



In the Matter of:

ALCATRAZ CRUISES LLC

ARB CASE NO. 07-024

**Dispute concerning applicability of the Service
Contract Act to Contract No. CC-GOGA001-05.**

DATE: January 23, 2009

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioner Alcatraz Cruises LLC:

**Charles S. Birenbaum, Esq., and Robert Spगत, Esq., *Winston & Strawn LLP,*
San Francisco, California**

For Respondent Administrator, Wage and Hour Division:

**Barbara Eby Racine, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq.,
Jonathan L. Snare, Esq.; *U.S. Department of Labor,* Washington, District of
Columbia**

*For Intervenors International Organization of Masters, Mates and Pilots, Pacific Maritime
Region, and Inlandboatmen's Union of the Pacific, International Longshore & Warehouse
Union:*

**Robert S. Remar, Esq., and Eleanor Morton, Esq., *Leonard Carder, LLP,* San
Francisco, California**

For National Park Hospitality Association, as Amicus Curiae:

**Charles S. Birenbaum, Esq., and Robert Spगत, Esq., *Winston & Strawn LLP,*
San Francisco, California**

FINAL DECISION AND ORDER

The Administrator of the United States Department of Labor's Wage and Hour Division (Administrator) found that the National Park Service (NPS) concession contracts at issue in this case are principally for providing ferry transportation services to and from Alcatraz Island. Thus, the Administrator determined that the concession contracts are subject to coverage under the McNamara-O'Hara Service Contract of 1965,

as amended (SCA or Act),¹ and are not within any of the categories of concession contracts that are specifically exempted from SCA coverage pursuant to 29 C.F.R. § 4.133(b) or entitled to an exemption pursuant to the Secretary of Labor's authority under Section 4(b) of the Act² and 29 C.F.R. § 4.123. Alcatraz Cruises LLC, the concessioner awarded the exclusive right to negotiate the NPS concession contracts in this case, requested that we review the Administrator's decision. We affirm the decision as it is supported by a preponderance of the evidence, reasoned, and consistent with law.

BACKGROUND

This case arose when, on November 30, 2005, representatives of the International Longshore & Warehouse Union, the Inlandboatmen's Union of the Pacific and the International Organization of Masters, Mates and Pilots (collectively, the unions) wrote to the Administrator requesting a determination as to whether the SCA applies to the existing and a proposed new NPS concession contract (Contract Nos. CC -8073-3-0019 and CC-GOGA001-05, respectively) providing for ferry transportation services to and from Alcatraz Island and San Francisco, California, as well as other related services.³

The NPS had contracted with the Blue and Gold Fleet LP (Blue & Gold) since 1997 to provide ferry transportation services to and from Alcatraz Island and other related services.⁴ Although the contract did not incorporate any SCA labor standards provisions or applicable wage determinations, Blue & Gold's gross receipts under the contract exceeded \$2,500 and its employees' wages were determined pursuant to collective bargaining agreements (CBA) reached between Blue & Gold and the unions that represented its employees.⁵ The SCA requires federal contractors to pay prevailing wages and fringe benefits that the Secretary of Labor predetermines or that a CBA specifies.⁶

On July 27, 2004, the NPS issued a solicitation seeking proposals for a new contract to provide ferry transportation services to and from Alcatraz Island and other

¹ See 41 U.S.C.A. § 351 *et seq.* (West 1994) and its implementing regulations at 29 C.F.R. Parts 4, 6 and 18 (2008).

² 41 U.S.C.A. § 353(b).

³ Administrative Record Tabs (AR) 2, 14.

⁴ See AR 2, 9-10.

⁵ AR 7, 10.

⁶ 41 U.S.C.A. § 351(a).

related services.⁷ Similar to the prior contract, the NPS solicitation and the draft proposed contract attached to it did not incorporate any SCA labor standards provisions or applicable wage determinations.⁸ Ultimately, in September 2005 the NPS chose the proposal for the new contract from Alcatraz Cruises LLC, whose employees are not union members.⁹ As a result, in November 2005 the unions made their request that the Administrator determine whether the SCA applies to the existing and the proposed new NPS contract.¹⁰

In response to the unions' request, the Administrator initially wrote a letter on January 6, 2006, to the Director of the NPS.¹¹ Noting that the contracts in question exceeded \$2,500 and are principally to provide transportation services, the Administrator requested that the NPS provide its reasons for not including SCA labor standards provisions and applicable wage determinations into the contracts.¹² Before the NPS replied to the Administrator's request, however, the unions filed motions in March 2006 seeking a preliminary injunction in the United States District Court for the Northern District of California to prevent the NPS from awarding the new contract to Alcatraz Cruises without incorporating SCA labor standards provisions and applicable wage determinations.¹³ In May 2006, the district court enjoined the NPS from awarding a contract that permits the contractor to pay its employees less than the wages specified in the unions' CBAs with Blue & Gold.¹⁴ Moreover, the district court stayed the case "pending the Department of Labor's determination of whether the SCA applies to the concession contract at issue."¹⁵

⁷ See AR 1, *Int'l Org. of Masters, Mates and Pilots, Pac. Mar. Region v. Nat'l Park Serv.*, Nos. C 06-2107-CW, C 06-2152-CW, slip op. at 4 (N.D. Cal. May 26, 2006) (Order on Plaintiffs' Motions for Preliminary Injunction).

⁸ *Id.*

⁹ See AR 1, *Int'l Org. of Masters*, slip op. at 5-6; AR 9.

¹⁰ AR 14.

¹¹ AR 13.

¹² *Id.*

¹³ See AR 1, 9.

¹⁴ See AR 1, *Int'l Org. of Masters*, slip op. at 23.

¹⁵ See AR 1, *Int'l Org. of Masters*, slip op. at 24. The unions contend before the Board that the district court has ruled that the SCA applies to the new contract and, therefore, the Board lacks the jurisdiction or the authority to reach a contrary result. However, as the district court merely stayed the case "pending the Department of Labor's determination of whether the SCA applies to the concession contract at issue," we reject the unions' contention.

The NPS Director ultimately replied by letter dated April 7, 2006, to the Administrator's request for an explanation for why it did not include SCA labor standards provisions and applicable wage determinations into the contracts.¹⁶ The NPS opined that NPS concession contracts are governed exclusively by the National Park Service Concessions Management Improvement Act of 1998¹⁷ or, alternatively, that they should be exempt from coverage under the SCA.¹⁸

The Administrator issued his final determination on September 15, 2006.¹⁹ Because the Administrator found that the NPS concession contracts are principally for providing ferry transportation services to and from Alcatraz Island, he determined that the concession contracts are covered under the SCA and are not within any of the categories of concession contracts that are specifically exempted from SCA coverage pursuant to 29 C.F.R. § 4.133(b).²⁰ Moreover, the Administrator determined that the NPS concession contracts are not entitled to an exemption pursuant to the Secretary of Labor's authority under Section 4(b) of the Act and 29 C.F.R. § 4.123.²¹

Alcatraz Cruises filed a Petition for Review with the Administrative Review Board (ARB or the Board).²² The unions filed a petition to intervene, which the Board granted, and the unions responded in opposition to the Petition for Review.²³ The Administrator has also responded, urging the Board to affirm his final determination. Finally, the National Park Hospitality Association has filed an amicus brief in support of the Petition for Review.

¹⁶ AR 3.

¹⁷ 16 U.S.C.A. §§ 5951 *et seq.* (West 1998).

¹⁸ *Id.*

¹⁹ AR 1, 3, 4.

²⁰ AR 1, 3, 4 Final Determination at 4.

²¹ *Id.* In response to the Administrator's final determination, the NPS informed the Administrator that as the predecessor contract expired (Contract No. CC -8073-3-0019) and a new concession contract had been awarded (Contract No. CC-GOGA001-06), the SCA's labor standards provisions and applicable wage determinations would be incorporated into the new concession contract, rather than the closed solicitation and proposed new contract (Contract No. CC-GOGA001-05). AR 1-2.

²² *See* 29 C.F.R. § 8.7(b)-(c).

²³ *See* 29 C.F.R. §§ 8.11(a), 8.12.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to hear and decide “appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative” rendered under the SCA.²⁴ The Board’s review of the Administrator’s SCA final rulings is in the nature of an appellate proceeding.²⁵ We are authorized to modify or set aside the Administrator’s findings of fact only when we determine that those findings are not supported by a preponderance of the evidence.²⁶ The Board reviews questions of law de novo.²⁷ We nonetheless defer to the Administrator’s interpretation of the SCA when it is reasonable and consistent with law.²⁸

DISCUSSION

Petitioner’s Arguments

Alcatraz Cruises contends that NPS concession contracts are governed exclusively by the National Park Service Concessions Management Improvement Act of 1998.²⁹ Alternatively, Alcatraz Cruises contends that the Administrator’s holding that the SCA governs NPS concession contracts is contrary to the plain language of the Act and its implementing regulations, which it asserts exclude such contracts from coverage, and that 29 C.F.R. § 4.133(b) as applied to NPS concession contracts is arbitrary and capricious.

The Statutory and Regulatory Framework

The SCA generally requires that every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to provide services through the use of service employees in the United States, must contain a provision that specifies the minimum hourly wage and fringe benefit rates that are payable to the various

²⁴ 29 C.F.R. § 8.1(b) (2008); *see also* Secretary’s Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

²⁵ 29 C.F.R. § 8.1(d).

