In the Matter of:

PACIFIC STEVEDORING, INC.

COMPLAINANT,

v.

BOYANG, LTD.,

RESPONDENT,

and

ADMINISTRATOR, WAGE AND HOUR DIVISION, EMPLOYMENT STANDARDS ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

AMICUS CURIAE.

ARB CASE NO. 03-041

ALJ CASE NO. 2002-ACM-1

DATE: June 30, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For Complainant Pacific Stevedoring, Inc.:
Russell R. Williams, Esq., *Gaspich & Williams PLLC, Seattle, Washington*

For Respondent Boyang, Ltd.:
Vincent T. Lombardi, Esq., Alex J. Rose, Esq., *Short, Cressman & Burgess PLLC, Seattle, Washington*

For Amicus Curiae Administrator, Wage and Hour Division:
William J. Stone, Esq., William C. Lesser, Esq., Steven J. Mandel, Esq., *U.S. Department of Labor, Washington, D.C.*

DECISION AND ORDER OF REMAND

This case arises under the Immigration and Nationality Act, as amended (INA), 8 U.S.C.A. §§ 1101-1537 (West 1999), and regulations at 20 C.F.R. Part 655 (2003). Pacific Stevedoring, Inc. (PacSteve) petitions for review of the order of dismissal issued by the Administrative Law Judge (ALJ) on December 17, 2002. PacSteve is a non-union Alaskan contract stevedoring company that supplies equipment and U.S. longshore workers to load and unload vessels in Alaskan waters, including Dutch Harbor, Alaska. Respondent is Boyang, Ltd. (Boyang), a Korean ship owner that employs nonimmigrant alien labor to transport seafood from Alaska to Asia. The Administrator, Wage and Hour Division, Employment Standards Administration, is participating as *amicus curiae.* The ALJ dismissed the case for lack of jurisdiction. We reverse the ALJ's decision and remand the case for a hearing.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's decision under 8 U.S.C.A. § 1288(c)(4)(A)-(E), 1288(d)(5)(A), and 20 C.F.R. § 655.655. *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia,* the INA).

Under the Administrative Procedure Act, the Board, as the designee of the Secretary of Labor, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996), *quoted in Goldstein v. Ebasco Constructors, Inc.,* No. 86-ERA-36, slip op. at 19 (Sec'y Apr. 7, 1992). The Board engages in *de novo* review of the ALJ's decision. *Yano Enterprises, Inc. v. Administrator,* ARB No. 01-050, ALJ No. 2001-LCA-0001, slip op. at 3 (ARB Sept. 26, 2001); *Administrator v. Jackson,* ARB No. 00-068, ALJ No. 1999-LCA-0004, slip op. at 3 (ARB Apr. 30, 2001). *See generally Mattes v. U.S. Dep't of Agriculture,* 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (rejecting argument that higher level administrative official was bound by ALJ's decision); *McCann v. Califano,* 621 F.2d 829, 831 (6th Cir. 1980), and cases cited therein (sustaining rejection of ALJ's decision by higher level administrative review body).

BACKGROUND

Subject to a number of exceptions, the INA prohibits longshore work at U.S. ports by nonimmigrant alien crewmembers on foreign vessels. *See* 8 U.S.C.A. §§ 1101(a)(15)(D)(i), 1288(a); 20 C.F.R. § 655.500(a). Longshore work, generally, is "any activity relating to the loading or unloading of cargo, the operation of cargo-related equipment (whether or not integral to the vessel), and the handling of mooring lines on the dock when the vessel is made fast or let go, in the United States or the coastal waters thereof." 8 U.S.C.A. § 1288(b)(1); 20 C.F.R. § 655.502.

One of the above-referenced exceptions to the prohibition is the "State of Alaska exception," which permits use of nonimmigrant alien labor at Alaskan ports and coastal

waters if an employer of alien crewmembers has filed an attestation with the Secretary of Labor. 8 U.S.C.A. § 1288(d); 20 C.F.R. §§ 655.530-655.541. These employers are required to attest that they will (i) make *bona fide* requests to U.S. workers to perform longshore activity, (ii) employ all U.S. workers made available in sufficient numbers and needed to perform the longshore activity, (iii) refrain from using workers to influence an election of a bargaining representative, and (iv) provide notice of attestation to specified labor organizations, contract stevedoring companies, and operators of private docks. 8 U.S.C.A. § 1288(d)(1)(A)-(D); 20 C.F.R. §§ 655.533(b)-655.537. PacSteve complains that Boyang did not make a *bona fide* request for U.S. workers to perform the longshore work before utilizing alien labor, the consequence being that Boyang either failed to meet a condition attested to or misrepresented a material fact in its attestation. *See* 8 U.S.C.A. § 1288(d)(1)(A); 20 C.F.R. §§ 655.533(b)(1), 655.605(a)(1). PacSteve construes a *bona fide* request to mean an offer of work that is "commercially and objectively reasonable." Initial Brief (Br.) at 14-17; Reply Br. at 7-9.

The Wage and Hour Division investigated PacSteve's complaint about Boyang's faulty attestation although the record does not contain the complaint. *See, e.g.*, 20 C.F.R. §§ 655.600, 655.605. On September 6, 2002, Warren T. Murphy, an Assistant District Director of the Wage and Hour Division, issued a determination regarding the complaint. Addressed to an agent of Boyang, Murphy's determination stated:

> Based on the evidence obtained in the recently concluded Wage and Hour Division investigation of your firm, Boyang, Ltd., under the D-1 provisions of the INA, as amended, it has been determined that no violation will be cited for failure to make a *bona fide* offer of work to qualified stevedore companies. The Department's position is that under the statute and regulations an offer is *bona fide* only if it is at a rate no less than the prevailing rate for the port based on any collectively bargained rates that apply.
>
> Given the exigent circumstances and the apparent confusion of communication with a local Immigration and Naturalization Service officer, we have concluded that your company acted in good faith in the period of time in question. Your company – and all other shippers operating under the Alaskan Exception – must be aware that in all future instances, a *bona fide* offer must reflect the union bargained rate as prevailing.

PacSteve Petition (Pet.) for Review (Rev.) of ALJ Order, Exhibit (Exh.) B. Although the record contains correspondence between PacSteve and the U.S. Immigration and Naturalization Service (INS) and between INS and the Alaska Department of Labor, the

substance of the above-referenced "communication with a local [INS] officer" is unclear.[1]

On September 19, 2002, PacSteve, by letter to the Seattle, Washington, office of the Wage and Hour Division, appealed the September 6 Wage and Hour Division determination "regarding requests to stevedore companies in the Port of Dutch Harbor, Alaska." In explanation, it stated: "There has never been a collective bargaining agreement regarding cost per ton for cargo to be loaded in the port of Dutch Harbor. Just because one particular company has an agreement with another company does not mean collective bargaining has taken place." Pet. for Rev., Exh. C. This letter constitutes a request for a hearing pursuant to 20 C.F.R. § 655.630(a). Although the letter was not addressed to the Chief Administrative Law Judge as specified under the regulation, the ALJ and the parties have construed the letter as a request for a hearing.

On December 17, 2002, the ALJ issued an Order Dismissing Complainant's Case for Lack of Jurisdiction (Order). Pet. for Rev., Exh. A. The Order of Dismissal followed the ALJ's request that the parties identify the issue(s) before her and specify necessary discovery and the scope of that discovery. The parties (and the Administrator as *amicus curiae)* filed responsive memoranda. PacSteve urged construction of the term *bona fide* offer of work to mean "commercially and objectively reasonable." The Administrator, in effect, urged the ALJ to affirm Murphy's determination. Boyang argued that the *bona fide* standard was exclusively subjective and that Boyang acted in good faith reliance on advice from INS.

The ALJ found that PacSteve had requested a hearing because it disagreed "with the Administrator's objective definition of '*bona fide* request.'" That is, PacSteve argued that since a collectively-bargained rate had never existed for loading at Dutch Harbor, the Administrator's equating *bona fide* request with any applicable collectively-bargained rate was erroneous. But the ALJ concluded that since this rationale for appealing the Administrator's September 6, 2002 determination "falls outside of the parameters of the regulations governing this case," she therefore lacked jurisdiction and had to dismiss PacSteve's complaint. Order at 3.

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[1] *See* Pet. for Rev., Exh. D. This exhibit contains a September 2, 1999 letter from PacSteve to the INS complaining about unreasonable "price" and "terms" for longshore work offered to U.S. workers by foreign employers prior to using nonimmigrant alien crewmembers. It also contains a September 9, 1999 letter from the INS to the Alaska Department of Labor in which the INS requests review of the "Alaska exception" and states that it considered a *bona fide* offer for purposes of 8 U.S.C.A. § 1288(d) to be longshore work at a rate of $28.00 a ton, which was unacceptable to PacSteve because it did not allow the company to profit. Finally, the exhibit contains an October 4, 1999 letter from the INS to PacSteve stating that as long as a request for U.S. workers is made to the parties specified under 20 C.F.R. § 655.537(a)(1)(ii) and (iii) (including contract stevedoring companies) "the requirements of the Alaska exception are satisfied."

PacSteve contends that the Administrative Law Judge erred in dismissing its complaint for lack of jurisdiction. It urges us to find that the term "*bona fide* request" means an offer which is "commercially and objectively reasonable" and then to remand to the ALJ to determine if Boyang's requests met that standard. Initial Br. at 13. PacSteve's briefing contains additional explanation of economic conditions peculiar to stevedoring. Specifically, PacSteve argues that Boyang's offers may or may not be *bona fide* or "good faith" offers depending on whether they contemplate "time and materials" or a "fixed price per metric ton of cargo handled." Initial Br. at 7-8; Reply Br. at 2-4. The Administrator argues to us that the ALJ erred in dismissing the complaint for lack of jurisdiction (Br. at 13-17), but that dismissal is appropriate because PacSteve failed to show that the Administrator's construction of the term *bona fide* offer was unreasonable. Br. at 18-25. The Administrator construes Murphy's September 6, 2002 determination as being that a *bona fide* offer is one that "must be made in good faith and at a rate no less than a union-bargained rate." Br. at 21.

ISSUE

Did the ALJ err when she dismissed PacSteve's complaint for lack of jurisdiction?

DISCUSSION

In his September 6, 2002 determination, Murphy stated that based on evidence obtained in the Wage and Hour Division investigation of PacSteve's complaint, "it has been determined that no violation will be cited for failure to make a *bona fide* offer of work to qualified stevedore companies." Pet. for Rev., Exh. B. We find that the Administrator therefore determined that Boyang did not violate its attestation, the INA, or the implementing regulations. In this circumstance, the regulations provide that a complainant may request a hearing. 20 C.F.R. § 655.630(b)(1) ("[t]he complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that an attesting employer has committed violation(s)"). Thus, we find that PacSteve was entitled to file, and did timely file, a request for a hearing pursuant to this regulation. Pet. for Rev., Exh. C.[2] Therefore, the ALJ had jurisdiction of this case. *See* 20 C.F.R. § 655.645(a) ("Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 655.630 of this part, the Chief Administrative Law Judge shall promptly appoint an administrative law judge to hear the case.").

[2] PacSteve's hearing request complies with 20 C.F.R. § 655.630(c). It is dated and typewritten, specifies that PacSteve appeals the Administrator's determination, is signed by PacSteve's president, and provides the company address.

The ALJ erred in concluding that PacSteve's request for a hearing was deficient and in dismissing PacSteve's case for lack of subject matter jurisdiction. Focusing on PacSteve's September 19, 2002 hearing request, she wrote: "Complainant's original appeal [the hearing request] was based upon a disagreement with the Administrator's objective definition of '*bona fide* request,' specifically, Complainant argued that 'there has never been a collective bargaining agreement regarding cost per ton for cargo to be loaded in the port of Dutch Harbor.'" Order at 3. The ALJ then concluded that "[t]his basis for an appeal falls outside of the parameters of the regulations governing this case, and it must therefore be dismissed for lack of jurisdiction." *Id.*

"[T]he regulations governing this case," according to the ALJ, are 20 C.F.R. §§ 655.605 and 655.630. She interpreted those regulations as follows:

> Once a claim has been investigated, and a determination has been made by the Administrator, an aggrieved party may then appeal the Administrator's decision to the Office of Administrative Law Judges ("OALJ") [*i.e.*, request a hearing]. Section 655.630 provides in part that a complainant may request a hearing where "the Administrator determines, after investigation, that there is no basis for a finding that an attesting employer has committed violation(s) . . . ." Thus, based upon the regulations, *an appeal may only be made if it specifically contests* the Administrator's determination that an attesting employer has "(i) Failed to meet conditions attested to; or (ii) Misrepresented a material fact in an attestation." 20 C.F.R. § 655.605.

Order at 3-4 (emphasis added). We disagree. True, Section 655.630(c)(3) requires that a party requesting a hearing "[s]pecify the issue or issues stated in the notice of determination giving rise to such request." But by concluding that she lacked jurisdiction because PacSteve did not "specifically contest" the Administrator's finding that Boyang did not violate the Act, the ALJ read 20 C.F.R. § 655.630(c)(3) as a jurisdictional requirement rather than what it actually is. Section 655.630(c)(3) merely sets out minimal pleading requirements for hearing requests.[3]

The United States Supreme Court has recognized the distinction between jurisdiction and the merits of a case:

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[3] As the Administrator correctly notes (Br. at 16), ambiguity in pleading may be remedied, *e.g.*, through a motion for a more definite statement or a motion to amend a complaint or hearing request. Fed. R. Civ. P. 12(e), 15.

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. Hood, 327 U.S. 678, 682 (1946). *See Equal Employment Opportunity Comm'n v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 622-624 (D.C. Cir. 1997) (because coverage under a statute forms an element of a plaintiff's cause of action rather than a prerequisite to a district court's jurisdiction, the district court erred in dismissing the case for lack of jurisdiction). *See also Sasse v. U.S. Dept. of Justice*, ARB No. 99-053, ALJ No. 98-CAA-7, slip op at 3-4 (ARB Aug. 31, 2000) (court has jurisdiction when parties properly are before it, proceeding is of a kind or class which court is authorized to adjudicate, and claim is not obviously frivolous). We find that PacSteve's "appeal," that is, its September 19, 2002 request for hearing, was sufficient for OALJ to assume jurisdiction of the case.

CONCLUSION

The ALJ erred in concluding that she lacked jurisdiction to hear PacSteve's complaint. The decision of the ALJ dismissing the complaint is **REVERSED,** and this case is **REMANDED** to the ALJ for a hearing on the issue of whether Boyang violated the attestation, the INA, or its implementing regulations.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge