No. 2020-0039

ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, DC

In the Matter of:
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 113, Third Party Complaint against KIRA, INC.,
Petitioner,

v.

ADMINISTRATOR, WAGE & HOUR DIVISION,
U.S. DEPARTMENT OF LABOR,
Respondent.

On Petition for Review of the Final Ruling of the Wage and Hour Administrator

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ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued:

Statutes:

Code of Federal Regulations:

Code of Federal Regulations – Continued:

Other Authorities:

ADMINISTRATOR'S RESPONSE TO PETITION FOR REVIEW

This cases arises under the labor standards provisions of the McNamara-O'Hara Service Contract Act of 1965 ("SCA" or "the Act"), 41 U.S.C. §§ 6701-6707, and its implementing regulations at 29 CFR Parts 4 and 8. The International Brotherhood of Electrical Workers, Local 113 ("Local 113" or "Petitioner"), representing seasonal grounds laborers who were employed by KIRA, Inc. ("KIRA" or "the contractor")[1] on SCA contracts, filed a complaint with the Wage and Hour Division ("WHD") alleging that these workers were not being paid fringe benefits in accordance with the governing collective bargaining agreement ("CBA") as required on these SCA contacts. After WHD ultimately found no violations of the SCA and closed its investigation without initiating an enforcement action, Local 113 sought review by the WHD Administrator ("Administrator"). The Administrator reviewed competing submissions and arguments from Local 113 and KIRA ("the parties") and issued a final ruling affirming WHD's interpretation of the CBA pursuant to the SCA, while noting that Local 113 was not entitled to review of WHD's enforcement decision in the underlying investigation. Local 113 now seeks further review by the Administrative Review

[1] KIRA has since been purchased by T&H Services, LLC, *see* Administrative Record ("AR") 86, 238, but is referred to by its original name herein.

Board ("ARB" or "Board") of the Administrator's final ruling interpreting the CBA, as well as of the underlying WHD investigation.

For the reasons set forth herein, the Board should affirm the Administrator's final ruling and decline the broader review sought by Local 113.

STATEMENT OF JURISDICTION

Local 113 seeks review of the Administrator's final ruling made in response to Local 113's inquiries regarding a closed WHD investigation. On January 14, 2020, the Administrator issued her final ruling pursuant to 29 CFR 4.101(g) and 4.102. On March 12, 2020, Local 113 timely filed its Petition for Review of the Administrator's final ruling with the ARB, which has jurisdiction to hear and decide appeals concerning such final decisions of the Administrator. 29 CFR 8.1(b)(6) (The Board's jurisdiction includes review of "[o]ther final actions of the Wage and Hour Administrator," such as "rulings with respect to application of the [SCA], or the regulations . . . ."); *id.* at 8.7(b) (requiring that a petition for review of a final written decision of the Administrator be filed within 60 days of the decision).

STATEMENT OF THE ISSUES

1. Whether the Administrator correctly considered extrinsic evidence of the parties' intentions, in particular evidence of the parties' bargaining history and historical pay practices, to reasonably determine that the CBA provided for

payments to seasonal grounds laborers under Schedule A that encompassed both the required minimum hourly wage rate and fringe benefit monies and that such payment of the Schedule A rate satisfied the contractor's obligation to provide fringe benefits as required by the CBA for purposes of SCA Section 4(c).

2. Whether the ARB should limit the scope of its review to that of the Administrator's final ruling given that the broader review sought by Local 113 implicates WHD's discretionary enforcement authority.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The SCA "provide[s] wage . . . protection for employees working under Government service contracts." S. Rep. No. 92-1131, at 1 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3534, 3534. Under the SCA, federal contractors must pay covered service employees no less than specified minimum hourly wage rates and provide such employees certain fringe benefits or their cash equivalent. 41 U.S.C. § 6703(1)-(2); 29 CFR 4.6(b). The Secretary's broad authority to administer and enforce the Act, *see* 41 U.S.C. §§ 6506-6507, has largely been delegated to WHD. Sec'y's Order 1-2014, Delegation of Authority and Assignment of Responsibility to Administrator, Wage and Hour Division, § 5(A)(3), 79 Fed. Reg. 77527, 77527 (Dec. 24, 2014).

WHD sets the required minimum wage rates and benefits based on its determination of the prevailing rates in the locality "or, where a collective-bargaining agreement (CBA) covers the service employees, [as] provided for in the agreement." 41 U.S.C. § 6703(1); *accord id.* at § 6703(2); *see generally* 29 CFR 4.50-4.53. Section 4(c) of the Act requires that service employees performing under a "successor" contract be "paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's [CBA]." 29 CFR 4.163(a).[2] Thus, under Section 4(c), the predecessor's CBA becomes the basis for the required minimum hourly wage rates and fringe benefits applicable under the successor contract. *See id.* at 4.163(d). Where unclear, "any interpretation of the wage and fringe benefit provisions of the

[2] Section 4(c), codified at 41 U.S.C. § 6707(c), provides that:

> Under a contract which succeeds a contract subject to this chapter, and under which substantially the same services are furnished, a contractor or subcontractor may not pay a service employee less than the wages and fringe benefits the service employee would have received under the predecessor contract, including accrued wages and fringe benefits and any prospective increase in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's length negotiations.

