In the Matter of:

**BECHTEL CONSTRUCTORS CORPORATION,**
**Prime Contractor**

**ARB CASE NO. 97-149**

**RODGERS CONSTRUCTION COMPANY,**
**Prime Contractor**

**(Formerly ARB Case No. 95-045A)**

**BALL, BALL AND BROSAMER, INC.,**
**Prime Contractor**

**(ALJ CASE NO. 91-DBA-3)**

**THE TANNER COMPANIES,**
**Subcontractor**

**DATE: March 25, 1998**

**With respect to laborers and mechanics employed by the Subcontractor on Contracts 4-CC-30-02120 (Brady Pumping Plant), Central Arizona Project ("CAP"), 5-CC-30-02770 (Red Rock Pumping Plant, CAP), 4-CC-30-01480 (Picacho Pumping Plant, CAP), 5-CC-30-03560 (Tucson Aqueduct, Reach 3, CAP).**

## DECISION AND ORDER OF REMAND

This matter is before the Administrative Review Board, United States Department of Labor, pursuant to the Davis-Bacon Act (the Act), 40 U.S.C. §276a *et seq*. and the regulations at 29 C.F.R. Parts 6 and 7. The case is pending on the Petition for Review filed by the Administrator, Wage and Hour Division (Administrator), seeking review of the Decision and Order on Remand (D.O.R.) issued by the Administrative Law Judge on August 21, 1997. For the following reasons, we reverse the D.O.R., grant the Administrator's Petition for Review, and remand this matter for further action consistent with this decision.

## BACKGROUND

The ALJ issued an initial Decision and Order (D. and O.) in this matter on May 5, 1995, that denied the Administrator's request to withdraw from factual stipulations entered into prior to the hearing. The stipulations involved the distances between certain batch plants and the sites of construction for three pumping stations on the Central Arizona Project (CAP). In the May 5, 1995

D. and O., the ALJ relied on the stipulations to support a finding that the disputed work was performed at locations too remote from the actual "site of the work," *i.e.* those locations where the construction work would remain upon completion, to be covered by the applicable regulations. Therefore, the ALJ dismissed the Administrator's DBA prevailing wage and Contract Work Hours and Safety Standards Act, 40 U.S.C. §327 *et seq*., overtime claims against the Respondents.

The Administrator sought review of the ALJ's D. and O. with respect to the findings concerning the three pumping stations. Briefs were filed and an oral argument was held. The Board issued a decision reversing the ALJ's conclusions concerning the pumping stations and remanding the matter. *Bechtel Constructors Corporation, et al*. (*Bechtel I*), ARB Case No. 95-045A, July 16, 1996. The facts of this case are thoroughly discussed in *Becthel I* and we will not repeat them here, other than as necessary to show the basis for our reversal of the August 21, 1997, D.O.R.

## DISCUSSION

### I. The Board's Decision in *Bechtel I*

In discussing the record evidence related to the issue of whether the disputed work was performed directly upon the site of the work, the Board in *Bechtel I* stated:

> The facts of this case clearly suggest that the work performed at the temporary batch plants satisfy the test set out in Section 5.2(l)(1). Aerial photographs of the Red Rock and Picacho sites place the temporary batch plants on land integrated into the work area adjacent to the pumping plants. Workers at the batch plants were employed on the sites of work equally as much as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property. Unless the Board were also to exclude these workers, and in doing so largely nullify the wage protections of the DBA, there is no principled basis for excluding the batch plant workers.
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> Tanner might concede that the batch plants were located proximate to the pumping stations, but argue that concrete from the batch plant was also transported and used on aqueduct construction miles from the plant. This argument is unpersuasive in that it is the nature of such construction, *e.g.* highway, airport and aqueduct construction, that the work may be long narrow and stretch over many miles. Where to locate a storage area or a batch plant along such a project is a matter of the contractor's convenience and is not a basis for excluding the work from the DBA. The map of the project introduced at hearing by Tanner, RX 22, abundantly illustrates that the project consisted of miles of narrow aqueduct connected by pumping stations. The only feasible way to meet the needs of the aqueduct construction was to have the concrete prepared at a convenient site and transported to the precise area of need. This equally holds true for the storage and distribution of other materials and equipment. Faced with such a project, the Board finds that work performed in actual or virtual adjacency to one portion of the long continuous

project is to be considered adjacent to the entire project. *See, L.P. Cavett Co. v. United States Dep't. of Labor, supra* at 979-980.

*Bechtel I*, slip op. at 6.

Given our conclusions regarding the distance reflected in the record, we reversed the ALJ's previous order that denied the Administrator's request to withdraw from clearly inaccurate[1/] stipulations as to the relevant distances. The Board remanded the case to the ALJ to give the parties the opportunity to submit additional evidence concerning the actual distances involved.

## II. The ALJ proceeding and decision on remand

Although the ALJ provided an opportunity for the parties to submit additional evidence concerning the distances between the batch plants and the pumping stations, neither party chose to submit further information. The ALJ then rejected the prior conclusions of this Board and reconsidered the question of the disputed distances, using the testimony, photographs and documents placed in evidence during the first proceeding.

With regard to the distances involved, the ALJ credited the testimony of two contracting agency representatives, Tex Edge and Gary Stevens, because these were the only two "impartial" witnesses.[2/] Edge testified that the Red Rock batch plant was ¼ mile from the construction site [Transcript (TR) 67]," and the ALJ found that this was consistent with most of the witnesses' testimony regarding Red Rock. D.O.R. at 5. The ALJ credited the testimony of Stevens with regard to the distances of the Brady batch plant (½ mile) and the Picacho batch plant (less than ¼ mile) from the site of construction work. *Id.*

In drawing the conclusion that the batch plants were not sufficiently close to the site of construction as to be covered, the ALJ relied on the recollection of witnesses, even though eight years had passed between the time that construction began and the hearing. The ALJ rejected photographic evidence that contradicted the relied upon recollections, noting that "although the distance from the batch plant to the construction site appears closer in the photographs in evidence (*see* GX 8-9), the testimony is very consistent and accordingly is *more probative than the*

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[1/] The incorrect stipulations - found in Parties' Joint Exhibit 1 - stated:

> These three batch plants were located from one-half to fifteen miles from the physical places where the construction called for in these contracts remained when the work was completed.

[2/] The ALJ discredited employee testimony on the basis that "these people will be awarded back pay if DOL is successful in this case. It is to their benefit to have the batch plants located as close as possible to the construction sites." D. O. R. at 5. Similarly, the ALJ discredited the testimony of Respondent Tanner's "management employees who would be expected to be biased in favor of Tanner." *Id.*

*photographs*." (Emphasis added). D.O.R. at 4. We cannot accept this unique analysis of the probative value of photographs versus dated recollections of witnesses.[3/]

As noted, the ALJ found, despite the photographic evidence to the contrary, that the distances between the batch plants and the construction site were one-half mile for Brady; one-quarter mile for Red Rock: and less than one-quarter mile for Picacho. The ALJ analyzed the evidence within the legal framework of two circuit court decisions dealing with interpretation of the statutory expression "directly upon the site of the work" -- *Ball, Ball & Brosamer, Inc v. Reich,* 24 F.3d 1447 (D.C. Cir. 1994) and *L. P. Cavett Company v. U.S. Dep't of Labor*, 101 F.3d 1111 (6th Cir. 1996). Using these cases as support, the ALJ held that the batch plants were too distant from the pumping plants to be "within 'actual or virtual adjacency' to the construction sites." D.O.R. at 8. Accordingly, the ALJ ordered dismissal of the case and return of all contract monies that had been withheld as back wages to the affected Respondents. *Id.* at 9.