²⁶ 29 C.F.R. § 8.9(b).

²⁷ *United Gov’t Sec. Officers of America, Loc. 114*, ARB Nos. 02-012 to 02-020, slip op. at 4-5 (Sept. 29, 2003); *United Kleenist Org. Corp. & Young Park*, ARB No. 00-042, ALJ No. 1999-SCA-018, slip op. at 5 (ARB Jan. 25, 2002).

²⁸ *See Department of the Army*, ARB Nos. 98-120/-121/-122, slip op. at 15-16 (Dec. 22, 1999).

²⁹ *See* 16 U.S.C.A. §§ 5951 *et seq.* (West 1998); *see also* 36 C.F.R. § 51.3 (2008).

classifications of service employees working on such a contract.³⁰ “[C]oncession contracts are considered to be contracts in excess of \$2,500 if the contractor’s gross receipts under the contract may exceed \$2,500.”³¹ Where there is a CBA between the service employees and an employer working on a Federal service contract, the Wage and Hour Division is mandated under the SCA to specify the wage and fringe benefit rates from the CBA (including prospective increases) as the required minimum rates payable to the service employee classifications to be employed on the procurement contract.³² In addition, Section 4(c) of the Act requires generally that the negotiated wage rates (and prospective increases) must be incorporated into a successor contract’s wage determination in those instances in which a labor agreement has been negotiated between the service employees and a contractor’s predecessor.³³

“The Act is applicable to [a] contract if the principal purpose of the contract is to furnish services, if such services are to be furnished in the United States, and if service employees will be used in providing such services.”³⁴ But the “Act is intended to be applied to a wide variety of contracts” and “does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services.”³⁵ It “does not define, or limit, the types of services which may be contracted for under a contract” and “the types of service contracts covered by its provisions are varied.”³⁶

Thus, contracts for concession services have been found to come within the coverage of the Act.³⁷ Moreover, “there is no limitation in the Act regarding the beneficiary of the services, nor is there any indication that only contracts for services of direct benefit to the Government, as distinguished from the general public, are subject to the Act.”³⁸

³⁰ See 41 U.S.C.A. § 351(a)(1)-(2).

³¹ See 29 C.F.R. § 4.141(a).

³² See 41 U.S.C.A. § 351(a)(1)-(2).

³³ See 41 U.S.C.A. § 353(c).

³⁴ 29 C.F.R. § 4.110.

³⁵ 29 C.F.R. § 4.111(a).

³⁶ 29 C.F.R. § 4.111(b).

³⁷ See 29 C.F.R. § 4.130(a)(11).

³⁸ 29 C.F.R. § 4.133(a).

Pursuant to Section 4(b) of the Act,

[t]he Secretary may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act ..., but only in special circumstance where he determines that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards.^{39]}

Specifically, 20 C.F.R. § 4.133(b), applicable to the concession contracts in this case, provides:

The Department of Labor, pursuant to section 4(b) of the Act, exempts from the provisions of the Act certain kinds of concession contracts providing services to the general public, as provided herein. Specifically, concession contracts (such as those entered into by the National Park Service) principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, as distinguished from the United States Government or its personnel, are exempt. This exemption is necessary and proper in the public interest and is in accord with the remedial purpose of the Act. Where concession contracts, however, include substantial requirements for services other than those stated, those services are not exempt.

The Administrator's Final Determination

Initially, the Administrator properly noted that “contracts for concession services” are included in the SCA’s implementing regulations as being among the types of service contracts “found to come within the coverage of the Act.”⁴⁰ Moreover, while the Secretary has exempted from coverage certain concession contracts that are “principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands and recreational equipment to the general public as distinguished from the United States

³⁹ 41 U.S.C.A. § 353(b). *See also* 29 C.F.R. § 4.123(b), which provides that “a request for exemption from the Act’s provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards.”

⁴⁰ AR 1, 3, 4 – Final Determination at 1; *see* 29 C.F.R. § 4.130(a)(11).

