1977 WL 24823 (DOL W.A.B.)

Wage Appeals Board
United States Department of Labor

***1** IN THE MATTER OF
FRY
BROTHERS
CORPORATION
FRY
BROTHERS
CORPORATION, PETITIONER

Subcontractor on HUD-FHA Project No. 116-44034 LDP, Plaza Dorado

Apartments; Project No. 116-44045 LDP Sandia Vista Apartments; Project No. 116-44Q26 LDP, Vista Oriente Apartments, Albuquerque, New Mexico

WAB Case No. 76-06

DATED: June 14, 1977

Appearances:

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Director,

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Division of Gov't Contract Regulation, United States Department of Labor

BEFORE: Oscar C. Smith, Chairman, Clarence Barker and Stuart Rothman, Members.[FN1]

BACKGROUND OF THE CASE AND POSITION OF THE PETITIONER

Petitioner, **Fry Brothers** Corporation (herein "Fry"), was the carpentry subcontractor for the prime contractor, Plaza Construction Company, on three HUD/FHA insured projects in Albuquerque, New Mexico: Plaza Dorado, Vista Oriente and Sandia Vista Projects.

After each of these projects was substantially completed, HUD under instruction of the Department of Labor withheld $72,213.54 for underpayments based on misclassification of carpenters as laborers. Fry disagreed. The dispute was brought to a hearing before an Administrative Law Judge On June 20, 1975, the Administrative Law Judge filed findings of fact, conclusions of law, and his decision holding generally in favor of Fry except for ten specific employees to whom he found $2,604.40 was due. The Department of Labor appealed. The Assistant Secretary of the Employment Standards Administration, Bernard E. DeLury, on December 31, 1975, reversed the decision of the Administrative Law Judge.

The petition points out that Mr. DeLury's decision essentially turns on his determination that the wage determinations issued by the Department of Labor for the three projects reflected union negotiated rates. He erred in concluding that work classifications accepted by practice under negotiated agreements would be enforced on each project. It was clearly established in the Administrative Law Judge hearing, says petitioner, that the prevailing practice in the area was to the contrary. Mr. DeLury further overruled the Administrative Law Judge's determination as to the credibility of the witnesses. He accepted the testimony of the HUD wage requirement officer on these projects with respect to the use to which definitions set forth in the Dictionary of Occupational Titles could be used. The HUD wage requirement officer had testified that he had not been asked to construe the meaning of the definitions in the Dictionary of Occupational Titles. Although the HUD wage requirement officer referred to the Dictionary of Occupation Titles in explaining to the contractors what duties their employees could perform under a given classification, Mr. DeLury concluded that **Fry Brothers** had gone well beyond what was contemplated by the Dictionary on what they had been told, and that the employees in question were improperly classified and were entitled to receive carpenter's wage rates as opposed to laborer's wage rates. The petitioner requested the Board to rule upon the following three questions which it claims the Assistant Secretary erroneously resolved:

***2** 1. Did the Assistant Secretary erroneously hold that if the wages reflected in the wage determinations are the same as the union-negotiated rates, the duties ascribed to the classification must be the same as those performed under the union-negotiated agreement?

2. Were the wage predeterminations for carpenters the same as union-negotiated rates?

3. Did the Assistant Secretary err in rejecting the findings of the Administrative Law Judge that the utilization of the employees in this dispute was proper and the instructions of a HUD officer to the petitioner concerning the classification of employees were also proper?

THE UNDERLYING FACTS OF THE CASE IN MORE DETAIL

On the basis of an investigation, the Wage and Hour Division, U.S. Department of Labor, determined that employees of Fry classified as laborers (or carpenter laborers) on the certified payrolls performed the work of carpenters. The computations of the Wage and Hour Division indicated that approximately 158 employees were due $85,184.64 in back wages, of which $72,213.54 was withheld by the Department of Housing and Urban Development.

The mortgages on three projects insured by the Federal Housing Administration under Section 236 of the National Housing Act (12 U.S.C. 1715z-1), were covered by Davis-Bacon labor standards requirements under Section 212 of the Act (12 U.S.C. 1715c).[FN2] Each project consisted of seven to twelve two-or three-story garden apartment

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buildings. The Department of Labor issued its wage decisions for the three projects on July 17, 1972, November 21, 1972, and December 7, 1972.

Under established Davis-Bacon Act procedures (29 CFR [sec] 5.5(a)(1)(ii)) Plaza Construction Company, the prime contractor, requested additional wage rates from HUD for 12 helper subclassifications, including carpenter helpers, for the Plaza Dorado Apartments. Rates were issued for only two helper subclassifications: marble and tile helpers and roofer helpers.

Fry performed only the framing and rough carpentry work. Fry began construction in December 1972, and completed the work in January 1974. Fry classified its employees as carpenters, forklift operators, and laborers (or carpenter laborers). The employees at issue in this proceeding were classified on the certified payrolls as laborers from December 1972 until July 1973, and as "carpenter laborers" from July 1973 until construction ended. These employees were paid in accordance with the classification appearing on the wage determinations as: "Laborers: Unskilled: Building and Common Laborers, Carpenters tenders."

Employees who were classified as "laborers" or "carpenter laborers" worked on the fabrication table and in the construction of buildings. They cut wall panels and other component pieces according to a pattern with a radial arm saw, nailing the pieces together with an air hammer, stapling celotex to the wall panels, and making simulated pilasters. In the buildings "laborers" laid down and nailed precut joists, placed and fastened metal bridging between joists, helped raise wall panels, laid down and nailed plywood sheets for flooring, and did corrective or "back-up" work such as replacing crooked wall studs. In some instances "laborers" cut stair horses from a pattern and assembled them, assisted in installing doors and windows, did top plating, and put up exterior siding and rough-cut trim. One employee classified as a "laborer" or "carpenter laborer" was a "pusher" or lead man on back-up work, who listed items to be corrected in the buildings.

***3** Employees classified as forklift operators operated a forklift truck and also performed the duties of employees classified as "laborers" (or "carpenter laborers") described in the preceding paragraph.

Employees classified by Fry as carpenters performed the same type of work as the "laborers" or "carpenter laborers" but in addition, they laid out the work, made patterns, plumbed walls, installed windows and doors, and supervised the work of the employees classified as "laborers" or "carpenter laborers."

The Department of Labor Administrative Law Judge conducted a hearing in September 1974, pursuant to Section 5.11(b) of Title 29 of the Code of Federal Regulations. Union representatives and non- union contractors testified as to work assignments of laborers and carpenters on residential construction in the Albuquerque area.

According to the testimony of union people, a carpenter under negotiated arrangements on residential housing of the type built does all of the cutting, fabrication, and installation of components with the exception of electrical, plumbing and sheet metal work, and placement of concrete. Framing work in general is exclusively carpenter's work under such arrangements. A laborer working with carpenters (when classified as a carpenter tender under the laborer's agreement) carries materials, cleans up, cleans materials, and strips forms. He does not assist a carpenter by holding components in place, feed a fabrication table, or use tools except in cleaning materials and stripping forms.

Nonunion contractors testified that they expect a man who is a full ("qualified") carpenter and receives the highest wage rate to be able to build a house from a set of blueprints. Such men were described as supervisors of a crew of less skilled men performing carpentry work under their direction. Those employees who are not "full" carpenters are generally termed carpenter helpers. They perform carpentry work, and are paid according to their skill, ability, experience, and/or productivity. The nonunion contractors described laborer's work, or the work performed by men receiving the lowest wage rate, as cleaning up, pulling nails out of used lumber, and hauling lumber. Laborers seldom (if ever) perform work with carpenter tools.

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It is clear the parties went to considerable effort to explain to the Administrative Law Judge the local practices in making work assignments on jobs which were subject to the control and discipline of a negotiated contract as compared with projects where the contractor was free to classify work and determine the rate of pay for any job free from such discipline and restraint.

Although there was conflicting testimony concerning the amount of union and nonunion residential construction in the Albuquerque area, the Administrative Law Judge found that the substantial majority of residential construction was performed by nonunion contractors and therefore concluded that the practice of nonunion contractors was the prevailing area practice in residential construction and would control in his decision.

***4** No classification of "carpenter helper" which is a negotiated classification was issued by the Department of Labor. [FN3] A conformable classification was not issued by the Department of Housing and Urban Development pursuant to 29 CFR [sec] 5.5(a)(1)(ii). Nonetheless, the Administrative Law Judge concluded that the wage determinations specifically provided an intermediate classification of "carpenter tender." He concluded that Fry employees classified as "laborers" or "carpenter laborers" performed duties consistent with the prevailing area practice for [*] nonunion [*] "carpenter helpers" and hence Fry was in compliance with the wage determinations requirements. [* Emphasis in original *]

The Department of Labor had advised the Board in its posthearing statement that the Department does not issue a wage determination with "helper" classifications unless a practice of using such a subclassification prevails in the area. Where the prevailing rate for carpenters, for example, is the same as the negotiated rate, a helper classification is included only if it is included in the collective bargaining agreement. The duties are those contemplated in the agreement. The Department of Labor further advises that in this case the negotiated carpenter's rate for residential construction was identical to the carpenter's rate in the wage determinations. No helper subclassification was included in the carpenter's collective bargaining agreement. Accordingly, such a subclassification was not issued.

In contrast, a "carpenter tender", it is pointed out, is a classification in the collective bargaining agreement of Laborers Local 16. Since negotiated rates prevail, a wage determination for the Albuquerque area would include a "carpenter tender" classification under laborers and not a carpenter helper subclassification under carpenters.

The Administrative Law Judge based his conclusion on a statement of Mr. Dale Hill, wage requirement officer in the Albuquerque office of the Federal Housing Administration, that "when you find a carpenter tender, I don't believe you'll find a carpenter helper rating on the decision."From this statement, the Department of Labor points out, the Administrative Law Judge concluded that "Mr. Hill did infer that the terms 'tender' and 'helper' in the absence of further qualifications, were used interchangeably in Wage Determinations."Mr. Hill, however, testified that he interpreted carpenter tender as a laborer and [*] not [*] as a helper. We cannot agree with the inferences drawn by the Administrative Law Judge. [* Emphasis in original *]

By the terms and structure of the wage determinations issued in this case and the nature of work classifications in the construction industry, a carpenter tender in the laborer's classification is an [*] unskilled [*] employee, as distinguished from semiskilled employees such as cement mason tenders. [*Emphasis in original *] The classification of carpenter tender in the laborer schedule is not an intermediate classification of carpenter in the carpenter's schedule.

***5** The Administrative Law Judge relied on his finding that Mr. Hill of the Federal Housing Administration told Plaza Construction Company and Fry that "carpenter laborers" could perform the duties of "Laborer, Carpentry" set forth in the Dictionary of Occupational Titles. The Dictionary purchased and said to have been relied on by Mr. Fry, contains a "Special Notice" that it does not necessarily reflect area practice and cannot be considered standards for setting wages or hours.

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The petitioner contends that Mr. Hill was the representative of the contracting officer on the three projects. The claim is made that he was acting in accordance with the Department of Labor regulations, 29 CFR [sec] 5.5(a)(1)(ii), when he "agreed that these employees could perform these functions."Therefore, petitioner argues, the Government is bound by the actions of Mr. Hill.

The contracting officer for the projects was Luther Branham, the Director of HUD's Albuquerque Insuring Office, not Mr. Hill. Mr. Branham's signature appears on the conformed classifications which were issued. The Department of Labor contends it is difficult to perceive how an informal conversation with Mr. Hill, in which the interpretation of a classification was discussed, could be construed to comply with the Department of Labor procedures in 29 CFR [sec] 5.5(a)(1)(ii).[FN4]

It was this procedure which was followed by Plaza Construction Company when it requested the carpenter helper classification. The request was not granted. No appeal was made to the Department of Labor. Reliance on this provision by petitioner is misplaced.

The Administrative Law Judge concluded that (with the exception of ten employees who were reclassified as carpenters after a trial period), the carpenter laborers employed by Fry were paid in accordance with the applicable wage determinations and performed duties consistent with the "prevailing area practice in residential building construction," and consistent with the interpretations of HUD. [FN5]

In his decision of December 31, 1975, the Administrator concluded that the employees in question were improperly classified and were entitled to the carpenters' wage rate as opposed to the laborers' wage rate. He reversed the decision of the Administrative Law Judge and remanded the case for the purpose of determining the amounts due individual employees. The matter is before the Wage Appeals Board on Fry's petition for review of the Administrator's decision.

THE DECISION OF THE BOARD

The Board has considered all matters presented in this request for review, including the record on appeal, the parties' prehearing and posthearing statements, and matters considered at the oral hearing.

1. The Board concludes that the Assistant Secretary of Labor who acted in this matter in place of the Administrator, Wage and Hour Division, did not err in reversing the decisions reached by the Administrative Law Judge. Not to have reversed the decision of the Administrative Law Judge would have turned some 40 years of consistent administration of the Davis-Bacon Act on its head. The Department of Labor would have become a party to shooting the Davis-Bacon Act so full of holes that there would be little left of the Act on the statute books to enforce.

***6** 2. The Board views this matter as a classical case of misclassification of the work of employees covered by the Act. The argument that developed between the contending parties before the Administrative Law Judge over whether the employees in question were properly classified as a subgroup of "unskilled carpenter tenders" under the laborers classification because the unorganized sector of the construction industry in the Albuquerque area gave laborers the carpenters's tools of the trade and told them to do carpentry work is much beside the point. Under established principles of Davis-Bacon Act administration, when the wage predetermination schedule contains only one wage rate for the carpenter classification without intermediate rates, it is not permissible for contractors who come on the project site, whether organized or unorganized, to divide work customarily considered to be the work of the carpenters' craft into several parts measured according to the contractor by his assessment of the degree of skill of the employee and to pay for such division of the work at less than the specified rate for the carpenters' craft.

3. Under facts which are not in dispute, the prime contractor, Plaza Construction Company, showed that it was aware of this basic principle. It applied for an "in conformity with" determination under Davis-Bacon regulations for

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the subclassification of carpenter helper, which is a subclassification recognized in the construction industry for the carpentry craft. An application by a prime contractor would be for itself and subs on the work. It did not get it. It is of some interest that Plaza Construction Company has made no appearance in this case and has let **Fry Brothers** Corporation go it alone.

4. Some limited flexibility exists under Davis-Bacon Act principles, with respect to classification of work in such matters as the acceptable use of composite crews and in cases of legitimate overlapping jurisdictional claims. The Board finds no such exculpatory circumstances in this case.

5. The Board finds no error in the determination of the Assistant Secretary that the wage predeterminations issued for these three projects reflected the wages paid under negotiated arrangements in the organized sector of the construction industry in the Albuquerque locality. When an interested person in the construction industry desires to challenge a practice of the Labor Department to accept the negotiated wage rates as prevailing without a wage data survey, it is necessary that the attack come before the Labor Department decision becomes the basis upon which bids are taken. It should not be raised at the enforcement stage. We again find no exonerating circumstances permitting it to be raised here at the enforcement stage.

6. When the Department of Labor determines that the prevailing wage for a particular craft derives from experience under negotiated arrangements, the Labor Department has to see to it that the wage determinations carry along with them as fairly and fully as may be practicable, the classifications of work according to job content upon which the wage rates are based. If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act. Under the circumstances that the Assistant Secretary determined that the wage determinations that had been issued reflected the prevailing wage in the organized sector it does not make any difference at all what the practice may have been for those contractors who do and pay what they wish. Such a contractor could change his own practice according to what he believed each employee was worth for the work he was doing.

***7** 7. The Department of Labor contends that under Reorganization Plan No. 14 of 1950 (5 U.S.C. App.), the Secretary of Labor is charged with the responsibility of assuring the coordination of the administration of the Davis-Bacon and related Acts and consistency of their enforcement. Pursuant to Labor Department regulations, if a question arose concerning work which could be performed by laborers and which work by carpenters, an authoritative ruling should have been requested from the Secretary of Labor as provided in 29 CFR [sec] 5.12. Thus, the U.S. District Court for the District of New Mexico, in dismissing for lack of jurisdiction an action related to this proceeding, **Fry Brothers** Corp. v. Department of Housing and Urban Development, 77 CCH LC [par] 33,306 (D.N.M. 1975, not officially reported [FN6] specifically rejected petitioner's argument that plaintiff relied on an agreement with HUD as to the classification of certain workers. The Court concluded that the authority to classify workers lies with the Department of Labor, and not with the contracting agency on the project.

The Department of Labor also points out that under the Portal-to-Portal Act (29 U.S.C. 259) only a written ruling of the Secretary of Labor can be relied upon as a defense against liability for wages which must be paid under the Davis-Bacon Act. See, e.g., Hodgson V. Square D Co., 459 F.2d 805 (C.A. 6, 1972), cert. denied, 409 U.S. 967 (1972). “Reliance” on an oral statement by a local official of the contracting agency cannot be a basis for finding that **Fry Brothers** has complied with the labor standards requirements of the National Housing Act, which does not provide any “good faith” exception. Again, the Board finds no excusing circumstances.

The Board is not convinced that a building subcontractor will undertake to assume required labor costs at the time he submits his bid without a careful consideration of his methods of operation as compared to the methods of operation required under negotiated agreements when the wage scales and their classifications patently reflect negotiated ar-

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rangements. The differences are too well understood for the contentions of the petitioner to be convincing here. The study of occupational titles in standard classification guides and the drawing of erroneous conclusions from what a HUD representative read in a book after bids are submitted is not a substitute for the close examination of the nature of the work required at the time that bids are submitted.

8. The petitioner has alleged that the Assistant Secretary has not duly taken into account credibility determinations made by the Administrative Law Judge. This case does not turn on such credibility considerations but upon the basic misapplication by the Administrative Law Judge of long-established Davis-Bacon Act enforcement regulations used in reaching and applying the initial wage predeterminations. The Board looks to the final decision of the Department of Labor that is brought to it for review. In this case, the Board concludes that the final decision, the decision of the Assistant Secretary, was correct in all respects.

ORDER

***8** The Assistant Secretary of Labor did not err in reversing the decision of the Administrative Law Judge. The decision of the Assistant Secretary of Labor is affirmed. The petition herein is denied.

SO ORDERED

Oscar Smith
Chairman

Stuart Rothman
Member

Clarence D. Barker

FN1. This case was heard by the Wage Appeals Board on May 17, 1976, considered by the full Board and a unanimous decision reached prior to May 30, 1976. The decision was prepared by Board Member Rothman at the direction of and with concurrence of Chairman Smith and Board Member Barker.

FN2. Section 212 of the National Housing Act, 12 U.S.C. 1715c, provides in pertinent part:

> (a) The Secretary shall not insure under section 1713 or 1715a or 1743 of this title, pursuant to any application for insurance * * * a mortgage or investment which covers property on which there is or is to be located a dwelling or dwellings, or a housing project * * * unless the principal contractor files a certificate or certificates (at such times, in course of construction or otherwise, as the Secretary may prescribe) certifying that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have been paid not less than the wages prevailing in the locality in which the work was performed for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary of Labor, in accordance with the Davis-Bacon Act, as amended, prior to the beginning of construction and after the date of the filing of the application for insurance. * * * The provisions of this section shall also apply to the insurance of any mortgage under Section 1715z [Section 236] of this title * * *.

FN3. Carpenter helpers employed by nonunion contractors, as well as the “carpenter laborers” employed by Fry, were informal apprentices or trainees rather than a separate “class” of laborers and mechanics for purposes of the Davis-Bacon and related Acts. A vice president of **Fry Brothers** and superintendent on these projects, described the practices of Fry in a letter to Plaza Construction Company as an “attempt to teach them the various tasks as required”. In addition, a foreman for **Fry Brothers** testified, “I didn't say that we were running an apprenticeship program, but that's more or less what it amounted to.”

In order to receive less than the predetermined rate for the work performed, apprentices must be registered in a

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program approved by the Bureau of Apprenticeship and Training or a recognized State apprenticeship agency, and trainees must be enrolled in a program approved by the Bureau of Apprenticeship and Training. Neither of these requirements was satisfied here.

FN4. 29 CFR [sec] 5.5(a)(1)(ii) provides:

The contracting officer shall require that any class of laborers or mechanics, including apprentices and trainees, which is not listed in the wage determination and which is to be employed under the contract, shall be classified or reclassified conformable to the wage determination and a report of the action shall be sent by the Federal agency to the Secretary of Labor. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics, including apprentices and trainees, to be used, the question accompanied by the recommendation of the contracting officer shall be referred to the Secretary for final determination.

FN5. The Wage and Hour Division determined that two employees classified as forklift operators were performing the work of carpenters 50 percent of the time and computed back wages accordingly. The Administrative Law Judge found that they performed the same work as the employees classified as "carpenter laborers" in addition to their duties as forklift operators. These employees should be considered the same as the other carpenter laborers for disposition of the matter.

FN6. The Labor Department pointed out in its statement that this case concerns the same facts and legal issues as the instant proceeding. **Fry Brothers** alleged that the withholding of funds was the result of arbitrary, capricious and intentional conduct by the Department of Labor defendants, and requested three million dollars in alleged damages to **Fry Brothers**' business as a carpentry subcontractor. As noted above, the case was dismissed for lack of jurisdiction.

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