



In the Matter of:

**REVIEW AND RECONSIDERATION OF
WAGE RATES FOR CAPTAIN AND FIRST
OFFICER, WAGE DETERMINATION 95-0229,
REV. 1, AS APPLIED TO UNITED STATES
POSTAL SERVICE'S ANET AND WNET
CONTRACTS FOR AIR TRANSPORTATION
OF EXPRESS MAIL**

ARB CASE NO. 97-033

DATE: July 25, 1997

REMAND ORDER

The United States Postal Service (USPS) and Emery Worldwide Airlines, Inc. (Emery) (Petitioners) petition for review of the December 13, 1996 final ruling of the Wage and Hour Division of the Department of Labor establishing the current wage determination under the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351-358 (1988) (SCA), for pilots and first officers performing work under a covered USPS contract. "Joint Appendix" submitted by Petitioners, (JA) 1. USPS entered into an on-going, multi-year contract in January 1994 with Emery to "[o]perate B-727 freighter aircraft on a dedicated contract basis to carry expedited mail on an overnight basis between the Postal Service's Indianapolis 'hub' and 37 specific outstation airports, and provide related services including mail handling at the outstation cities." JA-2. Emery subcontracted with a number of other airlines to carry out portions of the air cargo transportation services of the contract.^{1/}

The December 13 final ruling modified a Wage Determination (WD) 95-0229 (Revision 1) of May 15, 1996, which, among other things, established new monthly wage rates for pilots and first officers for the second biennial period of the contract. JA-2-1; 4-8. The May 15, 1996 WD substantially increased the wages for pilots and first officers from the previous revision of this WD issued on March 22, 1995. JA-4-6, but the final ruling of December 13, 1996 made some reduction in that increase. JA-1-3.

Petitioners seek review of the final ruling on two grounds: first, that the Wage-Hour Division had no authority to issue a wage determination for pilots and first officers because they are exempt professional employees not covered by the SCA; and second, that the methodology used by Wage-Hour in setting the new wages is "fundamentally flawed" because it (1) is based on irrelevant data, (2) it uses inherently unsuitable data from the wages of pilots of large commercial passenger airlines to establish the wages of the pilots of the cargo airlines involved here, and (3) it uses improper statistical methods. Wage-Hour opposes the petitions, urging the

^{1/} These subcontractors, two associations, and one pilot also have petitioned for review of the December 13 final ruling. The subcontractors and the associations support the position of USPS and Emery; the pilot seeks reinstatement of the May 15, 1996 Wage Determination.

Administrative Review Board (the Board) not to address the coverage issue at all in this proceeding, and arguing that the methodology used by Wage-Hour is reasonable and should be affirmed.

The regulations establishing the rules of practice before the Board under the SCA provide that “[t]he Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from final decisions of the Administrator of the Wage and Hour Division or authorized representative . . . arising under the Service Contract Act . . . [including] (1) [w]age determinations under the Service Contract Act . . .” 29 C.F.R. § 8.1(b) (1996). The Board has plenary authority, therefore, to review all questions raised by final decisions of the Administrator, constrained only by the requirement in 29 C.F.R. § 8.9(b) that findings of fact may not be reversed when they are supported by a preponderance of the evidence. Given the broad authority granted to the Board under 29 C.F.R. § 8.1(b), the Board has the power to determine its own jurisdiction as well as that of the Administrator. *Marshall v. Able Contractors, Inc.*, 573 F.2d 1055 (9th Cir. 1978) (agency should make initial determination of its own jurisdiction). We also agree with Emery that if the pilots and first officers providing services under this contract are exempt, the Department of Labor has no authority to issue a wage determination covering them. *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981) (agency has no authority to act when lack of coverage is clear). In addition, no purpose would be served and it would be administratively inefficient not to decide this issue in the context of this proceeding, when both the contracting agency and the contractor assert that the exemption applies to employees providing services under this contract.

We agree with the Administrator, however, that the Wage and Hour Division should make the initial determination, after gathering appropriate information, on whether the professional exemption applies to these particular employees. The Administrator should have an opportunity to develop a full record for Board review on this issue and to address the questions about the applicability of the exemption raised in the Administrator’s brief, *e.g.* whether all pilots and first officers are paid on a “salary basis,” whether the duties of all these employees can be characterized as “work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study,” 29 C.F.R. § 541.3(a)(1), and whether there is any basis for distinguishing these employees from the employee whom the Fifth Circuit found exempt in *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d 168, 173-74 (5th Cir. 1983). If the Administrator decides that the exemption does apply, the Board would not be required to expend valuable resources reviewing the methodology of the wage determination itself.

Accordingly, this matter is remanded to the Wage and Hour Division for further action consistent with this decision.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member