Government and its personnel” as provided under 29 C.F.R. § 4.133(b), the Administrator emphasized that section 4.133(b) also provides that “[w]here concession contracts ... include substantial requirements for services other than those stated, those services are not exempt.”⁴¹ Additionally, the Administrator pointed out that coverage under the SCA “does not depend on the government receiving direct benefit from the services provided.”⁴²

Consequently, because the concession contracts here “principally provide ferry transportation services to and from Alcatraz Island,” the Administrator determined that “they are covered” by the SCA and “are not within any of the categories of concession contracts that are specifically exempted under 29 C.F.R. § 4.133(b).”⁴³ Moreover, because the purpose of the concession contract is principally for services covered by the SCA, the Administrator held that the other related services to be provided under the contract “are deemed incidental to the overall purpose of the contract and thus are also subject to the requirements of the SCA.”⁴⁴ Finally, after consideration of the information submitted, the Administrator declined to grant an exemption for all NPS concession contracts as necessary and proper in the public interest or to avoid serious impairment of Government business, while giving due regard to the remedial purposes of the Act to protect prevailing labor standards, pursuant to the Secretary of Labor’s authority under Section 4(b) of the Act and 29 C.F.R. § 4.123.⁴⁵

The Administrator’s determination that the NPS concession contracts are principally for providing ferry transportation services and, therefore, subject to SCA coverage, but are not entitled to an exemption, is supported by a preponderance of the evidence, reasoned, and consistent with law.

The Administrator found that that the gross receipts under the concession contracts in this case exceeded \$2,500 and are principally to provide transportation services. The Administrator’s findings are not challenged on appeal and are supported by a preponderance of the evidence.⁴⁶ Thus, contrary to the Petitioner’s contention, the Administrator reasonably and properly determined that the concession contracts fall within scope of the SCA.⁴⁷

⁴¹ AR 1, 3, 4 – Final Determination at 1-2; *see* 29 C.F.R. § 4.133(b).

⁴² AR 1, 3, 4 – Final Determination at 2-3; *see* 29 C.F.R. § 4.133(a).

⁴³ AR 1, 3, 4 – Final Determination at 4.

⁴⁴ *Id.*

⁴⁵ AR 1, 3, 4 – Final Determination at 4; *see* 41 U.S.C.A. § 353(b); 29 C.F.R. § 4.123.

⁴⁶ *See* AR 1-2, 7, 9-10.

⁴⁷ *See* 41 U.S.C.A. § 351(a)(1)-(2); 29 C.F.R. §§ 4.110, 4.141(a).

The Secretary has been delegated the authority and discretion to make regulations that exempt certain service contracts from coverage pursuant to the standard enunciated in Section 4(b) of the Act.⁴⁸ “If a concession contract falls within the scope of the SCA, then a determination must be made as to whether the limited exemption from SCA coverage set forth in 29 C.F.R. § 4.133(b) applies.”⁴⁹

Because transportation services are not within any of the categories of concession contracts that are specifically exempted under 29 C.F.R. § 4.133(b), the Administrator determined that the limited exemption from SCA coverage set forth in section 4.133(b) did not apply. We find that the Administrator’s determination is reasonable, supported by a preponderance of the evidence and in accordance with the plain language of Section 4(b) and its implementing regulation at 29 C.F.R. § 4.133(b), applicable to the concession contracts at issue.

Although Alcatraz Cruises contends that 29 C.F.R. § 4.133(b) as applied to NPS concession contracts is arbitrary and capricious, the Board does “not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated through notice and comment by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions.”⁵⁰ Moreover, we decline to opine on any alleged conflict between the SCA and the National Park Service Concessions Management Improvement Act of 1998.⁵¹

CONCLUSION

Because a preponderance of the evidence supports the Administrator’s findings that that the gross receipts under the concession contracts exceeded \$2,500 and are

⁴⁸ 41 U.S.C.A § 353(b) (if the “exemption is necessary and proper in the public interest or to avoid the serious impairment of government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards); *see also* 29 C.F.R. § 4.123(b).

⁴⁹ *See* AR 5 – Wage and Hour Division, Coverage Guidelines for Concession Contracts under the Service Contract Act (SCA) (July 2006).

⁵⁰ 29 C.F.R. § 8.1(b).

⁵¹ 16 U.S.C.A. §§ 5951 *et seq.* (West 1998). We note, however, that the NPS has not appealed the Administrator’s interpretation of 29 C.F.R. § 4.133(b), as applied to NPS concession contracts, either in this case or in a previous, similarly decided case in which the Administrator issued a final determination. *See* AR 6, 15; *U.S. Dep’t of the Interior (Denali Nat’l Park)*, ARB No. 06-145 (ARB Sept. 29, 2006, Order Closing Case). Thus, the NPS is apparently in agreement with, or has at least acquiesced in, the Administrator’s determinations that certain NPS concession contracts are not exempt from coverage under the SCA.

principally to provide transportation services, the Administrator reasonably and properly determined that the concession contracts fall within the scope of the SCA. Moreover, because transportation services are not within the categories of concession contracts that are specifically exempted from coverage under the SCA pursuant to 29 C.F.R. § 4.133(b), the Administrator's determination that the concession contracts at issue in this case are not exempt from coverage is reasonable, supported by a preponderance of the evidence, and in accordance with the plain language of the Act and its implementing regulations. As a result, we **AFFIRM** the Administrator's final determination.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge