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Issue Date: 15 December 2011

CASE NO.: 2011-CBV-3

**IN THE MATTER OF APPLICABILITY OF WAGE RATES
COLLECTIVELY BARGAINED BY INTEGRITY NATIONAL
CORPORATION AND THE INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT
LODGE 37, LOCAL LODGE 1786, UNDER CONTRACT
NNJ08JB96C FOR CUSTODIAL SUPPORT SERVICE FOR
THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION-
LYNDON B. JOHNSON SPACE CENTER, 2101 NASA PARKWAY,
HOUSTON, TEXAS 77058-3696**

APPEARANCES:

Randall Suratt, Esq.
Cody Corley, Esq.
For the Petitioner (NASA)

Rod Tanner, Esq.
Dale Rodriguez, Esq.
For the Union

Roger Wilkinson, Esq.
For the U.S. Department of Labor

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. §351 *et seq.*, (hereinafter referred to as the SCA) and its

governing regulations set forth at 29 C.F.R. Parts 4 and 6 (1980). This proceeding originates from an Order of Reference issued on August 2, 2011 pursuant to a request for hearing under Section 4(c) of the Act. (ALJ EX-1). The Order of Reference indicated that there was enough evidence to warrant a hearing to resolve the issue of whether a wage variance exists. The dispute concerns the wage rates to be paid to employees engaged in the performance of a contract for custodial/janitorial services at NASA-Lyndon B. Johnson Space Center (NASA) Houston, Texas. The wage rates in question are contained in the collective bargaining agreement (CBA) between the contractor, Integrity National Corporation (INC) and International Association of Machinists and Aerospace Workers, District Lodge 37, Local Lodge 1786 (Union).

A formal hearing was held in this matter on November 2 & 3, 2011, in Houston, Texas. All interested parties were represented and afforded the opportunity to examine and cross-examine witnesses and to present relevant and material evidence. The Department of Labor's Wage and Hour Division was represented by counsel and was present to offer information as needed. DOL did not express any opinion on the substance of the hearing. Post-hearing briefs were submitted by NASA and the Union.

The administrative law judge's jurisdiction in this proceeding is limited to the question of deciding whether the wages in the collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality. 29 C.F.R. §4.10(c).

NASA asserts that because of a collective bargaining agreement between INC and the Union it is paying the personnel in excess of the area wage rates for similar work. The Union argues that the collectively bargained wage rates are the proper rates to be used, and that no variance has been shown to exist. The Department of Labor took no position with regard to the proper area wage rates.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NASA's request for a substantial variance hearing is limited to a single issue: whether the wage rates included in the 2009 CBA between INC and the Union vary substantially from the prevailing wage rates for work of a similar character in the same locality. NASA must make a "clear showing" that the variance exists and is "substantial." *In re Big Boy Facilities, Inc., et al.*, Case No. 88-CBV-7, 29 Wage & Hour Cases 356, 358-59 (L.B.S.C.A. Jan. 3, 1989); *In re Applicability of Wage Rates Collectively Bargained by Am. Guard Servs., Inc., et al.*, Case No. 2001-CBV-1, slip op. at 4 (ALJ April 25, 2011).

The locality applicable to the wages at issue is the Greater Harris County, Texas area. The wages at issue are monetary wages within the meaning of 41 U.S.C. §351(a)(1). As of March 1, 2011, the wage rates are based on the rates agreed to in the April 2009 CBA. The established wage for janitorial services across the class of services ranges from \$14.69 per hour to \$15.80 per hour:

- | | |
|-------------------------------------|---------|
| A) Custodian/Janitor Service Worker | \$14.69 |
| B) Custodian/Janitor Crew Leads | \$15.44 |
| C) Recycling Specialist | \$15.80 |

D) Warehouse Clerk

\$15.80

Neither the SCA nor the implementing regulations define “substantial variance,” nor do they provide a numerical cutoff for what is considered “substantial.” The DOL’s primary source of guidance for assessing whether a variance is “substantial” is All Agency Memorandum 166 (AAM 166). The AAM states: SCA does not define the term “substantial variance”; however, “the plain meaning of the term requires that a considerable disparity in rates must exist before the successorship obligation may be voided.” Furthermore, the Deputy Secretary found that “[n]o discrete comparison rate is conclusive. Rather, if upon comprehensive examination the negotiated rates are shown to be out of line with the rest of the rates, then a substantial variance may well exist.”

Because no single source of data is determinative, the AAM 166 calls for the review of (1) corresponding Federal wage board rates and surveys, (2) relevant Bureau of Labor Statistics (BLS) survey data and comparable SCA area wage determinations, (3) other relevant wage data, such as data reflecting rates other employers pay for similar services, and (4) other collectively-bargained wages and benefits.

Having been unable to obtain other collective bargained wages for comparison, NASA’s Exhibit 21 sets out the sources relied upon by NASA in support of its wage variance petition. The results, however, as hereinafter explained, I find flawed or unreliable and not a “clear showing” of a substantial variance:

- a. DOL Wage Determination Rev 12;
- b. Bureau of Labor Statistics (BLS) National Compensation Survey (NCS);

- c. BLS Occupational Employment Statistics (OES);
- d. Texas Workforce Commission Wage Information Network;
- e. NASA's market wage survey rates; and
- f. Federal Wage Rates.

