DATE: August 13, 1996

CASE NO: 93-CBV-1

IN THE MATTER OF APPLICABILITY OF WAGE RATES AND FRINGE BENEFITS COLLECTIVELY BARGAINED BY RYAN-WALSH, INC., AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (ILA), AFL-CIO, TO EMPLOYMENT OF SERVICE EMPLOYEES UNDER A CONTRACT FOR STEVEDORING AND RELATED TERMINAL SERVICES AT MTMC GULF OUTPORT, NEW ORLEANS, LOUISIANA

and

CASE NO: 95-CBV-1

IN THE MATTER OF APPLICABILITY OF WAGE RATES AND FRINGE BENEFITS COLLECTIVELY BARGAINED BY CERES GULF, INCORPORATED, AND THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (ILA), AFL-CIO, TO EMPLOYMENT OF SERVICE EMPLOYEES UNDER A CONTRACT FOR STEVEDORING AND RELATED TERMINAL SERVICES AT CONTAINER FREIGHT STATION, NEW ORLEANS, LOUISIANA

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER AWARDING SUBSTANTIAL WAGE VARIANCE PETITION

This proceeding arises under the McNamara-O'Hara Service Contract Act of 1965 (herein SCA or the "Act"), as amended, 41 U.S.C. §§ 351-358 (1988), and its implementing regulations, 29 C.F.R. Parts 4, 6 and 8 (1989).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto, notice of hearing for Case No. 93-CBV-1 was issued scheduling a formal proceeding on January 6, 1995, in Metairie, Louisiana. [1] All

---

[1] The hearing was originally scheduled for June 21, 1993. By joint motion of the parties, the hearing was continued. At the request of Neeb-Kearney, the hearing was re-scheduled for February 18, 1994, only to be postponed by agreement of the parties to April 29, 1994. The hearing was thereafter continued sine die in view of the

parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. [2]

On August 17, 1995, Case No. 93-CBV-1 and Case No. 95-CBV-1 were consolidated with agreement by all relevant parties.

With respect to Case No. 93-CBV-1, post-hearing briefs were received on March 6, 1995 and March 8, 1995 from Respondent and Petitioner, respectively. A supplemental memorandum was received on October 12, 1995 from Petitioner in Case No. 95-CBV-1 along with supplemental exhibits which are hereby received into evidence as NKX-S1 through NKX-S22. Based upon the stipulations of Counsel, the evidence introduced and my examination of all related documentation, and having considered the arguments presented, I make the following findings of fact, conclusions of law and order.

Statement of the Case

I.

The regulations under which this matter originates provide for two types of wage determinations for covered employment. [3] "Prevailing in the locality" determinations are the wages and fringe benefits set forth by the Secretary of Labor as prevailing in the locality where the contract is to be performed. The second type is based on the wage collectively bargained between the contractor providing the services and the union representing the service employees. This type of wage determination merely reflects the wages set forth in the collective bargaining agreement. [4]

However, in instances where a "substantial variance" exists between the collectively bargained wages and fringe benefits and those which prevail for services of a similar character in the locality, the obligation to pay the collectively bargained wages shall not apply. [5]

A substantial variance hearing was held on January 6, 1995 as requested by Neeb-Kearney & Company, Inc. (herein "Neeb-Kearney"), pursuant to section 4(c) of the Act, with respect to the collectively bargained wage rates [Case No. 93-CBV-1]. The sole issue before me in this proceeding is whether or not a wage variance existed during the relevant time periods between the wage rates paid to workers affiliated with the International Longshoremen's Association (herein "ILA") and the wages paid to a majority of workers in the New Orleans metropolitan area who allegedly perform such services as are called for in the subject government contract. After consolidation of Case Nos. 93-CBV-1 and 95-CBV-1, I now must make a further determination of whether there exists a substantial variance between the fringe benefits paid. I will make this determination in direct correlation to the decision regarding wage rates.

II.

In 1991, Neeb-Kearney bid for a contract solicited by the United States Military Traffic Management Command (herein "MTMC"), [6] pursuant to Solicitation Number DAHC24-91-R-0003 (herein "Solicitation"). The

---

1 (continued) necessity of the Regional Solicitor to institute subpoena enforcement proceedings against Neeb-Kearney. Subsequent to partial subpoena enforcement, this matter was finally scheduled for January 6, 1995. (ALJX-34).

2 The following abbreviations are used for citation of the record: Transcript of the hearing: Tr._____; Neeb-Kearney (Petitioner) Exhibits: NKX-_____; International Longshoremen's Association (Respondent) Exhibits: ILAX-_____; Joint Exhibits: JX-_____; Administrative Law Judge Exhibits: ALJX-_____.

3 See, 41 U.S.C. § 351, et seq. (1988); 29 C.F.R. Parts 4, 6 and 8 (1989).

4 29 C.F.R. § 4.50.

5 41 U.S.C. § 353(c).

6 MTMC constitutes the single manager operating agency for military traffic, land transportation, and common-user ocean

contract called for the performance of services at the MTMC Gulf Outport, New Orleans, Louisiana. 7 [emphasis added]. Specifically, the contract solicited "stevedoring and related terminal services." (JX-1, p. 2).

Neeb-Kearney is in the business of providing materials handling services 8 in the New Orleans metropolitan area (i.e., the Parishes of Orleans, Jefferson, St. Charles, St. John the Baptist, St. Bernard and St. Tammany). The company performs these services with labor covered by a collective bargaining agreement with Teamsters Local No. 270 of the International Brotherhood of Teamsters (herein "Teamsters"). (NKX-63).

On or about December 4, 1991, a final bid was submitted by Neeb-Kearney for the contract represented by the Solicitation. Neeb-Kearney formulated its bid using the Teamsters′ collectively bargained rates because they are at or near what Neeb-Kearney believes to be the actual prevailing wages in the New Orleans metropolitan area for the type of work involved in the solicited contract. Nonetheless, on January 15, 1992, MTMC rejected Neeb-Kearney′s bid as non-responsive. The Solicitation was finally awarded to Ceres Gulf, Incorporated (herein "Ceres Gulf") in early 1992. (JX-1, p. 3).

Neeb-Kearney has asserted that the type of services called for by the contract at issue do not require the use of longshoremen. Further, they argue that the contract work can be performed by the Teamsters or non-union labor at substantially lower wage rates and fringe benefits as those provided in the ILA′s collective bargaining agreement (herein "CBA"). Neeb-Kearney supports their contention with respect to the level of wage rates prevailing for such work by referencing the Bureau of Labor Statistics (herein "BLS") area wage survey

---

terminals. "Military traffic" is Department of Defense (DOD) "personnel and material to be transported." (ALJX-24(b))

7 The statement of work contained within the solicitation is set forth at Section "C", Attachment 1 to the Order of Reference issued on April 23, 1993, by the Acting Administrator of the United States Department of Labor, Employment Standards Administration. (ALJX-1; NKX-15). Specifically, the contractor shall arrange for and provide terminal services, including labor, materials and equipment incident thereto. The contractor's duties are two-fold: to perform a commodity service role associated with the operation of the functional activities and technical management services by providing a full-time professional management staff to plan, organize, control and support various functional operations. The major functional activities for which the contractor shall provide management are: terminal/warehouse and ship export and import cargo, to include dangerous and hazardous items; railcar and truck unloading and loading operations to support the container freight station and breakbulk operations; container freight operations to include a cargo management system; and a vehicle processing operation to process military and privately owned vehicles.

8 Materials handling services provided by Neeb-Kearney include the following (NKX-72, pp. 2-3):

(i) loading/unloading boxed, crated, wrapped and palletized

8 (continued)

freight from/to various types of transportation devices, including trucks, trailers, vans, box cars, flat cars, sea vans on wheeled chassis, roll on/roll off and other wheeled metal containers;

(ii) moving, storing, handling, and retrieving that freight from temporary storage at designated areas within a storage facility by hand, hand truck, forklift, or other powered freight movement vehicles;

(iii) moving, storing, and retrieving containers to/from designated areas within a storage facility by means of a powered vehicle ("yard hustler"); and

(iv) various clerical, checking, verification, identification and marking functions associated with these freight handling operations.

for the New Orleans, Louisiana, metropolitan area as it relates to material movement and custodial workers for 1991 and 1992. (NKX-19, 20).

According to MTMC, however, the Solicitation was subject to the collectively bargained rates between Ryan-Walsh Stevedoring Company (herein "Ryan-Walsh") and the International Longshoremen's Association (herein "ILA"). Ryan-Walsh, at the time of the Solicitation, was the current contractor pursuant to a preceding contract, Solicitation No. DAHC24-89-R-0006 awarded in 1989. (JX-1, p. 3).

In 1989, prior to the issuance of any solicitation, MTMC submitted a request for a SCA wage determination. Ryan-Walsh was listed as the contractor providing "Stevedoring and Related Terminal Services at MTMC Gulf Outport, New Orleans, Louisiana. . ." (JX-1). The request indicated that Ryan-Walsh paid employees consistent with its collective bargaining agreement with the ILA. (JX-1, p. 2). The solicitation under which Ryan-Walsh performed was subject to Wage Determination No. 73-71 9, as issued by the Department of Labor, Employment Standards Administration, Wage and Hour Division, Wage Determination Division (herein "DOL"). (JX-1, p. 3). [According to Determination No. 73-71, longshoremen performing work on the solicited contract generally received $18.00 for an hourly rate plus $6.70 in fringe benefits. (ALJX-24(b); NKX-52)].

On April 19, 1989, Neeb-Kearney requested a hearing from the Administrator of the Wage and Hour Division on "whether the wage and fringe benefit provisions of the ILA collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality." (JX-1, pp. 2-3). Thereafter, Ryan-Walsh was awarded the subsequent contract in 1990 and continued to perform under an extension. Neeb-Kearney also bid unsuccessfully for this contract and subsequently reiterated its request for a wage variance hearing. (JX-1, p. 3). Without reservation, on January 24, 1990, the Wage and Hour Division rejected Neeb-Kearney's request. (JX-1).

