



In the Matter of:

**AETNA BRIDGE HOLDING  
COMPANY, General Contractor**

**ARB CASE NO. 96-122**

**(Formerly WAB Case No. 96-06)**

**and**

**DATE: October 29, 1996**

**COLETTA'S DOWNTOWN AUTO  
SERVICES INC.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

This matter is before the Administrative Review Board pursuant to the prevailing wage labor standards provisions of the Federal-Aid Highway Act (FHWA), 23 U.S.C. § 113 (Supp. V. 1993) and the regulations of the United States Department of Labor at 29 C.F.R. Parts 5, 6, and 7 (1996). Petitioner Aetna Bridge Holding Company (Aetna) seeks review of the Decision and Order (D. and O.) issued by the Administrative Law Judge (ALJ) issued on January 22, 1996. The ALJ held that tow truck drivers, employed by Coletta's Downtown Auto Services, Inc. (Coletta's), under the requirements of a bridge reconstruction project funded by the FHWA were laborers or mechanics within the meaning of the Davis-Bacon Act (DBA), as amended, 40 U.S.C. § 276a *et seq.*<sup>2/</sup> and that those employees were therefore entitled to receive prevailing wages as predetermined for construction work under the bridge

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<sup>1/</sup> On April 17, 1996, a Secretary's Order was signed, re delegating jurisdiction to issue final agency decisions under the Davis-Bacon Act, as amended, 40 U.S.C. § 276a *et seq.* (and its related Acts; *see* 29 C.F.R. § 5.1 (1995)) and the implementing regulations (29 C.F.R. Parts 1, 3, 5, 6, and 7) to the newly created Administrative Review Board. Secretary's Order 2-96 (Apr. 17, 1996), Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization, were also published on that date.

<sup>2/</sup> The FHWA is one of the so-called "Davis-Bacon Related Acts," requiring payment of prevailing wages on construction projects financed or assisted by federal funds. *See* 29 C.F.R. § 5.1.

rehabilitation contract. For the following reasons, Aetna's petition for review is granted and the ALJ's D. and O. is reversed.

The DBA requires contractors on covered contracts for construction, alteration or repair of public buildings or public works to pay laborers and mechanics the wages determined by the Secretary of Labor to be prevailing in the area. We hold, for the reasons discussed below, that tow truck drivers who assist motorists and tow disabled vehicles from travel lanes on a bridge undergoing repair are not "laborers" or "mechanics" performing "construction" within the meaning of the DBA and its Related Acts, such as the FHWA.

The State of Rhode Island entered into a contract with Aetna for repair of a bridge on Interstate 95 (the I-95 bridge) in Providence. Among other things, the contract required Aetna to provide two tow trucks for "towing service to maintain the flow of traffic in the construction zone" 24 hours a day, seven days a week during the period "when existing traffic patterns are altered" by the I-95 bridge repair work. Joint Exhibit (J) 2 at page S-285. The function of the tow trucks was to keep the traffic lanes clear. T. (Transcript of hearing) 194. Aetna orally contracted with Coletta's to provide this towing service. D. & O at 3. The tow trucks were stationed off the road about six-tenths of a mile from the north and south ends of the I-95 bridge. Aetna's Exhibit 2; T. 205-206. Although the applicable wage determination contains no wage for tow truck drivers, the Wage Hour Administrator takes the position that the tow truck drivers should have been paid the wages provided in the wage determination for two-axle heavy or highway construction vehicles. J2. The ALJ found that the tow truck drivers performed work on the site of the construction, as required for coverage under the DBA and its Related Acts, because they were "located in actual or virtual adjacency to the construction site." D. & O. at 7. He also found that tow truck drivers are mechanics and laborers covered by the FHWA because the drivers are analogous to employees of traffic service companies who set up and service traffic control devices such as barricades, lights and signs, a category of workers "specifically covered by the DBA" in the Department of Labor, Wage and Hour Division Field Operations Handbook (FOH). *Id.* at 8. The ALJ found that 18 tow truck drivers were due back pay of \$101,659.13 for various periods of work between May and September 1993. *Id.* at 10.

