



In the Matter of:

**ITT FEDERAL SERVICES
CORPORATION (II)**

With respect to Review and

Reconsideration of Wage Determination
78-0389 (Rev. 21) issued for the
Ballistic Early Warning System (BMEWS),
Clear Air Force Base, Alaska

BEFORE: The Administrative Review Board¹

ARB Case No. 95-042A

(FORMERLY Case No. 95-07)

Date: July 25, 1996

FINAL DECISION AND ORDER

This matter is before the Board pursuant to the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351 *et seq.* (SCA), and the regulations of the Department of Labor (DOL) at 29 C.F.R. Part 8. The case is pending on the petition of the Fairbanks Joint Crafts Council and Teamsters Local 959 (Petitioners or the Unions), seeking review of the April 7, 1995 final ruling of the Administrator, Wage and Hour Division (Administrator). In her determination, the Administrator ruled that a collective bargaining agreement that expired during a prior contract period would not constitute an appropriate basis for determining wages on a successor contract. Under the facts in this matter, the Administrator held that the proper course was to issue an area wage determination. For the reasons stated below, the Administrator's ruling is affirmed.

¹ Petitioners filed this matter with the Board of Service Contract Appeals. On April 17, 1996, the Secretary of Labor re delegated authority to issue final agency decisions under, *inter alia*, the Service Contract Act and its implementing regulations to the newly created Administrative Review Board.

Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978, May 3, 1996 (copy attached). 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. A copy of the final procedural revisions to the regulations (61 Fed. Reg. 19982), implementing this reorganization is also attached.

BACKGROUND

This case concerns the proper method for determining wages to be paid for services during the contract year beginning October 1, 1993 in connection with the base operations contract at Clear Air Force Base, Alaska. It is undisputed that the contract in question is governed by the prevailing wage standards of the SCA and the regulations at 29 C.F.R. Part 4. Early in 1992, the Air Force solicited bids on an annually renewable five year base operations contract at Clear Air Force Base. ITT Federal Service Corporation (ITT), the incumbent contractor at Clear, was awarded the contract on June 26, 1992. The contract was to begin on October 1, 1992 and was renewable annually at the Air Force's option. After award of the contract, ITT notified the Unions by letters dated July 3, 1992 of its intent not to extend the existing collective bargaining agreements (CBAs) that governed wages under the prior contract. ITT informed the Unions at that time that it would be submitting to them its proposed changes in the agreements.

The new base operations contract commenced on October 1, 1992 without an agreement. ITT continued to abide by the expired CBAs until December 7, 1992 when it declared the negotiations to be at an impasse and unilaterally imposed changes in the conditions of work including wages and benefits. The Unions challenged this action by filing an unfair labor practice claim with National Labor Relations Board (NLRB) alleging that ITT had failed to bargain in good faith to reach a new CBA. The NLRB by decision of August 4, 1993 dismissed the Unions' claim, finding that "the Employer's actions in bargaining to impasse and then implementing its final offer do not appear to be violative of the National Labor Relations Act. At most, they amounted to hard bargaining." Summary Report, *ITT Federal Services Corporation*, NLRB Cases Nos. 19-CA-22713 and 10-CA-22719, Aug. 4, 1993.

The Air Force notified ITT and the Unions by letter of June 3, 1993 of its intention to renew the contract with ITT and that it would do so by September 15, 1993. ITT and the Unions returned some time thereafter to the collective bargaining table. New CBAs were reached and sent to the Air Force on September 18, 1993. As part of that agreement ITT agreed to withdraw its request to the Wage and Hour Division for a substantial variance hearing.² On September 6, 1993 the Air Force exercised its option with contract performance to begin on October 1, 1993. Performance on the contract's new option year began without the Wage and Hour Division issuing a new wage determination. After consulting with representatives of the parties, on December 21, 1993 the Wage and Hour Division issued Wage Determination 78-0389 (Rev. 21) which was to govern the contract. The wage determination incorporated the wage and benefit rates contained in the new CBAs submitted to the Air Force on September 18, 1993.

Counsel for the Unions raised the question with the Administrator whether the new CBAs were submitted too late under DOL's regulations to serve as the basis for the wage determination. Under 29 C.F.R. § 4.1b(b), in order for a new CBA to serve as the basis for a wage determination under Section 4(c) of the Act, the parties must notify the contracting agency of the terms of the new agreement prior to the exercise of the renewal option. This limitation does not apply unless

²²See, discussion *infra* at p. 5.

the contracting agency has given the parties at least thirty days notice of the anticipated procurement date. The Administrator, by letter of November 4, 1994, withdrew the wage determination finding that it was issued based on the mistaken belief that the Air Force had given insufficient notice to ITT of the anticipated procurement date, and therefore she found that the new CBA could not serve as a basis for a new wage determination. The Administrator then issued a new wage determination based on the previous CBA which she determined "had expired but had not terminated."

On December 16, 1994, ITT filed with the Board of Service Contract Appeals a petition seeking review of the Administrator's November 4, 1994 ruling. While this petition was pending, counsel for ITT filed additional information with the Administrator which raised questions regarding the correctness of her ruling. Counsel for the Administrator requested that the Board remand the matter to the Administrator for reconsideration in light of this new information. By order of January 27, 1995, the Board granted the Administrator's request and remanded the matter to the Administrator for reconsideration to be completed by March 28, 1995. Upon the Administrator's request the Board subsequently extended this date to April 7, 1995.

