

U.S. Department of Labor

Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202



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In the matter of :

DEPARTMENT OF LABOR :

Complainant :

Date: OCT 11 1985

v. :

Case No. 84-PCA-2

RAINEY FABRICATING, INC., a corporation :
and HAROLD RAINEY :

Respondents :

..... :

DECISION AND ORDER

This proceeding arises under the Walsh-Healey Public Contracts Act, 41 U.S.C. §35 et seq. ("Act"). A hearing was held before me on December 12, 1984 in Lancaster, Ohio, and briefing was completed in June 1985.¹ The respondents, Rainey Fabricating, Inc. ("the company") and Harold Rainey ("Rainey"), who is the company's president and the person responsible for its operations, are charged by the United States Department of Labor with violations of the Act resulting from alleged failure to pay the company's employees the minimum wages required by the Act at the time they were engaged in work on a government contract.

ISSUES

The issues in this proceeding are as follows:

1. Whether the individuals who performed the work in question were employees of the company at the time they performed that work.
2. Whether violations of the Act occurred as a result of the performance of that work.
3. Whether the respondents are responsible for such violations.
4. Whether the respondents are liable for back wages.
5. Whether the respondents should be placed on the list of debarred bidders for government contracts.

APPLICABLE LAW

41 U.S.C. §35 provides in pertinent part as follows:

¹ The following abbreviations will be used: C-Complainant's Exhibit; Tr.-Transcript of hearing.

In any contract made and entered into by any . . . agency or instrumentality of the United States, . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

41 U.S.C. §36 provides in pertinent part as follows:

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof [41 USCS § 35] shall render the party responsible therefor liable to the United States of America for . . . a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; . . . All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

41 U.S.C. §37 provides as follows:

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the

Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The company is an Ohio corporation engaged in the manufacture and sale of canvas products, chiefly on government orders (Tr. 110). Its business and manufacturing plant are on Route 78 in Murray City, Hocking County, Ohio and its mailing address is Lake Drive, Trimble, Ohio 45782. A typical contract of the company would be for tarpaulins for 6 x 6 army trucks (Tr. 110). Notice is taken that Murray City, Ohio is a small community which is not within normal commuting distance of any major population center. The company is and has been in poor financial condition and there have been times when it suspended operations. The maximum number of its employees has been about 30 to 50, and the smallest number of its employees has been about three to five (Tr. 111). Rainey is, and at all times relevant herein has been, the company's president and the person in control of its operations.

It is undisputed that on October 28, 1982 the United States government, through the Small Business Administration, entered into a contract with respondents for the manufacture and sale of canvas products to the United States military. The contract was numbered 58310311, and the number was subsequently changed to SB 5831-83-C-0311. The contract was for an amount in excess of \$10,000, it was subject to the Act and it contained the provisions required by the Act.

While engaged in the performance of that contract the company experienced financial difficulties. Rainey testified that at the time the contract was almost completed the company was unable to obtain any more bank loans, and it laid off the employees (Tr. 113), most or all of whom thereafter began to draw unemployment compensation benefits. (Respondents assert that 22 employees were laid off -- respondents' proposed finding of fact number 3.) Rainey's testimony indicates that the company's immediate problem was how to complete the contract so that it could receive payment and improve its cash position.

According to Rainey, it was suggested by Dulcie Kamento, a supervisor employed by the Company, that the employees would donate some time in order to complete the contract (Tr. 114). Kamento testified that at a meeting with Rainey, another employee, Allan Elteringham, and Pat Sikorski, Rainey's secretary, Rainey asked her if she thought the employees would come in and volunteer their time to help him out (Tr. 56). Elteringham testified that Rainey asked

Kamento to call the employees to try to get them to volunteer their work (Tr. 68). Both Kamento and Elteringham testified, and I find, that Rainey said that those employees who did not volunteer their time would not be employed afterwards. Rainey denied having said this, but it seems more likely than not that he did make the statement in question. Both Kamento and Elteringham testified that he made the remark. One employee, Donna Hartley, testified that when Kamento called her to ask her to volunteer her work she was told that if she did not do so she would not be called back to work (Tr. 41). Also, it is undisputed that the only two employees who did not volunteer their work, Dan Donaldson and Hazel Jenkins, were also the only two employees who were not eventually called back to work.

After her meeting with Rainey, Sikorski and Elteringham, Kamento called each of the employees who had been laid off and asked them to volunteer their services to the company during the week of March 19, 1983. Rainey estimated that this was about two or three weeks after they had been laid off (Tr. 115). All of the employees came to work and performed services during that week except Dan Donaldson and Hazel Jenkins. A list of the persons who performed work without pay during the week of March 19, 1983, the hours that they worked without pay at that time and the amounts of minimum wages payable for those hours is attached hereto as Exhibit A. The total minimum wages for those hours is \$1,462.28. Some or all of those individuals also drew unemployment compensation benefits during the time that they performed that work. For the most part, they performed their normal jobs at the company's plant. Rainey was present part of the time while the work was going on. Later, after a DOL investigation had taken place, Rainey had the employees sign a letter to the editor of a newspaper stating, among other things, "We trespassed on Mr. Rainey's property. We very quietly entered his building and operated his machinery" (C-3). However, at the hearing Rainey and the company stipulated that there had been no trespass (Tr. 30).

As a result of the performance of this unpaid work, the contract was completed, and Rainey was able to obtain additional financing for the company (Tr. 113-114). In April 1983 most or all of the employees were recalled from layoff (not including Dan Donaldson and Hazel Jenkins), although the company again became inactive in the spring of 1984 and was not in operation as of the time of the hearing (Tr. 111).

The Walsh-Healey Act does not define the word "employer" or "employee." However both the Act and the regulations under the Act refer to provisions of the Fair Labor Standards Act ("FLSA"), which has purposes similar to those of the Act. Therefore it is appropriate to turn to the provisions of the FLSA in determining the meaning to be attached to the term "employee" as used in the Walsh-Healey Act. In Fort Worth Pressed Steel Manufacturing Co., PC 592 (Decision of hearing examiner, March 27, 1956), another case arising under the Walsh-Healey Act, it was stated as follows in this connection:

The status of the relationship between the respondent and the individuals performing the described [work] is to be determined on the basis of the principles and standards announced and applied by the United States Supreme Court in a series of decisions rendered in June 1947 United States v. Silk, 331 U.S. 704; Harrison v. Greyvan Lines, 331 U.S. 704; Rutherford Food Corp. v. McComb, 331 U.S. 722; and Bartels v. Birmingham, 332 U.S. 126. While these decisions, along with the earlier decision of the Supreme Court in Labor Board v. Hearst Publications, 322 U.S. 111, are concerned and deal with the existence of an employer-employee relationship under statutes other than the Walsh-Healey Public Contracts Act, they are no less controlling here. In light of its policy and purpose, the Walsh-Healey Public Contracts Act is clearly social legislation of the same general character as the several statutes involved in the cited decisions, namely, the Social Security Act, the Fair Labor Standards Act, and the National Labor Relations Act. Its terms, as the Supreme Court has said of the terms of the other statutes, are to be construed to accomplish the purposes of the legislation. The terms "employed" and "employee," in particular, like the Supreme Court said of the terms "employment" and "employee" appearing in the Social Security Act, are not to be given a constricted interpretation which would not comport with the Act's purpose. United States v. Silk, supra. See also Labor Board v. Hearst Publications, supra, in which the Supreme Court went to some length in its treatment of the word "employee" in the National Labor Relations Act, holding that it was to be construed "in light of the mischief to be corrected and the end to be attained. Id. pg. 10 Slip opinion. (footnote omitted)

Under the FSLA an employee is defined as any person employed by an employer and employ is defined as including suffering or permitting one to work. It is clear that in this case the persons who worked at the company's plant during the week of March 19, 1983 were suffered or permitted to work by the respondents. Rainey made available the plant, electricity and other facilities to the persons who worked that week and observed them working without objection or hindrance. More than that, it is clear that Rainey suggested, or accepted Kamento's suggestion, that the laid off employees be called and asked to donate their services, and that respondents in fact requested them to perform the work in question.

It is therefore found that the individuals whose names appear in Appendix A, and who performed services at the company's plant during the week of March 19, 1983 were employees of the company during the time they performed those services. For the performance of those services those employees received less than the minimum

wages required by the contract referred to above, and by the Act, and in fact they received no wages for such services. As a result of respondents' failure to pay the employees the wages specified by the contract, they breached their contract with the government and violated the Act. It is also clear that the respondents, on account of such violations, have become liable for a sum equal to the underpayments of the minimum rates of pay as set forth in 41 U.S.C. §36 and listed in Exhibit A attached hereto.

The remaining question is whether or not a recommendation should be made to the Secretary of Labor to withhold the sanction of placing the respondents on the list of persons and firms who are debarred from being awarded government contracts for a period of three years from the date the breach occurred. In considering this question, attention is directed to the purposes of the Act and the likely effects which debarment would have in this case. The purpose behind the Act was discussed by the Supreme Court in Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S. Ct. 869 (1940):

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary on the Bill. "The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

Id. at 128, 60 S. Ct. 877.

A consideration weighing in favor of a recommendation that the respondents be relieved of the debarment provisions of 41 U.S.C. §37 is the fact that respondents apparently have no previous record of wage and hour violations. Other considerations are that almost all of the company's business is government business, and that debarring it from government business would probably require the company to suspend or discontinue operations, with consequent injury to the welfare of its employees and the small community where the company's plant is located.

Weighing against the foregoing, however, is the blatant nature of the violation and the element of compulsion involved in requiring the employees to donate their services as a condition of continued employment.

In view of all the facts and circumstances, I am unable to conclude that a recommendation should be made that the respondents be relieved of the debarment sanction.

Upon due consideration of the foregoing, IT IS ORDERED that the respondents pay the sum of \$1,462.28 to the Employment Standards Administration for distribution to respondents' employees.

It is not recommended that the Secretary relieve the respondents from the application of the ineligible list provisions of section 3 of the Act (41 U.S.C. §37).

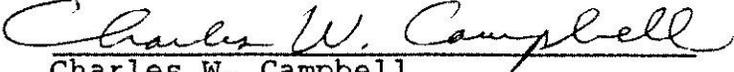

Charles W. Campbell
Administrative Law Judge

EXHIBIT A

| <u>Name</u> | <u>Hours</u> | <u>Due</u> |
|-------------------|--------------|--------------|
| Donna Ahle | 20 | \$ 67.00 |
| Betty Barnhart | 24 | 80.40 |
| Diane Burcher | 24 | 80.40 |
| Nina Bycofski | 16 | 53.60 |
| Elizabeth Carter | 16 | 53.60 |
| Sharon Davis | 24 | 80.40 |
| Steven Donaldson | 24 | 80.40 |
| Dolores Gursinger | 16 | 53.60 |
| Linda Handa | 32 | 107.20 |
| Donna Hartley | 20 | 67.00 |
| Kevin Hooper | 17 | 56.95 |
| Dulcie Kamento | 8 | 26.80 |
| Clarabelle Love | 24 | 80.40 |
| Debbie Love | 13-1/2 | 45.23 |
| Sue McIntosh | 24 | 80.40 |
| Leo Morrison | 32 | 107.20 |
| Ruth Pastol | 17 | 56.95 |
| Sarah Richards | 29 | 97.15 |
| Dorothy Shonborn | 20 | 67.00 |
| Leo Sikorski | 16 | 53.60 |
| Drema Waldeck | 20 | <u>67.00</u> |
| | | \$ 1,462.28 |