



Issue Date: 17 July 2017

Case No. 2009-SCA-00011

IN THE MATTER OF

**MESA MAIL SERVICE, LLC
RICHARD EDWARDS, MARY EDWARDS,
Individually and Jointly,
Respondents**

DECISION AND ORDER ON REMAND

This proceeding arises under the McNamara-O'Hara Service Contract Act (the Act)¹, and regulations issued pursuant thereto.² The Act sanctions those who are awarded a federal contract and subsequently fail to (1) pay the required wage, (2) award minimum fringe benefits, or (3) keep adequate records.

BACKGROUND AND PROCEDURAL HISTORY

On 23 June 09, the U.S. Department of Labor Wage and Hour Division (WHD) filed a complaint against Respondents, alleging that, in the performance of contracts awarded to them by the United States Postal Service (USPS), they had violated the Act by (1) failing and refusing to furnish required fringe benefits to employees, and (2) failing to make available adequate and accurate records showing daily and weekly hours worked by their employees. The original complaint alleged that Respondents were liable for underpayments of compensation in the amount of \$27,957.22 and sought debarment from receiving any government contract for three years.

A hearing initially set for 22 Jun 10 was rescheduled many times to allow the parties to attempt resolution via mediation. In the meantime, Respondents' counsel withdrew. However, on 13 Dec 12, consent findings and a proposed order that would resolve the case were submitted. They stated that Respondents owed \$188,152.73 to be distributed to its service employees by WHD. That sum was to be released to WHD from contract payments that had been withheld by USPS.³ The consent findings also stipulated that Respondents would be denied the award of any federal government contract for three years. On 31 Dec 12, I issued an order approving those consent findings. However, I vacated that order on 22 Jan 13, when Respondents objected that they had not actually agreed to the proposed consent findings.

¹ 41 U.S.C. §6701*et seq.* (hereinafter "the Act").

² 29 C.F.R. Parts 4 and 6.

³ Along with an additional \$59,472.47 to be released directly to Respondents.

A new hearing was set for 23 Sept 13 and Respondents enlisted the help of Mr. Don Strobel, a labor consultant for the firm Labor Consultants Central, Inc., who responded to WHD's discovery requests and interrogatories. The hearing was reset for 18 Nov 13. Prior to that hearing date, the parties agreed that because the dispute was primarily a legal one, I could decide the case on the written record. They agreed to submit a joint stipulation of facts, evidence on disputed facts, and briefs.

Based on that record, I found that Respondents had failed to make available daily- and weekly-hours-worked records as required. I further found WHD's methods of assessment of violations and calculations of back wages were reasonable and debarment was appropriate. Respondents appealed, arguing that their lay representative acted without their authority and they had not waived their right to an in-person hearing. Noting that the record did not contain a written waiver as required by the regulation, the Administrative Review Board (ARB) vacated the ruling and remanded the case for a full evidentiary hearing.⁴

In accordance with the ARB's order, a full evidentiary hearing was conducted on 13 and 14 Oct 16. Respondents proceeded pro se, but offered multiple exhibits and called and cross-examined witnesses.

Accordingly, the evidentiary record in this case consists of:

Witnesses

Evelyn Chatman
Arthur Harmon
Joseph Wallace
James Walker
Mary Edwards
Craig Jackson

Exhibits

Agency (CX) 1-8
Respondent (RX) 1-28

STIPULATED FACTS⁵

During the period from 2007 to 2011, Respondents were parties to Contract Numbers 790L0, 79036, 70640, 706AA, 70660, 70642, 70643, 706L0, 76936, 76910, 754B8, 757L6, and 76936, which required them to deliver mail for the U.S. Postal Service subject to the Service Contract Act.

⁴ ARB Case No. 14-075, January 21, 2016.

⁵ Tr. 10.

ISSUES IN DISPUTE

WHD argues that since Respondents did not keep or maintain time sheets reflecting the number of hours actually worked by the drivers it employed on the USPS contracts, it was reasonable to use employees' signed interview statements to reconstruct and extrapolate to other employees the hours worked and back wages owed. It employed the same approach for holiday pay.

Respondents counter that the method they employed to calculate hours was sufficient to satisfy the requirement that they maintain time sheets in accordance with the regulations and the Act. They also object to the consideration of statements by former employees who did not appear at trial and contest the reasonableness of WHD's calculations.

LAW

Under the Act, every contract into which the United States enters in excess of \$2,500 must contain provisions specifying the minimum monetary wages and fringe benefits furnished to employees under that contract, if the principal purpose is to furnish services through the use of service employees.⁶ Contractors who fail to provide such wages and benefits are liable for the underpayment and can be debarred from future federal contracts.⁷

The implementing regulations address the calculation of hours worked.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in part 785 of this title which is incorporated herein by reference. In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act. However, unless such hours are adequately segregated, as indicated in § 4.179, compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative proof to the contrary that such work did not continue throughout the workweek.⁸

⁶ 41 U.S.C. §§ 6702(a)-3.

⁷ 41 U.S.C. § 6705.

⁸ 29 C.F.R. § 4.178.

The threshold question is whether the employee showed that he performed work for which he was not properly compensated and that the employer had actual or constructive knowledge of that work.⁹ Contractors must maintain records of the daily and weekly hours worked by each employee for three years, including the wages they earned and the fringe benefits they were provided. They must also make those records available for inspection.¹⁰ The regulations do not prescribe any particular form or order of the records, as long as they contain the information and data required.¹¹ Employers may not delegate to or impose upon employees the responsibility for maintaining proper records.¹²

While the party alleging uncompensated work has the initial burden of proof, the employer is required to keep proper records and should be in position to easily rebut the allegation by accurately establishing the nature and amount of work performed. Therefore, when an employee produces evidence sufficient to create a just and reasonable inference that he was not compensated as required, he shifts the burden to the employer to come forward with evidence contradicting the reasonableness of the inference or show the precise amount of work performed. That burden shifting incentivizes employers to follow the regulations and keep accurate records.