41 U.S.C. § 6707(c)(1). Successorship is understood broadly. "A contractor may become its own successor because it was the successful bid on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing service contract, etc." 29 CFR 4.163(e).

[CBA] . . . must be based on the intent of the parties to the [CBA], provided that such interpretation is not violative of law." *Id.* at 4.163(j).

While a contractor is obligated to furnish fringe benefits "separate from and in addition to the specified monetary wages," 29 CFR 4.170(a), this obligation may be discharged by paying "a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required," *id.* at 4.177(c)(1); *accord* 41 U.S.C. § 6703(2). Inquiries regarding the application of these and other SCA requirements may be addressed by the Administrator pursuant to 29 CFR 4.101(g) and 4.102.

Complaints of alleged SCA violations are received and, where appropriate, investigated by WHD district and regional offices pursuant to 29 CFR 4.191. *See* 41 U.S.C. § 6506(e). To the extent that violations are found, the Office of the Solicitor may initiate enforcement proceedings. *Id.* at § 6507; 29 CFR 6.15(a) ("Enforcement proceedings under the [SCA] . . . may be instituted by . . . a Regional Solicitor."); Sec'y's Order 1-2014, § 5(F), 79 Fed. Reg. at 77527 ("The bringing of legal proceedings under [the SCA] . . . and the determination of whether such proceedings . . . are appropriate in a given case, are delegated exclusively to the Solicitor.").

B. Statement of Facts and Course of Proceedings

1. KIRA provided general maintenance services under consecutive contracts with the United States Army Corps of Engineers at Fort Carson in Colorado Springs, Colorado from September 30, 2013 through September 29, 2016, the pertinent period at issue. AR 238. Under Section 4(c) of the SCA, for most of this period, the service employees performing work on these contracts were entitled to no less than the wages and fringe benefits contained in a CBA entered into by KIRA and Local 113 with the stated duration of September 30, 2013 through September 29, 2016 ("the CBA"). AR 238; *see also* AR 218-37 (the CBA); SCA Wage Determination, No. CBA-2007-1676 rev. 4 (Aug. 21, 2013) (specifying that the wage rates and fringe benefits are governed by this CBA), *available at* https://beta.sam.gov/wage-determination/cba/agreement/55128/ document.

The CBA contains, in relevant part, "Schedule A" listing applicable "Labor Rates," AR 236-37, and "Article 21" setting forth KIRA's obligation to provide fringe benefit payments, AR 230-31. For full-time grounds laborers, Schedule A lists rates of $13.05, $13.12, and $13.18 per hour for the periods beginning September 30, 2013, September 30, 2014, and September 30, 2015, respectively. AR 236. For seasonal grounds laborers, the Schedule A rates are considerably higher: $16.37, $16.45, and $16.53 for these same periods. *Id.*

Article 21 provides that KIRA's full-time employees, with limited exceptions, are required to participate in the company's insurance benefits plans (Art. 21, § 1), and, *for each full-time employee*, KIRA will contribute to the cost of the employee's insurance coverage at the hourly rates of $5.90, $5.95, and $6.00 for the periods beginning September 30, 2013, September 30, 2014, and September 30, 2015, respectively (Art. 21, § 2). AR 230. With respect to part-time or temporary employees, Article 21 provides only that "when not eligible for the Company benefits plans" such employees "will receive their applicable fringe benefit monies paid out each pay period," *i.e.*, as cash in lieu of the employer making contributions to Company benefits plans (Art. 21, § 6). AR 231. The amount of fringe benefits to which part-time or temporary employees may be entitled is not specified in Article 21. *See* AR 230-31.

2. On September 16, 2016, Local 113 filed a complaint with a WHD district office ("DO") alleging, *inter alia*, that seasonal grounds laborers were not being paid fringe benefits in accordance with Article 21, Section 2 of the CBA, as required by the SCA. AR 80-85. The complaint was investigated by the Denver DO, which initially interpreted the CBA to require KIRA to pay seasonal grounds laborers both the Schedule A Labor Rate *and* the hourly fringe benefit contribution rate specified in Article 21, Section 2 and, based on this interpretation, calculated

that KIRA owed its seasonal grounds laborers $332,603.43 in back wages. AR 238.

However, after considering the CBA in light of the parties' prior CBAs, which evinced a consistent practice of including seasonal grounds laborers' fringe benefit monies as a component of the Schedule A Labor Rates, and discussing the case with WHD's Southwest Regional Office and the Denver Regional Solicitor's Office, the Denver DO reconsidered its interpretation of the CBA. AR 239. It determined that the CBA did not require KIRA to pay the seasonal grounds laborers the hourly fringe benefit contributions specified in Article 21, Section 2 (as fringe benefits for these workers were already reflected in the Schedule A Labor Rates for this classification) and, consequently, that such payments were not required by the SCA. *Id.* Accordingly, the Denver DO corrected its findings to reflect that there were no violations found and no back wages owed, recommended that KIRA and Local 113 clarify the ambiguous language in the CBA, and closed the investigation. *Id.*

3. Unhappy with this outcome, and believing it was entitled to administrative review of WHD's decision to close the investigation, Local 113 contacted the Administrator on February 20, 2018 seeking enforcement of the Denver DO's initial determination or, alternatively, a "final ruling" that would be subject to review by the ARB. AR 74-131. Specifically, Local 113 argued that the

issuance of a final ruling is required by 29 CFR 8.1(b), the regulatory provision that articulates the scope of the ARB's review. AR 74, 77-78. On July 2, 2019, Local 113 again contacted the Administrator seeking an appealable, final ruling. AR 132-35.

4. In response to Local 113's requests, on January 14, 2020, the Administrator issued a final ruling, pursuant to 29 CFR 4.101(g) and 4.102, affirming the Denver DO's conclusion that the compensation provided to seasonal grounds laborers in accordance with Schedule A of the CBA encompassed both an hourly wage rate and an hourly rate of cash in lieu of fringe benefits. AR 1-7. Under this interpretation of the CBA, KIRA's payments in accordance with Schedule A satisfied the Article 21, Section 6 requirement that part-time or temporary employees not eligible for Company benefits plans "receive their applicable fringe benefit monies paid out each pay period." AR 1.

In reaching this conclusion, the Administrator considered the text of the CBA (AR 218-37, discussed *supra* 6-7), the positions and submissions of the parties (AR 3-4, 8-135), and the parties' prior CBAs covering the 2006-2013 time period (AR 136-217). AR 2-6. Local 113 contended that the plain language of Article 21, Section 6 of the CBA entitled seasonal grounds laborers (when not eligible for Company benefits plans) to receive both the Schedule A Labor Rate, as well as the hourly fringe benefit rate specified in Article 21, Section 2 of the CBA.

AR 3-4.[3] However, it submitted neither documentary evidence, nor legal authority, to support this interpretation. *Id.* In contrast, KIRA contended that the language in Article 21, Section 6 of the CBA was intended to memorialize the parties' historical practice of paying out fringe benefit monies to seasonal laborers as part of the Schedule A Labor Rate. AR 4. To adopt Local 113's interpretation, KIRA explained, would result in seasonal grounds laborers receiving higher total compensation than their full-time counterparts "who perform a greater range of job tasks and have greater responsibilities," an anomalous result not intended by the parties. *Id.* As described *infra*, the Administrator ultimately found KIRA's arguments and submissions to be more persuasive.

First, the Administrator found that the evidence supported KIRA's contention that it was the parties' historical practice to include both the required minimum hourly wage rates and fringe benefits in the Schedule A Labor Rates for seasonal laborers. From approximately July 2006 through September 2013, KIRA provided the same maintenance services at Fort Carson that it provided during the pertinent period from September 30, 2013 through September 29, 2016. AR 3. The Administrator reviewed four CBAs entered into by the parties covering the

[3] As explained in the Administrator's final ruling, WHD understands that seasonal laborers typically, and perhaps invariably, were not eligible for KIRA's benefits plans during the period in question. AR 4 n.1.

wages and working conditions of workers performing maintenance services at Fort Carson during this earlier period. AR 3, 136-217.[4] The earliest of these CBAs, with stated effective dates of July 31, 2006 through December 31, 2006, contained Schedule A Labor Rates for seasonal grounds laborers ($11.08 and $11.52) that were higher than those for full-time grounds laborers ($8.86 and $9.39). AR 153. Article 21 of this CBA contained an hourly fringe benefit contribution rate of $4.70 for covered employees, such as full-time grounds laborers, but stated "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this Agreement." AR 149-50. Each of the three subsequent CBAs (with stated effective dates of August 18, 2006 through September 30, 2007; September 30, 2007 through September 29, 2010; and September 30, 2010 through September 29, 2013, respectively) also contained higher Schedule A Labor Rates for seasonal grounds laborers than for full-time grounds laborers. AR 169, 191, 210. Likewise, Article 21 of these CBAs, as with the 2006 CBA, contained hourly benefit contribution rates for covered employees, like the full-time grounds laborers, but explicitly excluded part-time and temporary seasonal employees from such benefits. AR

[4] During the July 2006 through September 2013 time period, KIRA performed work on these contracts in association with CSC Corporation, which was also party to the CBAs. *See* AR 3, 136, 155, 176, 198.

174, 196, 216. Thus, the Administrator observed that under each of these CBAs, (1) seasonal grounds laborers received a higher hourly rate of pay on Schedule A than did their full-time counterparts, but (2) full-time grounds laborers received higher aggregate compensation because they received an hourly fringe benefit contribution in addition to their Schedule A rate of pay. AR 3.

