Before the Administrative Review Board
U.S. Department of Labor

In the Matter of:	)	
	)	**ARB CASE Nos. 16-019**
PWCA,	)	**16-021**
	)	
and	)	
	)	
NAPWC,	)	
	)	
Petitioners,	)	
	)	
v.	)	
	)	
SECRETARY OF LABOR,	)	
	)	
Respondent,	)	
	)	
INDIANA-ILLINOIS-IOWA FOUNDATION FOR FAIR CONTRACTING,	)	
	)	
Intervenor.	)	
	)	
Re: Annualization of Supplemental Unemployment Benefits Plans	)	
	)	

***Amicus Curiae* Brief of the North America's Building Trades Unions in Response to the Opening Briefs filed on behalf of the PWCA and the National Association of Prevailing Wage Contractors, and in Support of the Briefs filed by the Wage & Hour Administrator and the Indiana-Illinois-Iowa Foundation for Fair Contracting**

Dated: April 11, 2016

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INTRODUCTION

PWCA (formerly the Prevailing Wage Contractors Association, Inc.), sponsors of the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan, ("PWCA Welfare Benefit Plan"), which offers a Supplemental Unemployment Benefit program to participating employers ("PWCA SUB Plan"), and the National Association of Prevailing Wage Contractors,

Inc. ("NAPWC"), which sponsors the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust Plan ("NAPWC SUB Plan"), have asked the Administrative Review Board ("the "Board") in separate petitions for review of determinations by the Administrator of the Wage and Hour Division (the "Administrator") both dated October 22, 2015.

These determinations rescinded exceptions previously granted to PWCA SUB Plan in a letter dated September 16, 2002, ARB Case Nos. 16-019 and 16-21 Administrative Record ("A.R."), TAB B, Exhibit 3, and to the NAPWC SUB Plan in a letter dated August 9, 2007, A.R. TAB F, Exhibit B, from the otherwise generally applicable rule that contractors covered by the Davis-Bacon Act ("DBA"), 40 U.S.C. § 3141 *et seq.*, or one of the more than 70 other federal statutes that incorporate the DBA prevailing wage requirement, which are also known colloquially as "Davis-Bacon related acts" or simply "DBRA," are only entitled to receive credit toward their prevailing wage and fringe benefit obligations for their effective annual rate of contribution, which is determined by dividing the total contributions made in each classification for which apprentices were being trained during the year by the total number of hours worked in the same classification on both government and non-government work. This generally applicable rule is commonly referred to as the "annualization principle."

The Administrator's October 22, 2015, determinations concluded that employers participating in both the PWCA SUB Plan and NAPWC SUB Plan, respectively, must instead "annualize" their contributions to the plans, because they provide benefits that are continuous in nature, *i.e.*, year-round, without regard to whether the recipient is employed on a privately financed construction project or one covered by the DBA or a DBRA.

North America's Building Trades Unions ("NABTU"), aka Building and Construction Trades Department, AFL-CIO, is a labor organization composed of fourteen (14) national and international labor organizations and 386 State, local and provincial building and construction trades councils representing more than 2.5 million men and women throughout North America. Most of the workers NABTU and its affiliates represent in the United States are construction craft workers employed in or seeking employment in the building and construction industry. In addition, many of these workers are currently employed or seeking employment on construction projects covered by the DBA or a DBRA, some of whom participate in supplemental unemployment benefit plans funded by contributions paid by contractors and subcontractors for all hours of work without regard to whether they are employed on DBA-covered projects or privately-financed projects. *See e.g.* A.R. TAB G, Exhibit H.

As a representative and advocate for these workers, NABTU subscribes to the following tenets. First, the DBA "was not enacted to benefit contractors, but rather to protect their employees from substandard earnings. . . ." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 177 (1954). Second, fringe benefits provided for in the DBA "constitute an integral part" of an employee's wage. S. Rep. No. 963, 88th Cong., 2d Sess. ("S. Rep. 963") (1964), *reprinted in* 1964 U.S. Code Cong. & Admin. News 2339, 2340. Third, if an employer can selectively make contributions to a fringe benefit plan based on its employees' hours of work on DBA-covered projects rather than for all hours worked then those employees do not receive the full amount of the "prevailing wage" to which they are entitled under the Act.

Consistent with these tenants, NABTU has repeatedly engaged in efforts to preserve and extend application and interpretation of the so-called "annualization principle" before the

Administrator, this Board and its predecessor – the Wage Appeals Board, and numerous federal district courts and courts of appeals since it was originally articulated by the Wage and Hour Division ("Wage & Hour") in 1978. For these reasons, NABTU has a longstanding and substantial interest in the issues raised in the above-captioned cases that it wishes to make available to the Board as an *amicus curiae*.

I. BACKGROUND

The parties in these consolidated cases have presented competing arguments challenging and defending the Administrator's October 22, 105, determinations. The fundamental dispute focuses on the Administrator's interpretation and application of the so-called "annualization principle" often used to determine whether, and if so, how much credit toward their DBA prevailing wage obligation contractors should receive for their contributions to fringe benefit plans or funds that are restricted to hours worked on projects covered by the DBA and the DBRA. In these cases the dispute concerns selective contributions to tow supplemental unemployment benefit plans ("SUB plans"),

SUB plans originated in response to organized labor's claims during the 1950s that state unemployment benefits were insufficient to aid employees during periods of layoffs resulting from technological, cyclical, and seasonal demands. Organized labor considered it critical that supplemental unemployment benefits be excluded from the definition of "wages" because the states generally disallowed unemployment compensation while employees received remuneration for employment (*i.e.*, "wages"). Thus, without an exception, supplemental unemployment benefits were considered "wages" and, therefore, receipt of such "wages" would disqualify individuals

from receiving state unemployment insurance benefit payments, which the supplemental unemployment benefits were intended to compliment.

To correct this anomaly, the IRS created an administrative exception to the definition of "wages" for supplemental unemployment benefits.[1/] In addition to alleviating conflicts with qualification for state benefits, excluding supplemental unemployment benefits from the definition of "wages" made SUB payments exempt from FICA and FUTA taxes. After the IRS made this determination, the popularity of SUB plans increased dramatically. In 1958, section 501(a) (17), 26 U.S.C. § 501(a) (17), was added to the Internal Revenue Code, allowing the creation of tax-exempt trusts for the purpose of providing supplemental unemployment benefits. The IRS issued additional guidance on the use of SUB plans as their popularity grew. Each ruling recognized the exception for SUB plans from the definition of "wages" for FICA and FUTA purposes.

In 1969, the Government again recognized SUB plans by adding section 3402(o) to the Internal Revenue Code, 26 U.S.C. § 3402(o), which clarified that employers must withhold federal income tax on SUB plan payments. In 1989, the IRS announced an extensive study of the tax treatment of SUB plans. The result of this study was issuance of Rev. Rul. 90-72, in which the IRS continued to recognize an administrative exclusion from FICA and FUTA taxes for SUB plans. As a result, although payment of supplemental unemployment benefits is treated as taxable income to participating employees, employers do not withhold or remit FICA or pay FUTA tax on SUB payments; however, they must withhold federal income tax on payments from the SUB plan. In addition, employers may deduct the contributions they make to qualified SUB plans on behalf of

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1/ Rev. Rul. 56-249.

participating employees if such the pay would otherwise be deductible under section 162 of the Internal Revenue Code, 26 U.S.C. § 162, as an ordinary and necessary business expense.

II. STATEMENT OF RELEVANT FACTS

A. The NAPWC SUB Plan

The NAPWC SUB Plan is a welfare benefit plan that provides supplemental unemployment benefits through a multiple employer trust fund established under section 501(c)(17) of the Internal Revenue Code, 26 U.S.C. § 501(c)(17). (A.R. TAB F, Ex. C at 2.)

Individual employers participating in the NAPWC SUB Plan make monthly contributions to the account of each eligible employee for his or her hours of work performed on projects covered by federal and state prevailing wage requirements during the preceding month. *Id.* at 3.[2/] These contributions are fully vested when made; however, the employee has no right to or interest in his or her account balance until he or she meets the eligibility requirements for benefit payments under the NAPWC SUB Plan. *Id.* at 4.

The NAPWC SUB Plan expressly limits employer contributions to not more than the aggregate fringe benefit component set forth in the prevailing wage determination applicable to a participating employer's government contract or subcontract. *Id.* at 3. However, if no fringe benefit component is included in the applicable prevailing wage determination, a participating employer's

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[2/] Notwithstanding this restriction on the hours of work for which an employer participating in the NAPWC SUB Plan can make contributions, the eligibility rules state that such employer can not only make contributions on behalf of its employees while performing work on prevailing wage projects but may also elect to make contributions on behalf of its employees for hours of work performed on private construction projects. *Id.* at 4 & 7-8. In addition, participating employers can make contributions to the NAPWC SUB Plan on behalf of their administrative, office and/or managerial employees. *Id.*

contributions to the NAPWC SUB Plan are limited to amounts in excess of the participating employee's "normal, non-prevailing wage rate of pay." *Id.*

The maximum amount participating employers can contribute on behalf of an employee participating in the NAPWC SUB Plan cannot exceed 50 percent of the employee's gross annual earnings during the previous year. *Id.* at 9. No further contributions can be made on behalf of a participating employee if this amount is reached until the SUB Plan pays out supplemental unemployment benefits thereby reducing the participating employee's account balance below the 50 percent cap. *Id.* Participating employees are ineligible for further supplemental unemployment benefits under the NAPWC SUB Plan once the amount contributed by participating employers is exhausted. *Id.*

Employees participating in the NAPWC SUB Plan are entitled to supplemental unemployment benefits, which are calculated by determining the difference between 173 hours and the employee's straight-time hours worked multiplied by his or her highest base rate of pay, if they are eligible for state unemployment benefits. *Id.* at 4. The NAPWC SUB Plan's eligibility rules state that participating employees are also entitled to receive supplemental unemployment benefits even if ineligible for state unemployment insurance benefits because the employee has (1) not compiled sufficient wage credits under state law; (2) exhausted unemployment insurance benefits under state law; or (3) not met the state's eligibility waiting period for unemployment insurance benefits. *Id.* at 8.

B. <u>The PWCA SUB Plan</u>

The PWCA Welfare Benefit Plan offers a supplemental unemployment benefit program to participating employers known as the PWCA SUB Plan, which provides "cash equivalent benefits

during involuntary work interruptions." Brief of Petitioner PWCA in Support of its Petition for Review ("PWCA Br.") at 1-2. The PWCA describes the PWCA SUB Plan as "a multiple employer supplemental unemployment benefit plan" to be used when an employee is assigned to a project which is subject to the Davis-Bacon Act, Service Contract Act, and/or State Prevailing Wage Law. A.R. TAB D, CD ROM ("I-I-I FFC CD Rom") Attachment D7 Misc. Information; see also PWCA Br. at 3.

The Welfare Benefit Plan is a trust fund administered by Service Contract Administrators, Inc., Columbus, Ohio. A.R. TAB D, I-I-I FFC CD Rom Attachment D7 Misc. Information (Summary Plan Description of PWCA Welfare Benefit Plan). All supplemental unemployment benefits are funded through the trust. *Id.* Like the NAPWC SUB Plan, the PWCA SUB Plan provides for immediate employee participation by eligible employees in the funds contributed on their behalf by their employers to the Plan and placed in each participating employee's account balance, which is held in trust for such employees until they are entitled to access the funds when they become involuntarily unable to work due to cyclical, seasonal or similar conditions. PWCA Br. at 3 (citing A.R. at TAB B [PWCA August 23, 2013 Response to III FFC Complaint]). An employee's account balance is the employer contribution plus earnings and forfeitures less administrative and trustee charges. A.R. TAB D, I-I-I FFC CD Rom Attachment D7 Misc. Information (Summary Plan Description of PWCA Welfare Benefit Plan).

The PWCA SUB Plan permits participating employees to receive supplemental unemployment benefit payments over a four week period unless the participating employee's account balance generates a payment that exceeds the participating employee's monthly adjusted straight-time pay in which case the payout period will be extended until the account balance is

zero. *Id.* Participating employees forfeit their supplemental unemployment benefits under the PWCA SUB Plan if he or she terminates employment by a participating employer due to voluntary termination, cause or retirement in which case the participating employee's account balance is reallocated among the remaining participating employees. *Id.*

C. The Administrator's Determinations that Employers Participating in the PWCA and the NAPWC SUB Plans Must Annualize Their Contributions for Hours Worked on Projects Covered by the DBA and DBRA Instead of Receiving Full Credit for DBA Purposes.

On September 16, 2002, former Wage & Hour Administrator Tammy D. McCutchen sent a letter to Leonard I. Fischer advising him she had determined:

> employers participating in the plan may receive full credit, for Davis-Bacon purposes, for the contributions made to the [PWCA SUB Plan] with respect to Davis-Bacon work. ***I believe that this is appropriate in the circumstances present here in light of the amendments made to the plan to ensure that almost every employee will in fact receive the full cash benefit of the contributions made on the employee's behalf.***

A.R. TAB **B**, Exhibit 3 (emphasis added). Five years later, Administrator McCutchen's successor, Paul DeCamp, sent a nearly identical letter dated August 9, 2007, to David P. Wolds informing him that employers participating in the NAPWC SUB Plan could receive full credit, for DBA purposes, for the contributions they made to that plan. **A**.R. TAB F, Exhibit B.

The Indiana-Illinois-Iowa Foundation for Fair Contracting ("I-I-I FFC") submitted a letter to Wage & Hour's Chief of the Government Contracts Branch, Timothy Helm, dated July 13, 2013, which requested review of decisions by prior Administrators that exempted employers participating in three different supplemental unemployment benefit plans from the so-called annualization requirement. Two of the three decisions that the I-I-I FFC asked the Administrator to review were Administrator McCutchen's September 16, 2002, determination concerning the

PWCA SUB Plan and Administrator DeCamp's August 9, 2007, determination concerning the NAPWC SUB Plan.

Thereafter, the Administrator issued two separate letters dated October 22, 2015, in response to the I-I-I FFC July 15, 2013, request for review. One letter, which was addressed to attorney Martha L. Hutzelman, who represented the PWCA SUB Plan, and Jimmie Profitt, PWCA Plan Administrator, concluded that employers participating in the PWCA SUB Plan must henceforth annualize their contributions to the Plan "because [supplemental unemployment benefits] are continuous in nature and compensation for [both] private and prevailing wage/DBA work." A.R. TAB A at 5. Similarly, the Administrator's other letter dated October 22, 2015, which was addressed to David P. Wolds, attorney for the NAPWC SUB Plan, concluded that participating employers must also annualize their contributions to the Plan, unless they can present evidence that they have chosen to make contributions on private, as well as on federal and state prevailing wage, construction projects in which case annualization of such contributions would not be required.. A.R. TAB E at 7 & n.3.

III. STATEMENT OF THE CASE

On November 10, 2015, the PWCA filed a Petition for Review asking the Board to overrule the Administrator's October 22, 2015, determination because of the long-standing existence of the annualization exception for the PWCA SUB Plan; the failure of the Administrator to consider the characteristics of the PWCA SUB Plan that are fundamentally similar to those of a defined contribution pension plan; and the serious financial harm and severe hardship that participants in the PWCA SUB Plan will experience if the annualization exception is revoked. Shortly thereafter, on November 20, 2016, NAPWC filed an additional Petition for Review, which contended that the

Administrator's October 22, 2015 determination is contrary to the ruling in *Tom Mistick & Sons, Inc.*, 54 F.3d 900 (D.C. Cir. 1995) and based instead on what it characterized as "a new, unrecognized benchmark for supplemental unemployment insurance plans called 'continuous nature of benefits.'"

The Board docketed the separate petitions for review filed by PWCA and NAPWC and issued separate notices of appeal and briefing schedules for each case on December 3, 2015. The I-I-I FFC subsequently filed a motion to intervene in both cases, and the PWCA, NAPWC, and the Administrator filed a joint motion requesting consolidation of the separate cases. The Board granted the I-I-I FFC motion to intervene and the joint motion by the PWCA, NAPWC, and the Administrator thereby consolidated the cases for purposes of rendering a decision in an Order issued on January 13, 2016. Thereafter, NABTU filed a Motion for Leave to Participate as *Amicus Curia*, which the Board granted in an Order dated March 8, 2016.

NABTU now submits its amicus curiae brief in accordance with the Board's January 13, 2016, Scheduling Order, as modified by its March 8, 2016, Order.

ARGUMENT

THE ANNUALIZATION PRINCIPLE SHOULD BE APPLIED TO ALL BONA FIDE FRINGE BENEFITS, FOR DAVIS-BACON PURPOSES, WITHOUT EXCEPTION.

There is a great deal of misunderstanding and misinterpretation of the "fringe benefit component" of the definition of "prevailing wage" in the DBA. This misunderstanding and misinterpretation has resulted in confusion and misapplication of the DBA, often in the name of serving the interest of laborers and mechanics employed on DBA-covered construction projects who are the intended beneficiaries of the Act. The exceptions to application of the "annualization

principle" Wage & Hour has granted over the years are prime examples of the consequence of this misunderstanding and misinterpretation of the "fringe benefit component" of the definition of "prevailing wage" in the DBA. NABTU contends that a fair and accurate interpretation and application of the "fringe benefit component" of the definition of "prevailing wage" in the DBA dictates consistent application of the "annualization principle" without exception on any account, including for bona fide supplemental unemployment benefit plans like the PWCA SUB Plan and the NAPWC SUB Plan.

A. The Purpose and Intent of the "Fringe Benefit Component" in the DBA is to Recognize Fringe Benefits in the Construction Industry without Considering and Giving Credit to Sham or Bogus Fringe Benefit Plans.

Congress amended the DBA in 1964 by adding a new subsection 1(b) that requires the Secretary of Labor to consider in his prevailing wage determinations the fringe benefits enumerated in the Act as well as any other bona fide fringes.[3/]

[3/] Specifically, section 1(b) of the DBA states:

> (2) Wages, scale of wages, wage rates, minimum wages, and prevailing wages.-The terms "wages," "scale of wages," "wage rates," "minimum wages," and "prevailing wages" include-
>
> (A) the basic hourly rate of pay; and
>
> (B) for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the forgoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying the costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of those benefits, the amount of-

In order to understand the purpose and intent of section 1(b) of the DBA as it relates to application of the "annualization principle," it is helpful to review the legislative history of the 1964 fringe benefit amendments to the DBA. The committee report that accompanied the DBA fringe benefit amendments to the floor of the House of Representatives explained their purpose and objective as follows:

> The amendments to the Davis-Bacon Act proposed by H. R. 6041 would bring up to date the Davis-Bacon Act by including fringe benefits in prevailing wage determinations. There has been a tremendous change in the concept of earnings since Congress enacted the Davis-Bacon Act. Group hospitalization, disability benefits, and other fringe benefit plans were the rare exception in the 1930's. Today more than 85 million persons in the United States depend upon the benefits they provide. Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation.
>
> It has become increasingly apparent that if the Davis-Bacon Act is to continue to accomplish its purpose, prevailing wage determinations issued pursuant to the act must be enlarged to include fringe benefits. The act was founded on the sound principle of public policy that the Federal Government should not be a party to the destruction of prevailing wage practices and customs in a locality. Unless the law is amended to provide for the inclusion of fringe benefits in wage determinations, prevailing wage practices and customs will not be reflected in these determinations.

H.R. Rep. No. 308, *Amendments to the Davis-Bacon Act*, 88th Cong., 1st Sess. ("H.R. Rep.

> (i) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person under a fund, plan, or program; and
>
> (ii) the rate of costs to the contractor or subcontractor that may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected.

40 U.S.C. § 3141(2).

308"), 2-3 (1963).

Under subsection 1(b) of the DBA, fringe benefit contributions must be irrevocable and they must be made pursuant to a bona fide fund, plan, or program. House Rep. No. 308 explains that after extensive hearings during March, 1963 (*see*, Hearings before the General Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, *A Bill to Amend the Prevailing Wage Section of the Davis-Bacon Act*, 88th Cong., 1st Sess. (1963)), the House Subcommittee on Labor made certain changes in proposed subsection l(b).

These changes, which were incorporated in H.R. 6041, included an expansion of the enumerated fringe benefits that may be considered by the Secretary of Labor in making a prevailing wage determination by adding the phrase "and any other bona fide fringe benefits." H.R. Rep. 308 explained:

> This change was instituted to give recognition to any new fringe benefits that might develop in the construction industry from time to time. To insure against considering and giving credit to any and all fringe benefits, some of which might be illusory or not genuine, the qualification was added that such fringe benefits must be "bona fide." The new types of fringe benefits which the Secretary finds to be of a bona fide nature would be subject to the same methods of determination utilized for the enumerated fringe benefits.

H.R. Rep. 308 at 4. The House of Representatives then passed H.R. 6041 as reported by the Subcommittee. Similarly, S. Rep. 963 that accompanied H.R. 6041 to the Senate floor stated:

> Under the bill, these contributions must be irrevocable and they must be made pursuant to a fund, plan, or program. While it was not the desire of the committee to impose specific standards relating to the administration of the plans it is expected that the majority of plans of this nature will be those which are administered in accordance with the requirements of section 302(c)(5) of the National Labor Relations Act, as amended. Among other things, therefore, the contributions would have to be placed with a trustee or third person who could not later be required to return them to the contractor or subcontractor making the contributions. This will help insure the bona fides of the plan, fund, or program, and protect and preserve the interest of the beneficiaries in them. The phrase "plan,

> fund, or program" is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions. It is identical with language contained in section 3(a) of the Welfare and Pension Plans Disclosure Act and the experience of the Department of Labor under that statute should be of assistance in applying the term here.