If the employer has failed to maintain the requisite records, WHD has the discretion to use reasonable methods to calculate hours worked and wages earned. Even if the employer's failure to maintain such records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, it cannot complain about the uncertainty of approximations calculations based on alternative information.¹³ Nor can it blame its incomplete pay records on its employee's failure to submit accurate time sheets. "The [act] makes clear that employers, not employees, bear the ultimate responsibility for ensuring that employee time sheets are an accurate record of all hours worked by employees."¹⁴

A contractor's failure to maintain proper records may result in giving more weight to the agency's calculation of shortages.¹⁵ Where proper records are not maintained, an ALJ may find an employer failed to provide its employees with the required wages or benefits.¹⁶

The Act states that "[u]nless the Secretary otherwise recommends because of unusual circumstances[,]" all persons or firms that the "Federal agencies or the Secretary have found to have violated the Act" shall be placed on the debarred bidders list. Therefore, once a violation of the Act has been found, there must be a debarment unless a finding of "unusual circumstance" is made.¹⁷ Relief from debarment is not warranted where there are willful or culpable violations

⁹ *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 361 (2d Cir. 2011).

¹⁰ 29 C.F.R. § 4.6(g)(1).

¹¹ 29 C.F.R. § 516.1.

¹² *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011).

¹³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–88 (1946); *Marshall v. Mamma's Fried Chicken, Inc.*, 509 F.2d 598, 599(5th Cir.1979).

¹⁴ *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 363 (2d Cir. 2011), citing *Skelton v. Am. Intercontinental Univ. Online*, 382 F.Supp.2d 1068, 1071 (N.D.Ill.2005).

¹⁵ *Thomas & Sons Building Contractors, Inc.*, 1996-DBA-37 (ALJ Feb. 17, 2000), citing *Anderson v. My. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Groberg Trucking, Inc.*, ARB No. 09-137 (Nov. 30. 2004).

¹⁶ *United Kleenist Organization Corp.*, 1999-SCA-18 (ALJ Jan. 10, 2000), *aff'd*. ARB No. 00-042 (Jan 25, 2002).

¹⁷ 41 U.S.C. § 6707.

and failure to maintain records.¹⁸ “The legislative history of the SCA makes clear that debarment of contractors who violated the SCA should be the norm, not the exception, and only the most compelling of justifications should relieve a violating contractor from that sanction.”¹⁹

Whether or not debarment is appropriate is governed by a three-part test.²⁰ The contractor must establish that the violations were not willful, deliberate, aggravated, or the result of culpable conduct, and must also demonstrate an absence of a history of similar culpable conduct.²¹ The contractor must next show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.”²² Finally, a variety of factors, including prior investigations for violations of the Act, recordkeeping violations, “bona fide legal issue,” efforts to ensure compliance, nature and extent of violations, and whether the amount was promptly paid must be considered.²³ The contractor bears the burden of proving unusual circumstances that warrant relief from debarment.²⁴

EVIDENCE

*Evelyn Chatman testified at hearing in pertinent part:*²⁵

She worked for USPS as a transportation clerk assigned to the manager of mail processing. USPS contracts with private companies to haul bulk mail from one location to another. Those contracts are for four year periods and identify specific routes, times, and capacities. The route times were based on the post office’s assessment of how long it would take to drive that specific trip. Once a year, she had to go and follow the trucks on the route to validate or amend the times, based on route changes.

The contracts were let out for bid on a set price to cover that route for the four years, with changes as conditions warranted. The bids included USPS’ assessment of how many miles and how much time was involved. She does not know if the contracting officer included any pre-inspection or post-inspection time in the estimate. The time does include estimates for loading and unloading at each stop. The contractors decided how much they would bid for the contract and pay their drivers, but they did have to comply with the Service Contract Act.

Once a contract was bid and awarded, transportation management in Dallas would send her a copy of the highway contract route. She could not change any of the contracted schedules. She monitored contract performance. The contractors were obliged to provide qualified drivers, adequate equipment, and pick up and deliver the mail on time. If there was a delay, the contractor had ten days to explain. If it was not the contractor’s fault, it would not be held against their performance standards.

¹⁸ 49 C.F.R. § 4.188(a).

¹⁹ *Vigilantes v. Administrator, Wage and Hour Div.*, 968 F.2d 1412, 1418 (citing 29 C.F.R. § 4.188(b)(2)).

²⁰ 29 C.F.R. § 4.188(b)(3)(i)-(ii).

²¹ 29 C.F.R. § 4.188(b)(3)(i).

²² 29 C.F.R. § 4.188(b)(3)(ii).

²³ *Id.*

²⁴ 29 C.F.R. § 4.188(b)(1).

²⁵ Tr-69-121.

The post office had an expediter on the terminal dock. He made sure that all the contracting trucks were present and loaded with the correct mail. He also made sure that the contract drivers had keys so that they could deliver mail to some of the offices in small towns that might not be open when the truck arrives. The time it takes to load the truck depends on the size of the truck and the amount of mail, but it's all rolling stock. They allotted fifteen minutes to load a 24-foot truck, which was the largest they had in Lake Charles. Generally, the allotted times were accurate. For instance, they allotted five minutes to offload and five minutes to on load in Vinton, which was more than generous.