On March 23, 1990, Neeb-Kearney appealed the decision of the Acting Administrator. On December 2, 1991, DOL's Deputy Secretary issued a "Final Decision and Order," dismissing Neeb-Kearney's petition for a substantial variance hearing. (JX-1, p. 3; ALJX-24(b)).

In response to MTMC's request for a wage determination (NKX-51), the Wage and Hour Division determined on February 12, 1992 that the minimum hourly wage to be paid to workers employed on the Solicitation, pursuant to Wage Determination 73-71 (NKX-52) is that set forth in the collective bargaining contracts of the ILA Locals 1655, 1497, 1802, 854 and 3000, effective during the period 1991-92. 10 (JX-1, p. 5).

On March 2, 1992, MTMC awarded the 1991 contract under Solicitation No. DAHC24-91-R-0003, a successor contract to Solicitation No. DAHC24-89-R-0006, to Ceres Gulf. This subject contract called for work to be performed in the Army/MTMC/Gulf Outport facility in New Orleans, Louisiana. Contract performance began on May 1, 1992. 11 (JX-1, p.3).

On or about April 29, 1992, pursuant to 41 U.S.C. § 353(c) and 29 C.F.R. § 4.10, Neeb-Kearney again requested a wage variance hearing with respect to the wages to be paid workers employed to perform services under the awarded contract. (JX-1, p. 4).

III.

Neeb-Kearney, pursuant to Section 4(c) of the Act and 29 C.F.R. § 4.10, filed suit in the United States District Court, Eastern District of Louisiana seeking to compel a variance hearing. On December 11, 1992, the court issued an "Order and Reasons for Entry" in which it concluded that the Department of Labor acted arbitrarily and capriciously when it denied Neeb-Kearney's request for a wage variance hearing. (ALJX-24(c)). The Court further ordered DOL to conduct a variance hearing on the issues of whether the wage and fringe benefit provisions of the ILA's CBA are substantially at variance with those which prevail for services of a character similar in the locality, i.e., the New Orleans Standard Metropolitan Area. (JX-1, p. 4; ILAX-12; ALJX-24(c)).

Thereafter, on April 23, 1993, an Order of Reference was issued by the Acting Administrator of the Wage and Hour Division of the U.S. Department of Labor (herein "Administrator") indicating that there was enough evidence to warrant a hearing to resolve the issue of the substantial variance of wages. (JX-1, p. 4).

As previously stated, on January 6, 1995, a hearing [Case No. 93-CBV-1] was held before me in Metairie, Louisiana, on the applicability of the collective bargaining agreement by and between Ryan-Walsh and the ILA to the contract for services at the Gulf Outport, New Orleans, Louisiana, exclusively solicited by MTMC.

On February 2, 1995, the hearing conducted in Case No. 93-CBV-1 was closed upon a joint stipulations of fact between Neeb-Kearney and the ILA, a statement of legal issues, the submission of the 1989 administrative record and index in that matter and various items of documentary evidence to include affidavits of certain witnesses.

On July 24, 1995, an Order of Reference was issued in Case No. 95-CBV-1, in which the Office of the Solicitor suggested that this matter be consolidated with Case No. 93-CBV-1. Based upon a conference telephone call conducted on August 16, 1995, between Neeb-Kearney, the ILA and Ceres Gulf, all parties were in agreement that the two cases should be consolidated in consideration of the similar factual and legal issues. It is

---

9 Since February 1973, requests for longshore services of the type at issue have been submitted with reference to the ILA's collectively bargained agreement and Wage Determination 73-71, with revisions having been issued for these contracts in accordance with the provisions of section 4(c).

10 See also, ILA's post-hearing brief (March 6, 1995) at p. 4.

11 Id.

represented that between the two cases, there exists only two relevant points of distinction. Specifically: (1) the location of contract performance is physically different; and (2) an issue of fringe benefit variance is presented only in Case No. 95-CBV-1.

Accordingly, on August 17, 1995, after giving due consideration to the legal and factual issues involved in Case No. 95-CBV-1 and Case No. 93-CBV-1, the similarity of interested parties, the fact that the nature and scope of the work to be performed by the service employees appears to be the same under each contract, and the commonality of proof, documentation and issues, pursuant to 29 C.F.R. § 18.11, I consolidated the above captioned cases.

For the record, Neeb-Kearney, ILA, and Ceres Gulf, in connection with the consolidation, have stipulated to the following: 12

1. The parties hereby adopt by reference all of the joint stipulations of fact submitted in Case No. 93-CBV-1 by Neeb-Kearney and the ILA.

2. Pursuant to prior solicitation and bid which occurred in 1993, on or about March 18, 1994, MTMC awarded the contract in connection with Solicitation No. DAHC21-94-R-0004 to Ceres Gulf, which began work on that contract on April 18, 1994. Neeb-Kearney bid on this contract but was unsuccessful in obtaining it.

3. The current contract, Solicitation No. DAHC21-94-R-0004, does not call for work to be performed at the MTMC/Gulf Outport Facility in New Orleans, Louisiana, but rather at a facility to be supplied by the contractor. Ceres Gulf is currently performing this contract at a facility in Jefferson, Louisiana. The facility does not have waterfront situs, nor does it have direct access to water transportation.

4. Section (c) of the 1993 solicitation for Contract No. DAHC21-94-R-0004 contains a description of the work and specifications of the services to be performed thereunder. (NKX-S1, p. C-5).

5. The work described in Solicitation No. DAHC24-91-R-0003 and DAHC21-94-R-0004 was/is performed by a service contractor (Ceres Gulf) which employed workers who are members of or affiliated with ILA, specifically:

ILA/Local 1655 - New Orleans Dray Clerks, Public Weighers, Warehousemen, Car Clerks, and Checkers of Docks, Barge Line Clerks, Sugar Samplers, Inspectors, and Cargo Surveyors;

ILA/Local 1497 - New Orleans Clerks & Checkers Union;

ILA/Local 1802 - Sack-Sewers, Sweepers, Waterboys and Coopers;

ILA/Local 854 - Dock Loaders and Unloaders of Freight Cars and Barges;

ILA/Local 3000 - General Longshore Workers.

6. Wage Determination 73-71 (Rev. 14), issued by the Department of Labor, Employment Standards Administration, Wage & Hour Division, Wage Determination Division, has determined that the minimum hourly wages and fringe benefits to be paid to workers employed on Solicitation No. DAHC21-94-R-0004 is that set forth in the collective bargaining contracts of the ILA Locals 1655, 1497, 1802, 854 and 3000, effective during the relevant period 1993-94.

7. All Bureau of Labor Statistics Area Wage Surveys for the New Orleans Metropolitan Area (BLS Survey) from 1988 to 1994 do not include a classification for "Stevedoring and Related Terminal Services." These BLS Surveys do not include, in calculating hourly earning levels for occupational classifications falling within the category of "material movement and custodial workers," wage data from companies that perform services incidental to water transportation.

8. BLS, in distinguishing these types of services followed the definition of "marine cargo handling" published in the Standard Industrial Classification Manual, 1972 ed., by the Executive Office of the President, Office of Management and Budget. (JX-1, p. 6).

9. Approximately 85% of all cargo in the Port of New Orleans is handled by individuals represented by the ILA local unions. Coastal Cargo Company, Inc., a wholly owned subsidiary of Neeb-Kearney, which utilizes individuals not represented by the ILA unions, performed 7.8% and other non-ILA entities performed 7.2% of the market share of work by tonnage in the calendar year and fiscal year 1992, respectively, in the Port of New Orleans. (JX-1, pp. 6-7).

10. ILA-represented employees have worked at the MTMC since at least the Vietnam War era. (JX-1, p. 7).

11. At MTMC, during the Vietnam era, and until the late 1970s, vessels would be berthed at the MTMC Gulf Outport facility, and were unloaded and the cargo would be checked and warehoused there by longshoremen. (JX-1, p. 7).

12. In the late 1970s the government ceased using its own ships for cargo and began to employ outside carriers using containers. (JX-1, p. 7).

13. The MTMC Gulf Outport Facility contains space and facilities for the berthing of oceangoing freight ships but, since approximately the late 1970s and the advent of containerization, such ships have not been

---

12 The Joint Stipulations of Fact in Case No. 95-CBV-1, submitted by the parties, is hereby received into evidence as Joint Exhibit No. 2 (JX-2).

berthed there nor on or off-loaded while berthed at that facility.

14. (a) Incoming containers destined for the "contractor-supplied" facility are unloaded at the Port of New Orleans. The workers who remove the containers from the vessels are ILA-represented labor. This work is not the subject of the contract before me.

(b) The containers are then drayed to the contractor-supplied facility in Jefferson, Louisiana. The drayage is also not the subject of the contract before me.

(c) At the contractor-supplied facility in Jefferson, Louisiana, pursuant to the subject contract and as they had under the predecessor contracts, ILA-represented labor strips or stuffs the containers, checks the cargo, and warehouses the cargo in the storage facilities supplied by MTMC. For outgoing containers, the process is reversed.

15. The services provided at the contractor-supplied facility do not differ from those services previously and historically performed under prior contracts with MTMC at the Gulf Outport Facility, except that contracts which were performed prior to the late 1970s also included physically loading and unloading ships berthed at the MTMC facility.

IV.

The essential issue before me is whether the referenced solicitations for the handling of Department of Defense sponsored cargo and other related operations at MTMC Gulf Outport, New Orleans, Louisiana, and the facility leased to Ceres Gulf in Jefferson, Louisiana are subject to the successor contract requirements of section 4(c) of the Act. Section 4(c) requires a successor contractor to pay any service employee performing services on a successor contract, under which substantially the same services are furnished, no less than the wages and fringe benefits provided for under the predecessor contractor's CBA.

