U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

Applicability of Wage Rates and Fringe Benefits Collectively Bargained by Ceres Gulf Inc, and the International Longshoremen's Association (ILA), AFL-CIO, to Employment of Service Employees under a Contract for Stevedoring and Related Terminal Services at Container Freight Station, New Orleans, Louisiana ("Ceres Gulf, inc. & ILA")	**ARB CASE NO. 96-192** **(ALJ CASE NO. 95-CBV-1)**
and	
Applicability of Wage Rates and Fringe Benefits Collectively Bargained by Ryan-Walsh, Inc. and the International Longshoremen's Association (ILA), AFL-CIO, to Employment of Service Employees under a Contract for Stevedoring and Related Terminal Services at MTMC Gulf Outport, New Orleans, Louisiana ("Ryan-Walsh, Inc. & ILA")	**(ALJ CASE NO. 93-CBV-1)** **DATED: January 6, 1998**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case is before the Administrative Review Board (Board) on a Petition for Review (Petition) filed by the South Atlantic and Gulf Coast District Association of the International Longshoremen's Association (ILA) under the McNamara-O'Hara Service Contract Act of 1965, as amended (SCA), 41 U.S.C. §§351-358 (1988), and its implementing regulations, 29 C.F.R. Parts 4, 6, and 8 (1997). The case involves contracts let in New Orleans by the Military Traffic Management Command (MTMC) for the loading and unloading of containers used to ship military cargo to and from the U.S. The ILA sought review of the Decision and Order Awarding Substantial Wage Variance Petition (D. and O.) of Administrative Law Judge (ALJ) Lee J. Romero Jr. The ALJ had concluded that the collectively bargained wages for work related to

the contract at issue in 93-CBV-1 and the collectively bargained wages and fringe benefits for work related to the contract at issue in 95-CBV-1 were substantially at variance with the wage rates which prevailed for services of a character similar in the locality and ordered the Wage and Hour Administrator to issue a new wage determination. Neeb-Kearney and Co., Inc. (Neeb-Kearney) filed a memorandum in opposition (Op. Mem.) to the Petition. Pursuant to a September 19, 1996 order of the Board, the Acting Administrator for the Wage and Hour Division (Administrator) filed a Statement.

On November 6, 1997, the ILA filed a motion to dismiss the petition for wage variance and to vacate the ALJ's opinion on grounds of mootness. On November 10, 1997, the Board ordered the parties to file a response to the ILA's motion on or before November 25, 1997. Neeb-Kearney, the Administrator, and intervening interested party Teamsters Local 959, filed responses to the motion to dismiss. For the reasons that follow, we now grant the motion to dismiss and vacate the ALJ's decision.

DISCUSSION

The ILA asserts that Contract #DAHC21-94-R-0-004, which is the subject of 95-CBV-1, and its extension, expired effective April 17, 1997. Motion at 1-2. The contract which was the subject of 93-CBV-1 has also expired. The ILA also asserts that the facility at which the work under the contract was being performed has been closed, that a successor contract was not let for bid or awarded in the Port of New Orleans, and that the MTMC cargo which is the subject of these cases is now handled in ports other than New Orleans. *Id.* at 2. The ILA argues that because under the SCA the only relief that might be afforded Neeb-Kearney is prospective, the wage variance issue presented in the cases is now moot. The Administrator agrees with this assessment and also argues that the ALJ's decision should be vacated. Acting Administrator's Response to Motion to Dismiss.

We conclude that because the relief which could be accorded under the SCA in the circumstances of these cases is prospective only, and because the contracts at issue have expired and have not been succeeded, these cases are moot. As the Board of Service Contract Act Appeals has held:

> It is well established that the Department of Labor cannot provide retroactive effect to a finding of substantial variance. In this regard, the Department's regulations clearly specify that prospective relief, only, is available and that relief must be under the same contract or option period at issue.

Porshia Alexander of America, Inc., BSCA Case No. 92-20 (August 26, 1992), citing 29 C.F.R. §4.163(c). *See also Meldick Services, Inc.*, BSCA Case No. 92-19 (August 26, 1992); *Northern Virginia Service Corporation*, BSCA Case No. 92-18 (August 26, 1992); *New LTR Corporation*, Case No. 86-CBV-1 (Dep. Sec. Dec.) (February 22, 1991); *Harry A. Stroh Associates., Inc.*, Case No. 84-CVBV-2 (Dep. Sec. Dec.) (April 8, 1988).

We are not persuaded by Neeb-Kearney's argument that the case falls within the exception to the mootness doctrine for matters which are capable of repetition yet evading review. *Southern Pacific Terminal Company v. ICC*, 219 U.S. 498 (1911). As Neeb-Kearney points out (Response at unnumbered p. 3), in order for that doctrine to apply there must be a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party. . . ." *Murphy v. Hunt*, 455 U.S. 478, 482-83 (1982), *quoting Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curium). Here Neeb-Kearney makes no showing that the same controversy involving it and the MTMC will recur.[1/] Therefore these cases are moot.

We also conclude, in line with previous Department of Labor precident, that because the cases are moot, the ALJ's decision should be vacated. Thus, for example, in *Harry A. Stroh Associates, Inc.*, *supra*, the Deputy Secretary vacated an ALJ's decision in a substantial variance case because the issues presented had become moot. The Deputy Secretary held that "the findings of the ALJ should not be given either *res judicata* or precedential effect." Slip op. at 4, 5. The Deputy Secretary relied upon *Mechling Barge Lines v. United States*, 368 U.S. 324 (1961) and *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). In *Munsingwear* the Supreme Court held that vacating a judgment below in light of intervening mootness "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. *Munsingwear, Inc.*, 340 U.S. at 39-40. These principles are still good law, and we apply them here. Therefore we shall vacate the ALJ's decision.

ORDER

These cases are dismissed as moot, and the decision of the ALJ below is vacated.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

[1/] The cases cited by Neeb-Kearney (Response at unnumbered pp. 3-5) are inapposite.