In the Matter of:

AMPRITE ELECTRIC COMPANY, INC.; FAST ELECTRICAL CONTRACTORS, INC.; GEORGE D. EDWARDS ELECTRIC CO., INC.; HARLAN ELECTRIC COMPANY, INC.; IMPULSE ELECTRIC CO., INC.; TRAVIS ELECTRIC CO., INC.; V & C ELECTRICAL CONTRACTORS, INC.; VETTER ELECTRIC, INC.; WOLFE & TRAVIS ELECTRIC CO., INC.; and SOUTHERN ELECTRICAL CONTRACTORS ASSOCIATION.

ARB CASE NO. 09-075

DATE: July 30, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Petitioner:
Michael D. Oesterle*, King & Ballow*, Nashville, Tennessee

For the Administrator, Wage and Hour Division:
Sarah J. Starrett, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., Carol A. DeDeo, Esq., *United States Department of Labor*, Washington, District of Columbia

FINAL DECISION AND ORDER DISMISSING APPEAL WITHOUT PREJUDICE

The Petitioners, Amprite Electrical Co. and eight other electrical contractors, joined by the Southern Electrical Contractors Association, filed this petition under the Davis-Bacon Act (DBA or the Act),[1] seeking review and reconsideration of three 2008 wage determinations for electricians in Tennessee and Kentucky, Wage Determination Nos. TN080001, TN080014, and KY080005, which they believe are inaccurate. The Petitioners attached to their petition a copy of a letter dated January 23, 2009, requesting the Wage and Hour Administrator to reconsider the wage rates. The Petitioners concede that they have not yet received a response to their request for reconsideration.

[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 (2006).

The Administrative Review Board issued a Notice of Appeal and Order Establishing a Briefing Schedule in this case and, in response, the Deputy Administrator of the Wage and Hour Division filed a Motion to Dismiss the Petition for Review Without Prejudice. In support of this motion the Deputy Administrator avers that the Petitioners' petition for review is premature because the Wage and Hour Administrator has not yet issued a Final Decision on the Petitioners' request for reconsideration.

The Board has jurisdiction under the DBA to "hear and decide in its discretion appeals concerning questions of law and fact from **final** decisions under [29 C.F.R. Part 1]."[2] Furthermore, "[a]ny interested person may appeal to the Administrative Review Board for a review of a wage determination or its application made under [Part 1], **after reconsideration has been sought pursuant to § 1.8 and denied**.[3] The DBA's implementing regulations further provide that the Administrator will respond to a motion for reconsideration within thirty days of receiving the motion or will notify the party requesting reconsideration that additional time is necessary.[4]

Here, the Administrator neither responded to the Petitioner's motion for Reconsideration nor notified the Petitioners within thirty days that additional time was necessary. On July 2, 2009, counsel for the Administrator notified the Petitioners for the first time that additional time was necessary to review the Petitioners' request. Counsel further stated that the Wage and Hour Division anticipated that it would complete its review by the end of the month "barring unforeseen circumstances," and that it would notify the Petitioners of its decision "as soon as possible."

In response to the Order to Show Cause, the Petitioners contend that the Administrator's delay in responding to their request for reconsideration constitutes "extraordinary circumstances," as provided in 29 C.F.R. § 7.1(e), and accordingly, the Board may assert jurisdiction over its petition despite the lack of a final decision for it to review.[5] They also argue that the White House's recent announcement of stimulus funding constitutes "extraordinary circumstances," sufficient to allow the Board to exert jurisdiction over the Petition.[6]

The regulation upon which the Petitioners rely, 29 C.F.R. § 7.1(e), provides, "The Board is an essentially appellate agency. It will not hear matters de novo except upon a

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[2] 29 C.F.R. § 7.1(b) (emphasis supplied).

[3] 29 C.F.R. § 1.9 (emphasis supplied).

[4] 29 C.F.R. § 1.8.

[5] Petitioner's Response to Order to Show Cause (Pet. Resp.) at 5-8.

[6] *Id.* at 8-9.

showing of extraordinary circumstances." Interpreting this regulation, the Board has held:

> 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. 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."[7]

In reply to the Petitioners' reliance on the "extraordinary circumstances" exception permitting de novo review, the Administrator argues that the Petitioners have confused two distinct concepts; the final order requirement that underlies the Board's authority to review a decision by the Administrator under the DBA and the standard of review the Board uses to review the decision once its authority to do so has been established. In other words, while generally the Board defers to the Administrator's interpretation of the law, under extraordinary circumstances, the Board could subject the Administrator's decision to de novo review, but only if the decision under consideration is final.

While, as stated above, the Board generally defers to the Administrator's interpretation of the DBA's regulations, it is not necessary for the Board to decide the issue whether in extraordinary circumstances the Board could hear a DBA case de novo, to resolve this case. The Petitioners have cited to no cases in which the Board or its predecessors conducted a "de novo hearing" of a DBA case relying upon 29 C.F.R. § 7.1(e). Even if the Board possesses such authority, we would not exercise it here.

The Petitioners have alleged two extraordinary circumstances arising in this case. The first is that the Administrator failed to comply with 29 C.F.R. § 1.8, the regulation establishing time limitations for responding to requests for reconsideration. While it is certainly regrettable that the Administrator did not comply with this regulation, the regulation in fact does not require the Administrator to issue his decision within 30 days; it requires him to either issue the decision or inform the requestor that more time is necessary**.** The Administrator has now, although belatedly, complied with this requirement. The Petitioners have not demonstrated how they were harmed in any way by the fact that the Administrator informed them on July 2, 2009, rather than on February 22, 2009, that more time was necessary to enable him to make his decision. Therefore

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[7] *In re Gary J. Wicke*, ARB No. 06-124, slip op. at 5 (Sept. 30, 2009)(citations omitted).

we do not find that the Administrator's failure to timely inform the Petitioners that more time was necessary to respond to their motion for reconsideration constitutes extraordinary circumstances, especially given the Administrator's statement that he intends to complete his review by the end of July and to inform the Petitioners of his decision shortly thereafter.

Secondly, the Petitioners cite their concern that stimulus funding will be wasted if it is used to fund DBA contracts under which wages are not properly paid. While we are sympathetic to the Petitioners' concern that the stimulus money be appropriately spent, we do not believe that this alleged possibility constitutes a circumstance that would permit the Board to co-opt the Administrator's responsibility to make a final decision on reconsideration in this case, especially given his intention to complete his reconsideration by the end of July.

Therefore, even if the Petitioners are correct that under extraordinary circumstances the Board could hear this matter de novo, the Petitioners have failed to establish that in this case, the Board should depart from its well–established precedent that it will not consider a petition for review under the DBA in the absence of a final order on reconsideration by the Administrator.[8] Accordingly, we **DISMISS** the petition for review **WITHOUT PREJUDICE.** We expect that, as the Administrator has stated, barring unforeseen circumstances, the Administrator will complete the reconsideration by the end of July and will notify the Petitioners of the final decision on reconsideration as soon as possible thereafter.[9]

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

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[8] *See e.g., In re Gary J. Wicke*, ARB No. 02-062 (May 21, 2002); *Laborers International Union of N. Am. v. Acting Administrator, Wage & Hour Div.,* ARB No. 04-179 (Jan. 12, 2005); *South Florida Carpenters Regional Council,* ARB No. 02-069 (Sept. 25, 2002).

[9] The Petitioners have requested the Board to permit them to incorporate by reference documents already filed in this case to avoid the duplication of duplication costs should they file a second appeal, once the Administrator issues the final decision on reconsideration,. The documents the Petitioners have filed will remain in the case record and may be incorporated by reference if the Petitioners appeal the Administrator's final decision.