However, Neeb-Kearney argues that "stevedoring" is not a separate classification for section 4(c) purposes and that the subject contract work is more properly included within the broader materials movement category. Neeb-Kearney contends that the services performed by Ryan-Walsh under solicitation DAHC24-89-R-0006 were erroneously classified, and, as a result, the services required by solicitation DAHC24-91-R-0003 and solicitation DAHC21-94-R-0004 have likewise been wrongly classified.

Central to my determination of whether the requirements of section 4(c) of the Act have been properly applied to the subject contract, I find the following to be pivotal issues: (1) a determination of the scope of the work performed, to include a definitive analysis of the duties and skills of the particular jobs or contract services provided; and (2) whether the job duties and skill characteristics of material handling services as performed by various occupations in the New Orleans metropolitan area are of a character similar to the contracted services.

Essentially, the threshold issue in any wage variance hearing is the moving party's establishment of services of a character similar to the solicited work to permit a comparison of wages and fringe benefits prevailing in the locality.

Substantial variance decisions are highly factual and turn upon an evaluation of all evidence presented. The Department of Labor's own policies require a searching consideration of whether the work at issue in a wage-variance determination is of a "similar character" to the work performed under a prior collective bargaining agreement. Moreover, for purposes of section 4(c) of the Act, direct evidence of the wages and fringe benefits that prevail in the locality for similar services is requisite to a finding of substantial variance.

Discussion

I.

The Contentions and Arguments

ILA argues that the subject MTMC contract services are stevedoring services, that stevedoring or marine cargo handling is a distinct and separate classification for Service Contract Act purposes, and that the subject MTMC contract services may only be compared to stevedoring/marine handling services because: 13

(1) ILA-affiliated workers have a history or tradition of performance of such work involving waterborne cargo in the Port of New Orleans in general and at the MTMC facility;

(2) freight handled at the facilities (at both the MTMC facility at issue in Case No. 93-CBV-1 and the contractor-supplied facility in Jefferson, Louisiana at issue in Case No. 95-CBV-1) are waterborne in metal containers on an ocean voyage on a container vessel at some stage of its movement;

(3) loading/unloading metal containers, which in turn are/were waterborne, is the functional equivalent of loading/unloading freight vessels themselves;

(4) the name given to workers who perform marine cargo/freight handling (i.e., stevedores) is different from the name given to other workers who handle cargo that may not be waterborne, or who handle cargo/freight in a non-waterborne phase or phases of its movement.

(5) [the MTMC facility has direct water access or ship berthing capability, or otherwise is considered a water terminal] 14;

---

13 See, ALJX-24, Exhibit D.

14 This argument has applicability to the Solicitation in Case No. 93-CBV-1 which involved solely the services at the MTMC facility

However, Neeb-Kearney contends that such a comparison as is urged by the ILA is legally incorrect and that all such grounds or rationale are totally irrelevant to the process of establishing proper comparisons under the Act. Neeb-Kearney asserts that the proper process is based solely on an examination of the content of the solicited services and an identification of those with workers/occupations whose job duties and skill characteristics may be similar or of a related nature to those called for in the solicited services. The character of the services to be utilized for section 4(c) purposes must be similar, not identical, to the solicited services. Thereafter, the wage rates for the identified occupational classification(s) are compared to the collectively bargained wage rates for the union-affiliated workers who performed the predecessor contract in order to determine if a substantial variance exists between those rates (i.e., comparing the wage rates of the ILA to those of the Teamsters or non-union labor).

Neeb-Kearney further maintains that the solicited services are most properly compared to and identified with the occupational classification of materials movement, in terms of the similarity of the job duties and skill characteristics. Neeb-Kearney further claims that there is no reason, basis, or authority to narrow the identification only to stevedoring for section 4(c) purposes.

Conversely, citing National Labor Relations Board v. International Longshoremen's Association 15, ILA argues that off-pier stuffing and stripping of containers (as is called for by the subject contract) is the "functional equivalent of traditional longshore work; that is, handling cargo going onto or coming from a ship." ILA contends that while there may be some physical similarities between the work of non-marine cargo handling employees surveyed by the BLS 16, longshoremen nonetheless constitute a recognized occupational class of employees performing specific work in the New Orleans locality. ILA also argues that the occupational class of "longshoremen" is to be compared with other marine cargo handling occupations -- longshoremen -- and not the general classification of "material movement and custodial workers" as insisted upon by Neeb-Kearney.

II.

The Contract Services

Longshoremen generally service either "conventional" or "container" ships. Breakbulk (loose) cargo is loaded onto and unloaded from conventional ships at the pier. In servicing container ships, workers move large unopened containers, packed with cargo, on and off ships at the pier. 17 "Stuffing" (loading) and "stripping"

---

that has direct water access. However, Case No. 95-CBV-1 involves services performed at an inland facility. As such, ILA has essentially waived this argument as of the agreement for consolidation on August 17, 1995, or, alternatively, its significance has greatly diminished as a distinguishing criterion.

15 447 U.S. 490, 100 S.Ct. 2305 (1980); and 473 U.S. 61, 105 S.Ct. 3045 (1985).

16 As stated above, Neeb-Kearney supports their contention with respect to the level of wage rates prevailing for such work by referencing the BLS area wage surveys for the New Orleans, Louisiana, Metropolitan Area as they relate to material movement and custodial workers; see also ILAX-14(a).

17 The ILA describes the process as follows (ALJX-24(b)):

> Containers are large, reusable metal receptacles....capable of carrying upwards of thirty thousand pounds of freight, which can be moved on and off an ocean vessel unopened.
> Container ships are specially designed and constructed to carry the containers, which are affixed to the ship's hold....Before the introduction of container ships, and as is still the case with conventional vessels, trucks delivered loose...."break-bulk" cargo to the head of the pier. The cargo was then transferred piece by piece from the truck's tailgate to the ship by longshoremen [who] checked the cargo, sorted it, placed it on pallets and moved it by forklift to the side of the ship, and, lifted

17 (continued)

(unloading) the containers may be performed at either the pier or elsewhere. Containers may be attached to a truck chassis or railcar for transport to and from the pier. At the MTMC Gulf Outport, the contract service workers perform the container stuffing and stripping portions of the sequence. They also load breakbulk cargo onto and unload breakbulk cargo from trucks 18 and railcars.

MTMC is located on the Mississippi River in New Orleans. It has direct waterfront access and berthing facilities for oceangoing freight ships. Through the late 1970s, ships would be berthed at MTMC and loaded or unloaded there. Outbound cargo would arrive by rail or truck, be unloaded and stored temporarily awaiting shipment, and then be loaded on an outbound ship. Inbound cargo would be handled in the reverse order.

Since the late 1970s, with the advent of containerization and the building of installations in the Port for container ship loading/unloading, MTMC has not berthed ships for this purpose and freight is not loaded on or off vessels docked there. Rather, outbound cargo arrives by rail or truck which is unloaded and stored temporarily awaiting shipment; it is eventually loaded into metal containers and consolidated with other freight bound for a similar destination. The container is placed on a chassis and hooked up to a truck cab and carted/drayed from MTMC to a container wharf in the Port where it is then loaded aboard an outbound container vessel. Neither the drayage to/from MTMC nor the on/off loading of the container itself to/from the container vessel at the container wharf are part of the subject contract or its predecessors. 19

Materials are loaded on and discharged from railcars and trucks at the MTMC Gulf Outport. These items include small arms and ammunition; hazardous cargo; pilings, poles and logs; lumber; metal products, e.g., propellers, anchors, tank and tractor treads, bulldozer blades, pontoons, revetments; household goods; government vehicles including ambulances, tractors, construction equipment, personnel carriers, boats, trailer-mounted machinery; privately-owned vehicles; and cargo transporters. (ALJX-24(b)). In loading and discharging these materials, the workers employ trucks, forklifts, tractors, toploaders and cranes. (ALJX-24(b)).

Neeb-Kearney argues that because the services called for in the Solicitation did not involve loading and unloading ships -- work long recognized as "stevedoring" -- at least two labor groups in the New Orleans area, in addition to members of the ILA, perform the same or similar services as those called for in the subject contract. These are the Teamsters and non-union labor. Both the Teamsters and non-union labor, Neeb-Kearney further notes, perform such similar services at rates substantially lower than the ILA rates. Neeb-Kearney asserts that the work to be performed at the MTMC facility under the contract is properly labeled "material movement," which is undertaken by several labor groups, not just longshoremen.

As evidence of a substantial wage variation, Neeb-Kearney offers the Bureau of Labor Statistics Area Wage Survey for the New Orleans Standard Metropolitan Area. The BLS Survey provides wage rates for "materials movement and warehousing services," which include specific rates for "receivers," warehousemen," "order fillers," "material handling laborers," "forklift operators," and "guards." 20

III.

Job Duties: Services of a Similar Character

The threshold issue presented is whether Neeb-Kearney met its burden of proof to establish that the services/jobs/duties/skills being compared to the contract services represent "services of a character similar." In the Matter of Applicability of Wage Rates Collectively Bargained by Harry A. Stroh Associates, Inc., etc., Case No. 89-CBV-2 (Final Dec. and Order, April 24, 1991). It is clear that the guidelines for the BLS surveys and the Act, requiring services be merely of "similar" character, contemplate some differences in the jobs to be compared.

In addition to the foregoing factual stipulations, the generic description of the scope of work/jurisdictional guidelines and coverage language set forth in the respective collective bargaining agreements for each separate ILA job classification reflect traditional duties. (See, ILAX-54, 56, 58, 60 and 62).

LTC Robert Garcia, Commander of the Gulf Outport was deposed on May 11, 1992. (NKX-6). He testified that the Outport's mission is to move Department of Defense-sponsored cargo world-wide. He acknowledged that the Outport is an intermediate transshipment point between like and different modes of transportation which are incidental to further movement. (NKX-6, pp. 32, 67, 69). He described the Outport as a "marine cargo freight station" since cargo is shipped by vessel. However, he testified that stuffing and unstuffing a container would involve the same work regardless of whether the terminal is a marine cargo freight terminal, an air terminal,

---

it by means of a sling or hook into the ship's hold. This process was reversed for cargo taken off incoming ships.

18 For example, longshoremen may load and secure export breakbulk cargo to be shipped on an ocean carrier's flatbed trucks. (ALJX-24(b)).

19 See, Neeb-Kearney's post-hearing brief (March 8, 1995) at p. 3; ILA's post-hearing brief (March 6, 1995), p. 7.

20 These data are obtained from a sampling of employers in six industry divisions: manufacturing; transportation; communication and other public utilities; wholesale trade; retail trade; finance, insurance, and real estate; and services.

a rail or truck terminal. (NKX-6, pp. 81, 85).

The Standard Industrial Classification Manual (1987), page 275, regarding "Services Incidental to Water Transportation," describes "marine cargo handling," in part, as:

> Establishments primarily engaged in activities directly related to marine cargo handling from the time cargo, for or from a vessel, arrives at shipside, dock, pier, terminal, staging area, or in-transit area until cargo loading or unloading operations are completed. Included in this industry are establishments primarily engaged in the transfer of cargo between ships and barges, trucks, trains, pipelines and wharfs.

(NKX-7; JX-1, p. 6).

LTC Garcia testified that "marine cargo handling" as described above is what the MTMC Outport does as a mission. He further stated that the "shipside, dock, pier, terminal, staging area and in-transit area" are located within the France Road facility of the Port of New Orleans. By inference, it does not include the MTMC Outport. (NKX-6, p. 89, 92-93). LTC Garcia also testified that "cargo is cargo," and that it is of no consequence how the cargo gets to the Outport, the operation is the same. (NKX-6, p. 103).

William J. Landwehr, Chief of Cargo Operations and Transportation Operations Officer at the MTMC Gulf Outport, was deposed by the parties on May 11-12, 1992. He testified that the export flow involves receipt from parcel post, motor freight, rail, car, owner delivery, e. g. POVs, and air freight delivery. Export goods are not received at the Outport in containers. (NKX-1, pp. 55-56, 58). Such exports are then consolidated for shipment with 90-95% of the export goods leaving the Gulf Outport in seavan containers. (NKX-1, pp. 68, 60).

Upon receipt of cargo to be exported, a "freight handler" is assigned to receive the cargo and check the cargo documentation. The cargo is unloaded, if from a truck, by use of material handling equipment, e.g. a forklift which may range from 3-ton to 20-30 ton capacity. (NKX-1, pp. 96, 105, 123). The handler places the cargo in a staging area based on destination or the nature of the cargo. (NKX-1, p. 116). The ocean carrier contracted to move the cargo will spot containers at MTMC for export stuffing. A clerk will also check the condition of the container spotted before it is loaded. (NKX-1, p. 123). Laborers or forklift operators will perform bracing, cribbing and shoring as required in the seavan containers. Laborers will also hand-stow cargo in containers. (NKX-1, pp. 120, 132, 136). A yard hustler or fifth-wheel driver then hooks up to the stuffed container chassis and moves the container to a staging area for subsequent pick-up by the steamship company. (NKX-1, pp. 125, 126, 139-140).

He stated that all import cargo, except POVs, arrives in seavan containers. (NKX-1, p. 63). When imported cargo is received, a clerk checks the document manifests and spots the container for "unstuffing." The cargo removed from the containers is thereafter loaded on/in trucks for inland shipment or on rail cars, which is rare. (NKX-1, pp. 142, 149; NKX-6, p. 23). Imported cargo is "deconsolidated" for further movement. (NKX-1, p. 68).

Although "marine cargo handlers/specialists" are employed at the Outport, they work for the Gulf Outport and not the contractor and, thus, are not included in the contracted services. Marine cargo handlers/specialist liaison with the steamship companies and MTMC in Bayonne, New Jersey, to insure proper handling of cargo at the port. (NKX-1, pp. 153-154).

Mr. Landwehr further testified that it is not necessary for the terminal location to be adjacent to the Mississippi River. Two reasons for locating a terminal within a reasonable distance to wharfs and ocean-going vessels is the lower drayage costs and the availability of seavan containers. (NKX-1, pp. 196-197).

The description of the contracted services changed from the 1989 solicitation, which described the contracted services as "stevedoring and related terminal services," to "container freight station and related terminal services" in the 1991 solicitation. Mr. Landwehr testified that he recommended the deletion of "stevedoring" from the solicitation since stevedoring is "loading to or from vessels" which is not performed under the solicited contracts. (NKX-1, p. 171, 200; ILAX-10, pp. 37-39). Lastly, he stated that the container freight station concept includes all activities of the Outport, such as, receiving, staging, warehousing, stuffing, unstuffing, shipping and documenting which are terminal operations. (NKX-1, pp. 167, 171).

Joseph F. Madison, Contracting Officer for MTMC and Chief, Acquisition Division, Office of the Deputy Chief of Logistics, was deposed by the parties on May 13, 1992. (NKX-8). He testified that "terminal services" include documentation, loading, unloading, stuffing, unstuffing and handling cargo in the terminal area whether it be destined for containerization or not. (NKX-8, p. 65). He, too, acknowledged the change in contracted services in 1991 which eliminated "stevedoring" activities. The change occurred to better describe the services being solicited and because stevedoring and its activities "do not take place at the Outport." (NKX-8, p. 81).

Mr. Madison reviewed the Standard Form 98a which lists the classes and numbers of service employees estimated to be employed for the 1991 solicitation (NKX-12) and briefly described the following duties associated with each job category:

> (1) tractor operators (2): move containers, spots and re-spots containers by use of a "yard hustler."
>
> (2) vehicle processor foreman (1): oversees vehicle processing for POVs.
>
> (3) vehicle processors (3): processes vehicles, removes fuel, repairs flat tires, places labels on windshield, and removes/replaces accessories
>
> (4) terminal forklift and tractor operators (4): use 3-ton up to 40-50 ton forklifts and toploaders for lifting cargo and yard hustlers which require more skill because of the nature of the operation.
>
> (5) sweepers (3): ride mechanical sweepers on and around the warehouse floors, docks, piers performing a housekeeping function.

(6) clerks/timekeepers (2): perform clerical and documentation functions.

(7) terminal workers (7): general laborers; move things around the warehouse; check documentation, manifests and markings.

(8) crane operators (2): brought in if needed, since no cranes are used at the Outport; more skilled than a forklift operator or tractor operator.

(9) longshoremen (10): lash cargo, secure POVs into containers, other labor intensive activity, police the area picking up trash.

(NKX-8, pp. 130, 131, 135, 137, 138-141, 142, 145; NKX-51).

Mr. Madison further testified that in the absence of a CBA, in preparation of a solicitation, he would follow the SCA, Dictionary of Occupations (herein "SCA Directory"). (NKX-8, p. 151). He stated that the title of a job is immaterial to its function. (NKX-8, pp. 155-156). Upon review of the Dictionary of Occupations (NKX-41), Mr. Madison identified tasks commencing at page 63 thereof which reflect the duties performed by the service employees at the Gulf Outport.

The Dictionary of Occupations discloses the following pertinent tasks and duties of job classifications which Neeb-Kearney contends are of a character similar to the contracted services:

(1) Materials handling and packing occupations: prepares and arranges materials and products for distribution or storage; moves and loads or unloads equipment, materials and products; drives forklifts and related material-handling machinery and equipment; and uses scoops, handtrucks and wheelbarrows to load and move materials.

(2) Material handling laborer: performs physical tasks to transport or store materials or merchandise; manually loads or unloads freight cars, trucks or other transporting devices; unpacks, shelves or places items in proper storage locations; or transports goods by handtruck, cart or wheelbarrow.

(3) Power truck operator: operates a manually controlled gasoline or electric powered truck or tractor to transport goods and materials of all kinds about a warehouse, manufacturing plant or other establishment. This classification includes forklift operator.

(4) Shipper and receiver: performs clerical and physical tasks in connection with shipping goods and receiving incoming shipments. May direct and coordinate the activities of other workers engaged in handling goods to be shipped or being received.

Shippers typically are responsible for verifying orders are accurately filled by comparing items and quantities of goods gathered for shipment against documents; insuring shipments are properly packaged, identified with shipping information and loaded into transporting vehicles; preparing and keeping records of goods shipped, e. g., manifests and bills of lading.

Receivers typically are responsible for verifying the correctness of incoming shipments by comparing items and quantities unloaded against bills of lading, invoices, manifests, storage receipts or other records; checking for damaged goods; insuring that goods are properly identified for routing to departments within the establishment; preparing and keeping records of goods received.

(5) Shipper packer: prepares finished products for shipment and storage by placing items in shipping containers, the specific operations performed being dependent upon the type, size and number of units to be packed, the type of container employed and method of shipment. Work requires the placing of items in shipping containers; knowledge of various items of stock in order to verify content; selection of appropriate type and size of container; inserting enclosures in container; using excelsior or other material to prevent breakage or damage; closing and sealing container; and applying labels or entering identifying data on container.

(NKX-41, pp. 63-64).

(6) Warehouseman: performs a variety of warehousing duties which involve verifying materials against receiving documents, noting and reporting discrepancies and obvious damages; routing materials to prescribed storage locations; storing, stacking or palletizing materials; rearranging and taking inventory of stored materials; examining stored materials and reporting deterioration and damage; removing material from storage and preparing it for shipment. May operate hand or power trucks in performing warehousing duties.

(NKX-41, p. 23).

(7) Order filler: fills shipping or transfer orders for finished goods from stored merchandise in accordance with sales slips, customer’s orders or other instructions. May keep records of outgoing orders and perform related duties.

(NKX-30, p. 32).

(8) Guards: protects property from theft or damage or persons from hazards or interference. Duties involve serving at a fixed post, making rounds on foot or by motor vehicle, or escorting persons or property.

(NKX-41, p. 90).

Moreover, the U.S. Department of Labor's response to Interrogatories identified the description of work for material coordinator, tool & parts attendant, laborer and material handling laborer as additional job categories/functions reflected in the contracted services and Dictionary of Occupations. (NKX-21, pp. 5-6).

In addition to the foregoing, the Listing of Job Categories and Descriptions for use with Federal Wage System rate surveys (NKX-49) provides further detailed descriptive duties and skills for the jobs of janitor (light), janitor, material handler, packer, warehouseman, forklift operator and material handling equipment operator.

Mr. Madison testified that "similar services" to the contracted services would be "handling ocean-going containers for stuffing and unstuffing cargo on the waterfront." (NKX-8, p. 164) However, he acknowledged that the loading and unloading process and the equipment used in the contracted services are also likely to be used in a manufacturing process, production facilities and warehousing and supply operations. (NKX-8, pp. 173-174).

Although Mr. Madison declared that the "complexity of cargo handling equipment routinely employed at the waterfront facilities dictates the need for workers with an expanded skill level greater than that which might be required at non-waterfront facilities," there is no record evidence of the use of such equipment at the Outport or the specific skills required or how such skills, if possessed by contracted employees, differ from the skills possessed by non-waterfront employees performing similar duties. (See, ILAX-7, Declaration dated April 29, 1992). Furthermore, there is no evidence of record that contracted employees possessed any greater skills than any other employees performing similar duties at other locations or establishments.

Statutory Framework and the Applied Standard

Normally, the underlying purpose of Section 4(c) is to achieve a degree of "labor stability and economic security" for service employees who frequently confront replacement contracts and contractors. 21 The collectively bargained rate in a predecessor contract is to apply in the ordinary, usual circumstance and "any displacement of that rate is expected as the exception rather than the norm." 22

Moreover, Section 2 of the Act generally requires every Federal government service contract to contain a provision specifying minimum monetary wages to be paid and fringe benefits to be furnished to the various classes of service employees engaged in performing the contract. The wages are "determined by the Secretary....in accordance with prevailing rates for such employees in the locality...." The benefits specified are those determined by the Secretary "to be prevailing...." 23 Additionally, the contract must state, inter alia, the Federal wage board rates which would be paid to the classes of employees under the Prevailing Rate Systems Act 24 and the Secretary must "give due consideration to [these] rates in making the wage and fringe benefit determinations specified in this section." 25 However, in the event that the service employees performing the contract are covered by an arm's-length collective bargaining agreement, "this prevailing rate" procedure does not apply. Rather, the wage determination would specify the negotiated wages and fringe benefits, including any prospective increases, provided by the collective bargaining agreement. 26

Although Section 4(c) imposes an obligatory floor for wages and fringe benefits on successor contracts in the event the predecessor contract has specified collectively-bargained rates, 27 it also contemplates circumstances in which the obligation may be suspended. 28 The provision specifies that the successorship

---

21 In the Matter of the Applicability of Wage Rates Collectively Bargained by United Healthserve, Inc., Case Nos. 89-CBV-1, et al. (Dec. and Remand Order, Feb. 4, 1991).

22 In the Matter of the Applicability of Wage Rates Collectively Bargained by Big Boy Facilities, Inc., 2 Wages-Hours Lab. L. Rep. (CCH) ¶ 31,675, 29 Wage and Hour Cas. (BNA) 356 (1989) [hereinafter Big Boy Facilities].

23 41 U.S.C. § 351(a)(1) and (2).

24 5 U.S.C. §§ 5341-5349 (1988).

25 41 U.S.C. § 351(a)(5).

26 41 U.S.C. § 351(a)(1) and (2).

27 41 U.S.C. § 353(c).

28 The collective-bargaining rate alternatives were incorporated into Section 2(a)(1) and (2) through the Act's 1972 amendment. Section 4(c) was also enacted at that time. The Senate Report explains:

> Section 2(a)(1) and 2(a)(2) of the act have been amended, and a new subsection (c) has been added to section 4 to explicate the degree of recognition to be accorded

obligations do not apply "if the Secretary finds after a hearing....that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." 29 While wages paid and benefits furnished under a successor contract must generally be greater than or equal to those provided under its predecessor, 30 it has further been established that "there are certain unusual circumstances where predetermination of wages and fringe benefits contained in such a collective agreement might not be in the best interest of the worker or the public." 31 [emphasis added].

> collective bargaining agreements covering service employees, in the predetermination of prevailing wages and fringe benefits for future such contracts for services at the same location.....
>
> The committee appreciates the importance of decasualizing the service contract industry -- a labor intensive and otherwise casual transient industry.

See, S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News (USCAN) at 3537.

29 The Senate Report states: "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme. It is the intention of the committee that sections 2(a)(1) and 2(a)(2) and 4(c) be so construed that the proviso in section 4(c) applies equally to the above provisions." Accordingly, in the event that successor rates are found to be substantially at variance with those prevailing in the locality, the wage determination contained in the successor contract would be altered in accordance with those rates prevailing in the locality. If the wage determination "minimum" rate is reduced below the collectively-bargained rate, the contractor certainly could continue to honor his labor agreement by paying the negotiated rate. However, upon resolicitation of the service contract, other contractors could submit bids based on the new minimum rates specified in the wage determination because the obligation to pay at least the predecessor rate would no longer apply. See, S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News (USCAN) at 3537.

30 Specifically, the provision reads as follows:

> No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract....

31 See, S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News (USCAN) at 3537.

The dual objectives of protecting service contract workers and safeguarding other legitimate government interests are best achieved by requiring a predetermination of collectively-bargained wages and fringe benefits, except where it is found, after notice to interested parties and a hearing, a "clear showing" exists of a substantial variance. Big Boy Facilities, slip op. at 3-10, 29 Wage & Hour Cas. (BNA) at 358-360.

The party alleging that a "substantial variance" exists, in this case Neeb-Kearney, carries the burden of proof and must establish by a "clear showing" or "clear and convincing evidence" that such a wage discrepancy exists. 32 The persuasion must be by a substantial margin. 33 In describing the standard with respect to substantial variance hearings, the Deputy Secretary has stated that:

> [A] clear showing requires evidence which directly supports the fact sought to be proved and which clearly outweighs contrary evidence. 34

Therefore, Neeb-Kearney must establish that a substantial variance exists among the wages for services of a character similar with respect to the Solicitations by proving beyond a simple preponderance using evidence of the quality and character superior to mere inference or suggestion. After intemperate scrutiny of all the facts and evidence, I find and conclude that a substantial variance exists. Specifically, in light of the required analysis for establishing the Solicitations as contracts for "material handling" services, I have determined that the negotiated rates are shown to be of substantial variance with the broadly defined wages of "material handlers" within the New Orleans Metropolitan Area. To follow, I will analyze the specific evidence that has been presented by both parties.

IV.

Evaluation of the Evidence: Neeb-Kearney

The cornerstone of Neeb-Kearney's claim rests heavily on the BLS wage survey and federal wage survey rates. The SCA Directory requires the DOL to compare the collectively bargained wage rates with the rates for "services of a character similar" in the locality. According to 29 C.F.R. § 4.51(a), the primary source for this comparison is the BLS survey. However, the DOL's own regulatory policies and rulings require it to match the character of the solicited work with the character of the work described and categorized in the SCA Directory and the BLS survey.

Neeb-Kearney argues that the DOL should select the BLS survey labor category that most closely approximates the solicited work on the basis of job content, not title or other criteria. Throughout the extent of this case, Neeb-Kearney has maintained that this Court should not be engaged in determining what to call the services or what they are functionally equivalent to, or where they are performed (situs argument), but solely what the services are in terms of job duties and skill characteristics so that services of a character similar to them may be chosen for wage comparison purposes. Regardless of how the services are termed, Neeb-Kearney contends that the work performed involves specific tasks, and thus no reference should be made without regard to the character of those actual tasks performed.

Neeb-Kearney's argument is drawn on a comparison of the actual work to be performed, as described in the Solicitation, with the descriptions of various labor categories contained in the SCA Directory. Neeb-Kearney asserts that it is necessary to select the SCA Directory labor categories which most closely resemble the description of the work in the Solicitation. Further, absent an abuse of discretion and regardless of whether the job description's title is different from that given in the statement of the work, 35 if the BLS survey wage rates and federal wage rates for the selected labor categories substantially differ from the rates contained in the collective bargaining agreement, 36 and a majority of workers perform such work for the wages indicated in the BLS Survey and/or federal wage survey rates, then a variance exists and the collectively bargained rate will not be the prevailing rate.

In the classification of the solicited services, I find Neeb-Kearney's argument based on the notion that terminology does not govern solution to be logical, reasonable and acceptable. To establish whether there is a substantial variance, actual performance and job content must be analyzed and considered. Only a consistent pattern of additional duties can justify a substantial pay differential because actual job performance and content, as opposed to job descriptions, titles, or classifications, are the determining factors. The salient issue resolved in this Decision and Order is whether work of a character similar is being performed in the New Orleans Metropolitan locale by sufficient numbers of employees at lower wages to necessitate a lower prevailing wage.

Although the ILA's position may subvert the principal purpose of the Act, Neeb-Kearney has produced clear and convincing evidence in opposition. The wages paid to ILA-affiliated workers are substantially in excess of the wages paid to all other workers who perform work whose content is of a freight handling/material movements character similar to that called for in the Solicitation.

