U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

BECHTEL CONSTRUCTORS CORPORATION,

ARB CASE NO. 95-045A

(Formerly WAB Case No. 95-06)

Prime Contractor

RODGERS CONSTRUCTION COMPANY,

DATE: JUL 15 1996

Prime Contractor,

BALL, BALL AND BROSAMIER, INC.,

Prime Contractor,

THE TANNER COMPANIES,

Subcontractor

With respect to laborers and mechanics employed by the Subcontractor on Contracts 4-CC-30-02120 (Brady Pumping Plant), Central Arizona Project ("CAP"), 5-CC-30-02770 (Red Rock Pumping Plant, CAP) 4-CC-30-01480 (Picacho Pumping Plant, CAP), 5-CC-30-03560 (Tucson Aqueduct, Reach 3, CAP).

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

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[1] On April 17, 1996, the Secretary redelegated jurisdiction to issue final agency decisions *inter alia,* the Davis-Bacon and Related Acts and their implementing regulations to the newly created Administrative Review Board (the Board). Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached).

Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Board now issues final agency decisions. A copy of the final procedural revisions to the regulations, 61 Fed. Reg. 19982, implementing this reorganization is also attached. The Secretary's earlier decision and the entire record in this case have been reviewed by the Board.

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DECISION AND ORDER OF REMAND

This matter is before the Administrative Review Board on the petition of the Administrator, Wage and Hour Division (Administrator) seeking review of the May 5, 1995 Decision and Order (D. and O.) issued by an Administrative Law Judge (ALJ). The ALJ denied the Administrator's motion to withdraw from a stipulation relating to the distance between certain batch plants and the permanent construction work. The ALJ then relied on the stipulation to find that the work was performed at a location too remote from the permanent construction to be deemed on the "site of the work" and therefore dismissed the claim against the Respondents.

For the reasons set forth below, the ALJ's D. and O. is reversed and the matter is remanded for a decision consistent with this order.

I. BACKGROUND

This case is a dispute over whether the wage standards of the Davis-Bacon Act, as amended (DBA), 40 U.S. C. § 276a *et seq.,* apply to work performed at certain batch plants constructed and operated in connection with construction work on the Central Arizona Project (CAP). The CAP is a massive Bureau of Reclamation construction project consisting of 330 miles of aqueduct and pumping plants running from Lake Havasu in northwestern Arizona to Tucson in south central Arizona. Respondents Rodgers Construction (Rodgers), Bechtel Constructors Corporation (Bechtel), and Ball, Ball & Brosamer, Inc. (Ball) were prime contractors on the CAP. Rodgers was the winning bidder on the contract to construct the Picacho Pumping Plant. Bechtel was awarded the contracts to build the Brady Pumping Plant and the Red Rock Pumping Plant. Ball was responsible for building the aqueduct connecting the pumping plants. The four contracts were awarded on various dates between May 1984 and September 1985 and construction on each commenced soon after award. Each contract was expressly subject to the specifications and requirements of the DBA, *supra,* the contract overtime requirements of the Contract Work Hours and Safety Standards Act, as amended (CWHSSA), 40 U.S.C.§ 327 *et seq.,* the Department of Labor regulations (29 C.F.R. Part 5), and the prevailing wage rate classifications and hourly rates specified by the Department of Labor (DOL) through wage determinations.

Each of the prime contractors contracted with Respondent Tanner Companies (Tanner) to provide the concrete necessary for the performance of its contract. In order to perform

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satisfactorily on these contracts Tanner found it necessary to construct a temporary batch plant proximate to each of the pumping stations under construction. The Bureau of Reclamation's specifications for the concrete was essentially the same for each of the contracts. Roughly ninety-nine percent of the concrete produced was used in connection with this project, and specifically with these four CAP contracts. Each of the batch plant's dedicated the largest share of its output to the construction of the pumping station to which it was proximate. Each of the plants also provided a significant amount of its production to Ball for the construction of the aqueduct between the pumping stations. The Picacho batch plant also provided concrete to the Red Rock Pumping Station.

According to the testimony given before the ALJ, the Brady batch plant was somewhere between five hundred feet to one half mile from the actual permanent location of the Brady Pumping station. Concrete from the Brady batch plant was also delivered to various sites along the aqueduct ranging in distance from one thousand feet to fifteen miles from the plant.

At the Picacho site the batch plant was located from three hundred feet to one-half mile from the permanent location of the pumping station. The Picacho batch plant was located between twelve to fifteen miles from the Red Rock station to which it also supplied concrete. Deliveries to sites along the aqueduct from the Picacho batch plant ranged from one half to fifteen miles. The Red Rock batch plant was located between one quarter and three quarters of a mile from the permanent location of the Red Rock pumping station. Concrete was delivered to Ball for aqueduct construction from the Red Rock batch plant up to a distance of fifteen miles from the batch plant.

Photographic evidence of the Red Rock and Picacho construction sites show that both batch plants were located on land cleared by the contractors for the purpose of facilitating construction of the pumping stations. These batch plants are located amid other work and equipment storage areas dedicated to the construction project. These batch plants are, at a minimum, adjacent to the actual pumping stations and the associated aqueduct. No photographic evidence was introduced with respect to the Brady pumping station.

Sometime during 1985, following a complaint by a Tanner employee, the Administrator initiated an investigation into whether Tanner was operating in compliance with the DBA. Specifically, the investigation was aimed at determining whether the workers employed by Tanner at the temporary batch plants were employed on the "site of the work" and consequently covered by the DBA. As a result of that investigation, the Acting Administrator of the Wage and Hour Division issued a charging letter to Tanner and each of the prime contractors, asserting various violations of the DBA and CWHSSA in the operation of the temporary batch plants. In response to the charging letter, Tanner requested a hearing on this matter. By Order of Reference dated September 28, 1990, the Acting Administrator forwarded that request to the Chief Administrative Law Judge to schedule a hearing.

Accordingly, a three day hearing commencing on October 18, 1993 was held. Prior to hearing the parties entered into a number of stipulations including the following:

> These three batch plants were located from one-half to fifteen miles from the physical places where the construction called for in these contracts remained when the work was completed.

Parties' Joint Exhibit 1.

At the close of the hearing, the ALJ requested and received briefs from the Administrator and Tanner. While the matter was still pending before the ALJ, the District of Columbia Circuit Court of Appeals issued its decision in *Ball, Ball & Brosamer, Inc. v. Reich,* 24 F.3d 1447 (D.C. Cir. 1994). Because of the relevance of that case to the pending proceeding, the ALJ directed the parties to file briefs addressing the *Ball, Ball & Brosamer* case. *Id.*

In response to a request by the Administrator, by order of February 13, 1995, the ALJ permitted the Administrator to file a motion to withdraw from the above quoted portion of the written stipulations entered in this case. By Decision and Order of May 5, 1995, the ALJ ruled adversely to the Administrator's motion and rendered a decision in this matter. The Administrator then filed a petition for review with the Wage Appeals Board, the responsibilities of which have since been transferred to this Board.

II. PROCEDURAL ISSUE

Tanner argues that the Administrator has unlawfully relied upon Wage Appeals Board (WAB) decisions that have not been indexed and appropriately made available pursuant to the Freedom of Information Act (FOIA). 5 U.S.C. § 552(a)(2). The Administrator responds by noting that "since at least 1984, the Department of Labor has notified the public, through the "Guide to Freedom of Information Indexes," published in the *Federal Register,* of the availability of an index and digest for Wage Appeals Board decisions." Reply of the Administrator, October 5, 1995, at 2. The full text of WAB decisions is also available through a "computer bulletin" board previously provided by the WAB and now supported by this Board. Further, while the prior decisions of the WAB have been cited by the Administrator in presenting this case and by us in deciding the case, those decisions only serve to highlight the department's regulation 29 C.F.R. § 5.2(l)(1), that is the basis for the reversal of the ALJ's decision in this matter. Tanner's argument that this case should be dismissed for violation of the FOIA is without merit.

III. DISCUSSION

Two issues present themselves at this time for review by the Board. The first issue is whether the ALJ erred in denying the Administrator's request to withdraw from the stipulation regarding the distances between the three temporary batch plants and the construction called for in these contracts. The second issue is whether the ALJ properly applied the holding of *Ball, Ball, & Brosamer* to the facts of this case.

For the reasons more fully discussed below, the Board concludes that the ALJ erred in failing to permit the Administrator to withdraw from the stipulation in question. The Board then finds that the ALJ compounded this error by relying on the stipulation in concluding that the temporary batch plants were so removed from the actual construction work as not to be included in the "site of the work." In reaching this decision the ALJ went beyond the D.C. Circuit's decision in *Ball, Ball and Brosamer* and rendered a decision inconsistent with the statute and the relevant regulations. The Board finds that, notwithstanding the stipulation, the record clearly supports a finding that the temporary batch plants were located at the "site of the work." Nevertheless, to avoid any potential unfairness to the Respondents that may have been caused by

reliance on the stipulation, this issue will be remanded to the ALJ for consideration of any additional evidence that may be offered on this point.

A. Stipulation

As a general rule, the trier of fact is given broad discretion to permit a party to withdraw from a stipulation. *Morrison v. Genuine Parts Company,* 828 F.2d 708, 709 (11th Cir. 1987). The trier of fact is to exercise this discretion where the enforcement of a stipulation would result in manifest injustice or where substantial evidence adduced at trial casts serious doubt on the accuracy of the stipulation. *Smith v. Blackburn,* 549 F.2d 545, 549 (5th Cir. 1986). Finally, in deciding procedural issues, such as whether to permit a party to withdraw from a stipulation, the trier of fact should be reversed only upon a finding of an abuse of discretion. *See, Lui Landscaping,* WAB Case No. 94-05, May 20, 1994, slip op. at 3; *Killeen Electric Company,* WAB Case No. 87-49, March 21, 1991, slip op. at 4. However, the trier of fact has an independent duty to examine the record to ascertain the accuracy of a stipulation. *Smith v. Blackburn, supra,* at 549. This obligation is particularly pronounced in matters, such as the instant one, in which the rights of individuals not parties to the proceedings are being adjudicated. The danger of manifest injustice is heightened where the individuals whose rights are being decided have not assented to the stipulation of a critical fact.

In the present case, the Board finds it particularly difficult to compel the Administrator to adhere to a critical stipulation known to be false. The stipulation states that the batch plants were located between one-half and fifteen miles from the site of the actual construction. The portion of the stipulation regarding the outer limits (fifteen miles) of the distance between the batch plants and the site of construction is in accordance with the evidence introduced at the hearing. The portion of the stipulation that is clearly false, based upon the testimony at the hearing and the photographic evidence, is the statement that the nearest point between any batch plants and any site of construction was one-half mile.

The Respondents, in their own pleadings, have shown the minimum of one-half mile estimate to be false. In its statement opposing the petition for review, Tanner recites evidence that is clearly at odds with the stipulation. At page 9 of that statement, Tanner states that "estimates as to the distance from the Brady plant to the Brady Pumping Plant construction site ranged from five hundred feet to one-half mile." At page 10, Tanner states that "estimates as to the distance between the Picacho plant and Picacho Pumping Plant construction ranged from three hundred feet to one-half mile." With respect to the Red Rock Plant at page 11, Tanner states that "this batch plant was from one-quarter to three-quarters of a mile from Bechtel's Red Rock Pumping Plant construction site." Each of these statements suggests a shorter distance to a place of permanent construction than that to which the parties stipulated. These statements, combined with the photographic evidence and testimony introduced at the hearing, show the minimum one-half mile stipulation to be false.

Stipulations are critical to the efficient use of adjudicatory resources. The Board wants to take every appropriate step to encourage stipulations between litigants. The Board recognizes that precedent lightly setting aside a stipulation could severely undercut the important judicial values generated by the proper use of stipulations. On the other hand, never allowing a party to

withdraw a previously agreed upon stipulation could also have a deleterious effect on the use of stipulations. As the Federal District Court noted in *Sam Galloway Ford v. Universal Underwriters Ins.,* 793 F.Supp. 1079 (M.D. Fla. 1992):

> One way for courts to encourage parties to stipulate is for courts to readily set aside stipulations when parties discover that the stipulations are erroneous. This willingness on the part of courts to set aside stipulations encourages parties to stipulate since the parties feel more confident that courts will set aside the stipulations if there is a reasonable basis to do so.

793 F.Supp. at 1082.

Our decision to allow Petitioner to withdraw from the stipulation is made easier in light of the Circuits Court's decision in Ball. The Ball decision, which was rendered after the hearing in this matter, increased the relevance of distance in determining whether work was performed "on site" for the purposes of the DBA. Prior to the D.C. Circuit Court's decision in *Ball* any batch plant within fifteen miles of the work site was close enough to meet the geographic proximity test of the regulations. In fact, the Board had previously held with regard to this very same project that "2 to 15" miles was close enough to meet the geographic proximity test of the regulation. See *Ball, Ball and Brosamer,* WAB Case No. 90-18, November 29, 1990, slip op. at 13.

The stipulation entered into in this case contained what amounted to boilerplate language regarding the distances between the batch plants and the site of construction. The actual distance between the batch plant and the site of construction, prior to *Ball,* was not a concern to the extent that it was 15 miles or less. The actual distance became paramount, after the stipulation was entered into, when the Ball decision limited the geographic proximity test to where the batch plant is directly on the site of the work, or where the batch plant was "in actual or virtual adjacency to the construction site." *Ball, Ball & Brosamer, id.* at 1452.

Where there has been a change in the law it is generally recognized that a court may relieve a party from a stipulation. In *Brast v. Winding Gulf Colliery Co.,* 94 F.2d 179 (4th Cir. 1938), the court addressed this issue by noting that "where a stipulation is entered into under a mistake of law induced by the then existing state of the case law, a taxpayer is entitled to be relieved of the effect of that stipulation if no prejudice results." *Id*. at 182. Similarly in this matter the Administrator entered into a stipulation unable to appreciate the effect that a subsequent change in the case law would give to the stipulation. The Board sees no prejudice that would result if the Administrator is relieved of this stipulation and the matter is resolved on the basis of more precise and complete findings of fact. We find that the ALJ abused his discretion in refusing, the Administrator's request to be relieved from the burden of the stipulation as it related to the distance between the batch plants and the sites of work.

B. Site of the work

The D.C. Circuit's recent decision in Ball unfortunately has created a good deal of confusion with respect to the coverage of the DBA. Some have read the decision to mean that the statutory phrase "directly upon the site of the work" limits the wage standards of the DBA to the

physical space defined by contours of the permanent structures that will remain at the close of work. At close reading it is clear that Ball does not suggest, let alone demand, such a narrow reading of the protections of the statute. See, *Cavett Co. v. United States Dept of Labor,* 892 F.Supp. 973 (S.D. Ohio 1995). The Circuit Court held in *Ball* only that the Secretary was enforcing Section 5.2(l)(2) of the regulations in a manner that did not respect the geographic limiting principle of the statute. The court found that the Secretary had gone beyond the plain meaning of the statute to include within the reach of the statute work performed at locations too remote from the place of permanent construction. The Circuit Court specifically declined to rule on the validity of the definition of the "site of the work" set out at 29 C.F.R. § 5.2(l)(1).

The Board holds that the language of § 5.2(l)(1) sufficiently resolves this matter. It is instructive to note what the Circuit Court said regarding § 5.2(l)(1):

> The Secretary maintains that the regulations at § 5.2(l)(2) satisfy the geographic limiting principle of the Davis-Bacon Act and *Midway.* This might be the case if the Secretary were applying the regulatory phrase "so located in proximity to the actual construction location that it would be reasonable to include them" only to cover batch plants and gravel pits located in actual or virtual adjacency to the construction site. *See* 29 C.F.R. § 5.2(l)(1). But such an application is not before us and we express no opinion on its validity.

Ball, supra at 1452.

The facts of this case, as developed to this point, clearly suggest that the work performed at the temporary batch plants satisfy the test set out in Section 5.2(l)(1). Aerial photographs of the Red Rock and Picacho sites place the temporary batch plants on land integrated into the work area adjacent to the pumping plants. Workers at the batch plants were employed on the sites of work equally as much as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property. Unless the Board were also to exclude these workers, and in doing so largely nullify the wage protections of the DBA, there is no principled basis for excluding the batch plant workers.

Tanner might concede that the batch plants were located proximate to the pumping stations, but argue that concrete from the batch plant was also transported and used on aqueduct construction miles from the plant. This argument is unpersuasive in that it is the nature of such construction, *e.g.* highway, airport and aqueduct construction, that the work may be long, narrow and stretch over many miles. Where to locate a storage area or a batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding, the work from the DBA. The map of the project introduced at hearing by Tanner, RX 22, abundantly illustrates that the project consisted of miles of narrow aqueduct connected by pumping stations. The only feasible way to meet the needs of the aqueduct construction was to have the concrete prepared at a convenient site and transported to the precise area of need. This equally holds true for the storage and distribution of other materials and equipment. Faced with such a project, the Board finds that work performed in actual or virtual adjacency to one portion of the long continuous project is to be considered adjacent to the entire project. *See, L.P. Cavett Co. v. United States Dep't of Labor, supra* at 979-980.

Alternatively, Tanner argues that insofar as it supplied concrete to more than one contractor on the project, its temporary batch plants were not dedicated exclusively to one contract and therefore did not satisfy the functional test which the regulations and our predecessor, the Wage Appeal Board, applied in determining whether work was performed on site. *United Construction Company, Inc.,* WAB Case No. 82-10, January 14, 1983. First, the applicable section of the regulations, Section 5.2(l)(1) does not explicitly contain a functional test. Secondly, to the extent that a functional test is read into Section 5.2(l)(1), the Board refuses to draw an artificial distinction between one portion of the project that is let under one contract and another portion of the same project that is let under a separate contract.[2] Any other interpretation would free contracting agencies to circumvent the statute by purposely dividing work on one project into separate contracts. To the extent that 29 C.F.R. § 5.2(l)(1) incorporates a functional test, we deem it satisfied under the facts of this case.

For the foregoing reasons, the Administrator's petition for review is granted and it is hereby

Ordered, that the ALJ's order denying the Administrator's motion to withdraw from the stipulation is reversed and this matter is remanded for the ALJ to take additional evidence the parties may wish to enter relevant to the distances between the batch plants and the sites of the work, and to thereafter render a new decision and order consistent with the DBA, the pertinent regulations, and this Decision and Order.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

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[2] The functional test set out in Section 5.2(l)(2) requires examination of whether facilities are "dedicated exclusively, or nearly so, to performance of the *contract or project* . . . ." Emphasis added. Application of this test to these contracts -- which were all part of a single project -- demonstrates that the batch plants were functionally part of the "site of the work."