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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-198590 **DATE:** August 26, 1981

MATTER OF: Grand Coulee Project Office - Temporary Employees - Construction or Operation and Maintenance Pay Rates

DIGEST:

1. Where an arbitrator has requested that the parties in dispute seek the Comptroller General's opinion as to the legality of a labor-management agreement provision, the Comptroller General will issue a decision to the parties on their request. 4 C.F.R. § 22.7(b) (1981).

2. Negotiated labor-management agreement provision, which is protected by savings provision of section 9(b) of Pub. L. 92-392, August 19, 1972, provides for payment of construction rates of pay to specified temporary employees of Grand Coulee Project Office. The arbitrator found that as of September 1979 the payment of construction rates of pay to temporary employees was not a prevailing practice in the area. Since section 704 of the Civil Service Reform Act of 1978, Pub. L. 95-454, October 13, 1978, requires that agreement provisions protected by section 9(b) shall be negotiated in accordance with prevailing rates and practices, we conclude that these temporary employees may not continue to be paid at construction rates of pay.

This decision is issued pursuant to a joint request from the Columbia Basin Trades Council and the United States Water and Power Resources Service (formerly Bureau of Reclamation), Department of the Interior. The issue presented is whether the Service's Grand Coulee Project Office may pay construction rates of pay, rather than operation and maintenance rates, to temporary blue collar employees in the occupations listed in the negotiated labor-management agreement.

We decide, for the reasons stated below, that these temporary employees of the Grand Coulee Project Office may not continue to be paid at construction rates of pay.

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BACKGROUND

The joint request from the Columbia Basin Trades Council and the Water and Power Resources Service was directed by the arbitrator's opinion and award in the Matter of the Arbitration between the Columbia Basin Trades Council and all of its constituent Unions, Spokane, Washington, and the Grand Coulee Project Office, Bureau of Reclamation, U.S. Department of the Interior, Grand Coulee, Washington (W.J. Dorsey, Jr., Arbitrator), FMCS #79k/18263, Case No. 3.

The arbitrator was presented with the question as to the propriety of action taken by the Water and Power Resources Service to terminate the payment of construction rates of pay to employees hired on a temporary basis in 20 different blue collar occupations. At issue was whether the Service violated a provision in the labor-management agreement by discontinuing the payment of construction rates of pay to the temporary employees who are covered by the agreement.

The contract language in dispute is found in the Supplementary Labor-Management Agreement No. 2 (Wage Schedule 1977-1979) to the Basic Labor-Management Agreement between the Bureau of Reclamation, Grand Coulee Project Office, United States Department of the Interior, and the Columbia Basin Trades Council and it states as follows:

> "Temporary employees in the following classifications will be hired at local prevailing construction rates of pay. Such employees are not entitled to either sick or annual leave but will receive appropriate fringe benefit payments. All other temporary employees will receive the negotiated rates of pay.

"Boilermaker
"Carpenter
"Electrician (Power Systems)
"Lineman
"Rigger (Structural & High Line)
"Utilityman
"Sandblast Operator
"Laborer
"Mechanic (Heavy Duty)
"Machinist
"Operator General (Mobile Pwr Equip) Cl 3
"Operator General (Mobile Pwr Equip) Cl 2
"Operator General (Mobile Pwr Equip) Cl 1
"Oiler
"Painter (Brush)
"Painter (Spray)
"Pipefitter
"Concrete Finisher
"Truck Driver Class 2
"Truck Driver Class 1

> "Night Differential: Night pay differential has been considered in revising the above wage rates and does not apply to the above rates." (Arbitrator's emphasis.)

The arbitrator found that this contract language antedated the signing of the Supplementary Labor-Management Agreement No. 2 (Wage Scale, 1975) in July 1975. He stated that the language in dispute was in place when the 1971 version of the Supplementary Labor-Management Agreement No 2. was agreed to by the parties.

In 1975, management sought to negotiate changes in this provision on the ground that the temporary employees involved were intermingled with the general operation and maintenance work force and could not be identified as performing construction work. After unsuccessfully attempting to negotiate changes, management on December 18, 1977, discontinued payment of construction rates of pay to the temporary employees in question, relying on the following legal analysis from the Department of the Interior's Solicitor's Office.