Evaluation of the Evidence: ILA

---

32 Big Boy Facilities, supra., ¶ 31,675, at 43,999-550--43,999-552.
33 Id.
34 Id. at 43,999-551--43,999-552.
35 48 C.F.R. 22.1008-2(b)(2).
36 See, In Re Applicability of Bargained Wages (ITT Firemen), 22 Wage and Hour Cas. 768 (BNA 1975) (Variances as low as 7% have been deemed substantial).

The ILA asserts that the BLS considers longshore work to be distinct from "material handler laborer work," specifically excluding it from that classification, and not including it in the Area Wage Survey. The ILA argues that given BLS's and the Department of Commerce's 37 specific intent to classify and treat longshoremen differently from general material handlers, it must be concluded that the Area Wage Survey has no application to the issues before me. It is an accepted fact or certainty that the BLS considers longshore work to be distinct from material handling. Moreover, it is undisputed that longshore work is different from material handling. However, I note that the ILA has too narrowly classified the solicited services under both DAHC24-91-R-0003 and DAHC21-94-R-0004 as marine cargo handling work, i.e., the "functional equivalent" of longshore work.

Despite the contention by the ILA that loading and unloading of containers at off-pier sites is the "functional equivalent" of traditional work of longshoremen, the record has established that the services solicited by the ILA are of a character similar to that being done in the New Orleans locality by sufficient numbers of employees at lower wages to necessitate a lower prevailing wage.

V.

Analysis

It first must be determined whether the MTMC Solicitation demands services that are or can be classified as longshore work or material handling. Furthermore, the fact that predecessor MTMC contracts have been classified as requiring "stevedoring" services will not preclude a determination in favor of Neeb-Kearney.

I find and conclude that the Solicitation does not call for services that can only be performed by longshoremen. Although the ILA argues that the contracted work is the traditional work of the ILA, the record evidence belies such an assertion.

It is patently clear from the foregoing factual summary of the job duties that the contracted service duties are in the nature of material handling activities. It is further clear that the services performed by the contracted employees, although initially termed stevedoring, do not conform to the loading, unloading or stowing of cargo in a ship's hold which is commonly considered stevedoring. NLRB v. ILA, supra., 100 S.Ct. at 2314. The loading or unloading of a vessel is not included as a contracted service.

The instant case does not present issues of work preservation or the resolution of a jurisdictional dispute. Thus, the ILA's argument that the service contract work should be recognized as its traditional work or that the contracted service work is functionally equivalent to ILA work is misplaced. The Service Contract Act focuses on whether work of a character similar is being performed in the locality by a sufficient number of employees at lower wages. The sole focus is on actual duties and skills. The mode of cargo movement, whether it be "waterborne," air, rail or truck is not determinative. Moreover, the fact that the Outport has access to water, but no longer berths ships, or that "stevedores" are workers who are so named because they handle waterborne cargo are insignificant distinctions and do not dictate a contrary result when analyzing contractual and comparative duties and skills.

In the absence of any record evidence of a distinction in the skills required to perform the contracted services and the skills of any other employees who perform similar duties in the locale, I find that the inherent duties and skills of material movements/handling employees are substantially similar to the contracted services. The duties of the contracted service employees, as detailed by MTMC representatives and ILA officials, is not esoteric to stevedores performing "off-pier" container services: truckers, longshoremen, warehousemen, receivers and others perform this type of work. (ALJX-24 (c), p. 3). See, also, NLRB v. ILA, supra. The work described in the SCA Directory and the BLS Survey categories is of a character similar to that in the MTMC contract. Therefore, I further conclude that the services called for by the Solicitations are to be classified broadly as "material movements/handling," and not narrowly as "stevedoring services." For reasons set out below, it is recommended that the successorship obligations required by section 4(c) of the Act, 38 therefore, be suspended.

Next, the issue of situs as dealt with by ILA's original post-hearing memorandum must be considered. The current solicitation does not call for performance, nor is it performed, at a waterfront location. It is being performed at a contractor-supplied warehouse facility within fifteen miles of the Gulf Outport Facility. The fact that these services are capable of being performed at a different location, specifically one with no water access or berthing facilities, is evidence that the nature of the work -- the job content and duties of the workers -- is of a character that is similar to the loading/unloading of cargo or any other materials in the process of movement, transit, or storage at any other warehouse facility in the New Orleans metropolitan area.

Generally, the requirement to qualify for longshore status involves a two prong test -- one based on "status" and "situs." A strict interpretation of the definition of "employer" established by the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act mandates a conclusion that the services currently performed by Ceres Gulf do not satisfy either requirement, and the services at issue under Case No. 93-CBV-1 do not satisfy the "status" requirement. Under § 902(4) of Longshore and Harbor Workers' Compensation Act (LHWCA), status is acquired if there exists an employer "whose employees are employed in maritime employment . . . upon navigable waters of the United States (including an adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." [emphasis added]. Therefore, analogyzing to the definition established by LWHCA, because the services called for by the solicitations at issue do not require the employment of maritime workers, I cannot conclude that the services at issue before me require the work of longshoremen.

Again, it bears relevance to reiterate the fact that Neeb-Kearney makes reference to this "situs" issue

---

37 The Departments of Commerce and Labor treat the occupations as separate and distinct.
38 See text, supra., note 33.

in their brief to strengthen their argument that a wage determination should not be restricted to a "stevedore" classification merely because the services occur near the waterfront. As noted above, Ceres Gulf is currently performing the same type of work as that originally solicited by MTMC under DAHC24-91-R-0003. By agreement of all parties, consolidation was ordered and granted and in so doing, the ILA has in effect abandoned their argument based on waterfront "situs." Thus, the issue regarding the locality of services is calculated upon a broader operation of work and is not limited by the "waterborne" nature of the cargo. The determination of wages regarding Case No. 93-CBV-1 and Case No. 95-CBV-1 has been compared to services of a similar character in the locality [In this case, that locality is all of Metropolitan New Orleans, not just the waterfront].

Material Handler Wages: A Substantial Variance

Having determined that the services, for the purposes of the contract work at issue, may be classified as "material handling," an analysis of whether a substantial wage and benefits variance exists must be conducted. A key factor in finding a substantial variance involves the appropriate use and consideration of Federal wage rates. In the Matter of Applicability of Wage Rates Collectively Bargained by United Healthserv, Inc., supra. (slip opinion, pp. 15-16) provides guidance as follows:

> I am persuaded that Federal wage rates constitute evidence of prevailing rates and that they warrant consideration in the Section 4(c) context.
>
> *****
>
> [T]he Federal wage board rates and surveys represent an important measure in gauging whether a given variance is "substantial," as do the BLS surveys and other relevant wage data, including evidence of other collectively bargained wages and fringe benefits.
>
> *****
>
> Reference to Federal wage board information appears appropriate in gauging deviation. The Federal wage board information appears appropriate in gauging deviation. The Federal wage board rates and surveys provide a measure of rates which prevail among private industry employees surveyed and among the Federal employees who are not displaced by service contracts and who are compensated according to these rate schedules. These rates are significant in establishing a frame of reference against which to assess whether a variance exists and, if so, whether it is substantial. 39 (italics added).

The Act does not define the term substantial variance, specifying only that the Secretary must find, after a hearing in accordance with his regulations, "that such [negotiated] wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." 40 The plain meaning of these terms is that a considerable disparity must exist before the successorship obligation may be avoided.

Means of Analysis

The impetus under the Section 4(c) proviso is disparity between the negotiated rates and rates prevailing in the locality for similar services. In Re United Healthserve, Inc., supra., (slip op. p. 15). The following chart represents the number of employees in the local area performing duties similar to the estimated 37 contract service employees contained on the Standard Form 98a (See NKX-12), which numbers clearly exceed the 50% or majority of workers in a class of service employees engaged in similar work in the locale. Where a majority of employees perform work which is similar in duties and skills, a determination must be made, as exists in the instant case, that the initial predicate for determining which rate is prevailing has been demonstrated. The following chart also reflects, by classifications which have been found to be of a character similar, the collectively-bargained rates, the Federal wage rates for comparable blue collar workers and the area wage rates in effect during the relevant contractual period from 1991-92:

Worker Category	No. of Non-ILA Affiliated Workers	Area Hourly Wage Mean	Area Hourly Wage Median 41	Federal Wage Rate	ILA Hourly Wage42
Janitors	2941 43	$5.14	$4.40		$20.27
	896 44	$6.08	$5.82		

39 Id., (slip opinion, pp. 19, 22).

40 Id.

41 For purposes of determining the "prevailing wage rate" in a locality, the use of the "median" wage is the general rule pursuant to 29 C.F.R. § 4.51(b).

42 The negotiated wage rates set forth are derived from the wage schedules attached to each Local ILA CBA using straight time/normal cargo rate for work at container facilities, effective 10/1/92. (NKX-54, 56, 58, 60 and 62).

43 BLS Survey, July 1992 (NKX-20, p. 7, hourly earnings for custodial occupations for all establishments in the New Orleans Metropolitan Area).

44 BLS Survey, July 1992 (NKX-20, p. 14, hourly earnings for custodial occupations in State and Local government positions).

	92 45			$6.88 46		
Order Fillers	298 47	$7.15	$5.56		$19.27 48	
Shipping/ Receiving Clerks	166 49	$7.16	$6.18		$16.00 50	
Packers	38 51			$8.51		

Worker Category	No. of Non-ILA Affiliated Workers	Area Hourly Wage Mean	Area Hourly Wage Median	Federal Wage Rate	ILA Hourly Wage
Forklift Operators	431 52	$9.05	$9.22		$20.00 53
				$9.28 54	
Materials Handling Laborer	151 55	$7.97	$8.10	$6.88 56	$15.65 57
Warehouse Specialists	468 58	$10.24	$9.35	$9.28	
		$6.89	$6.71 59	$9.28 60	

In addition to the foregoing, the federal wage system survey of November 1992 reveals comparable numbers of employees by classification and wage rate. See NKX-44.

The existence of a wage variance is further shown by comparing the ILA-affiliated workers' hourly wage rate exhibited above with the following wage rates derived from the referenced sources, other than the BLS survey, each of which pertains to the New Orleans Metropolitan area:

---

45 The number of Janitors (light) and Janitors, Wage Grades 1 and 2, respectively, are derived from NKX-49 and 47, p. 1.

46 Department of Defense Wage Fixing Authority, Wage Rate Schedule effective August 1, 1992. (NKX-45, p. 2).

47 BLS Survey, NKX-20, p. 7.

48 There were 137 active members of Local 1497, New Orleans Clerks' and Checkers' Union, ILA during the contract period from October l, 1991 through September 30, 1992. (NKX-53, p. 3). The hourly wage rate is set forth in NKX-56.

49 BLS Survey, NKX-20, p. 7.

50 There were 22 active members of Local 1655 of the ILA in 1992 whose hourly wage rate is set forth in NKX-58. (See, NKX-57, p. 3).

51 See NKX-47, p.1 and NKX-49 for Packer, Wage Grade 4.

52 See NKX-20, p. 7.

53 There were 571 active members of Local 3000, General Longshore Workers, ILA (See, NKX-59, p. 3) whose hourly wage rate is set forth in NKX-60.

54 The hourly wage rate of forklift operators employed as blue collars workers for the Federal government; however the number of such Grade 5 employees are not readily discernible from among the 105 total combined Department of Defense (DOD) and non-DOD Grade 5 employees. (See, NKX-49, NKX 47, p.1 and NKX-45, p. 2).

55 See NKX-20, p. 7.

56 Additional blue collar federal workers should be added to the total number of non-ILA material handlers, however the number of such Grade 2 employees is not decipherable from the total of 85 Grade 2 employees. (See NKX-49, NKX-47, p.1 and NKX-45).

57 The total number of members reported through Interrogatory by and for Local 854, ILA was "approximately 150 men estimated." (NKX-61, p. 2). The wage rate is derived from NKX62, p. 31, effective October 1, 1991.

58 BLS, NKX-20, p. 7.

59 The mean and median wage rates for the 163 State and local warehouse specialists employed in the New Orleans Metropolitan area.

60 The hourly wage rate for federal blue collar workers employed as warehousemen, Grade 5. The total number of warehousemen from among the 105 Grade 5 employees is not available. (See NKX-49, NKX-47, p. 1 and NKX-45).

1991 Wage Determinations (Material Handling and Packing Occupations) 61

- material coordinator $10.15
- order filler $ 9.70
- warehouseman $10.15
- laborer $ 8.31
- material handling laborer $10.16
- power truck operator $10.15
- forklift operator $10.15
- shipper/receiver $ 9.70
- shipping packer $ 9.70

1990 Department of Defense Wage Fixing Authority Schedule 62

- material handler (WG-02) $6.49
- packer (WG-04) $7.95
- warehouseman (WG-05) $8.56
- forklift operator (WG-05) $8.56
- Material handling equipment operator (WG-05) $8.56
- janitor (WG-02) $6.49

New Orleans Work Sheet, Blue Collar Workers, BLS Survey 10-90 and 7-91 63

- receivers (WG-05) $7.02
- warehousemen (WG-05) $11.45
- forklift operator (WG-05) $8.87
- shipper/receivers $6.92

Teamster-Affiliated Workers Employed by The Great Atlantic & Pacific Tea Company, Inc.64 and National Tea Co.65

	6/16/91	6/14/92
• receiver/shipper clerk	$9.81	$10.16
• checkers	$9.81	$10.16
• forklift operators	$9.81	$10.16
• general warehouse laborer	$9.66	$10.01
• order filler	$9.71	$10.06

Teamster-Affiliated Workers Employed by the Coastal Cargo Company, Inc. 66

- checker $11.35 67
- crane operators $11.35
- lift drivers $11.35
- laborer $11.35

I am convinced, based on the foregoing, that (1) there were more non-ILA-affiliated material movements

---

61 See NKX-22 through 29, Wage Determination and revisions for 91-0111 dated March 25, 1991, September 19, 1991, April 27, 1992 and August 7, 1992 for the Parishes encompassing the New Orleans Metropolitan area.
62 See NKX-33, effective July, 1990, consisting of wage rate ranges which correspond to wage grades 1 through 5 for indicated classifications set forth in NKX-49.
63 See NKX-36.
64 See NKX-65, effective June 16, 1991.
65 See NKX-66, effective June 16, 1991.
66 See NKX-67, CBA from October 1, 1990 through September 30, 1995.
67 NKX-67, p. 23, wage rates effective October 1, 1992.

employees working in the New Orleans Metropolitan area during the 1991-92 relevant period than ILA-affiliated workers; and (2) there was a substantial wage variance between the wages paid to non-ILA-affiliated workers who performed materials movement work and ILA-affiliated workers employed under the Gulf Outport services contract.

Moreover, it is noted, as urged by the ILA, that the number of materials movement workers in the New Orleans Metropolitan area are diminished from the actual number because BLS purposely excluded wage data from longshoremen and companies that perform services "incidental to water transportation." 68 Thus, stevedoring companies as well as container freight stations, which employ workers who perform materials movement functions, were excluded. The record does not support a conclusion that such an exclusion lends weight to either competing argument advanced by the parties that an even greater number of material movement employees exist than ILA-affiliated workers because of lack of specificity or that the materials movement work should not be compared to stevedoring/longshoring because of the excluded classifications.

The facts with respect to Case No. 95-CBV-1 are virtually identical with those which pertain to Case No. 93-CBV-1 69
except that the relevant time period for the subsequent contract is 1993-94 and therefore involves a slightly different wage for comparison purposes. It also involves a comparison of fringe benefit rates, an issue which was pretermitted in Case No. 93-CBV-1. Information on the number of workers in the relevant categories has been presented in the original exhibits in this proceeding and has not changed materially except to show that, in each category, there are more non-ILA-affiliated workers in the latter time period than in the former to be compared to ILA-affiliated workers. 70 Thus, using the 1993 New Orleans Metropolitan Area Survey (NKX-S5) and the ILA contract data for 1993 yields the following wage comparisons:

Worker Category	Non-ILA Hourly Wage Mean	Non-ILA Hourly Wage Median	ILA Affiliated Hrly Wage 71
Janitors	$5.20	$4.65	$21.27
Blue Collar Clerical	$8.19	$8.13	$18.82
Freight Handling/ Warehouse (Forklift Operators, Material Handling Laborers, Warehouse Specialists)	$7.29	$7.00	$19.33

The existence of a wage variance is further shown by comparing the ILA-affiliated workers' hourly wage rate referenced in the table above with the following wage rates drawn from the indicated sources, other than the BLS Survey, each of which pertains to the New Orleans metropolitan area:

1993 Wage Determinations (Materials Handling and Package Occupations) 72

- material coordinator $10.43
- order filler $ 9.97
- warehouseman $10.43

68 See ILAX-8, p. 1, Affidavit of Hoffman, BLS Labor Economist.
69 See Supplemental Joint Stipulation No. 3 (JX-2) as set forth above.

70 Thus, for example, a simple comparison between the total number of workers in the July 1992 BLS Survey [NKX-20], with the May 1993 BLS Survey, NKX-S5, shows the following:

	1992	1993
Janitors	2941	4705
Shipping/Rec. Clerks	166	356
Fork Lift Operators	431	552
Material Handling Lab.	151	171
Warehouse Specialists	468	701

71 The wage data used in this chart is compiled from the wage schedule attached to each ILA Local's collective bargaining agreement using the straight time/normal cargo rate in connection with work at container facilities, effective 10/1/93. See, NKX-54, 56, 58, 60 and 62.
72 See, NKX-S11 and NKX-S13.

- laborer $ 8.54
- material handling laborer $10.44
- power truck operator (other than forklift) $10.43
- forklift operator $10.43
- shipper and receiver $ 9.97
- shipping packer $ 9.97

1994 Wage Determinations (Materials Handling and Packing Occupations) 73

- material coordinator $11.84
- material handling laborer $10.44
- forklift operator $ 9.97-10.43
- shipping/receiving clerk $ 9.97
- shipping packer $ 9.27-9.97
- warehouse specialist $10.43
- janitor $ 5.20

Standard Form 98 to 1994 Contract Solicitation 74

- materials handler leader (WL-05) $11.09
- materials handler (WG-05) $ 9.69
- packer (WG-06) $10.53
- packer (WG-04) $ 8.86
- laborer (WG-03) $ 8.02
- custodial worker (WG-02) $ 7.18

1994 Department of Defense Wage Fixing Authority Schedule 75

- materials handling leader (WL-05) $10.27-11.99
- materials handler (WG-05) $ 9.34-10.90
- packer (WG-04) $ 8.55-9.96
- packer (WG-06) $10.15-11.84
- laborer (WG-03) $ 7.74-9.02
- custodial worker (WG-02) $ 6.93-8.08

Teamster-Affiliated Workers Employed By Neeb-Kearney Who Would Perform the Solicited Services 76

- shipping and receiving clerk $ 8.50
- warehouse specialist $ 7.56
- material handling laborer $ 7.56
- power truck/forklift operator $ 7.85

After consolidation of these matters, the Office of the Solicitor, DOL advanced the Administrator's position that fringe benefit data based on nationwide surveys do not provide evidence of a substantial variance within the meaning of the SCA. It is argued that fringe benefit rates contained in DOL area prevailing wage determinations are based on such nationwide surveys conducted by BLS and thus are not considered sufficient to demonstrate a substantial variance within a particular locality, such as the New Orleans Metropolitan area.

---

73 See NKX-S12, NKX-S14, and NKX-S15 through NKX-S21.
74 See, NKX-S7.
75 See, NKX-S3; a range of rates is indicated which corresponds to the step grades 1-5.
76 Neeb-Kearney/Teamster collective bargaining agreement, 1991-95, rate schedule [NKX-63].

It is further asserted that Neeb-Kearney must establish a substantial variance based on locality-based information.

In response, Neeb-Kearney contends that BLS does not survey fringe benefit rates on a locality basis because such rates do not vary significantly from locality to locality. It is further argued that significant data exists in the record, computed by BLS and other sources, of both regional and national fringe benefit rates by industry and type of work which, by definition, includes the New Orleans Metropolitan area service workers and material handling workers' fringe benefit rate ranges. (See, NKX-S4, NKX-S6 and NKX-S8-10).

Neeb-Kearney also argues that it is of no consequence if the New Orleans Metropolitan area fringe benefit rates are at the high, middle or low end of the various regional or national fringe benefit rate ranges since all of such rates are substantially lower than the fringe benefit rates paid to ILA-affiliated workers in the New Orleans Metropolitan locale. In comparison, NKX-S22 reflects the fringe benefit rates for the Teamsters-affiliated workers in the New Orleans area which workers represent a substantial number of material handlers. Such rates are also corrobative of regional and industry-based fringe benefit rates disclosed in the record for the New Orleans Metropolitan area. (See, NKX-S11 through NKX-S21, DOL New Orleans Metropolitan Area Wage Determinations, to include fringe benefit rates, for federal contract employees by specific industry).

It is illogical for DOL to argue that fringe benefit rate ranges established for federal contract jobs and mandated for use and actually used on federal jobs in the New Orleans Metropolitan area cannot be the basis for comparison with fringe benefit rates reflected in ILA contracts for workers in the same metropolitan locale. As Neeb-Kearney points out, DOL has not advanced any regulatory or precedential authority for its proposition. Accordingly, I reject DOL's argument that DOL-gathered and established fringe benefit data cannot be used for comparison purposes in determining if a substantial wage and fringe benefit variance exists in the New Orleans Metropolitan area.

With respect to fringe benefits, 77 a similar large disparity exists. Fringe benefit rates for the relevant time period paid to ILA-affiliated workers range 78 from $6.615 to $8.415 per hour. 79 The following fringe benefit ranges are used for appropriate comparison:

Paid by Neeb-Kearney to its Teamster-affiliated
employees: 80 $1.808 to 1.842

March 1993 BLS Employment Cost Index 81
-all private industry: $1.190 to 3.200
-all smaller employers $.890 to 2.350
-all larger employers $1.860 to 5.130

March 1993 BLS Employment Cost Index 82
-all service workers: $1.010 to 2.750

March 1993 BLS Employment Cost Index 83
-all service occup/civ. $.690 to 1.790

March 1993 BLS Employment Cost Index 84
-south region $.990 to 2.690

March 1993 BLS Employment Cost Index 85
-all transportation and material moving service
occupations $1.140 to 2.930

American Warehouse Association Survey 86

---

77 As used herein, fringe benefits refer to cost components for health, welfare, pension, vacation and paid holidays, expressed as a total amount on an hourly basis. Legally required benefits such as Social Security, federal and state unemployment insurance, and workers' compensation are not included.

78 The reason for a "range" in this and other fringe benefit rates used throughout has to do with the higher cost of paid vacation and holiday benefits allocated to workers with higher hourly wage rates, since these benefit costs are a direct function of the amount of the hourly rate.

79 Wage Determination 73-71 (Rev. 14), (NKX-S2).

80 Affidavit of David Mannella, (NKX-S22).

81 See, Table 18, (NKX-S4(c)).

82 See, Table 16, (NKX-S4(b)).

83 See, Table 15, (NKX-S4(a)).

84 See, Table 19, (NKX-S4(d)).

85 See, Table 22, (NKX-S4(e)).

86 1993 Cash Compensation Survey Report, (NKX-S6).

-south regional, avg. $1.410

American Warehouse Association Survey
-all transportation and material moving service occupations, average $2.540

All 1993 Service Contract Act Wage Determinations 87
$.890 to 2.390

All 1994 Service Contract Act Wage Determinations 88
$.900 to 2.560

All 1994 Wage Determinations - New Orleans Metro Area 89
$.890 to 1.880 90

All 1994 Wage Determinations - New Orleans Metro Area 91
$.890 to 2.560

Based on the foregoing, it is axiomatic that Neeb-Kearney has met its burden of proof. In addition to the existence of a substantial wage variance shown for the original time period of 1991-92 in Case No. 93-CBV-1, a substantial variance in both wages and fringe benefits has thoroughly been demonstrated for the New Orleans Metropolitan area for the relevant period of 1993-94, regarding Case No. 95-CBV-1.

The services called for by the MTMC contract demand three broad categories of workers: (1) those who perform the clerical work incidental to the movement and storage of the materials or goods from or to a container, truck or rail car or around the terminal; (2) those who physically move the materials and/or goods; and (3) those who stuff and unstuff containers. These categories may be arbitrarily broken down further. For instance, a distinct set of workers may be assigned to perform the clerical work involved in warehousing, and by the essential **character** of their services are clerical workers incidental to the movement of materials and/or goods. In the same way, some workers may unload rail cars and others may load trucks, but the **character** of their services is that they move materials and/or goods from place to place around the terminal and among the truck and rail cars at the terminal. The only distinguishing feature among workers who move materials and/or goods is that some may operate equipment and some may not.

The BLS Area Wage Survey (1993) for the New Orleans Metropolitan Area contains wage categories and rates that encompass all the types of work called for by the Solicitation. 92 These rates are substantially lower

---

87 See, August 18, 1993 DOL/ESA Memorandum No. 172, (NKX-S8).
88 See, August 8, 1994 DOL/ESA Memorandum No. 178, (NKX-S10).
89 New Orleans Metropolitan Area 1993 Wage Determinations, (NKX-S11 and NKX-S13).
90 The wage determinations list .89/hour for health and welfare benefits based on a forty hour week. Two weeks paid vacation and ten paid holidays are also included; the value of these amounts will fluctuate as a function of the base hourly rate of the occupation under review. The extent of the range is for the highest paid category, material coordinator, at $11.84/hour for which vacation and holiday fringe benefit component is .99/hour (11.84 x 160, divided by 1920). Thus, the indicated upper range for fringe benefits for materials movement workers is $1.88/hour.
91 New Orleans Metropolitan Area 1994 Wage Determinations, (NKX-S12, NKX-S14, and NKX-S15 through NKX-S21).
92 Where services are to be performed at a particular government installation, the cases generally hold that the Standard Statistical Area is the pertinent locality. See Southern Packaging and Storage Company, Inc., 458 F. Supp. 726 (D.S.C. 1978), aff'd. 618 F.2d 1088 (4th Cir. 1980) (98% of requested wage determinations apply Standard Metropolitan Area as locality); Big Boy Facilities, supra.; and In Re: Reynolds Electrical Engineering Company, 2 LAB. L. Rep., Wage and Hour Cases at ¶ 31, 571 (CCH 1988). Directly analogous and also indicating that the Metropolitan Area is the pertinent locality is In Re: Applicability of Bargained Rates, (IBEW, Local 2088), 22 WH 831 (BNA 1974). Here, as in IBEW, the labor at the Gulf Outport renders services performed throughout the Metropolitan Area, reside in the

than those provided in Wage Determination 73-71 (Rev. 10) and are presumed reliable. 93 It is my determination that the job categories called for by both Solicitations in issue and those provided for in the surveys define essentially the same type of services and are sufficiently similar to be compared for purposes of establishing a substantial variance in wages and fringe benefits.

I find that the work performed at the MTMC Gulf Outport facility is relatively unskilled labor involving similar work functions to that of a material handling worker. Both the guidelines for the BLS survey and the Act, requiring that services be merely of "similar" character, contemplate differences in the jobs to be compared. I find that a solid core of comparable or identical duties exists in each of the job classifications introduced by both parties. Wage rates must be compared with those in the locality for work of a similar character. That work, I find, is comparable to a material handler.

For the foregoing reasons, I have made a determination that there exists a substantial variance between the collectively bargained wages and fringe benefits 94 and those which prevail for services of a similar character in the locality. Therefore, the obligation to pay the collectively bargained wages shall not apply to future resolicitations of the service contract work and is not to be applied retroactively. Ceres Gulf, the current contractor, certainly can continue to honor its CBA by paying the negotiated rate. 95

ORDER

Pursuant to Section 4(c) of the Act, I find that there exists a substantial wage variance in relation to the job categories set forth in Solicitation Number DAHC24-91-R-0003 and a substantial wage and fringe benefit variance in relation to the job categories set forth in Solicitation Number DAHC21-94-R-0004.

It is recommended that a prospective, new Wage Determination be issued reflecting the wages and fringe benefits which prevail in the New Orleans Metropolitan locality for the job classifications set forth in Standard Form 98a for Solicitation Number DAHC21-94-R-0004.

LEE J. ROMERO, JR
Administrative Law Judge

Metropolitan Area, and are part of the Metropolitan Geographical Area. There is absolutely no reason to restrict the locality to the Port of New Orleans.

93 29 C.F.R. 4.51(a); In the Matter of Meldick Services, Inc., 2 LAB. L. REP. WAGE AND HOUR CASES, ¶ 31,514 (CCH 1088).

94 Under Case No. 93-CBV-1, the existence of a variance in fringe benefits has been pretermitted.

95 See, S. Rep. No. 1131, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News (USCAN) at 3537.