If the contracting trucks were delayed at the beginning because the post office was not ready to load them, they would issue the driver a late slip that noted the delay was the post offices' fault. The drivers would present that slip at the delivery. The expediter on the dock would issue late slips with four copies: one to the originating office, one to the driver, one for her to keep, and one to the destination post office. There was no copy for the contractor, and if the driver did not give the late slip to the contractor, the contractor wouldn't know about the delay. If the contractor did not turn in the late slip, the contractor would not be paid for the delay. On the other hand, it was possible that a driver might get a 30 minute delay slip at origin, but makeup that time en route.

She had a set schedule and every four weeks she would certify any extra trips or late slips that were turned in by the contractor. She would add those up and submit them to the postal data center for payment.

Occasionally, they would also contract for an extra trip to clear out some accumulated mail. There was an occasion when a number of contractors folded and they had to put out an emergency bid. Respondents showed up with excellent equipment and competent drivers and really bailed out the post office. They were very impressed by seeing Respondent's operation, after having dealt with shoddy equipment and drunken drivers from other contractors. Respondents were recognized in 2000 with United States Postal Service Golden Eagle award for excellence.

Mary Edwards testified at hearing in pertinent part:²⁶

She has been married to Richard Edwards for almost 25 years. Her primary role in their trucking business was to work on payroll and deal with employers. On the average, they had close to 100 drivers at any one time. When she calculated their pay, she used the hours in the contract from the Postal Service. One day might be a little longer and one day might be a little shorter, but the post office was pretty accurate on the contract times. If for some reason the driver took longer, the post office would give them a late slip.

RX-3 is a time sheet that the drivers would complete. They started using the time sheet after DOL investigated their operations in Amarillo. They were advised they needed to have a form. Before they started using the form, the drivers would just call in and report

²⁶ Tr-205-339.

their times. They started using the form around 2006. The form did not really change the way they calculated pay.

The drivers were supposed to enter on the time sheet the time they backed up to the post office dock and the time they delivered at the far end. They were only supposed to put the driving time in those blocks. By definition, those times should have been very close to the contract times and if by chance a driver did arrive early, they would still put something close to the contract time in the block. Delays for unusual circumstances were supposed to go in a different block. As a result, the starting and stopping times never varied by more than a few minutes. Drivers were paid a lower rate for breakdown time or things like waiting for an oil change. They did get the full rate for late slip time. Drivers were never disciplined for failing to ask to be paid for extra time.

She did use the times on their timesheets, but just to check and make sure they were staying close to the post office contract time. If the times didn't match, she knew something was wrong. If the trips were consistently taking longer than the post office time, they would do a route review and the post office might change the contract time or say the driver was doing something wrong, because the trip should take what they say it takes.

She would always pay on late slips issued by the post office when it was their fault. When there was a late delivery without the post office being at fault, they would not always get a late notice. It depended on the post office involved and the expeditor. Sometimes a phone call explaining why there was the delay was enough. If the post office did file a late notice and the delay was beyond the driver's control, she would go to the post office and ask them to supplement the normal contract price. She would pay the driver for the extra time when the post office paid the extra amount. Even if the post office did not pay them, she would do an end of year audit and pay the drivers on the late time. She could only pay on the late slips that she received, and if the driver did not hand in a late slip, he would not be paid for it. She paid the drivers the extra amount for the late slips based on when they got their money from the post office. The same was true for extra trips. Those payments could be months later.

RX-4 is a summary she made showing how the drivers were paid for their holiday pay. They treated all of their drivers the same way. Rodney Richards got paid every two weeks for his regular rates. Late slips and add on trips would be longer. He was never told that he had to stay with his truck. If he was down between routes, the truck had a sleeper, but he could do whatever he wanted. If he turned in a slip for extra time for truck inspections, he got paid. If he didn't, he did not get paid. Even though they at first lumped the fringe benefits and insurance in with the rest of the pay period, the drivers were paid the right total. Rodney Richards was paid for health and welfare. So were Michael Keefe and Michael O'Dell. Pedro Picon did call once to say he had been shorted two days' vacation, but they fixed that and he was paid.

RX-25 is an inspection checklist. Very few of the drivers ever turned them in, even though they were expected to do inspections and send in the reports. Most of the drivers did not do inspections. That's why they hired someone else to come in and check the trucks. They had a lead man at each location to check the trucks. In Lake Charles that was Roscoe Wallace. If a driver did do a pre-trip inspection and it took extra time, he would have to turn in a slip and ask for the extra pay. At her deposition, she testified that they did not consider pre-trip inspections as hours worked. She does not recall anyone claiming a pre-trip inspection took longer than ten minutes.

There were two earlier Amarillo investigations. Jeff Jett came to them and said they were in serious financial trouble with four kids and no job. He asked them for some sort of work. They told Jett they had not planned on hiring a driver and could not pay him the normal amount but they did pay him \$4500, even though it was not the required wage under the act. They adopted his family, gave them toys and food at Christmas and did what they could to help them out of poverty. The other case involved a driver named Rita in a similar situation. They hired her and paid her what they could.

There are no longer in the business of hauling mail for the post office.

Arthur Harmon testified at hearing in pertinent part:²⁷

He worked for Respondent for quite a while as a supervisor and running the trucks. He made sure that the trucks showed up to work and the company was running straight every day. He did that between 1993 and the middle of 2007. He was familiar with the postal contracts and oversaw those operations. He was basically Respondents' VP for operations and oversaw all of the postal contract routes.