> "Whether the temporary employees in question may be paid at construction rates depends on the pay practices of those employers whose rates are used as comparison points for the

> negotiated wage schedule. If the prevailing practices justify the use of construction rates, and thereby the description of the affected employees as 'construction' employees, then they may also receive additional hourly wage increments in lieu of entitlement to certain fringe benefits they do not otherwise receive. However, if they cannot legitimately be considered to be construction workers, they are not entitled to such additional increments in lieu of fringe benefits."

The Service conducted a survey and found that it was not the practice in the area for private employers to pay construction rates of pay for temporary operation and maintenance workers. Thus, since the Service found that the temporary employees in the above-quoted job classifications were not engaged in construction work, it unilaterally decided not to pay them construction rates of pay any longer. Grievances were filed by employees in the bargaining unit which were ultimately presented to the arbitrator for resolution.

ARBITRATOR'S FINDINGS

Based on the survey questionnaires which were a part of the Service's wage survey relating to the payment of construction rates of pay to temporary employees by utilities in the Pacific Northwest Region, the arbitrator found that as of September 29, 1979, "* * * the payment of construction rates for temporary operation and maintenance workers in the classifications listed in the contract is not 'a prevailing practice in the area surveyed for wages and working conditions.'" (Arbitrator's emphasis.) He then stated that this raised the question as to whether the contract provision calling for the payment

of construction rates was illegal. The arbitrator, however, declined to rule on the legality of this long-standing contract language and stated the following:

> "Instead he [the arbitrator] will rule, as he must in view of the contract language, that the Employer's unilateral actions in setting aside and ignoring the clear and unambiguous contract language found in Supplementary Labor Management Agreement No. 2 of the parties * * * violated its contract with the Columbia Basin Trades Council and that all of the Employer's temporary hourly employees on board prior to December 18, 1977, and all temporary employees hired by the Employer on and after December 18, 1977, in the express classifications listed in the Supplementary Labor-Management Agreement No. 2, are entitled to back wages based on the 'local prevailing construction rates of pay' for their classifications from December 18, 1977 (for new hires) or from the start of the pay period beginning February 12, 1978 (for all temporary employees on board prior to December 18, 1977) until the date of receipt of a Comptroller General's decision which might declare such payment invalid.
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> "In addition, the Arbitrator in his AWARD has ordered that the parties jointly, within sixty days of receipt of his DECISION AND AWARD in this case, formally apply to the Comptroller General of the United States for a ruling on the legality of the contract language in question and that until such time as the Comptroller General may rule that this contract language is illegal and therefore null and void under Section 1.4 of Article I of the contract, the Employer must continue to pay its temporary employees in the classifications in question the negotiated rate appropriate to their classification, also as set forth in Supplementary Labor-Management Agreement No. 2.

> "By this particular type of relief the Arbitrator has attempted to make the members of the bargaining unit whole for the unilateral action taken by the Employer, in direct violation of the particular, express and long-standing contractual language of the parties, and at the same time afford the Employer an opportunity to settle this dispute on the legality of the contract language in question by a joint application with the Columbia Basin Trades Council for an opinion of the Comptroller General of the United States."

The arbitrator further explained his actions as follows:

> "The Arbitrator is a creature of the parties, who, pursuant to their express contractual provisions, chose him to hear their dispute in this case and to make his decision on the basis of the contractual provisions which the parties entered into. Under the particular, express and long-standing contractual provisions of the parties which are clear and unambiguous, the temporary hourly employees of the Employer in the classifications listed in the contract were, and are, entitled to be paid 'at local prevailing construction rates of pay.' All the Arbitrator has done in his DECISION AND AWARD in this case is to find that the Employer violated these express contractual provisions, that the employees in question are due back pay, that the Employer should pay this back pay, that within sixty days of the date on which the parties receive his DECISION AND AWARD in this case they should jointly resort to the Office of the Comptroller General for an opinion from the expert in the field of pay statutes for federal employees for a permanent resolution of their dispute on the legality of this contractual provision, but

that until such a decision declares the contractual provision illegal, the Employer must continue to pay the local prevailing construction rates to the employees in question." (Arbitrator's emphasis.)

JURISDICTION

Thus, the arbitrator ordered the union and management jointly to seek our decision on the legality of the disputed language in the labor-management agreement. Accordingly, we shall consider this matter as a joint request of the parties and issue a decision thereon under our "Procedures for Decisions on Appropriated Fund Expenditures Which are of Mutual Concern to Agencies and Labor Organizations," 4 C.F.R. Part 22 (1981) originally published as 4 C.F.R. Part 21, at 45 Fed. Reg. 55689-92, August 21, 1980. See specifically 4 C.F.R. § 22.7(b) (1981).

In deciding this case, we shall confine our opinion to the question submitted as to the legality of the contract provision in question. Under 5 U.S.C. § 7122 (Supp. III, 1979) we no longer have the authority to review arbitration awards. See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess., July 31, 1978, 56, 57. Thus, we express no opinion on the arbitrator's ruling that the temporary employees are entitled to backpay at construction rates until the date of receipt of a Comptroller General decision declaring such payments invalid. Any payments made by the agency pursuant to the arbitration award are conclusive on the General Accounting Office. 4 C.F.R. § 22.7(a) (1981). See 58 Comp. Gen. 198, 200 (1979).

OPINION

In submitting the legal question to us pursuant to the arbitrator's instructions, the Water and Power Resources Service takes the position that the payment of construction rates is illegal. The Service's position is based on its view that these temporary employees are engaged in the maintenance, repair, and upkeep of the powerplant and related facilities and that the payment of

construction rates to such employees is not a prevailing practice among the northwest utilities that make up the wage survey.

The Columbia Basin Trades Council does not dispute the Service's contention that the employees are not engaged in construction work nor does it dispute the Service's contention about the prevailing practice in the area. The union's position is basically that the labor-management agreement requires payment of construction rates and that management had no authority to unilaterally terminate the payment of construction rates in violation of the agreement.

We start with the arbitrator's finding that the payment of construction rates of pay to the temporary operation and maintenance employees involved is not a prevailing practice in the area surveyed for wages and working conditions. This finding is consistent with the Service's statements as to the work performed by the temporary employees and with the survey results obtained pursuant to the recommendation of the Solicitor's Office.

We now turn to the relevant statutes. Pay policies and procedures for most prevailing rate employees are prescribed by subchapter IV of chapter 53 of title 5, United States Code, as amended by Pub. L. 92-392, August 19, 1972, 86 Stat. 564, 5 U.S.C. § 5343 note, which requires that rates of pay be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates. This subchapter requires pay to be fixed by means of area wage schedules established periodically from wage surveys made by lead agencies or by the Office of Personnel Management. However, section 9(b) of Pub. L. 92-392 exempts certain employees who had negotiated their wages on or before August 19, 1972.

Section 9(b) has been amplified by section 704 of the Civil Service Reform Act of 1978, Pub. L. 95-454, October 13, 1978, 92 Stat. 1218, 5 U.S.C. § 5343 note, which reads as follows:

"(a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

"(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of--

"(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;

"(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code, or

"(C) any rule regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code."

Accordingly, negotiated provisions of labor-management agreements which were in effect on August 19, 1972, such as the provision here in question, are protected and may be continued under the provisions of sections 9(b) and 704, even though these negotiated provisions may be in conflict with certain other provisions of law or prior interpretations thereof.

However, the application of section 704(a) is premised on the concept that prevailing rates and practices shall be used in determining what the terms and conditions of employment and other employment benefits are. Moreover, section 704(b) specifically requires that the pay and pay practices of employees under these negotiated contracts "* * * shall be negotiated in accordance with prevailing rates and pay practices * * *." Thus, even though the Congress gave broad authority for the negotiation of wages to those employees who had historically negotiated their wages, Congress insisted that the authority shall be governed by prevailing rates and pay practices.

As has been indicated, the contract provision here in question was in existence before August 19, 1972, and thus falls within the purview of sections 9(b) and 704. However, the arbitrator has found that, as of September 1979, the payment of construction rates of pay for temporary operation and maintenance workers in the occupations listed in the agreement was not a prevailing practice in the area. Therefore, since section 704 provides that contract provisions protected under section 9(b) of Pub. L. 92-392 shall be negotiated in accordance with prevailing rates and practices, the arbitrator's finding compels us to conclude that the agreement provision requiring payment of construction rates of pay is not valid under section 704. Accordingly, the temporary operation and maintenance workers at the Grand Coulee Project Office may not continue to be paid at construction rates of pay.

Milton J. Socolar

Acting Comptroller General
of the United States