business agent stated that the project does not constitute family residence construction not to exceed 4 units,

Abhe & Svoboda, Inc., ARB Nos. 01-063, -066, -068 through -70, slip op. at 12 (July 30, 2004).

³² *Brunetti Constr. Co.*, WAB No. 80-09, 1982 WL 155899 (Nov. 18, 1982).

³³ *Id.*, slip op. at 1-2.

³⁴ *Id.*, slip op. at 4.

the subcontractor had to pay the higher rate to the electricians. The WAB rejected this argument too:

[T]he Board does not accept the contention of the Wage and Hour Division here that in its efforts to solve this problem by referring to an authoritative local source, all that Wage and Hour had to do was to ask the local union business agent how this definition was applied, and to accept an answer without concrete project data.³⁵

To resolve a dispute as to the nature and characteristics of a construction project, and thus decide which wage rate applies, the WAB suggested that the starting place is to examine the project drawings or specifications.³⁶ From there, the factfinder should consider other “concrete project data” such as photographs and the “architectural, engineering, and structural elements of a project.”³⁷

Though Local 38 submitted wage payment data to the Administrator indicating that electricians were paid the higher wage rate on other similar town home projects, this evidence does not amount to “concrete project data.” And while Tesco did provide some project data (“elevation and architectural drawings of the project”), the Administrator relied solely upon the Local 38 wage payment data. In so doing, the Administrator contravened the *Brunetti Construction* mandate that he consider “concrete project data.”

CONCLUSION

The Administrator’s March 21, 2005 final determination that the higher electrician wage applies is unreasonable because his determination is based upon a misreading of *Fry Brothers* and ignores *Brunetti Construction*. Therefore, we **VACATE** the final determination and **REMAND** this matter to the Administrator with instructions that he proceed in a manner consistent with this opinion.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

³⁵ *Id.*, slip op. at 5.

³⁶ *Id.*, slip op. n.2.

³⁷ *Id.*, slip op. at 4.