In addition, the Administrator relied on a 2007 email exchange in which the parties calculated the Schedule A Labor Rate for seasonal grounds laborers by adding the required minimum hourly wage rate and fringe benefits specified in the then-applicable wage determination. AR 5, 28-34. Similarly, a March 17, 2011 CBA addendum demonstrated that the parties set the rate of pay for seasonal tire technicians to reflect the sum of the required minimum hourly wage rate and fringe benefits. AR 5, 40. Taken together, with the evidence of the prior CBAs, the Administrator found that it was the parties' historical practice to include both the required minimum hourly wage rates and fringe benefits in the Schedule A Labor Rates for seasonal laborers. AR 4-5.

Second, the Administrator found that the remaining evidence suggested that the parties intended to continue this practice in the operative CBA. AR 5. Job descriptions submitted by KIRA demonstrated that full-time grounds laborers performed a broader array of "essential functions" than did their seasonal counterparts and were expected to have greater experience. *Compare* AR 19 (Job

Description – Laborer, Grounds Maintenance), *with* AR 21 (Job Description – Seasonal Laborer, Grounds Maintenance). The greater responsibility and experience required of full-time grounds laborers undercut Local 113's proposed interpretation of Article 21, Section 6, under which seasonal grounds laborers would receive higher total remuneration. AR 5. The Administrator noted that none of the evidence before her reflected an intent to pay seasonal grounds laborers significantly more than their full-time counterparts. *Id.*

Thus, the Administrator reasonably determined, in light of the parties' past practice, bargaining history, and other evidence, that Article 21, Section 6 of the CBA was intended to memorialize the parties' practice of including both the hourly wages and fringe benefits in the Schedule A Labor Rates for seasonal grounds laborers. AR 4-5.

After adopting this interpretation of the CBA, the Administrator considered whether KIRA had satisfied its obligation to furnish fringe benefits separate from and in addition to the monetary wages, as required by 29 CFR 4.170(a). AR 6. The Administrator noted that a contractor can satisfy its obligation to provide separate fringe benefits if it informs covered employees that it has included fringe benefits in their pay and the employees understand that it has done so. *Id.* (citing *United Kleenist Org. Corp.*, No. 00-042, 2002 WL 181779, at *6 (ARB Jan. 25, 2002)). The Administrator determined that KIRA fulfilled this obligation by

negotiating the CBA with Local 113, the legally authorized representative of KIRA's employees, under which Schedule A and Article 21, Section 6 make clear (especially in light of the parties' bargaining history) that the Schedule A Labor Rates for seasonal grounds laborers include both wage rate and fringe benefits components. *Id.*

Finally, the Administrator explained that her final ruling was being issued pursuant to her authority to make official rulings and administer the SCA as described in 29 CFR 4.101(g) and 4.102. AR 6. She disagreed with Local 113's assertion that it was entitled to a written decision containing a final, reviewable ruling following an SCA investigation initiated in response to a complaint filed under 29 CFR 4.191, explaining that WHD's decision not to institute an administrative enforcement action is not subject to review. *Id.*

5. On March 12, 2020, Local 113 filed the instant petition seeking ARB review of the Administrator's final ruling. Petition for Review ("Pet."). However, the requested review extends beyond the scope of the Administrator's decision, in which she affirmed the Denver DO's conclusion that the compensation provided to seasonal grounds laborers in accordance with Schedule A of the CBA encompassed both an hourly wage rate and an hourly rate of cash in lieu of fringe benefits and concluded that KIRA's Schedule A payments thus satisfied its obligation under the SCA to provide fringe benefit monies in cash as required by

Article 21, Section 6. *See* AR 1-7. Specifically, the petition seeks Board review of WHD's decision to close the underlying investigation without pursuing an enforcement action.

SUMMARY OF ARGUMENT

This crux of this dispute is the parties' competing interpretations of Article 21, Section 6 of the operative CBA, which provides that part-time or temporary employees "not eligible for the Company benefits plans . . . will receive their applicable fringe benefit monies paid out each pay period." *See* AR 231.

The Administrator, after reviewing evidence of the parties' bargaining history and consistent pay practices, determined that this provision was intended to memorialize the parties' practice of including both the required minimum hourly wage rates and cash in lieu of fringe benefits in the Schedule A Labor Rates for seasonal grounds laborers. AR 4-5. Thus, by paying the Schedule A rate, KIRA complied with the requirement to pay these seasonal employees "their applicable fringe benefit monies . . . each pay period." *Id.* The Administrator's position is supported by evidence demonstrating this long-standing practice, including communications showing that the parties calculated the Schedule A rates by adding together the required minimum hourly wage rates and fringe benefits. AR 4-5, 28-34, 40. The Administrator's analysis, including her reliance on extrinsic evidence

to ascertain the parties' intent, was reasonable and should be affirmed by the Board.

