



In the Matter of:

**STEPHEN W. YATES, Individually
and Jointly as Operating Manager of
TRANSPORTATION VENTURES #1,
LLC and TRANSPORTATION
VENTURES #2, LLC**

ARB CASE NO. 02-119

ALJ CASE NO. 01-SCA-21

DATE: September 30, 2003

***In re: Contract Nos. HCR 75796,
HCR 75958, and HCR 75910 with the
United States Postal Service***

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Petitioners:

Don W. Duran, Esq., *Lufkin, Texas*

For Administrator, Wage and Hour Division:

**Roger W. Wilkinson, Esq., Douglas J. Davidson, Esq., Steven J. Mandel, Esq.,
Howard M. Radzely, Esq., Acting Solicitor, *U.S. Department of Labor,
Washington, D.C.***

FINAL DECISION AND ORDER

This matter is before the Administrative Review Board pursuant to the statutory authority of the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA or the Act), 41 U.S.C. § 351 *et seq.* (2000). Our jurisdiction to hear and decide appellate matters under the Act is established by the regulations at 29 C.F.R. Parts 4 and 8 (2003) and Secretary's Order (SO) 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).¹

¹ From July 1992 until May 3, 1996, our predecessor, the Board of Service Contract Appeals, rendered final agency decisions pursuant to the SCA. Under SO 2-96, 61 Fed. Reg. 19,978 (May 3, 1996), the Secretary of Labor established the Administrative Review Board and delegated to this Board jurisdiction to hear and decide administrative appeals arising under, *inter alia*, the SCA. SO 2-96 has been superceded by subsequent orders amending and updating the provisions relevant to the composition of the Board and its jurisdiction;

Continued . . .

Stephen W. Yates (Yates), individually, and jointly as the operating manager of Transportation Ventures #1, LLC and Transportation Ventures #2, LLC (collectively Petitioners) petitioned for the Board's review of a July 29, 2002 Decision and Order (D. & O.) issued by a United States Department of Labor Administrative Law Judge (ALJ). The ALJ ruled that Petitioners had committed SCA wage and fringe benefit violations in the amount of \$96,525.94 due four service employees who worked as truck drivers hauling and delivering mail under three United States Postal Service (USPS) contracts. Further, the ALJ ruled that Yates, individually, was a "party responsible" for the prevailing wage violations within the meaning of the SCA and that Yates, as well as the LLC parties, should be debarred from doing business with the Federal government for a period of three years for these violations of the Act. D. & O. at 10-11.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction over this Petition for Review pursuant to 29 C.F.R. § 8.1(b) (2002). Pursuant to 29 C.F.R. § 8.1(c), in rendering its decisions, "the Board shall act as the authorized representative of the Secretary of Labor and shall act as fully and finally as might the Secretary of Labor concerning such matters." However, this Board does

not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions. The Board also shall not have jurisdiction to review decisions to deny or grant exemptions, variations, and tolerances and does not have the authority independently to take such actions.

SO 1-2002, at § 4.

The Board's review of an ALJ's decision is in the nature of an appellate proceeding. 29 C.F.R. § 8.1(d). Pursuant to 29 C.F.R. § 8.9(b), the Board shall modify and set aside an ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence. See *Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999). However, conclusions of law are reviewed de novo. *Supervan, Inc.*, ARB No. 00-008, ALJ No. 94-SCA-14 (ARB Sep. 30, 2002); *United Kleenist Org. Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002).

however, the delegation with respect to the Act is essentially unchanged. The current delegation of authority is set forth in SO 1-2002.

ISSUES PRESENTED BY THE PETITION FOR REVIEW

Petitioners raise two issues for resolution by the Board. First, Petitioners contend that the ALJ erred in concluding the four truck drivers working under the USPS mail hauling and delivery contracts were “service employees” within the meaning of the Act and that those workers were therefore entitled to payment of the prevailing rate pursuant to the SCA, its implementing regulations, and the requirements of the contracts. Petitioners thereby also implicitly appeal the ALJ’s determination that Yates, individually, was a “party responsible” for the SCA violations and should therefore, in addition to the LLC business entities, also be subject to debarment from doing business with the Federal government for a period of three years.