Under the facts of this case, we do not agree with the Administrator or the ALJ that tow truck drivers are mechanics and laborers covered by the DBA or its Related Act at issue here, the FHWA.<sup>3/</sup> There is no dispute that the tow truck drivers did not perform any physical or manual work on the construction project itself or that they were not part of the "construction crew." *See* FOH Sections 15e09(a) and 15e10. The tow truck services in this case were provided as a convenience to the motoring public. The towing services relieved the

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<sup>3/</sup> The FHWA requires payment of DBA prevailing wages to "all laborers and mechanics employed by contractors or subcontractors *on the construction work* performed on highway projects on the Federal-aid highways authorized under the highway laws providing for the expenditure of federal funds upon the Federal-aid systems." 23 U.S.C. § 113(a) (1991)(emphasis supplied).

State of the responsibility for maintaining clear passage, a service that would otherwise have been provided by or under the direction of the State Police. The tow truck operators performed no work that facilitated the prosecution or completion of the I-95 bridge construction work. Under these facts, we find that the work performed by the tow truck operators was too removed and weakly connected with actual construction work for the operators to be considered “laborers” or “mechanics” under the DBA and its Related Acts.

The predecessor of the Administrative Review Board -- the Wage Appeals Board (WAB); *see* 29 C.F.R. Part 7 (1995) -- addressed a similar issue in *Aleutian Constructors and Universal Services, Inc.*, WAB Case No. 90-11, Sep’t. 27, 1991. A contractor engaged in defense-related construction on one of the Aleutian islands set up a work camp to house and feed its workers and the Administrator asserted that culinary (camp cooks) and camp maintenance workers (janitors, housekeepers and domestic helpers) should have been paid prevailing wages. In that case, the WAB held that the DBA was intended to protect construction workers as that term is ordinarily understood, that is, those engaged in the “work of a trade” in construction. In addition, the WAB found several provisions of the regulations show that coverage depends on “some direct relationship between the work in question and the construction project.” For example, “building” or “work” are defined as “construction activity as distinguished from manufacturing, furnishing of materials or servicing or maintenance work.” 29 C.F.R. § 5.2(i). The WAB held that “the physical or manual labor under consideration must have a direct relationship to the prosecution, completion or repair of the public work . . . with which it is associated.” Food service workers and janitors and maids were too indirectly related to the construction projects to be covered.<sup>4/</sup>

Tow truck drivers who remove disabled vehicles from the travel lanes of a bridge under repair have less relationship to the construction work than the food service workers and camp maintenance workers in *Aleutian Constructors*, who provided a support service to the construction workers themselves. If a car broke down in one of the two open lanes on the I-95 bridge, a serious traffic back up would have undoubtedly occurred. But unless the traffic jam incidentally interfered with delivery of construction supplies or the movement of construction equipment to and from the construction site, that traffic had no impact on prosecution or completion of the construction work.<sup>5/</sup> Thus, on these facts, the tow truck drivers’ work was

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<sup>4/</sup> We find a case cited by the Administrator, *In the Matter of Dworshak Dam, Idaho*, WAB Case No. 72-04, June 1, 1973, easily distinguishable. The employees in question there were warehouse workers employed by heavy equipment firms, which leased warehouse space on the construction site. They worked as warehouse clerks in the same warehouse as admittedly covered employees of the construction contractor and performed the same duties of accepting deliveries, unloading and placing parts in bins, keeping records and delivering parts to the contractor’s workshops. The duties of these employees were directly related to completion of the project, *i.e.* maintenance and repair of essential construction equipment.

<sup>5/</sup> The construction workers and the unfortunate commuters could not even see one another; the  
(continued...)

“too indirect” in its relationship to the actual construction to be covered by the DBA and the Related Act under consideration here.

For the foregoing reasons, the petition for review filed by Aetna Bridge Holding Company in this matter is **GRANTED** and the ALJ’s Decision and Order is **Reversed**.

**SO ORDERED.**

**DAVID A. O’BRIEN**  
Chair

**KARL J. STANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member

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<sup>2/</sup>(...continued)

traffic lanes were separated from the construction area by three foot high concrete barriers topped by a two and one half foot high shield “to avoid rubbernecking.” T. 193.