



Issue Date: 07 December 2011

BALCA Case No.: 2012-PWD-00002

ETA Case No.: P-400-11048-902021

In the Matter of:

ALSTEDE FARMS, LLC,
Employer

Appearances: Jerrod Sharp
Federation of Employers and Workers of America
Bay City, Texas
For the Employer

Gary M. Buff, Associate Solicitor
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Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **WILLIAM S. COLWELL**
Associate Chief Administrative Law Judge

ORDER OF DISMISSAL

This matter arises from a request for review of a National Processing Center H-2B prevailing wage determination pursuant to 20 C.F.R. § 655.11(e).

BACKGROUND

The Employer in this case filed an application for temporary labor certification under the H-2B program and received certification for eight farm market clerks, SOC/O*Net code 43-5081.01, occupation title "stock clerks, sales floor," from May 1,

2011 to November 30, 2011. AF 84.¹ The rate of pay for the position was \$8.29 per hour. AF 88.

In response to litigation surrounding the Department of Labor's method of calculating H-2B prevailing wage determinations ("PWD"),² the Employment and Training Administration ("ETA") revised the methodology by which prevailing wages are determined. Proposed Rule, 75 Fed. Reg. 61578 (Oct. 5, 2010), Final Rule, 76 Fed. Reg. 3452 (Jan. 18, 2011). Although the 2011 Wage Rule was to go into effect on January 1, 2012, ETA was subsequently ordered by the Eastern District of Pennsylvania to move the effective date forward. *CATA v. Solis*, Dkt. No. 119, 2011 WL 2414555 at *4 (E.D. Pa. June 16, 2011).³ To comply with the district court's order, ETA amended the effective date of the 2011 Wage Rule to September 30, 2011. Proposed Rule, 76 Fed. Reg. 37686 (June 28, 2011); Final Rule, 76 Fed. Reg. 45667 (Aug. 1, 2011). ETA notified employers that the National Prevailing Wage Center ("NPWC") would issue supplemental PWDs to all employers with H-2B workers who would be performing work on or after September 30, 2011.

Supplemental PWD

On August 15, 2011, the NPWC issued a Supplemental PWD to the Employer, requiring the Employer to pay \$15.05 per hour for all work performed on or after September 30, 2011. AF 78-83. The NPWC indicated that the wage was based on the job title of "Store Worker I" under the McNamara O'Hara Service Contract Act ("SCA"). *Id.* On August 24, 2011, the Employer filed a request for review of the Supplemental PWD with the Center Director under 20 C.F.R. § 655.11(a). AF 49-77. The Employer argued that the job title was incorrect and that the wage rate should be based on the SOC

¹ Citations to the appeal file will be abbreviated "AF" followed by the page number.

² On August 30, 2010, in *Comité de Apoyo a los Trabajadores Agrícolas (CATA) v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (E.D. Pa. Aug. 30, 2010), the U.S. District Court in the Eastern District of Pennsylvania ordered the Department of Labor to promulgate new rules concerning the calculation of the prevailing wage rate in the H-2B program that are in compliance with the Administrative Procedure Act ("APA") within 120 days. Subsequently, the court extended the deadline to January 18, 2011. *CATA v. Solis*, Civil No. 2:09-cv-240-LP, 2010 WL 3431761 (Oct. 27, 2010).

³ The district court found that the one-year delay in the effective date was not logical and therefore violated the APA, and violated the Immigration and Nationality Act ("INA") inasmuch as the DOL considered the hardship on employers when deciding to delay the effective date. *Id.*

title of “stock clerks, sales floor,” rather than the SCA title of “store worker I.” AF 49-51.

On September 9, 2011, the Center Director affirmed the Supplemental PWD. AF 43-48. The Employer requested BALCA review of the Center Director’s determination on September 28, 2011, arguing that the SCA title and code assigned by the NPWC did not correspond to the position’s job duties. AF 3-42

Due to district court litigation challenging the September 30, 2011 effective date of the 2011 Wage Rule, ETA published a notice in the Federal Register notifying employers that the 2011 Wage Rule would be postponed to November 30, 2011. 76 Fed. Reg. 60720 (Sept. 30, 2011). On November 3, 2011, the NPWC issued a letter to the Employer, notifying it that the effective date of the wage rate had been postponed to November 30, 2011. AF 1-2.

Postponement of 2011 Wage Rule to January 1, 2012

On November 18, 2011, the President signed the Consolidated and Further Continuing Appropriations Act, 2012. Section 546 of the Act provides:

None of the funds made available by this or any other Act for fiscal year 2012 may be used to implement, administer, or enforce, prior to January 1, 2012, the rule entitled “Wage Methodology for the Temporary Non-agricultural Employment H-2B Program” published by the Department of Labor in the Federal Register on January 19, 2011 (76 Fed. Reg. 3452 et seq.).

Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546, *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2112enr/pdf/BILLS-112hr2112enr.pdf> (2011) (*hereinafter* “the Continuing Resolution” or “Section 546”).

The legislative history provides:

Section 546 prohibits any funds from being used to implement, administer, or enforce the “Wage Methodology for the Temporary Non-agricultural Employment H-2B Program” prior to January 1, 2012, to allow time for Congress to address this rulemaking. In making prevailing wage determinations for the H-2B nonimmigrant visa program for employment prior to January 1, 2012, the conferees direct the Secretary of Labor to continue to apply the rule entitled “Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers),

and Other Technical Changes” published by the Department of Labor on December 19, 2008 (73 Fed. Reg. 78020 et seq.).

H.R. REP. NO. 112-284, at 197 (2011); 157 CONG. REC. H7528 (daily ed. Nov. 14, 2011).

Appeal Sub Judice

BALCA received the appeal file on November 23, 2011. As the Employer’s H-2B labor certification ended on November 30, 2011, it appeared that the Employer’s PWD appeal was moot inasmuch as it would not be required to pay the \$15.05 wage provided in the NPWC’s Supplemental PWD. Therefore, I held a telephone conference call with the parties on November 30, 2011, to discuss whether this appeal should be dismissed as moot.

While counsel for the CO agreed that this matter was moot, the Employer disagreed. The Employer filed a brief on December 1, 2011, arguing that I should find that an exception to the mootness doctrine applies because this dispute is capable of repetition but will evade the Board’s review. The Employer asserts that it will likely receive the same wage rate based on the allegedly improper job classification when it requests a PWD in connection with its H-2B application next year. The Employer further contends that it will be unable to meaningfully avail itself of the review process under Section 655.11 next year because the Center Director will not review the PWD and transfer the file to BALCA in a timely manner.

The CO filed a brief on December 2, 2011, contending that because the new wage rule does not become effective until after the Employer’s stated dates of need, the Employer’s appeal is moot and must be dismissed. The CO argues that the exception to the mootness doctrine for matters that are capable of repetition yet evading review is not applicable in this case. The CO argues that if the Employer disagrees that with a PWD issued in connection with a future H-2B application, it will be able to request review under the appeal procedures outlined at Section 655.11. While the CO acknowledges that there was a delay in the transfer of the appeal file to BALCA in this matter, the CO contends that this delay was the result of an unusual period of legislative and regulation change, and there is no reason to expect that this situation will recur in the future.

DISCUSSION

I find that this matter is moot. The Supplemental PWD issued on August 15, 2011 instructed the Employer to pay a higher wage beginning on September 30, 2011 to its eight farm market clerks who were working for the Employer under H-2B labor certification until November 30, 2011. This date was subsequently delayed until November 30, 2011, which was the final day of the Employer's labor certification. When the Continuing Resolution was signed on November 18, 2011, it prevented the implementation, administration, and enforcement of the 2011 Wage Rule prior to January 1, 2012. Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 546 (2011). As the Supplemental PWD issued in this matter only covers labor performed on November 30, 2011, and the underlying certified H-2B application does not involve any labor that will be performed on or after January 1, 2012, the Supplemental PWD is no longer valid.

Additionally, I find that no exception to the mootness doctrine exists. As the Eighth Circuit has held, the "capable of repetition, yet evading review" exception to the mootness doctrine "applies only in exceptional situations, and only when two factors exist: the challenged action must be of a duration too short to be fully litigated before becoming moot, and there must be a reasonable expectation that the same complaining party will be subjected to the same action again." *Midwest Farmworker Employment and Training, Inc. v. U.S. Department of Labor*, 200 F.3d 1198, 1201 (8th Cir. 2000).

The Employer has not met its burden of establishing either of these two factors. The H-2B regulations provide for an expedited review process for PWD appeals. 20 C.F.R. §§ 655.11; 655.33. Moreover, although the NPWC experienced delays in requests for review of PWDs during the past few months, there is no reason to presume that these delays will occur after the implementation of the new wage rule. I agree that this delay was likely the result of an unusual period of legislative and regulatory change that is not likely to recur. As such, there is no reasonable expectation that the Employer will be subjected to an excessive NPWC delay if it seeks review of a PWD next year.

Based on the foregoing, I find that this matter is moot and is therefore **DISMISSED.**

For the Board:

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WILLIAM S. COLWELL

Associate Chief Administrative Law Judge