We hold that the ALJ committed reversible error in rejecting, without any additional evidentiary basis, our factual conclusions in *Becthel I* that the disputed work at the batch plants was performed on the "site of work" as defined by §5.2(l)(1). Our remand in *Becthel I* was only intended to give the Respondents the opportunity to present additional evidence in light of their potential reliance upon the inaccurate stipulations that we rejected. In the absence of further evidence, the ALJ should have accepted the conclusions contained in *Bechtel I* and affirmed the Administrator. The ALJ should then have made findings concerning the amount of back wages and overtime due the affected batch plant workers.

Our *Bechtel I* instructions concerning the existing record evidence were explicit and the ALJ, in fact, adopted them. Further, our analysis of the *Ball and Cavett* decisions established the "law of the case," as argued by the Administrator and Intervenor Building and Construction Trades Department, AFL-CIO (BCTD).[4/] Our predecessor, the Wage Appeals Board (WAB) recognized the limiting principles of the "law of the case" doctrine in *Prime Roofing, Inc*., WAB Case No. 92-15, July 16, 1993, slip op. at 6. n.3. This Board, likewise, requires that once the law of the case is established, an ALJ is not free to substitute his or her judgment for our final agency action.

The ALJ's reliance on *Ball and Cavett* to support the conclusion that the disputed work was not on the site is misplaced. It is an axiom of administrative law that an agency is bound by its own regulations. *U.S. v. Nixon*, 418 U.S. 683, 696 (1974); *see also Roderick Construction Co.,* WAB Case No. 88-39, Dec. 20, 1990, slip op. at 5. Accordingly, neither the Board nor the ALJ are free to ignore the Department of Labor's site of the work regulations.

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[3/] In *Bechtel I* we found, based upon the photographic evidence, that the stipulations regarding the distances between the batch plants were "known to be false." At 4. The ALJ opines that this statement is inaccurate, D. O. R. at 2, and we reject this purported correction of our prior order for the same reason.

[4/] We reject Respondent Tanner Companies Motion to Strike BCTD's brief since it was filed within the time limit set for reply briefs.

The Department of Labor's regulations which interpret the term "directly upon the site of the work" are found at 29 C.F.R. §5.2(l):

> (1) The term *site of the work* is defined as follows:
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> (1) The *site of the work* is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed and, as discussed in paragraph (l)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the *site*.
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> (2) Except as provided in paragraph (l)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yard, *etc*., are part of the *site of the work* provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

As noted in *Becthel I,* the *Ball* court was not interpreting the regulation at 29 C.F.R. §5.2(1)(l), but rather the provision found at (1)(2). Nor did the *Cavett* court address (1)(l). Interpretation of Section 5.2(1)(l) requires examination of the question of whether the temporary facilities are so "located in virtual adjacency" to the site of the work that it would be reasonable to include them. Both the *Ball* and *Cavett* courts specifically reserved ruling on the application of Section 5.2(1)(l), since that provision was not at issue in those cases. With respect to 29 C.F.R. §5.2(1)(l), the *Cavett* court noted that: "it is not unreasonable to conclude that . . . a facility in virtual adjacency to a public work site might be considered part of that site." *Cavett*, 101 F.3d 1111, 1115.

The question of whether a temporary facility is virtually adjacent to the "site of the work" is one to be examined on a case-by-case basis. Thus, in examining a project like the CAP -- a huge project stretching over approximately 330 miles -- "it is not unreasonable" to consider the three batch plants in "virtual adjacency" to the project, given their proximity to the pumping stations as clearly shown by the photographs in evidence. The batch plants were established for the convenience of Respondents' construction activities and their choice not to move the batch plants each time a new milestone was passed should not be determinative of whether they were on the site of the work.

We previously noted that the batch plants were on land "integrated" into the construction area:

> Aerial photographs of the Red Rock and Picacho sites place the temporary batch plants on land integrated into the work area adjacent to the pumping plants. Workers at the batch plants were employed on the sites of work equally as much as the workers who cleared the land and the workers who inventoried, assembled, transported or operated tools, equipment or materials on nearby or adjacent property.

