



Issue Date: 02 June 2014

Case No. 2009-SCA-00011

IN THE MATTER OF

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

DECISION AND ORDER

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 by barring them from receiving federal contracts for a period of three years.

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 they had violated the Act by (1) failing and refusing to furnish required fringe benefits to employees engaged in the performance of contracts awarded to Respondents by the United States Postal Service (USPS), and (2) failing to make available adequate and accurate records showing daily and weekly hours worked by their employees. The original complaint stated that Respondents were liable for underpayments of compensation in the amount of \$27,957.22 and should be debarred 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 the U.S. Postal Service.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, on 22 Jan 13 I vacated that order 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 each submitted briefs.

Accordingly the evidentiary record in this case consists of:

Stipulated Facts
 EX-A-F
 RX-1-2⁴

STIPULATED FACTS

1. Respondents were parties to Contract Numbers 790L0, 79036, 70640, 706AA, 70660, 70642, 70643, 706L0, 76936, 76910, 754B8, 757L6, and 76936, which required Respondents to deliver mail for the U.S. Postal Service during the time period of the investigations conducted by WHD in this case.
2. Richard Edwards and Mary Edwards exercised control, supervision, and/or management over the performance of Contract Numbers 790L0, 79036, 70640, 706AA, 70660, 70642, 70643, 706L0, 76936, 76910, 754B8, 757L6, and 76936, including handling issues such as hiring, firing, managing, and/or paying employees.
3. The contracts, including any modifications or renewals, were subject to and contained the representations, stipulations, and regulations required by the Act and 29 C.F.R. Part 4.
4. Services specified in the contracts were furnished in the United States to the Government of the United States through the use of service employees, as defined by Section 8(b) of the Act.⁵
5. Before this case, Respondents had three prior investigations that resulted in violations of the Act. In each of the previous investigations, Respondents agreed to pay the amount of back wages. Respondents also agreed to comply in the future with the requirements of the Act, the applicable contracts, and the wage determinations that were incorporated into the contracts.⁶

CASE ID	INVESTIGATIVE PERIOD	CONCLUSION	ACTION
76408	4/15/1994-7/15/1995	Owed \$4,500 to one employee for failure to pay proper health and welfare and fringe	Paid all back wages due

⁴ Respondent's exhibits were not labeled so I have termed them RX-1 and 2.

⁵ 41 U.S.C. § 357(b).

⁶ In their Response to Joint Stipulated Facts, which Mr. Strobel signed, Respondents agreed with #1-5, but offered a different perspective on case number 1466133, identified in the table above. Because they do not dispute that they were *charged* with a third violation for the period, or that WHD concluded they owed \$735, but simply argue that the charge was unwarranted, I find that does not invalidate the stipulations.

		benefits	
398180	8/15/1994-8/15/1997	Owed \$14,223 to one employee for failure to pay prevailing wage and health and welfare benefits	Paid all back wages due
1466133	10/03/2005-10/31/2005	Owed \$735 to one employee for failure to pay prevailing wage	Paid all back wages due

ISSUES IN DISPUTE

WHD's Position

Violations

WHD alleges that Respondents did not keep or maintain time sheets reflecting the number of hours actually worked by the drivers it employed on the USPS contracts. Instead, Respondents paid their drivers "by the trip," based on the USPS's schedule of hours set forth in the contracts.⁷ WHD alleges that this method did not adequately compensate drivers for all of the hours they worked. For example, WHD alleges that Respondents' drivers spent time before and/or after their routes conducting inspections of and maintenance on their trucks, which was part of their job duties and which was not compensated by Respondents.

Back Wage Assessment

Because Respondents did not keep accurate time records, WHD used employees' signed interview statements to reconstruct their hours and calculate back wages owed. When WHD was unable to interview an employee, they based their calculations on interview statements of other drivers who drove the same routes. For some of the contracts (specifically 754B8 and 757L6), WHD determined it was reasonable to use uniform estimates of the actual hours worked, and thus calculated back wages equal to 30 minutes per day per driver, to account for pre and post-trip inspections, fueling, oil changes, and time spent driving the trucks to and from the loading docks.

WHD also included back wage amounts on those contracts for five of the ten Federal holidays required to be paid, based on employee statements that they were not paid for all holidays. WHD also credited Respondents for per diem amounts Respondents paid, as well as late slips, vacations, and holidays paid, where Respondent provided such information.

⁷ For example, if the USPS contract designated that the time for Route A between City 1 and City 2 was three hours, then Respondents paid the driver the applicable wage rate for a total of three hours.

WHD Assistant Director Troy Mouton determined that for contracts 70640, 70642, 70643, 70660, 706AA, and 706L0, it was reasonable to calculate 1.5 hours of back wages per week for each driver, to cover pre and post-trip inspections, fueling, oil changes, and time spent driving the trucks to and from the loading docks. Mouton also included back wage amounts for five of the ten Federal holidays required to be paid based on employee statements and credited Respondents for per diem, late slips, and vacations and holidays paid, where Respondents provided such information.