When they won a contract, they would get a truck and hire drivers to run the route. The post office contract would tell them how many hours were required for the route and that is what they would use to pay the driver. If there was a delay, he would get the delay slip from the driver, submit it to the office, and the office would pay the driver the overage. If the route did not take as long as the post office estimated, they still paid the driver the full amount. Holiday time was paid an extra 50%.

He and Mr. Edwards used to travel out on the road for months at a time. They used a big motor coach as a combination home and office. If they had to hire drivers for a contract they put an ad in the paper or got on the phone to call drivers. Once they hired the drivers, they explained the rules and regulations and policies. They gave every driver a handbook with all of the information. The drivers were told that they would be paid the postal service estimated time for a trip. If they had extra hours because of the delay or something else, they needed to submit that documentation to be paid.

²⁷ Tr-121-161.

They told the drivers that they had a certain time to arrive at the dock to load. If they were delayed in loading, they could get a delay slip. However, most of the time, even with a delay in loading, their drivers made it to the destination either on time or even early. Some of those drivers wanted to be paid for their delay time, but Respondent couldn't pay the driver, because the post office wouldn't pay anything extra, because there had been no delay in total time. The contracts allowed a half hour or more than it actually took to complete the route. That was true in the hundreds of contracts he was involved in. The extra half hour was for inspecting the trucks and taking care of other things. A good truck inspection takes about 20 to 25 minutes. That includes a real inspection, checking tires, oil, and everything on the truck. They were told they had to do a pre-trip inspection, but that didn't always happen. Sometimes they would write drivers up for not doing their jobs properly, but he does not recall any specific examples. The morning pre-trip inspection happened before they backed the truck up to the post office dock. Since the post office time started with arrival at the dock, the inspection time was not included.

If the driver was delayed not because of a late load, but some other problem en route, like traffic, he would submit a form at the destination explaining the delay. If the driver gave Respondents a copy of that form, the driver could get paid for the extra time.

Every so often, he would go out after a meeting and check on the trucks himself. The trucks were filthy and he would help clean them. In the process of doing that it was a common thing to find late slips on the floorboard of the truck that hadn't been turned in. Some of the late slips were meaningless, because the time was made up en route, but others would have been payable. They kept telling the drivers to turn the late slips in, so that the drivers could be paid for that extra time. He does not recall disciplining any drivers for not turning in late slips, figuring that if they didn't want to get paid extra it was on them.

Respondents always paid the drivers what they were owed. During Hurricane Katrina they even paid their drivers extra money, even though they didn't get reimbursed from the post office.

Joseph Wallace testified at hearing in pertinent part:²⁸

He worked for Respondents for seventeen years as a driver. He got paid every two weeks. The amount was based on the contracts. He did not clock in or clock out. His hours worked was based on a daily report they sent him. The drivers completed the report and listed all their trips. He put the name of the trip, the start time, and the end time. He did not always put the same times for the same trips. Sometimes they might be five minutes one way or another. The start time he entered was the time he arrived at the post office. He would do a pre-trip inspection before he left for the post office, but it would only take five or ten minutes. The truck was parked only a half mile from the post office. Most of the time it was ten minutes from when he arrived at the truck to when he had the truck at the dock. The ending time on the form was the time that he got to the end of the route. At

²⁸ Tr-162-178.

that point he was off duty and could do whatever he wanted until the evening run. He would do another five or ten minute truck check before the evening run. That was also before he pulled up to the dock.

Respondents always paid him for the exact amount he put on the form. If there was a significant delay in loading at the post office dock, they couldn't just rely on the numbers on the time sheet. They had to submit a late slip. If he was held up for an extended period of time en route due to traffic or something else, he simply didn't get paid for that.

In addition to driving for Respondents, he also inspected the trucks, because many of the drivers didn't do it. Respondents paid him for doing that and probably paid him a little bit more than the hourly rate he got when he was driving.

James Walker testified at hearing in pertinent part:²⁹

He started working for Respondents in 1994 and stayed with them almost until 2011. He took care of the drivers' timesheets. He only worked with the Lake Charles drivers. He also drove some routes.

He would go on his computer and make a calendar, entering the drivers' arrival and departure times. He would sometimes pre-enter the data based on the contract time. None of the drivers ever came back claiming less than the contract time. If they wanted more than the contract time, they needed a late slip. Respondent always paid on the late slips. If it wasn't a late slip but a non-post office delay, he would tell Respondent and they would reimburse him. Pre-trip inspection times were not included in the logs, because the start time was arrival at the post office. A pre-trip inspection could have taken no more than about five or ten minutes. He was aware that Respondent had hired one person to inspect the trucks, but he still would want to look at the truck himself and was required to by the handbook.

Richard Edwards testified at deposition in pertinent part:³⁰

His primary role was to run the company. 60% of the 20 years he was in business, he stayed out in the field with the company on site monitoring the routes and drivers. He did that by traveling in a motor home that was also his office. Because DOL set the wage rates, a lot of the bookkeeping challenges and wage competition for labor were taken out of the business. That wage rate changed every two years.

The drivers had a morning run and an afternoon run. They were free to do whatever they wanted in between. In the morning they would show up for work, take their truck to the post office at the appointed time and load the mail. They then drove the route and unloaded their mail. After that they could do whatever they wanted, as long as they came back at the proper time to the post office to pick up the mail for the afternoon run. In many instances, the driver would probably drive the truck home. He allowed them to do

²⁹ Tr-178-195.

³⁰ CX-4.

that if it was not too far and just ate the cost of the gas himself. Other drivers might park their car on the postal grounds. Some would go to a truck stop and watch videos. They put sleeper units on some of the trucks even though it wasn't required, to make life better for the drivers. They tried to give their drivers good jobs so they could improve their lives.

Most drivers were honest, but some would cheat. For example, some would claim it took four hours to get an oil change when they had only been there 30 minutes. The drivers would stop and get their cigarettes and coffee and maybe something to eat. There was ample time in the contract for them to do it. The contracts had an extra 20 or 30 minute buffer, based on running at the posted speed.

They explained to their new drivers that they did not have an insurance program and instead would pay the additional rate. He explained that that included both insurance and retirement. If a driver worked on a holiday they got paid double. After one full calendar year, they got a week of vacation. The handbook they distributed to their drivers explained all of that. Their payroll records reflected the separation of fringe benefits.

The handbook also instructed the drivers to do a pre-trip inspection that included checking oil, lights, tires, brake fluid, and water. They didn't use an air gauge to measure tire pressure; they just looked to see if the tire was flat. It was a general check. He could do a check in three or four minutes without breaking a sweat. There was ample allowance in the contract time to do an inspection. They had a real problem with drivers not checking the trucks and even had a \$1000 fine charged against him in Lake Charles. He would sit across the street and watch guys pick up their trucks in the morning and no one would ever check a truck. He would get calls from the post office expediter telling him that the driver showed up with a flat tire. It was destroying his business. He had Joseph Wallace, who was a mechanic that had been with him for 18 years, do all the truck checks. Wallace was also one of his drivers.

If the post office caused them to be late, they were given a late slip. If the driver was able to make up the time en route, the late slip was denied. The fact that that happened often showed how much extra time was in the contract. The post office based its time calculations on less than the posted speed limit. If a driver ran at the posted speed limit there would be extra time. The drivers were supposed to turn in the late slips. If he did not get the late slips, he would not be aware of the extra work hours.

James Smith is his son-in-law and works for him as a manager, not a truck driver. Tina Smith is his daughter and help with the books. She never drove a truck. He would allow drivers to take their trucks extended distances home and write off the mileage and gas just to help those employees. Another driver didn't tell them about a run that was dropped and they overpaid him \$9000. When they caught the mistake in the paperwork, they just wrote it off. He allowed a driver to drive from Lake Charles and even paid him for the time it took him to drive home. That was probably an extra \$75 a day. He gave the same guy \$800 when his daughter got sick and they needed to go to Tennessee.

He will admit that the two previous violations involving Jett and Rita were the only two they didn't pay a wage rate to. They paid the back wages and cleaned up their paperwork so it never happened again. He does not recall the violation involving \$775.

A statement by Rodney Richards on 1 Jul 10 states in pertinent part:³¹

He was paid \$21.61 per hour to drive the San Angelo to Abilene route for Respondent. For the first four months, he drove seven days a week. Then he went to five days a week.

He would arrive at the lot where the truck was parked at 1645 and conduct vehicle inspection as required by DOT. After performing his inspection, he got to the San Angelo post office between 1730 and 1745. He backed up the truck to the dock to load and would leave San Angelo for Abilene 1830 and 1845. He would arrive in Abilene between 2015 and 2030. After unloading, he would take about 30 minutes to go get something to eat and then drive back to the post office to wait for reloading for the return trip. He was not allowed to use the truck for personal use and just sat and waited. One time when he went to Cracker Barrel for about an hour, Respondents told him he was supposed to wait with the truck. That was in the middle of 2009. He would fuel the truck twice a week in Abilene while he was waiting for the return trip. It took 15 to 25 minutes to fuel the truck. The first year of driving the route he would leave Abilene at 2100 but the last year and a half of driving it, he would get back to the Abilene post office about 0130 and leave Abilene at 0230 or 0300. He got back to the San Angelo post office between 0515 and 0530, arriving back at the parking lot between 0600 and 0615. He did not do a post-trip inspection and would be paid for four hours and ten minutes of work.

He would mail his late slips to Respondent once a month. In September or November of 2009, health and welfare payment started showing up on his pay statements. It indicated about \$18 for an hourly rate and \$3 for health and welfare. Before that time there was no indication of how much was for health and welfare. He was paid time and a half for hours that he drove on holidays.

A statement by Michael O'Dell on 4 Aug 10 states in pertinent part:³²

He drove the San Angelo to Abilene route for Respondent. He drove the route 6 days a week from 8 Feb 10 — 17 May 10. Then he started driving the route 7 days a week. He picked up his truck at a parking lot at 1700 and did a pre-trip inspection. He completed the inspection reports and sent them into Respondent once a month. After the inspection, he drove to the San Angelo post office to load mail. He then drove to the Abilene mail processing center, arriving between 1940 and 2040. After he unloaded at Abilene, he went to the Walmart to eat supper and sleep. At 0455, he drove back to the Abilene post office, picked up his load, and was supposed to leave Abilene at 0530. If he stopped for gas, he got back to San Angelo about 0815. If he didn't, he got back about 0745. He fueled twice a week. He did a post-trip inspection three times a week. That takes 30

³¹ CX-6.

³² CX-7.

minutes to clean the windows and mirrors and check tires. Often the post office was late loading him and he didn't leave until 0600. When that happened he got a late slip.

Respondent paid him based on times at the post office dock for loading and after unloading. He is paid 4.66 hours per day at \$17.56 per hour, plus \$3.74 health and welfare. He was paid for the Fourth of July holiday because he worked it. If he was not working on a holiday, he was not paid. He was paid for Memorial Day. He never missed a day for being sick and did not take any vacation days. He was told he would get one week vacation after working for a year.

*A statement by Daniel Henderson on 4 Aug 10 states in pertinent part:*³³

He worked for Respondents as a semi-truck driver at a rate of \$17.87 per hour plus \$3.74 per hour for health and welfare. He also worked as a light truck driver for \$17.56 hourly plus \$3.74. He did not know what his pay rate was and the pay stubs were very confusing.