In collecting data from these sources, Stephanie Hunter, NASA's Contracting Officer, Stephen Candler, NASA's Contracting Officer's Technical Representative, and Mandy Kuehn, NASA's Contracting Specialist, all agreed they relied solely on the Statement of Work (SOW) contained in the Unions contract (EX-2), and no consideration was given to NASA's Workers actual job duties or the uniqueness of the job qualifications or the uniqueness of the environment in which these jobs are performed. (Tr. pp. 161, 260, 233-235). An omission which Ms. Hunter acknowledged could be construed as "misleading." (Tr. p. 235). I agree.

NASA relied upon the SOW, rather than job qualifications and descriptions of employees' actual job duties and skills, to identify comparable locality job classifications and corresponding wage rates in its data compilations and market survey. SOW however, does not delineate or identify any specific job duty or skill for any specific position. It is simply a description of the services the contractor has agreed to deliver to NASA; not a description or identification of the specific duties and skills of Janitor, Lead Janitor, Recycling Specialist and Warehouse Clerk positions at issue or the manner in which these services are performed at NASA.

In other words, NASA ignored significant differences such as security clearance, language proficiency, reading/writing ability, education requirements, and people skills, of employees working at NASA as compared to any other known work site in the locality. (See job qualification requirements at Union's EX-9-12).

NASA also failed to account for the uniqueness of the NASA workplace as compared to other employers in the Houston or Harris County area and the impact of NASA's thorough security requirements and workplace environment on the skill level of the custodial workers that can be hired and retained to work in such a facility.

The testimony of Dr. Charles North, Hugo Galatoire, Antoninus Hines, Natalie Mitchell, Maydie Hanes, and Union Exhibits: 9, 10, 11, 12, 42, 44, 67 all support these findings.

Hugo Galatoire is the Director of Operations for INC. He has hired, fired and managed janitorial workers for over 20 years and finds the workers at NASA to be of the highest quality he has ever seen.

In addition to cleaning skills and the equivalent of a high school education, the job requirements include the ability to read and speak English¹, interaction skills, drivers or state identification license, and security clearance including finger printing.

According to Mr. Galatoire no other employer in the Houston area has such high standards, but as a result there is little turnover, with many employees having been at NASA over ten years and one as long as 41 years (Seniority List EX-13).

¹ NASA conducts its safety meetings in English (Tr. p. 149).

Natalie Mitchell worked with INC until April 2009 as the Finance Manager. She testified the SOW only indentifies the work INC must do under the contract, how that work is accomplished is INC's prerogative.

Antonius Hines is INC's Chief Industrial Officer and has been since 1997. He has been in custodial related services for 35 years, and explained that INC strives to get good workers at NASA because it is a "family environment." In fact when INC took over the contract it kept the existing staff because they were exceptional.

Maydie Hanes has worked at NASA for 21 years. She cleans, sweeps, makes beds on a daily basis for the astronaut quarters. She attends safety classes and has a security badge.

Dr. Charles North was qualified as an economics expert. His report is Union's Exhibit 67. In his opinion, NASA's methodology used to prove a substandard variance is flawed and incomplete. Specifically, NASA ignored the actual requirements of the jobs in issue to read and write English, have good communication skills and problem solving skills as well as safety training and thorough security clearance. The sources NASA used to base their case simply demonstrated general, average wages. No other collective bargained wages were introduced.²

In Dr. North's opinion NASA's higher productivity with lower turnover is the result of efficient wages being paid, all as demonstrated by NASA senior work force. In

² Ms. Hunter acknowledged failure to obtain wage rates from other area unions, as did Mr. Candler and Ms. Truman. The only offered union rates were those of the predecessor CBA dating back to 2005. (Tr. pp. 231-233)

sum, INC was left to carry out the agreed SOW and it is being done by a staff which from the evidence offered appears to be superior to workers in the private market.

Lastly, and in addition to NASA's failure to gather other collective bargained wage rates, and in addition to NASA's arguably misleading job qualifications, it appears NASA also misapplied the wage measure charts by comparing an "average" of each of the federal wage based rates and surveys, the BLS data and Comparable SCA area wage determinations to the collective bargained rates in issue without regulatory or statutory direction to do so. (Tr. pp. 238-240).

CONCLUSION

While the wage evidence offered by NASA shows variance with the collectively bargained wages at issue, the job descriptions or date compilations used to demonstrate such variances are not sufficiently matched to the job duties and job qualifications of the workers in question. Simply put, NASA failed to show that these collectively bargained wages are at variance with jobs of a similar character in the locality. As stated in *Big Boy Facilities, Inc.*, supra p.3 a "clear showing" is required to rebut the collectively bargained higher rate, and a "clear showing requires evidence which directly supports the fact sought to be proved and which clearly outweighs contrary evidence." No such "clear showing" has been made in this instance.

ORDER

IT IS HEREBY ORDERED that NASA's petition for a collective bargaining variance is **DENIED**.

So ORDERED this 15th day of December, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL: Within 10 days after the date of the decision of the Administrative Law Judge, any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board pursuant to 29 C.F.R. Part 8 if the proceeding was under the Service Contract Act.