WHD seeks a judgment for \$213,965.02 in back wages due to 58 employees. WHD also seeks to have Respondents debarred from future contracts with the government for three years.

Respondent's Position

Respondents agree that they paid their employees on a trip basis and not by the hour. They object to WHD's back wage calculations, however, because they claim they did not get any credit for the fact that the routes were run in less time than the USPS allotted and paid Respondents to pay their employees. In other words, Respondents' position is that they paid the proper wages to their employees because the time for pre and post-trip inspections, refueling, &c. was accounted for by the generously-estimated route times given by the USPS.

Respondents argue that when a driver is late starting the route, the USPS issues a late slip, which allows the driver to be paid for the extra time. However, if the driver still arrives at the destination at the designated time, the late slip is denied. Thus, Respondents conclude, "the days when the driver did not start out late...he would have been able to complete the route in less time than the USPS was paying for and for which he was paid."⁸

Respondents argue WHD's position is untenable because the USPS "expects the trucks to be maintained and functional," "allows for time to load and unload the mail," and "the routes are run at 10 miles or more below the posted speed limits to insure that the carrier is being paid for enough hours."⁹

Respondents also argue that the WHD Field Office Handbook and/or "regulations"¹⁰ only require that an employee be paid an amount equal to the applicable rate times the total hours worked, even if some hours are not paid for at all but the total hours worked times the applicable rate is met. They cite *U.S. v. Klinghoffer* for the proposition that as long as the minimum wage of \$7.25 is met by this method, there is compliance.¹¹

⁸ Respondents' Brief at p.2.

⁹ *Id.* at 2-3. Later in the brief, Respondents stated "USPS maintains very accurate records of the starting time and ending time of the routes. Rather than using the employees' estimates or allegations of what time it took them to run the routes, WHD should have contacted the USPS and looked at those records." Respondents did not offer those records, however.

¹⁰ Respondents do not cite to the regulations.

¹¹ 285 F.2d 487 (2d Cir. 1960).

Respondents also take issue with any claims that drivers in Lake Charles were taking time to check their trucks, because Joseph Wallace was employed specifically for that purpose and no other drivers were doing so. Respondents further maintain that they were not credited for some overpayments to employees, arguing that some were paid an extra ten dollars per day and some were paid more than the Act's required rate. Moreover, Respondents noted that they were never credited for days the driver had received a late slip and been paid extra, but had actually made up the time on the route.

Respondents also allege that they have records that show their employees fueled their trucks during the running of the routes, and not before or after.

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.¹² Contractors who fail to provide such wages and benefits are liable for the underpayment and can be debarred from future federal contracts.¹³

Contractors must maintain records of the 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.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 Findings of fact under the Act are held to the preponderance of the evidence standard.¹⁷

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.¹⁸ Relief from debarment is not warranted where there are willful or culpable violations and failure to maintain records.¹⁹ "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."²⁰

¹² 41 U.S.C. § 6702(a).

¹³ 41 U.S.C. § 6705.

¹⁴ 49 C.F.R. § 4.6(g)(1).

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 *Dantran, Inc. v. Dep't. of Labor*, 171 F.3d 58, 71 (1st Cir. 1999) (citing 41 U.S.C. § 39).

¹⁸ Section 5(a) of the Act.

¹⁹ 49 C.F.R. § 4.188(a).

²⁰ *Vigilantes v. Administrator, Wage and Hour Div.*, 968 F.2d 1412, 1418 (citing 29 C.F.R. § 4.188(b)(2)).

Whether or not debarment is appropriate is governed by a three-part test.²¹ 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.²² The contractor must next show a “good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.”²³ 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.²⁴ The contractor bears the burden of proving unusual circumstances that warrant relief from debarment.²⁵

EVIDENCE

*Declaration of Craig L. Jackson states in pertinent part:*²⁶

He was a government contracts specialist at the time WHD investigated Respondents, and reviewed all of those investigations. WHD initiated its investigation of Respondents after multiple employee complaints that their pay practices violated the SCA. During his investigation, he found that Respondents failed to pay required wages under the Act in the total amount of \$213,965.02 to 58 employees, and he prepared a spreadsheet showing a breakdown of back wages due to each driver in the case (EX-F).

*Declaration of Troy Mouton states in pertinent part:*²⁷

He was an Assistant District Director at the time WHD investigated Respondents and reviewed all their investigations. He reviewed the Secretary’s document entitled “Evidence on Disputed Facts,” has personal knowledge of facts 7-11 and 13, and attests that those facts are true and accurate. During the course of his investigation, he found that Respondents failed to pay required wages under the Act in the amount of \$59,897.36 to 37 employees in Louisiana.

*A statement by Rodney Richards on 1 Jul 10 states in pertinent part:*²⁸

He was paid \$21.61 per hour and drove the San Angelo to Abilene, Texas, route. He worked Sundays through Friday mornings. He would arrive at the lot at 16:45 and would check the truck’s tires, lights, replace small parts, check fluids, and warm it up as per the required DOT inspection. He would arrive at the San Angelo post office at 17:30 or 17:45 and would leave after loading at 18:30 or 18:45. He would arrive in Abilene at 20:15 or 20:30 pm and would unload the truck. He would then go to get something to eat and would return to the truck to get it re-loaded with mail. He drove back to the Abilene post

²¹ 29 C.F.R. § 4.188(b)(3)(i)-(ii).

²² 29 C.F.R. § 4.188(b)(3)(i).

²³ 29 C.F.R. § 4.188(b)(3)(ii).

²⁴ 29 C.F.R. § 4.188(b)(3)(ii).

²⁵ 29 C.F.R. § 4.188(b)(1).

²⁶ WHD’s Exhibit (EX)-A.

²⁷ EX-B.

²⁸ EX-C.

office at 01:30 and left at 02:30. He would arrive in San Angelo at 05:15 to 05:30 and would return the truck at approximately 06:15. He only got paid four hours and ten minutes a day for driving, at \$21.61 per hour. He would fuel the truck twice a week in Abilene, which took 15-25 minutes. He would fuel the truck after unloading, during the time that he was waiting prior to loading again.

A statement by Michael O'Dell on 4 Aug 10 states in pertinent part:²⁹

He drove the San Angelo to Abilene route for Respondents six days a week from 8 Mar 10 to 17 May 10, when he started driving it seven days per week. He would show up at 17:00 or 17:15 to do a pre-trip inspection every day, during which he would start the truck and check fluids, oil, tires, lights, and mirrors. He would also fill out a driver's vehicle inspection report. He picked up the truck and drove it to the San Angelo post office to pick up the mail to be delivered to Abilene. After picking up the mail he would arrive at the Abilene processing center between 19:40 and 20:40 and would unload the truck and go to eat supper, taking an hour and a half. He would lay down to sleep from 23:00 to 04:30, then go back to the Abilene post office at 04:55. He left Abilene at 05:30 unless they were late. He would arrive back in San Angelo at 07:45 if not refueling, and at 08:15 if he was. He refueled twice a week. Post inspection occurred three times a week and took 30 minutes to clean the windows and mirrors and look at problems with the tires.

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. He was paid 4.66 hours per day at \$17.56 per hour plus \$3.74 per hour for health and welfare.

A statement by Daniel Henderson on 4 Aug 10 states in pertinent part:³⁰

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 drove the semi from Tyler to Marshall, Texas. He arrived at his truck at 02:30 and conducted the pre-check, which consisted of checking lights, tires, oils, pressures, and liquids and took approximately 15 minutes. Approximately four times per week, he would fuel up between 02:30 and 03:15, which took about fifteen minutes. He left Tyler at 03:15 and arrived in Marshall at 04:15. He left Marshall at 04:40 and arrived in Longview, Texas, at 05:00. He would then pick up a light box truck and conduct a pre-trip inspection and leave the Longview post office at 05:10 and drive back to Tyler, arriving at 05:30. He would then pick up another load of mail in Tyler at 06:15 and would leave Tyler for Marshall at 06:30, arriving around 07:15, then unload the truck and leave Marshall again at 07:30, arriving back in Tyler at 08:15. He unloaded and left the Tyler post office at 08:30, drove to Longview and refueled the truck along the way, arriving in Longview at 09:00 and then going home.

²⁹ EX-D.

³⁰ EX-E.

He would retrieve the truck in Longview at 17:00, conduct a pre-trip inspection, and leave for the post office at 17:15. He would drive from Longview to Tyler about 17:20 or 17:30 and arrive at 18:10, unloading the truck until 18:25. He would then drive the truck back to Tyler and conduct a post-trip inspection and was finished for the day at 18:45. He was paid for about five hours of work. He did not use any means to clock in or out. He had two break downs and was not paid for the time spent waiting for the repair.

Printout of Speed Limits for USPS states in pertinent part:³¹

The USPS Speed Limit Committee set new speed limit guidelines. For a posted speed of 60, the maximum HCR scheduled speed was 49. For a posted speed of 65, the maximum HCR scheduled speed was 52, and so on.

An excerpt from the Field Operations Handbook states in pertinent part:³²

Section 30b02 states:

In non-OT [overtime] w/w's [work weeks] or in w/w's in which the OT provisions do not apply, an employee subject to section 6 of FLSA is considered to be paid in compliance if the overall earnings for the w/w equal or exceed the amount due at the applicable MW [minimum wage]. This is true regardless of whether the employee is paid on the basis of a single hourly rate, different hourly rates, commissions, certain bonuses, or some combination of these methods. In other words, if the employee's total earnings for the w/w (including certain bonuses such as a production bonus—see FOH 30b07) divided by compensable hours equals or exceeds the applicable MW, the employee has been paid in compliance with Sec 6. These principles will also apply where an employee is not compensated for time which is compensable under FLSA. For example, if an employee subject to the \$3.35 MW during a w/w is paid for 32 hours at \$5.50 per hour and is paid at a lesser rate or nothing at all for 8 or fewer additional hours worked, this individual is considered to have been paid in compliance with Section 6. The WHD position regarding proper payment in w/w's where OT is due is set out in 32j02.

DISCUSSION

Back Wages

Respondents submitted only argument to support their position that they did not underpay their employees. They did not submit evidence in the form of payroll records, wage slips, statements, affidavits or other documentation to support their position that their method of compensation was adequate. Neither the stipulated facts nor the citations to the Field Operations Handbook nor the posted speed limits for USPS trucks adequately answers WHD's contention that they did not pay employees for pre and post-trip maintenance and refueling time. They did not offer any evidence for the record of the late slips that they alleged USPS provided to account

³¹ Respondent's Exhibit (RX)-1.

³² RX-2.

for time spent waiting when the loading/unloading process was delayed.³³ Respondents' sole contention that it did not underpay its employees seems to rest on its argument that because the USPS calculates routes based on a lower-than-posted speed limit, the "extra" time on the route makes up for time spent inspecting and refueling the trucks.

According to the evidence WHD produced, however, the time spent refueling and/or inspecting the trucks far exceeded any shortage in time spent actually driving the route. For example, Michael O'Dell drove a route from San Angelo to Abilene, and was paid for 4.66 hours of work. His statement was that he actually spent a minimum of 6.92 hours on the route,³⁴ which included a pre-trip inspection of the truck and an hour of extra time spent waiting for the post office to load the mail. Driving the maximum scheduled speed of 56 in a 70 miles-per-hour posted zone would not come close to making up this difference.

Respondent also contends that the USPS issued late slips to compensate employees for extra time spent on the route, when the loading or unloading process took longer than anticipated. This fact does not account for extra time the driver may have spent on pre-trip inspections or refueling, however.

Testimony in the record from Respondents' employees corroborates WHD's allegation that Respondents failed to adequately compensate them for time spent on pre and post-trip maintenance, refueling, and time spent driving the trucks to and from the loading areas. Employer submitted no evidence that its "per trip" compensation scheme adequately compensated its employees for the time spent on the job. The case Respondents cite, *Klinghoffer*, dealt with minimum wage under the Fair Labor Standards Act, and does not apply here.³⁵

There is nothing in the evidentiary record to allow me to find that Respondents kept adequate records of the wages and benefits it was paying its employees. Respondents produced no such records to counter WHD's allegations. WHD used employee's estimates of hours worked to calculate wages owed, which was reasonable, under the circumstances. It credited Respondents for wages paid and other documented payments, such as a per diem. Moreover, there is no indication that Respondents were entitled to simply rely on the USPS calculations of the time required and not track and pay its employees for actual time spent.

³³ To the extent that such a production would have served to explain why the allegations of underpayment were incorrect.

³⁴ Three hours and forty minutes one way and three hours fifteen minutes the other, not including fueling time if he refueled.

³⁵ 285 F.2d 487.

Thus, between the absence of evidence to the contrary³⁶ and the employee's signed statements, I find that WHD's methods of assessment of violations and calculations of back wages were reasonable.

Debarment

Respondents have a history of underpaying their employees' wages and of failing to keep adequate records. There was no evidence presented that they put mechanisms in place after prior violations to ensure future compliance. Their steadfast reliance on their own theory of payment—that the difference between the posted speed limit and the USPS scheduled speed would account for the extra time spent refueling and inspecting the trucks—indicates a fundamental lack of either understanding of or respect for the assurances of the Act. Moreover, for many employees, the calculated back wages owed were substantial.³⁷

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.

SO ORDERED.

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
United States Department of Labor
Suite S-5220
200 Constitution Avenue, NW
Washington, DC 20210

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

³⁶ Respondents submitted no evidence to support their allegation that drivers in Lake Charles should not have been compensated for maintenance time because they had hired Joseph Wallace to do such work, nor did they produce documentation showing their employees fueled their trucks during the running of the routes, and not before or after.

³⁷ *See* EX-F. For example, Michael O'Dell is owed \$24,388.87, Rebecca Perkins \$13,358.25, Rodney Richards \$25,978.08, and Bliss Bignall \$17,320.60.

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). 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).