He drove the semi from Tyler to Marshall, Texas six times a week. His appointed time to arrive at the dock to load was 0315. His truck was parked at the Valero gas station and he would get there at 0230. He would do a pre-trip inspection that would take about fifteen minutes. He sent the inspection reports in to Respondent. About four times a week, he would fuel up at the Valero and that would take about ten minutes. It took about five minutes to drive from the Valero to the post office. At 0315, he left the post office, arriving in Marshall at approximately 0415. Two or three times per week, he would get there early and have to wait until 0415 to unload. After unloading, he would leave for Longview post office by about 0440. He dropped the truck off at Longview about 0500.

He would then pick up a light box truck and conduct a ten minute pre-trip inspection and leave the Longview post office at 0510 and drive back to Tyler, arriving at 0530. He would then wait for the appointed 0615 pick-up time. He wasn't paid for that waiting period. After picking up the mail in Tyler at 0615, he would leave Tyler for Marshall at 0630. The scheduled arrival time for Marshall was 0715, but he would usually arrive about 0705 and have to wait until 0715.

He would load again and leave Marshall for Tyler at 0730, arriving back in Tyler at 0815. He unloaded and left the Tyler post office at 0830, drove to Longview and refueled the truck along the way, arriving in Longview at 0900 and then going home.

He would retrieve the truck in Longview at 1700, conduct a pre-trip inspection, and leave for the post office at 1715. He would drive from Longview to Tyler about 1720 or 1730. He was scheduled to arrive at Tyler around 1800, but actually arrived at 1810, unloading the truck until 1825. He would then drive the truck back to Tyler and conduct a post-trip inspection and was finished for the day at 1845. Sometimes, he also fueled the truck. He was paid for about five hours of work. He did not use any means to clock in or out. He

³³ CX-8.

had three break downs of two hours each and was not paid for the time spent waiting for the repair. He thinks he was owed, but never paid for, four or five hours in late slips.

Craig L. Jackson testified at hearing and his declaration states in pertinent part:³⁴

He is a regional wage specialist in the Southwest region for the Department of Labor. He conducts Davis – Bacon surveys in that region. At the time DOL began its investigation and enforcement action, Denise Flores was the responsible specialist. He took over from her and one of the first things he did was to go through the investigative case files.

The investigations in this case were all initiated from drivers' complaints. The contracts involved were contract Nos. 790L0, 79036, 70640, 706AA, 70660, 70642, 70643, 706L0, 76936, 76910, 754B8, 757L6, and 76936. A couple of the investigations had multiple complaints. The general nature of the complaints was that the drivers were not being paid for all of their hours. When DOL received the complaints, the investigator scheduled an initial conference with Respondents to try to resolve the issues. They interviewed the complainants and asked for the pay records from Respondents. The complainants reported that they were not clocking in or clocking out and there was no time keeping method. They also said they were not being paid for holidays or vacation time. They indicated that pre- and post-trip inspection time was not being paid. There were also problems with prevailing wage rates, in that some employees were getting paid by day rate as opposed to prevailing wage rate with health and welfare being shown on a payroll stub. Some complainants reported that the health and welfare was just beginning to be separated out on pay. If health and welfare is not separated out, DOL assumes that it was not paid. The regulations require that it be separate in the payroll records. Where they did go and retroactively separate it out, there were deficiencies or the total amount was less than the required wage and fringe benefits combined. That deficiency resulted from the annual fringe benefit increase.

In the process of calculating back wages, some of the investigators included layover time because they were told that the drivers could not leave the truck. However after discussing the issues with Respondents, they determined that layover time was not compensable and removed that from the violation. That accounts for a significant decrease in the amount due. They also gave Respondents credit for other amounts such as per diem, even though that was not required. In the process of the interviews, some drivers would indicate that they had actually had an eight or nine hour day, but only been paid four or five hours. It was very difficult because there were no records and they were relying on the recollection of witnesses about things that had happened years before. Eventually, they did meet with Respondents' representative and went through more records and were able to reduce the charged violation amount, sometimes by splitting the difference. It appeared that the drivers operated on the assumption that they were going to be paid for the contract time, no matter what.

³⁴ Tr. 339-374; CX-3.

For contract Nos. 754B8 and 757L6, he reviewed all the documents to estimate 30 minutes per day per driver to account for inspections, fueling, oil changes and driving to and from loading docks. He also included back wages for unpaid federal holidays, but did give credit to Respondents for per diem amounts as well as late slips and vacations paid, where Respondents were able to provide documentation of those payments.

For the other contracts, he was able to use more specific information based on driver statements. He used those statements to estimate actual hours worked per week, multiplied that by the wage rate and calculated the amount owed. He compared the amount owed to the actual amount paid and identified the difference as the underpayment. In the aggregate, his calculations revealed that Respondents owed 58 employees a total of \$213,965.02. The post office withheld \$188,152.73 from Respondents and transferred that amount to the Department of Labor.

Respondents had been involved in three earlier investigations, each of which identified violations of the Act and resulted in Respondents agreeing to pay back wages. In case 76408, Respondents paid \$4500 for failing to pay health and welfare fringe benefits. In case 398180, Respondents paid \$14,223 for the same violation. In case number 1466133, Respondents paid \$735 for failing to pay prevailing wages.

Declaration of Troy Mouton states in pertinent part:³⁵

He was an assistant district director for WHD in Kenner, Louisiana. WHD initiated an investigation of Respondents after receiving multiple complaints that Respondents were violating the Act. The first complaint came in April 2007 and regarded contract number H CR 79036 for mail routes in the Amarillo area. In the process of investigating that complaint, WHD received a number of other complaints from drivers on routes in Louisiana and other parts of Texas.

The investigation revealed that Respondents paid all of their drivers by the trip based on the post office contracted hourly schedule. However, WHD's investigation led it to conclude that drivers spent more time than the contract time due to inspection, fueling, and maintenance of the trucks, along with time spent driving the trucks to and from the post office loading docks. WHD calculated the underpayment by using employees signed interview statements and reconstructing the hours worked that were not paid.

Based on his review of the employee statements, he concluded that for Louisiana contracts 70640, 70642, 70643, 70660, 706AA, and 706L0, it would be reasonable to add an additional 1.5 hours per week per driver to cover those additional duties. He also included amounts for five of the ten Federal holidays required to be paid, based on the employee's statements that they were not paid for those holidays. On the other hand, he gave credit to Respondents for per diem amounts that Respondents paid, as well as late slips and vacation and holidays paid, where Respondents were able to document such payments.

³⁵ CX-1.

Based on his investigation, he determined that Respondents failed to pay a total amount of \$59,897.36 to 37 employees.

DISCUSSION

There is no real dispute as to the factual background of this case. Respondent contracted with the United States Postal Service (USPS) to drive various mail routes. USPS designated pickup and delivery times based on its assessment of distance, speed limits, and traffic. Those times did not assume the maximum speed limit and were designed to provide a buffer so that drivers were generally able to complete the designated route in the allotted time. USPS included time for loading and unloading the mail in its route estimates, but did not specifically allow time for pre-trip or post-trip truck inspections, fueling, or maintenance.

The evidence varied widely as to the time it took to do a pre- or post-trip truck inspection. Respondents provided an inspection checklist, but the checklists were rarely ever turned in by the drivers. Mary Edwards testified that if the time the driver spent inspecting his vehicle caused him to exceed the default hours, he could submit a request to be paid for that extra time. She did not recall anyone claiming that it took more than ten minutes to do an inspection and the record indicates that it was rare for a driver to claim the extra time for truck inspection.

Arthur Harmon said an inspection would take 20 to 25 minutes, but conceded that didn't happen very often. Joseph Wallace and James Walker said inspections would take five to ten minutes. Richard Wallace said a pre-trip inspection would take three to four minutes, without breaking a sweat. Daniel Henderson said he would do an inspection in about fifteen minutes. In fact, the drivers' compliance with the daily inspection requirement was so poor that Respondents hired someone to specifically do the inspections. The weight of the evidence is that, in the vast majority of cases, inspections were either not done or done in less than ten to fifteen minutes.³⁶

Consequently, in most cases, drivers were able to complete the route with time to spare. If a driver's departure was delayed because of problems at the post offices,³⁷ the driver was provided a late slip. The driver was to turn one copy of the late slip in to the post office on arrival to justify any delay on delivery. The driver was to turn another copy of the late slip in to Respondent so that he could be compensated for the extra time and Respondent could in turn charge the post office. If a driver was late through no fault of the post office, it was within the discretion of the post office dispatcher whether or not to raise the issue with Respondent. Repeated problems of that nature could lead to contractual action against Respondent or a reassessment of USPS' time estimates for the subject route. If the post office did not notify Respondent, it was up to the driver to do so and claim the extra time.

³⁶ However, the evidence is also clear that in those instances where inspections required the drivers to work hours in excess of the postal contract time, they would only be compensated if they specifically asked.

³⁷ For instance, a delay in departure because the mail was not ready for pickup.

Respondent's general approach to keeping employee time records was based on its conclusion that the time allotted by the post office was more than the drivers actually required and that in the majority of cases it was erring to the benefit of the drivers by paying them the post office route time instead of actual clocking in or clocking out time.³⁸ That fundamental assumption was the foundation of Respondents' wage and hour calculations and the drivers understood that the hours they submitted were expected to match the contract time.

In those instances where a driver was delayed and spent more than the contract time, he could submit a late slip. If the delay was due to the post office and the driver submitted the late slip, Respondent would charge the post office for the extra time and eventually pay the driver. In many cases, the driver would make up for the delayed departure and still deliver on time. In those instances, some drivers would still turn in the late slip in hopes of getting extra pay, even though they did not end up working the extra time.

If the delay was due to other circumstances, the post office or driver might or might not notify Respondent. If Respondent was notified of such a delay by the driver and the driver was not at fault, Respondent would pay him or her for the extra time. There was no real clocking in or clocking out and drivers would normally simply submit slips that matched the contract time.

As a result of their reliance on the contract time as the default working hours, Respondents had no real system for recording actual working hours. Indeed, they testified at hearing that they only started using timesheets in 2006, after WHD investigators told them they needed to use a form. However, they also candidly conceded that the timesheets did not change the way they calculated pay and they used the timesheets just to check that they were staying close to the default contract times.

Consequently, it would be fair to say that the drivers were employed on a quasi-piecework basis and essentially paid per trip. The set hours of work were never amended down, even if the trip was shorter than the contract time, resulting in those instances in an overpayment. However, if the trip was longer than the contract time the hours were supplemented and the driver properly compensated only if he or she took the initiative to request it. Respondents made sure the drivers knew they could do so, but ultimately allowed the individual drivers to decide for themselves whether they wanted to be paid for any hours worked beyond the postal contract times. Indeed, the ultimate accuracy of Respondents' approach to recordkeeping depended on the assumption that drivers would report extra hours in order to be paid. While that is not an entirely irrational approach, the law is clear that an employer may not rely on its employees to carry the burden of proper recordkeeping.

³⁸ The family run business appears to have been based more on trust than structure, which ultimately led to my finding of inadequate recordkeeping and subsequent reliance on WHD's admittedly extrapolated calculations. Indeed, the lack of a developed records management system forced Mrs. Edwards to take on a herculean task on the eve of trial and assemble and summarize pay data in a well-intentioned and helpful, albeit ultimately legally vain, attempt to establish the reliability of Respondents' pay process.

The record indicates that the reliance on post office contract times was generally justified as a matter of aggregate equity. The extra time allowed by the post office was sufficient for normal pre-and post-trip inspections and to make up for a late departure. Consequently, in the majority of instances, drivers were more likely to be overpaid than underpaid.³⁹ However, Respondents allowed their drivers to decide whether or not to claim hours in excess of the contract time. Moreover, they understood that many drivers were not doing so. That part of Respondent's approach to tracking working hours is fatal to any lingering suggestion that they were in compliance with the requirement for recordkeeping.

Although it may be of limited relevance, I do note that I found the testimony of Respondents and their witnesses to be highly credible. At hearing, Respondents appeared forthright, honest, candid, and committed to accepting whatever outcome resulted from the emergence of the truth. While obviously frustrated by an enforcement activity they believed to be based more on form than substance, they readily testified to facts that were not in their favor. They clearly took great pride in the service they had provided to the USPS and the employment they had provided to their drivers. The clear weight of the evidence was that their intent was never to abuse their drivers in terms of compensation.

That said, the fact remains that they did not keep the requisite records to allow a complete and reasonable determination of whether they complied with the Act. As a result, WHD was entitled to independently review and calculate wages due to Respondents' employees under the relevant contracts. Moreover, the burden shifted to Respondents to show why WHD's calculations are unreasonable.

In that regard, I note that Investigator Jackson's testimony was also very credible and WHD's calculations appear to be rational and reflect an effort to take into consideration Respondents arguments and give them credit for payments wherever practicable. Of course, WHD relied on statements made by former drivers who may have had a personal bias against Respondents, who were not subject to cross-examination, and whose statements were not significantly corroborated by other evidence in the record. In short, it is difficult to tell just how much weight those statements deserve.

However, what is clear is that at least in some instances, drivers worked in excess of the postal contract time. It is also clear that although Respondents operated on the assumption drivers would claim the extra time, that did not always happen. Nonetheless, Respondents had no policy that required or even encouraged⁴⁰ drivers to report when they were forced to work in excess of the postal contract time.

³⁹ Respondents cite *U.S. v. Klinghoffer*, 285 F.2d 487 (2nd Cir. 1960) in support of a "no harm no foul" argument that if the shortages and overages balanced out, they have complied with purpose of the Act. However, *Klinghoffer* dealt with minimum wage and not adequate recordkeeping. Moreover, because Respondents did not actually keep track of shortages and overages, the record does not support a finding that they actually balanced, particularly in terms of each individual driver.

⁴⁰ Beyond the fact that they would eventually be paid.

As a result, it is impossible to say with any degree of confidence that in the aggregate, considering all the drivers over the period of the contracts, the overpayments were equal to or greater than the failure to pay for extra time, whether claimed or not. Even if it were somehow possible to make that determination, it would still leave open the question of whether or not some drivers were overpaid and other drivers underpaid. Therefore, I find that Respondents failed to maintain records as required by the Act and were unable to carry their burden in establishing that WHD's calculations are unreasonable.⁴¹

The record is clear that Richard and Mary Edwards have retired and no longer intend to seek any federal contracts. While as a practical matter the issue of debarment is moot, WHD nonetheless seeks an order in that regard. As previously noted, Respondents take a great deal of pride in the history of their performance of contracts with USPS and understandably believe the debarment could be viewed as an inaccurate characterization of that history. The weight of the evidence in the record indicates that USPS was highly satisfied with their performance and they tried to treat their drivers fairly.

However, the burden is on Respondents to show why a debarment order should not be issued. Included in the legal standard for debarment is whether or not the contractor responded appropriately to prior investigations for violations of the Act. Perhaps the most probative evidence in that regard was that even after they were cautioned after being investigated to start using timesheets in their pay management, they still did not change their approach to calculating pay.

It is important to note that an order of debarment does not necessarily require an intent to defraud its employees or the government and I note that I find no such intent in this case. However, it is clear that Respondents willfully failed to comply with the recordkeeping requirements of the Act and were unable to show in the absence of reliable records that drivers may have been underpaid. Respondents have not shown unusual circumstances that warrant relief from debarment, and therefore, based on the evidence before me, I find they should be debarred pursuant to Section 354(a) of the Act.

⁴¹ The analysis applies equally to the uncertainty related to the payment of fringe benefits and holiday pay.

Based on the foregoing, it is hereby **ORDERED** that:

Respondents are liable for \$213,965.02 in unpaid wages and fringe benefits. To the extent the postal service or other federal departments, agencies or entities are in or become in possession of funds otherwise payable to Respondent, they shall turn over such funds up to the amount due under this Order to the United States Department of Labor, Wage and Hour Division.

Respondents' names shall be placed on the list maintained by the Comptroller General of the United States, of persons or firms having been found to have violated the Act, and therefore having become ineligible, for the period of three (3) years from the date of publication on the list, for the award of any contract of the United States.

ORDERED this 17th day of July, 2017 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service

(eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

A copy of any such petition must also be provided to the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002. Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB's Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). However, if you e-File your petition, only one copy need be uploaded.

Service is to be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).

A copy of the petition is also required to be served upon the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).