BACKGROUND

The USPS awarded three contracts for mail hauling services to Yates, individually. D. & O. at 2-3. It is undisputed that the three contracts were subject to the SCA wage requirements. Furthermore, the USPS contracts also contained and were subject to applicable wage determinations specifying the minimum wages payable to service employees, including truck drivers, under the three service contracts.² Subsequent to award of the contracts, Yates unilaterally “assigned” each of the USPS contracts to the following business entities: Transportation Ventures #1, LLC, Transportation Ventures #2, LLC and Transportation Ventures #3, LLC. D. & O. at 4. The USPS specifically informed Stephen W. Yates that it would not revise the contracts to be contracts between the USPS and the business entities, each of which was a “Limited Liability Company” (LLC) formed under the laws of Texas. D. & O. at 4-5. See Transcript (Tr.) at 86; 110 (assignment of contracts to new contracting parties (i.e., the LLCs) would represent the contracts’ “novation” and novation of each contract would require Yates to “terminate the contract and rebid it.”

Four individuals (Calvin Copeland, James D. Thompson, Norman Foster, and Perry Vinson) were truck drivers who hauled and delivered mail between designated USPS offices pursuant to the terms of the three SCA contracts. *Id.* at 5; *see* Tr. at 11;

² The USPS contracts, award dates, and wage determinations are: HCR 75796 (mail hauling and related services between Nacogdoches, Texas and Stephen F. Austin State University located in Nacogdoches, Texas), awarded August 21, 1993, containing Wage Determination (WD) No. 77-193, Revision (Rev.) No. 18, dated August 13, 1993; HCR 75958 (mail hauling and related services between Lufkin and Woodville, Texas), awarded June 23, 1995, containing WD No. 77-193, Rev. No. 22, dated March 31, 1995; and HCR 75910 (mail hauling and related services between Lufkin and Houston, Texas), awarded August 11, 1995, containing WD No. 77-193, Rev. No. 22.

118. Yates named each of these truck drivers as a “member” (or “partner”) of one of the LLC operations; however, none of the drivers had any capital investment in any of the LLCs; neither did the USPS and the drivers have contractual relationships. *Id.* The ALJ concluded that Yates exercised sole control over the LLCs’ business affairs: “[Stephen W.] Yates alone actively directed and supervised the performance of all three contracts, including but not limited to exercised [sic] control and management over the contracts, labor policies, employment conditions, day-to-day operations, payroll policies, drivers, and cost analysis.” *Id.* The ALJ then concluded that each of the named individual truck drivers was “not paid in accordance with the wage determination” contained in each of the three USPS mail hauling contracts “despite his performance as a driver in furtherance of” each contract. *Id.*

DISCUSSION

I. Coverage of the Drivers Under the SCA

Petitioners defend their admitted failure to comply with the SCA’s wage payment requirements and the respective wage determinations on a single ground. They argue that the four truck drivers working on the USPS mail hauling contracts were “members” (or “partners”) of the LLCs and therefore were not service employees under the Act.³

As noted previously, the USPS contracts were subject to the SCA, which applies to all non-exempt workers employed in performing Federal service procurement contracts in excess of \$2,500 “entered into by the United States ... the principal purpose of which is to furnish services in the United States through the use of service employees.” 41 U.S.C. § 351(a). Service contractors are required to compensate covered service employees at minimum hourly basic and fringe benefit rates determined by the Secretary of Labor to be prevailing in a locality. 41 U.S.C. § 351(a)(1), (a)(2). The SCA defines the term “service employee” as:

³ As noted by counsel for the Administrator, “Petitioners do not directly challenge the ALJ’s acceptance of the Department of Labor’s back wage calculations. . . . In addition, it is not disputed that Petitioners failed to keep accurate records.” Administrator’s Statement in Opposition to Petition for Review at 14. At hearing, the parties agreed to formulas for computing back wages (if the truck drivers were found to be service employees). Tr. 130-135. Accordingly, the Board accepts the ALJ’s back wage findings as being a “just and reasonable inference” of the back wages due the four truck drivers. *See Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680, 687 (1946); *see also Amcor v. Brock*, 780 F.2d 897, 901 (11th Cir. 1986) (applying the principles of *Anderson v. Mt. Clemens Pottery Co.* to a case arising under the SCA).

any person engaged in the performance of a contract entered into by the United States and not exempted under section 356⁴ of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, . . . and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

41 U.S.C. § 357(b) (emphasis added). Thus, the plain language of the Act includes within its coverage all persons working in the performance of an SCA-covered contract, with certain limited exceptions. Accordingly, the truck drivers' purported status as LLC members or partners⁵ appears unavailing so long as the drivers were working in performance of an SCA-covered contract and were not otherwise excluded or exempt under the terms of the SCA.

This reading of the meaning and effect of the “contractual relationship” clause is supported by the SCA regulation which provides:

The Act, in section 8(b), makes it plain that *the coverage of service employees depends on whether their work for the contractor or subcontractor on a covered contract is that of a service employee as defined in section 8(b) and not on any contractual relationship* that may be alleged to exist between the contractor or subcontractor and such persons. In other words, any person, except those discussed in §4.156 below, who performs work called for by a contract

⁴ 41 U.S.C. § 356 exempts specified contracts, none of which are relevant to the instant case. Additionally, 41 U.S.C. § 353(b) authorizes the Secretary of Labor to provide reasonable limitations and make rules allowing exemptions. Relevant limitations or exemptions are discussed under the pertinent heading below.

⁵ There is some question whether the truck drivers were bona fide “partners” in a legal sense. None of the drivers contributed any capital to the LLCs, and they would lose “membership” in the LLCs if they ceased to drive for the enterprises. We note that Petitioners now argue that the four mail truck drivers “were in business for themselves as members of the LLCs *just as if they were partners.*” Pet. for Rev. at 5 (emphasis added).

or that portion of a contract subject to the Act is, per se, a service employee. *Thus, for example, a person's status as an "owner-operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.*

29 C.F.R. § 4.155 (emphasis added).

The relevant inquiry, therefore, is whether the drivers come within the SCA definition of "service employee." The drivers in this case hauled and delivered mail under SCA-covered USPS mail hauling and delivery contracts; it is clear that Petitioners' mail truck drivers "perform[ed] work called for by a contract . . . subject to the Act" and that each of the drivers is accordingly "per se, a service employee." *Id.* Thus, in the absence of a pertinent exemption or exclusion, Petitioners' mail hauling and delivery truck drivers were, as a matter of law, covered service employees within the meaning of the Act and the regulations. *See* 29 C.F.R. § 4.111; 29 C.F.R. § 4.130(a)(31) and (50) ("mail hauling" and "transporting property and personnel," respectively, included among types of service contracts covered by the Act).

The Board has previously considered and rejected the contention that there is no SCA coverage for truck-driving "partners" on mail hauling contracts. In *Donald M. Glaude d/b/a D's Nationwide Indus. Serv.*, ARB No. 98-081, ALJ No. 95-SCA-38 (ARB Nov. 24, 1999), the Board was presented with a claim for exemption of five mail hauling truck drivers who were alleged to be partners (with Glaude) in the enterprise awarded an SCA-covered USPS contract. The Board determined that the "asserted status of the drivers as partners . . . [was] irrelevant to the issue of coverage under the SCA." *Id.*, slip op. at 6. The Board in *Glaude* also emphasized the point that "it is clear that it is an employee's work duties, not his or her title or status in the business, that determine whether he or she is a service employee." *Id.* *See also Sam Ayres*, 87-SCA-83, slip op. at 5 (Sec'y Dec.⁶ June 6, 1991) (SCA contractor claiming exemption for service employees performing contract work denominated as partners rejected because Act specifies that contractual relationship "has no bearing on a contractor's duty to comply with the Act. This provision of the Act disposes conclusively of [the contractor's] partnership argument."). Moreover, it is also well established that a service contractor's prevailing wage obligations cannot be altered or avoided by entering private agreements purporting to waive the requirements of the Act. *James R. Erbes d/b/a Sunnybrook*

⁶ For a period of time prior to establishment of this Board, the Deputy Secretary of Labor final agency issued decisions under the SCA. During a vacancy in that position, the Secretary of Labor issued the final decision and order in *Ayres*, among other matters.

Contractors, No. 84-SCA-109, slip op. at 3 (Sec’y Dec. July 17, 1991). See also *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) (under the overtime provisions of the SCA, quoting *Mitchell v. Turner*, 286 F.2d 104, 106 (5th Cir. 1960)).

II. Exclusions and Exemptions from SCA coverage

Since the truck drivers fit within the general definition of service employees, we next consider whether the drivers fall within any exclusion (i.e. limitation of) or exemption from SCA coverage. The definition of “service employee” in section 357(b) of the Act specifically excludes “any person employed in a *bona fide* executive, administrative, or professional capacity.” Claims for exclusion under the “executive, administrative, or professional” clause must be determined under 29 C.F.R. Part 541, which are regulatory standards implementing the minimum wage and overtime provisions of the Fair Labor Standards Act of 1938, as amended (FLSA), 29 U.S.C. § 201 *et seq.* (2000). In this case, the ALJ concluded that the USPS contracts’ truck drivers were not exempt from the SCA after examining their duties and responsibilities under the Part 541 standard.⁷ Before us, Petitioners do not, however, specifically allege or argue that the mail service truck drivers were exempt under any of these three categories of workers. See Pet. for Rev. at 1-5. Accordingly, we decline to revisit this portion of the ALJ’s decision and order.

The regulations interpreting and implementing the Act also exempt from coverage certain categories of contracts “found to be necessary and proper in the public interest or to avoid serious impairment of Government business” 29 C.F.R. § 4.123(d). Among those listed are “contracts entered into by the U.S. Postal Service with an individual owner operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident” *Id.* at (d)(2). See also 29 C.F.R. § 4.113(a)(1), excluding from coverage all contracts where the “services . . . will be performed individually by the contractor, and the contracting officer knows when advertising for bids or concluding negotiations that service employees will in no

⁷ In his decision and order, the ALJ briefly addressed some of the major criteria established at 29 C.F.R. Part 541 and their application to the facts of Yates’s LLC employment scheme. The ALJ noted that the standards for executive employee exemption require that employees have management as their primary duty; that they regularly direct the work of other employees; that they have the authority to hire and fire, that they must regularly exercise discretionary powers; and they must not devote more than a small percentage of time to non-managerial duties. D. & O. at 8. The ALJ held that the drivers did not meet these requirements, stating “Yates’ attempt to cloak his four drivers with the title of ‘partner’ does not exempt them from the requirements” of the SCA. *Id.*

event be used by the contractor in providing the contract services”

Petitioners do not claim that the LLC arrangements here qualify under either § 4.123(d)(2) or § 4.113(a)(1), nor does it appear that the requirements of those regulatory provisions were met, e.g., what had to be known or contemplated at the time of advertising for bids, concluding negotiations or making the contract. Moreover, the contracts were between the USPS and Yates individually, not with the LLCs or the truck drivers. Thus, no driver or LLC qualified as an “individual owner-operator” (under section 4.123(d)(2)) or the “contractor” who “individually” performs the contract services (under section 4.113(a)(1)).

Petitioners also argue that “minimum wage provisions of the FLSA apply only to workers who are employees within the meaning of that Act.” Pet. for Rev. at 5. However, the instant case arises under the SCA, which contains the applicable and operative definition of the term “service employee.” The FLSA definition of the term “employee” is therefore irrelevant. *See* 29 U.S.C. § 203(e)(1) (“the term ‘employee’ means any individual employed by an employer.”). To the extent that Petitioners’ argument is that 41 U.S.C. § 351(b)(1) incorporates the minimum wage under the FLSA and thereby incorporates that Act’s definition of employee, we further reject it on the basis that that § 351(b)(1) references section 206(a)(1) of Title 29 only with respect to the amount of payment under the FLSA. We also reject Petitioners’ argument to the extent that they contend Congress impermissibly incorporated the Part 541 FLSA regulatory standards in section 357(b) of the Act.

III. Debarment of Yates as a “Party Responsible”

We also conclude that the ALJ’s finding that Yates was a “party responsible” and should therefore be individually debarred is supported by a preponderance of the evidence. The ALJ determined that Yates, as an individual, was a “party responsible” for the prevailing wage violations within the meaning of the SCA, and that Yates should therefore be debarred from doing business with the Federal government for a period of three years.⁸ The term “party responsible” is not defined in the Act; however, the implementing regulations fill this gap:

An officer of a corporation who actively directs and supervises the contract performance, including

⁸ The SCA requires debarment of responsible parties for any SCA violation unless the service contractor demonstrates that “unusual circumstances” were present. 41 U.S.C. § 354(a). Although not defined in the Act, a standard for determining the existence of “unusual circumstances” is found in the regulations at 29 C.F.R. § 4.188(b). However, at the hearing, Yates stipulated that Petitioners would not contest the absence of “unusual circumstances.” *See* D. & O. at 10; Tr. at 135.

employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company

29 C.F.R. § 4.187(e)(1) (emphasis in original).

Moreover, the regulations impose personal liability for SCA violations. Thus, the “failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability *but also the personal liability of each officer* charged by reason of his or her corporate office while performing that duty.” 29 C.F.R. § 4.187(e)(2) (emphasis added).

The regulations further require a finding that Yates is a “party responsible” based on his level of overall control of the mail hauling and delivery business operations. The regulation at 29 C.F.R. § 4.187(e)(2) states:

The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty. . . . Accordingly, it has been held by administrative decisions and by the courts that the term party responsible, as used in section 3(a) [sic] of the Act, imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts.

In his testimony, Yates admitted to more than enough indicia of control over the mail hauling and delivery business operations to fall squarely within the regulatory definition of “party responsible.” Yates was the “operating manager” under the LLC arrangements and had exclusive managerial control of each LLC. Tr. at 107-8. Yates was also the “president” of the LLC enterprises and had exclusive control of all LLC funds, was the only party to the LLC checking accounts, and was himself solely empowered to execute contracts and other instruments on behalf of the LLCs. *Id.* at 108-109. If a driver “did not agree to be a partner” in an LLC, Yates would not allow the individual to drive on an USPS contract. *Id.* at 111. Yates had the “final say” in the amount of “draw” (or payment) the drivers would receive. *Id.* at 114. Yates supplied the vehicles which the truck drivers used to haul the mail for the USPS contracts. *Id.* at 99-100. Moreover, Yates signed the contracts with the USPS and the contracting agency’s payment checks were made payable to Yates personally. Tr. 104-105; 111-112. In short,

Yates was the only “party responsible” for the SCA violations in this case given that only he directed the operations of the LLCs and the performance of the USPS contracts.

The plain language of the regulation defining “party responsible” and case precedent clearly support the ALJ’s finding that Yates was a party responsible for the SCA violations in this case, given the level of control Yates exercised over the service contracting operations. *See Houston Building Services, Inc. and Jason Yoo*, ARB No. 95-041A, ALJ No. 91-SCA-30, slip op. at 3 (ARB Aug. 1, 1996) (individual who signed contract and was responsible for day-to-day operations including job assignments was “party responsible”). The ALJ appropriately ordered the debarment of Stephen W. Yates as an individual.

CONCLUSION and ORDER

For the foregoing reasons, we **AFFIRM** the ALJ’s Decision and Order and **DENY** the Petition for Review.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge