U.S. Department of Labor

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

In the Matter of:

PONY EXPRESS COURIER CORPORATION,

RESPONDENT.

ARB CASE NO. 96-114

ALJ CASE NO. 95-SCA-45

DATE: July 17, 1997

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

DECISION AND ORDER OF REMAND

This matter is before us pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.* (SCA or the Act), and the regulations of the Department of Labor at 29 C.F.R. Part 8. The United States Department of Labor (DOL) alleges that the Administrative Law Judge (ALJ) erred in granting Respondent Pony Express Courier Corporation's (Pony Express) Motion for Summary Decision dismissing the complaint. In a February 29, 1996 Decision and Order (D. and O.), the ALJ concluded that Pony Express's contract with the Federal Reserve Bank of Richmond, Charlotte Branch (FRB, Charlotte Branch) was exempt from the SCA. For the following reasons, we reverse the ALJ, dismiss Respondent's Motion for Summary Judgment, and grant DOL's Motion for Partial Summary Decision.

BACKGROUND

Pony Express is a motor courier holding a 48 state general commodity authority to operate as a motor common carrier. Since 1975, Pony Express has provided courier service for various branches of the Federal Reserve Bank (FRB) pursuant to written transportation contracts. Respondent has thousands of customers, in addition to the FRB, that it services on an ongoing basis. Its FRB shipments are commonly commingled with non-FRB shipments. D. and O. at 3.

In 1993 Pony Express entered into a contract with the FRB, Charlotte Branch, to perform transportation services. The contract states that:

> On the days and at the time or times shown on Schedule (or Schedules) (annexed hereto), Carrier will call for and pick up at those locations designated certain non-negotiable cash letters, letters of transmittal, checks, drafts, notes, money orders, travelers' checks, and other media for the exchange and transmittal of credit, but not including food stamps, all of which will have one or more restrictive endorsements, together with accompanying records or forms and other

> documents incidental to the operation of the Federal Reserve System (all of which may be hereinafter referred to as *Items)* and deliver them to the consignee Federal Reserve office in accordance with said Schedule. Packages are to be securely sealed and clearly marked or tagged with the name and locations of the sender and the consignee to which they are to be delivered. Carrier will receipt for Items accepted from Customer at its premises for transportation and delivery hereunder. Timely and safe pick up and delivery of the Items are of the essence of this Agreement.

Respondent performed these services for the FRB, Charlotte Branch, continuously between March 1993 and February 1996. Affidavit (Aff.) of Mr. George J. Nero (Nero), Pony Express's Vice-President for Operations, ¶14. The contract states that "it is understood and agreed that this Agreement is subject to the provisions of the Service Contract Act of 1965," and incorporates eight separate wage determinations. Nero Aff. Exhib. 1, pp. 5-6. The contract also states that the FRB Request for Proposal (RFP) "is incorporated into and shall be a part of this Agreement to the extent that it is not inconsistent herewith." D. and O. at 5, n. 4. The FRB RFP indicates that "a wage determination has been requested from the Department of Labor and shown in Attachment VIII. All vendors should review the provisions of the Service Contract Act of 1965 and be prepared to comply with them under any agreement with the Federal Reserve." Nero Aff., Exhib. 5, p. 12.

At the time the shipments at issue began, Pony Express had on file with the Interstate Commerce Commission (ICC) published interstate common carrier tariff rates.[1] The rates charged to FRB, Charlotte Branch under the contract were submitted to the FRB in response to the RFP as a sealed bid. D. and O. at 8.

In October 1994, DOL's Wage and Hour Division conducted an investigation and concluded that Pony Express had violated the SCA by failing to (1) pay its employees the minimum monetary wages in accordance with prevailing wage rates determined by the Secretary of Labor, as required by §2(a)(1) of the SCA and the regulations found at 29 C.F.R. §§4.6 and 4.161; and (2) furnish employees the fringe benefits required by §2(a)(2) of the SCA and the Regulations found at 29 C.F.R. §§4.6 and 4.162. Thereafter, on March 3, 1995, DOL instructed the FRB, Charlotte Branch to withhold monthly payments due to Pony Express for services provided. On May 8, 1995, Pony Express filed suit against DOL, alleging that the withholding of payments was unlawful. Pony Express filed a motion for a preliminary injunction, seeking

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[1] Until recently, motor common carriers were required to file tariffs with the Interstate Commerce Commission that disclosed their transportation rates. *See* 49 U.S.C. §10762(a) (1994). Effective on January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, §101, 109 Stat. 803, 804, abolished the ICC. The tariff filing requirement was eliminated for most forms of trucking transportation with the passage of the ICC Termination Act of 1995. *In re Olympia Holding Corp.,* 88 F.3d 952, 955 (11th Cir. 1996). The requirement remains intact only in a limited number of situations, none of which are pertinent here. *See* 49 U.S.C.A. §13702 (West 1996).

an order directing the release of all withheld payments and prohibiting any future withholding of payments, as well as a motion for summary judgment.

On July 27, 1995, DOL filed this administrative complaint alleging that Pony Express violated the SCA and owed its employees an estimated total amount of $261,112.30. Pony Express denied the allegation and submitted a Motion for Summary Decision, alleging that it is exempt from coverage under the Act pursuant to Section 7(3) of the SCA. DOL opposed Pony Express's motion and submitted its own Motion for Partial Summary Decision on February 8, 1996. On February 29, 1996, the ALJ issued a Decision and Order Granting Respondent's Motion for Summary Decision and Dismissing Complaint. DOL requested reconsideration, and on March 28, 1996, the ALJ issued a Decision and Order Denying DOL's Motion for Reconsideration.

DISCUSSION

I. Exemption

The SCA requires that contracts for services with the United States specify minimum wages and fringe benefits to be paid employees performing services under the contract. 41 U.S.C. §351(a). Section 7(3) of the SCA provides that for "any contract for the carriage of freight . . . by truck [or] express . . . where published tariff rates are in effect," such contract is exempt from the provisions of the Act. 41 U.S.C. §356(3). In order to qualify for this exemption, Pony Express is required to establish that it: 1) has a contract for carriage of freight with the U.S. Government; 2) is both an express service and utilizes trucks to provide service to the FRB; and 3) has "published tariff rates in effect." Additionally, Pony Express must prove that the contract in question is "actually governed" by the published tariff pursuant to 29 C.F.R. §4.118.[2]

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[2] 29 C.F.R. 4.118 states that:

> The Act, in paragraph (3) of section 7, exempts from its provisions "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect." In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is *actually governed* by published tariff rates in effect pursuant to State or Federal law for such carriage. The contracts excluded from the reach of the Act by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the transportation contract between the Government and the carrier is

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It is well established that "exemptions from remedial legislation such as the Service Contract Act should be narrowly construed against the party asserting the applicability of the exemption." *Williams v. United States Department of Labor,* 697 F.2d 842, 844 (8th Cir. 1983). We agree with the ALJ's conclusions that Pony Express had a contract for carriage of freight with the U.S. Government, was an express service utilizing trucks to provide service to the FRB and had published tariff rates as required under 41 U.S.C. §356(3). D. and O. at 2-5. Although Pony Express has shown that it had published tariff rates on file with the ICC, D. and O. at 4-5, it has not proven that its contract with the FRB, Charlotte Branch, was actually governed by those tariff rates, as required by the regulations.

Under published common carrier tariff rates, carriers must offer services to the general public at a uniform rate. Because of the nature of the published tariff, carriers whose rates are set by tariff are not motivated to reduce their employees' wages in order to undercut other bidders and obtain business. If the tariff does not control the price at which a shipper's goods will be carried, but merely becomes an "asking price" subject to reduction by the carrier, the tariff no longer protects employees from wage discrimination on federal service contracts. This function is only served where the tariff actually governs the business relationship between the parties to the contract. The purpose underlying the SCA and its provision for the payment of prevailing wages can only be served by giving effect to the Department's regulation, particularly given the practical and regulatory changes that have taken place in the transportation industry over the last 15 years. Since 1983, contract carriers have not been required to file tariffs with the ICC for work performed pursuant to contracts. In *Ex Parte MC-165*, the ICC exempted motor contract carriers from all tariff filing requirements, effective September 28, 1983. *See Central & Southern Motor Freight Tariff Ass'n v. U.S.*, 757 F.2d 301 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1019 (1985). Therefore, any transportation provided by a contract carrier since September 23, 1983 that has not actually been governed by published tariff rates has not been exempt under Section 7(3).

The ALJ also misunderstands the distinction between a contract carrier and a common carrier. Motor contract carriers of property provided "motor vehicle transportation of property for compensation under continuing agreements" with one or more shippers, by dedicating equipment or by meeting the shippers' distinct needs. 49 U.S.C. §10102(16) (1994).[3] Motor common carriers, by contrast, held themselves "out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." 49 U.S.C.

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[2](...continued)
evidenced by a Government bill of lading citing the published tariff rate . . . (emphasis added).

[3] "Because most filing requirements have been abolished, most transportation will now be provided under private agreements, and therefore the distinction between common and contract carriers is no longer meaningful." *In re Olympia Holding Corp.,* 88 F.3d at 955 n.4. The term "motor common carrier" has been deleted by the ICC Termination Act. *Compare* 49 U.S.C.A. §13102 (West 1996) with 49 U.S.C. §10102(15) (1994).

§10102(15) (1994). The rates provided in its published tariff are those it held out to all comers. A common carrier, such as Pony Express, may also be a contract carrier and carry freight at a different rate under contract.

Whether a motor carrier is operating as a contract carrier or a common carrier is a factual inquiry. The mere existence of a published tariff is not determinative. Resolution of this issue turns on whether the parties' legal obligations are established by the tariff or by a separately negotiated contract. In this case, the rates were determined by Pony Express's bid in response to the RFP and then memorialized in a contract. Even if the rates were identical to those in its tariff, Pony Express would not be providing service pursuant to its tariff, but pursuant to its written contract with FRB.

Pony Express does not dispute this essential fact. Pony Express failed to introduce any evidence to show that the contract services were governed by the common carrier tariffs it submitted in evidence. Nero's affidavits, on which the ALJ relied, do not establish that the contract work was actually governed by any of the tariffs submitted. Nero stated only that "in calculating the rate to be utilized in our bid for work on the FRB Richmond, Charlotte Branch, which is the subject of the present action, I utilized the rate formula for determining charges pursuant to the dedicated service tariff." Nero Aff. ¶ 24. No portion of the contract was submitted which indicated the contract work was subject to any published tariff, and Pony Express submitted no evidence that it adhered to the tariff rates in the contract. More importantly, Pony Express offers no evidence that its legal obligations to the FRB flowed from its published common carrier tariffs rather than from its written contract with the FRB.

As further evidence that the contract was not governed by published tariff rates, it is evident that the contract provided for adjustments to the fee schedule based on fuel costs. Nero Aff., Exhib. 1, ¶ XIII. These adjustments to the fees were clearly set by the contract rather than controlled by a tariff. Where published tariffs do not actually govern the activities at issue, but at most are only utilized in some manner to formulate a bid, a carrier is not acting in a common carrier capacity. Operating as contract carrier, Pony Express cannot point to the existence of published common carrier tariffs to relieve it of SCA obligations. To allow a carrier to use non-binding tariffs to qualify for the exemption would defeat the purposes of the statute. Non-binding tariffs do not provide protection against wage competition and do not fall within the exemption. In such situations the parties are not constrained from underbidding competitors by diminishing the wages of their workers. If Pony Express did not believe that the wage determination accurately reflected the prevailing wages in the areas covered, then it was incumbent on Pony Express to challenge the wage determination. Only by following the prescribed procedures and challenging the wage determination could fairness to all bidders be assured and the statutory protection of service employee wages be effectuated. By failing to do so, Pony Express ran the risk that it would be compelled to pay its employees performing on the relevant contracts wages consistent with the wage determination.

II. Summary Judgment

As Pony Express is not exempt from the SCA and has not averred in its answer to DOL's complaint that it did pay its employees the minimum monetary wages and fringe benefits in accordance with the SCA, we must grant DOL's request for summary judgment. Title 29 of the Code of Federal Regulations and Federal Rule of Civil Procedure 56 set out the procedure for summary judgment. The Code states that "where no genuine issue of a material fact is found to have been raised, the [ALJ] may issue a decision to become final as provided by the statute or regulations under which the matter is to be heard." 29 C.F.R. §18.41. The U.S. Supreme Court has held that "the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The burden of demonstrating that there are no material facts in issue is upon the party seeking summary judgment. *See, e.g., Williams v. United States Department of Labor*, *supra* at 844. DOL satisfied this test by demonstrating that Pony Express had failed to pay its courier workers the SCA rates established for work they performed on the service contract with the FRB. Although Pony Express maintained that its practices were lawful, it failed as a matter of law to establish that it was entitled to the exemption. Pony Express does not contend that it paid its employees in compliance with the SCA. DOL is therefore entitled to summary decision because Pony Express failed to

> make a showing sufficient to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

III. Estoppel

Pony Express also alleges that DOL's failure to appeal the decision in *U.S. Department of Labor v. Lanter Courier Corporation*, No. 91-SCA-52 (CCH) ¶ 32,247 (April 23, 1993) precludes DOL from challenging the applicability of the Section 7(3) exemption in this case. As noted above, whether a tariff actually governs a transportation service contract is a factual inquiry that can only be decided in the context of a particular case. In *Lanter*, DOL did not contest the applicability of various published tariff rates which were claimed by the Respondent in that case. Even if DOL had, it would have no effect on this case. The issue of whether Pony Express's published tariffs actually governed its contract with the FRB can only be decided in the context of the facts of this case. Whether the ALJ properly decided a similar issue in *Lanter* has no bearing on our decision in the instant matter. Thus, Pony Express's suggestion that DOL is collaterally estopped from challenging its motion is incorrect.

CONCLUSION

DOL's Motion for Summary Decision is granted because there are no genuine issues of material fact remaining as to whether or not the contract at issue was subject to published tariff rates. Entitlement to the exemption at issue requires that published tariff rates must actually govern the contract, and in this case they do not.

As a result of the aforementioned violations of the SCA, Pony Express owes an estimated total of $261,112.30 to the affected employees for violations during the period from March 1, 1993 through December 31, 1994. Because it is believed that the violations may have continued through the remaining term of the contract, this matter is remanded to the ALJ for a computation of any additional amounts due.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member