*Bechtel I* at 6.

It is clear from the record that the batch plants in question were constructed on land cleared and used for the DBA covered project. Indeed these plants were built and operated to enable the contractor to fulfill their contractual obligations on that project. There is no logical basis for distinguishing the work performed at the batch plants from other work performed on the land surrounding the pumping stations. Consequently, the Board reiterates its finding under 29 C.F.R. §5.2(l)(1) that the batch plants, given their location and purpose, are reasonably to be included in the site of work.

This result is dictated not only by our reading of the applicable regulation but by common sense as well. It is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work. An example of work that is covered even though it is not directly on the site where the permanent construction will remain upon completion was cited to the Board by Intervenor BCTD. In constructing a building in an urban area, construction cranes are often positioned adjacent to the permanent site of construction. It would not be possible to place the crane where the building is to stand. The most feasible location -- for the convenience of the contractor -- would be as close as possible to the actual site of the work, just as the batch plants were placed in the case now before us. To read the regulations to preclude coverage of such work would lead to absurd and arbitrary results clearly not intended by Congress or the regulations.

The Board rejects the arguments raised by Tanner and Intervenor Associated General Contractor's of America, Inc. (AGC) to the effect that the regulation at 29 C.F.R. §5.2(l)(1) does not provide -- as argued by the Administrator -- "a wholly adequate independent basis to support the Board's determination that the work at issue in this case is covered as part of the 'site of the work,'" Statement of the Acting Administrator, p. 12, n.5. *See* AGC Statement at p. 6. Sections 5.2(l)(1) and (2) are clearly separate regulations interpreting the "site of the work" language. We see no inherent infirmity in Section 5.2(l)(1) because it contains reference to Section 5.2(l)(1).[5/]

For the foregoing reasons, the ALJ's D.O.R. of August 21, 1997 is **REVERSED**; the Administrator's Petition for Review is **GRANTED**; and this matter is remanded to the ALJ for the

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[5/] If anything, reference to 29 C.F.R. §5.2(l)(2) clarifies and limits the coverage provisions of 29 C.F.R. §5.2(l)(1) by virtue of the requirement that "batch plants . . . are part of the *site of the work* provided they are dedicated exclusively, or nearly so, to performance of the contract or project." (Emphasis in original.)

sole purpose of computing back wages consistent with the principles enunciated by the Supreme Court in *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680 (1946).[6/]

**SO ORDERED**.

**DAVID A. O'BRIEN**
Chair

**KARL J. SANDSTROM**
Member

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[6/] The Wage Appeals Board previously endorsed use of the *Mt.Clemens* methodology for computing back wages where absolute precision is impossible. *See Apollo Mechanical, Inc.*, WAB Case No. 90-42, Mar. 13, 1991, at slip op. 2-3. *See also P.B.M.C., Inc.*, WAB Case No. 87-57, Feb. 8, 1991, where the WAB explained that under *Mt. Clemens Pottery*, an employee who seeks to recover unpaid wages "has the burden of proving that he performed work for which he was not properly compensated." 328 U.S. at 687.

However, where an employer's records are inaccurate or incomplete, employees are still entitled to the statutorily mandated wage even though the incompleteness of the record introduces some imprecision into the calculation. In such circumstances, an employee meets his burden "if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." 328 U.S. at 687. The employer then has the burden to demonstrate the precise number of hours worked or to present evidence sufficient to negate "the reasonableness of the inference to be drawn from the employee's evidence." 328 U.S. at 688. In the absence of such a showing, the court "may then award damages to the employee, event though the result be only approximate." *Id*. Furthermore, *Mt. Clemens Pottery* provides specific guidance on the responsibilities of the trier of fact: "Unless the employer can provide accurate estimates [of hours worked], it is the duty of the trier of facts to draw whatever reasonable inferences can be drawn from the employees' evidence . . . ." *Id*. at 693.