In contrast, Local 113's argument that this provision requires KIRA to pay its seasonal grounds laborers *additional* monies representing the cash-equivalent of the fringe benefit contributions specified in Article 21, Section 2 is completely at odds with the text of Section 2, which states unequivocally that the listed rates apply to full-time employees. *See* AR 230. Adopting the interpretation advanced by Local 113 would lead to an anomalous result whereby seasonal grounds laborers would receive significantly more compensation than their full-time counterparts who have greater responsibility and experience and would run counter to the parties' consistent compensation practices. Local 113's argument that payment of the Schedule A rate does not satisfy the requirement to pay the cash-equivalent of fringe benefits, *see* 29 CFR 4.170(a), 4.177(a)(3), relies on the erroneous assumption that seasonal grounds laborers are entitled to the cash-equivalent of the fringe benefits to which full-time laborers are entitled and, therefore, must fail.

The Board, an appellate body, should limit the scope of its review to that of the Administrator's ruling letter and, consistent with its precedent, decline to review WHD's discretionary enforcement decisions.

Accordingly, the Board should affirm the Administrator's final ruling.

ARGUMENT

I. STANDARD OF REVIEW

The Board's review of final rulings of the Administrator issued pursuant to the SCA "is in the nature of an appellate proceeding." *ServiceStar Landmark Props.-Fort Bliss LLC*, No. 17-013, 2018 WL 6978220, at *1 (ARB June 25, 2018); *Court Sec. Officers*, No. 98-001, 1998 WL 686632, at *3 (ARB Sept. 23, 1998) ("The Wage and Hour Administrator is the primary interpreter of the contract labor standards and implementing regulations, with the Board acting in an appellate capacity."). The Board may modify or set aside findings of fact only when it determines that they are not supported by a preponderance of the evidence. *ServiceStar*, 2018 WL 6978220, at *1 (citing 29 CFR 8.9(b)). While questions of law are reviewed de novo, the Board defers to the Administrator's interpretation of the SCA when it is reasonable and consistent with law. *Id.* (citing *Alcatraz Cruises LLC*, No. 07-024, 2009 WL 250456, at *3 (ARB Jan. 23, 2009)); *see also Court Sec. Officers*, 1998 WL 686632, at *3 ("[W]e ordinarily defer to the expertise and experience of the Administrator, and will upset a decision of the Administrator only when the Administrator fails to articulate a reasonable basis for the decision.").

II. THE BOARD SHOULD AFFIRM THE ADMINISTRATOR'S REASONABLE INTERPRETATION OF THE CBA.

A. The Administrator Appropriately Considered Extrinsic Evidence of the Parties' Intent and Reasonably Interpreted the CBA in Light of this Evidence.

The central issue before the Board is whether, in applying the SCA, the Administrator reasonably interpreted Article 21, Section 6 of the CBA. This provision provides that part-time or temporary employees, such as the seasonal grounds laborers, "when not eligible for the Company benefits plans . . . will receive their applicable fringe benefit monies paid out each pay period." *See* AR 231. In light of the parties' bargaining history and past compensation practices, the Administrator reasonably determined that this provision was intended to memorialize the parties' practice of including both the required minimum hourly wages and cash in lieu of fringe benefits in the Schedule A Labor Rates for seasonal grounds laborers and that KIRA's payments made in accordance with Schedule A thereby satisfied its obligation to pay these seasonal employees "their applicable fringe benefit monies . . . each pay period." AR 4-5.

Read alone, Article 21, Section 6 requires only that part-time or temporary employees not eligible to participate in KIRA's benefits plans "receive their applicable fringe benefit monies paid out each pay period," *i.e.*, that they receive in cash any fringe benefit amounts to which they are entitled. *See* AR 231. Notably, this provision does not specify the amount of this entitlement. *See id.*

Where unclear, "any interpretation of the wage and fringe benefit provisions of the [CBA] . . . must be based on the intent of the parties to the [CBA], provided that such interpretation is not violative of law." 29 CFR 4.163(j); *see also Am. Stevedores v. Porello*, 330 U.S. 446, 457-58 (1947) (discussing need for evidence of parties' intent where the contract clause at issue was susceptible of different constructions). Evidence of contracting parties' past practices and dealings can be illustrative of the parties' intent. *NLRB v. Ne. Okla. City Mfg. Co.*, 631 F.2d 669, 676 (10th Cir. 1980) ("Where past practice has established a meaning for language that is used by the parties to a new agreement, the language will be presumed to have the meaning given it by such past practice."). "It is well-established that when interpreting the terms of a labor contract, a fact-finder is entitled – and indeed, in some cases required – to look to the past practices of the parties and the 'common law of the shop' to determine the parties' contractual obligations." *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1243 (10th Cir. 1998); *IBEW, Local 611 v. Pub. Serv. Co.*, 980 F.2d 616, 617-19 (10th Cir. 1992) (upholding an arbitrator's interpretation of ambiguous contract terms in light of the parties' past practices).

In analyzing Article 21, Section 6, the Administrator relied on extrinsic evidence for insight into the parties' intent, including prior CBAs, communications made during collective bargaining, and the hiring and compensation practices relating to the classifications at issue. *See* AR 1-6. For instance, based on her

review of the parties' prior CBAs, the Administrator observed that the parties consistently agreed that (1) seasonal grounds laborers should receive a higher hourly rate of pay on Schedule A, but (2) their full-time counterparts should receive higher aggregate compensation by virtue of their entitlement to the hourly fringe benefit contribution specified in Article 21. AR 3. Correspondence between the parties while negotiating their 2007-2010 CBA demonstrated that seasonal grounds laborers received the cash-equivalent of their required fringe benefits as part of their Schedule A Labor Rate. AR 5, 28-34 (adding together the minimum hourly wage rate and fringe benefits specified in the then-applicable wage determination to get the Schedule A Labor Rate for seasonal grounds laborers); *see also* AR 40 (Schedule A rate for seasonal tire technicians was the sum of the minimum hourly wage rate and fringe benefits). Finally, job descriptions for the full-time and seasonal grounds laborer classifications demonstrated that full-time laborers were expected to assume greater responsibility and, generally, to have more experience than their seasonal counterparts, AR 5, 19, 21, consistent with the parties' practice of agreeing to higher total compensation for the full-time laborers, *see* AR 3.

The Administrator reasonably relied on this evidence to inform her understanding of the operative CBA for purposes of applying the SCA. *Webb*, 155 F.3d at 1243. Specifically, she appropriately found that the Schedule A rates for

seasonal grounds laborers encompassed both the required minimum hourly wage rate and cash in lieu of fringe benefits, giving these rates the same meaning that they had under prior CBAs. *See Ne. Okla. City Mfg.*, 631 F.2d at 676 (permitting CBA terms to be understood based on meaning established from past practice). Similarly, she appropriately determined that the applicable fringe benefit monies to which seasonal grounds laborers were entitled under Article 21, Section 6 must be understood to refer to the fringe benefit component of seasonal laborers' Schedule A rates. *See IBEW, Local 611*, 980 F.2d at 617-619 (interpreting ambiguous contract term in light of past practices). Accepting the interpretation advanced by Local 113, would result in seasonal grounds laborers being over-compensated vis-à-vis their full-time counterparts, contrary to evidence demonstrating that the parties intended otherwise.

B. Local 113's Interpretation is Not Supported by the Plain Language of the CBA and is Inconsistent with Evidence of the Parties' Intent.

Local 113's argument that Article 21, Section 6 requires paying seasonal grounds laborers both the Schedule A rate and the cash-equivalent of the fringe benefit contributions to which *full-time employees* are entitled under Article 21, Section 2 stretches the meaning of the CBA and is otherwise unsupported.

Local 113 contends that the "plain language" of Article 21, Section 6 supports its interpretation (and, indeed, it has not offered any documentary evidence or legal authority in support of an alternative argument, either in its

submissions to the Administrator or to this Board). Pet. 6-9; AR 3-4; *see* AR 74-135. However, despite its repeated invocation of this term, it has provided no explanation of *how* the plain language of Article 21 supports its interpretation. As noted above, the text of Article 21, Section 6 states only that part-time or temporary employees not eligible to participate in KIRA's benefits plans "receive their applicable fringe benefit monies paid out each pay period." AR 231; *see supra* 18. It does not refer to a specific fringe benefit amount, nor does it cross-reference any other provision of the CBA or otherwise explain what is meant by the phrase "their applicable fringe benefit monies." AR 231. Local 113's argument rests on the assumption that this phrase refers to the fringe benefit contribution amounts specified in Article 21, Section 2 of the CBA. But this assumption is belied by the actual text of that Section, which specifies that these are the contribution amounts for full-time employees. AR 230 (listing the hourly amounts KIRA will contribute "to each *full time* employee to be used to cover the cost of the employee's insurance coverage" (emphasis added)).

Instead, Local 113 ascribes significance to the parties' revisions to Article 21. As described more fully *supra* 11-12, prior versions of this provision contained hourly fringe benefit contribution rates for eligible employees, but stated "[i]t is understood and accepted that part-time and/or temporary seasonal employees covered by this Agreement will not be eligible for benefits under this

Agreement." AR 149-50, 174, 196, 210. In 2013, this provision was changed to contain hourly fringe benefit contribution rates for full-time employees and to state that part-time and temporary workers "when not eligible for the Company benefits plans will receive their applicable fringe benefit monies paid out each pay period." AR 230-31.

Local 113 erroneously characterizes this as a significant change negotiated by the parties to provide seasonal workers with fringe benefits or their cash equivalent. Pet. 5-6, 9.[5] In fact, as explained *supra* 18-21, evidence of the parties' bargaining history and past compensation practices demonstrates that seasonal grounds laborers were *already* receiving cash in lieu of fringe benefits, which was incorporated into their Schedule A Labor Rates. And while this revision appears to contemplate that certain seasonal employees might, at least under some circumstances, have been eligible to participate in KIRA's benefits plans (thus

[5] In fact, Local 113 goes even further when it argues that the revised language "is express and can have only one meaning: seasonal employees are entitled to the *same* fringe benefits as all other employees." *Id.* at 9 (emphasis added). As discussed *supra* 22, Local 113 has no basis for asserting that seasonal employees are entitled to the same fringe benefits as full-time employees. Instead, seasonal and full-time employees are segregated into different job classifications, which are treated differently under the CBA. AR 236 (listing separate classifications for seasonal and full-time grounds laborers); AR 19, 21 (requiring different work and experience from seasonal and full-time grounds laborers); AR 230-31 (separately addressing fringe benefits for seasonal and full-time employees in Section 6 and Sections 1 and 2, respectively).

entitling such workers to an employer contribution to such plans rather than the cash-equivalent), Local 113 has submitted no evidence suggesting that any seasonal employees actually were eligible to participate in KIRA's benefits plans. *See* AR 4 n.1. In the absence of such evidence, these minor revisions are best understood as intended to memorialize the parties' historical practice of incorporating seasonal ground laborers' fringe benefit monies into their Schedule A Labor Rates.

C. Local 113's Argument that Seasonal Grounds Laborers Did Not Receive "Equivalent" Cash in Lieu of Fringe Benefits is Without Merit.

The Administrator reasonably interpreted the CBA as requiring that seasonal grounds laborers be paid the Labor Rates in Schedule A, comprising both the required minimum hourly wage rate and cash in lieu of fringe benefits. AR 1, 4-5. As discussed *supra* 18-21, this interpretation is well-supported by the parties' bargaining history and consistent historical pay practices and is not inconsistent with the language of Article 21, Section 6 of the CBA. Thus, payment of the Schedule A rate satisfies the statutory and regulatory requirement to provide the cash-equivalent of any required fringe benefits. AR 1, 4-5; *see* 41 U.S.C. § 6703(2); 29 CFR 4.170(a), 4.177(a)(3).

As explained in the regulations, a contractor may discharge its fringe benefit obligation by making an "equivalent" cash payment, meaning a payment "equal in terms of monetary cost to the contractor." 29 CFR 4.177(a)(3). Stated differently,

where a contractor chooses to discharge its fringe benefit obligation by making an "equivalent" cash payment, a service employee is entitled to cash equal, in terms of employer cost, to the fringe benefits to which *that* service employee would otherwise be entitled.

Local 113 compares the difference in seasonal and full-time employees' Schedule A rates with the fringe benefits contribution rate that full-time employees receive pursuant to Article 21, Section 2 in order to argue that the Administrator's interpretation of the CBA deprives seasonal ground laborers of equivalent fringe benefits. Pet. 11-12. This methodology is based on the erroneous premise that seasonal grounds laborers are entitled, not to the cash-equivalent of *their* fringe benefits, but instead to the cash-equivalent of the Article 2, Section 2 fringe benefits to which full-time laborers are entitled. Further, Local 113's calculations seem to assume that full-time and seasonal grounds laborers are entitled to receive the same required minimum hourly wage rate, *see* Pet. 11-12, an assumption that is at odds with the record and contrary to both parties' arguments, *see* AR 3-4; *see also supra* n.5.

III. THE BOARD SHOULD LIMIT THE SCOPE OF ITS REVIEW TO THAT OF THE ADMINISTRATOR'S FINAL RULING.

Finally, Local 113 asserts that this Board should expand the scope of its review beyond the issue addressed in the Administrator's final ruling to reach WHD's decision to close the investigation and seeks an order "directing that

employees receive backpay for the fringe benefits for which they were not compensated." Pet. 12-14.

As noted above, the Administrator issued her final ruling pursuant to 29 CFR 4.101(g) and 4.102. This ruling addressed a central issue in the underlying investigation – the appropriate interpretation of the operative CBA, which established the required minimum hourly wage rates and fringe benefits under the SCA in this case – but it did not evaluate the full range of legal and factual issues present in the WHD investigation, nor did it affirm the decision to close the investigation. While the Administrator's final ruling is subject to Board review, the underlying investigation is not.[6]

As an appellate body, this Board's role is to decide those issues properly before it – in this case, the Administrator's interpretation of the CBA for purposes of the SCA. *See* 29 CFR 8.1(d); *Court Sec. Officers*, 1998 WL 686632, at *3. In this role, the Board appropriately declines to review matters committed to the

[6] Local 113 argued before the Administrator that 29 CFR 8.1(b) entitles it to a final, appealable decision following the conclusion of a WHD investigation. *See* AR 77-79, 132-33. The Administrator notes that Section 8.1(b) describes the scope of the Board's jurisdiction, not a party's right of review. It imposes no duty upon the Administrator to review every determination of its investigators, let alone the right to seek Board review. 29 CFR 8.1(b); *Barron v. Reich*, 13 F.3d 1370, 1375 (9th Cir. 1994) ("[N]o portion of the [SCA] imposes a duty . . . to investigate every claim of alleged underpayment . . . or to take an employer to task every time a violation is found.").

Administrator's discretion, such as enforcement decisions. *Ames Constr., Inc.*, No. 91-02, 1993 WL 306710, at *2 (WAB Feb. 23, 1993) (holding that WHD's discretionary enforcement authority under the Davis-Bacon Act (DBA) was not reviewable by the Board); *see also, e.g.*, *Ronald R. Bradbury*, No. 02-042, 2003 WL 21788042, at *6 (ARB July 31, 2003) ("The Administrator's refusal to proceed to a hearing, given the paucity of 'reliable and probative' evidence, was a reasonable decision and well within the broad zone of discretion allowed the Administrator in enforcing the [DBA]."); *W.J. Menefee Constr. Co.*, No. 90-15, slip op. at 3-4 (WAB Oct. 25, 1993) (decision not to seek back wages is committed to the Administrator's enforcement discretion).

As in these cases, a decision not to institute enforcement proceedings in an SCA matter is one committed to the Administrator's discretion. 41 U.S.C. § 6506(e) ("The Secretary . . . *may* make investigations and findings . . . ." (emphasis added)), § 6507(b) ("The Secretary . . . *may* hold hearings when there is a complaint of breach or violation . . . ." (emphasis added)); 29 CFR 6.15(a) ("Enforcement proceedings under the [SCA] . . . may be instituted by . . . a Regional Solicitor."); *Barron*, 13 F.3d at 1375 ("[N]o portion of the [SCA] imposes a duty on the Secretary of Labor to investigate every claim of alleged underpayment which is made by an employee, or to take an employer to task every time a violation is found."). Accordingly, regardless of how the Board rules on the

Administrator's interpretation of the CBA for purposes of SCA Section 4(c), the Board should decline to extend its review to encompass WHD's decision to close its investigation without initiating an enforcement proceeding. *See Ames Constr.*, 1993 WL 306710, at *2.[7]

To support the breadth of review it seeks and its extraordinary request for relief, Local 113 seems to argue that it would be able to obtain these under either the Administrative Procedure Act (APA), 5 U.S.C. § 701(a)(2), or the federal mandamus statute, 28 U.S.C. § 1361. While not directly applicable to the Board's review, these statutes almost certainly would provide no basis for such relief given the Administrator's enforcement discretion, described above. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985) (deeming such decisions "presumptively unreviewable" under the APA); *Barron*, 13 F.3d at 1375 (denying mandamus relief given the Secretary's SCA enforcement discretion); *Danielson v. Dole*, 746 F. Supp. 160 (D.D.C. 1990), *aff'd* 946 F.2d 1564 (D.C. Cir. 1991) (denying writ of mandamus where "the Secretary of Labor [does not] have a clearly defined or

[7] Similarly, the Board should decline Local 113's extraordinary request for relief, the issuance of an order awarding back wages, as not properly brought before it. *See* 29 CFR 8.1(d). Even should the Board reverse the Administrator's final ruling, there would be neither the procedural finality, nor the factual findings, to support an award of back wages. *See, e.g.*, 29 CFR Part 6, subpart B (SCA hearings procedures, including employer's right to defend against violations).

specific duty under the SCA . . . to institute enforcement proceedings in every case").

Local 113 relies on a single mandamus case, *Carpet, Linoleum Resilient Tile Layers, Local 419 v. Brown*, 656 F.2d 564, 568 (10th Cir. 1981), to support its contrary argument. Pet. 12-13. However, the widespread and egregious allegations raised in that case, amounting to systemic failures by multiple federal agencies to enforce government contracting statutes, distinguish *Carpet, Linoleum Resilient Tile Layers*. As the Tenth Circuit explained in vacating the lower court's dismissal and remanding for further proceedings, the allegations, if true, would have constituted a "complete failure" of federal action akin to "'ignor[ing] the purpose of the controlling statute.'" *Id.* (quoting *Operating Eng'rs, Local 627 v. Arthurs*, 355 F. Supp. 7, 9 (W.D. Okla. 1973)). In contrast, WHD's decision not to bring an enforcement action after an investigation in a single case – one in which a reasonable interpretation of the employer's wage and fringe benefit obligations supports the conclusion that there was no SCA violation whatsoever with respect to the payment of the fringe benefit monies at issue – falls squarely within the enforcement discretion typically accorded deference by the courts, *see, e.g.*, *Chaney*, 470 U.S. at 831-33; *Barron*, 13 F.3d at 1375, as well as by the Board, *see, e.g.*, *Bradbury*, 2003 WL 21788042, at *6; *Ames Constr.*, 1993 WL 306710, at *2.

CONCLUSION

For the foregoing reasons, the Administrator requests that the Board affirm the Administrator's January 14, 2020 final ruling.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because it contains 6,826 words, including headings, footnotes, and quotations, but excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally-spaced typeface, Times New Roman, in 14-point font. This brief was prepared using Microsoft Word 2016.

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I certify that on this 19th day of May 2020, a copy of this Response Brief for the Administrator was sent by email, with the consent of the recipients, to:

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