After providing the Unions an opportunity to respond to the information submitted by ITT, the Administrator issued a final ruling in this matter on April 7, 1995. Based on her understanding of the requirements of the National Labor Relations Act, 29 U.S.C. § 151 et seq., the Administrator ruled that once bargaining had reached an impasse the employer was no longer bound by the terms and conditions of an expired collective bargaining agreement and therefore she reversed her earlier ruling that the CBA had expired, but had not "terminated." Because the expired agreement did not cover the employees during the term of the predecessor contract, the Administrator ruled it could not serve as a basis for a wage determination under Section 4(c) of the SCA. Section 4(c) not being applicable, the Administrator proceeded to issue an area wage determination to govern the contract. The Unions then petitioned the Board for a review of that ruling.

DISCUSSION

The issue for the Board is whether the Administrator acted contrary to law or regulation in failing to issue a Section 4(c) wage determination for the contract in question. The SCA provides for two types of wage determinations. Both types are authorized under Section 2(a) of the SCA: wage determinations are to contain the rates as determined by the Department of Labor "in accordance with prevailing rates for such employees in the locality, *or, where a collective bargaining agreement covers any such employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement . . .*" 41 U.S.C. § 353(c). (Emphasis added). The first type of wage determination referred to in the first clause of the statute quoted above is commonly known as an area wage determination. The second wage determination referred to (as emphasized above) is commonly known as a Section 4(c) determination.

Section 4(c) determinations were authorized by the 1972 amendments to the SCA which provided in relevant part:

No contractor or subcontractor under a contract, which succeeds a contract subject to [the SCA], and under which substantially the same services are furnished, shall pay any service employee under such contract less the wages and fringe benefits including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provide 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.

41 U.S.C. § 353(c)

Petitioners do not contest that each exercise of an option year by the Air Force constitutes a new contract for the purposes of this provision. This Board has previously held that the express language of Section 4(c) requires that a successor contractor be liable for the CBA wages of a predecessor contractor for a period of one successor contract only. *International Union of Operating Engineers Local 387*, BSCA Case No. 92-23, Jan. 27, 1993. The Administrator's ruling that a CBA that terminates prior to the completion of a predecessor contract cannot serve as the basis for a Section 4(c) wage determination is not on its face inconsistent with the statute.

Petitioners contend that there are good policy reasons for interpreting the statute differently. Allowing a terminated collective bargaining agreement to continue to serve as the basis for Section 4(c) wage determinations, Petitioners contend, serves the important legislative purpose of insulating the collective bargaining process from undue interference by the government through DOL. Counsel for the Administrator responds that requiring the terms of a terminated collective bargaining agreement to be carried forward indefinitely tips the negotiating balance in favor of one side and consequently, poses the exact danger of undue interference by the Department of which Petitioners warn.

The Board of Service Contract Appeals has previously recognized on numerous occasions that the Administrator is granted broad discretion in interpreting the SCA. *Service Employees International Union, AFL-CIO, CLC*, BSCA Case No. 92-01, Aug. 28, 1992. The express language of Section 4(c) certainly does not dictate an interpretation different from the Administrator's. The Administrator's reading of this provision is reasonable and not a departure from accepted canons of construction. Therefore, the Administrator's interpretation is accorded great weight. The Board should not substitute its own policy preferences for those of the official in whom primary responsibility for enforcing the statute is vested. See *A. Vento Construction*, WAB Case No. 87-51, Oct. 17, 1990 and *Titan IV Mobile Service Tower*, WAB Case No. 89-14, May 10, 1991.

Petitioners' reliance on general statements of Congressional intent found in the legislative history is misplaced. These statements are of little utility in giving meaning to the very specific statutory language employed in Section 4(c). Read in the most favorable light to the Petitioners, these statements merely suggest the possibility that these particular legislators might have attempted to address this issue in a manner favorable to Petitioners if they had foreseen the issue at the time that the statute was drafted. The Administrator is governed by express words of the statute actually enacted and if the meaning she gives the statute is reasonable and consistent with the implementing regulations, it is to be upheld. That is the case in this matter and therefore, the Board is compelled to affirm her ruling.

Additionally, Petitioners contend that a contractor's sole remedy for seeking a change in the wages and benefits paid under a terminated CBA is through a "substantial variance" proceeding under 29 C.F.R. § 4.10(b)(3)(ii). Petitioners' position finds no support in the regulations or past practice of the Wage and Hour Division. To compel an employer to resort to a substantial variance proceeding, rather than the collective bargaining process, to determine wages and benefits undermines the preference for collective bargaining that Section 4(c) embodies. ITT, by withdrawing its substantial variance request under Section 4(c) at the Unions' urging during negotiations, reflected this preference. If the Board were to find substantial variance proceedings to be the exclusive remedy available to successor contractors, then the Board would indeed be undermining the collective bargaining process and interjecting the Department into labor-management negotiations.

For the forgoing reasons, the Administrator's April 7, 1995 decision is affirmed.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member