S. Rep. 963 at 5, *reprinted in* 1964 U.S.C.C.A.N. at 2343-44.

Thus, the legislative history plainly indicates that the term "bona fide fringe benefits" in subsection 1(b) of the DBA was not intended to refer to the actual operation of the "plan, fund, or program." Rather, it was simply intended to insure that the contributions to these plans are legitimate. As the Senate report states, the supporters of the DBA fringe benefit amendments expected most of the plans to be joint labor-management plans administered in accordance with the requirements of section 302(c)(5) of the Labor-Management Relations Act ("LMRA") (also known as the Taft-Hartley Act), 29 U.S.C. § 186(c)(5). The fact that they were collectively bargained by a recognized or certified exclusive bargaining representative and must comply with the requirements of LMRA § 302(c)(5) satisfied Congress that such fringe benefits would be "bona fide."

But, what of fringe benefit plans such as the PWCA SUB Plan and the NAPWC SUB Plan, that are not collectively bargained for and need not comply with LMRA § 302(c)(5), because they are not administered by a joint labor-management committee? The court resolved that question in *Miree Constr. Co. v. Dole*, 930 F.3d 1536, 1543 (11th Cir. 1991), holding that an employer may only receive DBA credit for contributions to a fringe benefit plan under either section 1(b)(2)(B)(i) of the Act "The rate of contribution irrevocably made . . . to a trustee or to a third person pursuant to a fund, plan, or program," 40 U.S.C. § 3141(2)(B)(i), or section 1(b)(2)(B)(ii) "The rate of costs . . . which may be reasonably anticipated in providing benefits . . . pursuant to an enforceable

commitment to carry out a financially responsible plan or program. . . ." 40 U.S.C. § 3141(2)(B)(ii), that are reasonably related to the cost of the fringe benefit. The court explained:

> If an employer could make contributions to a fringe benefit plan that were not reasonably related to the benefits actually received by the employee, the employee would not receive an appropriate "wage" as contemplated by the Act.

Id.

Since here is no evidence in the record in this case that either the PWCA SUB Plan or the NAPWC SUB Plan is a sham or bogus fringe benefit plan, the Administrator correctly decided not to consider the I-I-I FFC's request for review as a challenge to the "bona fides" of either plan, but rather as a challenge to prior Administrators' decisions to exempt those plans from compliance with the so-called "annualization principle." A.R. TAB A at 1; A.R. TAB E at 1.

B. Wage & Hour's "Annualization Principle" Applies to Fringe Benefits that are provided Year-Round.

The "annualization principle" is a computation strategy devised by Wage & Hour to determine the hourly rate of contribution that is creditable against an employer's DBA prevailing wage obligation. In practice, the "annualization principle" limits the amount of contributions a contractor can offset by restricting their DBA credit to an amount equal to the hourly cost of the benefit averaged over all hours an employee works (both Davis-Bacon hours and non-Davis-Bacon hours) during a year.

Wage & Hour publicly articulated its "annualization principle" for the first time in an opinion issued in 1978. In that opinion, the Acting Assistant Administrator, Dorothy P. Come, wrote:

> We would also like to note that it is the long standing position of the Department that fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of nongovernment work.

> For example, let us assume a contractor's expense in providing health insurance for a particular employee is computed to be $ 200 per year. If that employee works 1500 hours of the year on a Davis-Bacon project and 500 hours of the year on another job not covered by the Davis-Bacon provisions, only $ 150 or 10 cents per hour, would be creditable towards meeting the contractor's obligation to pay the prevailing wage on the Davis-Bacon project.
>
> You state that certain of your client's employees worked on a Davis-Bacon project, and that the difference between what they were paid in cash and the amount of the required prevailing wage was $ 44,383.03. You indicated that this amount was paid into a fringe benefit trust to purchase various employee benefits. According to your computations, approximately $ 13,000 was used to purchase benefits for those employees who worked on the Davis-Bacon project. If, as you contend the $ 13,000 payment constituted contributions for bona fide fringe benefits within the meaning of the Davis-Bacon Act (40 U.S.C. 276a, et seq.) and regulations of the Department of Labor (29 CFR Part 5), and if, as noted earlier, this payment constitutes contributions made only for periods of government work, then this amount is creditable towards meeting your client's prevailing wage obligations on the Davis-Bacon project. However, the employees who worked on the government project would still be due the difference between $ 44,383.03 and the $ 13,000, and should be paid this amount in cash immediately, with the amount for each employee computed in accordance with the credit the employer has attempted to take for that employee.

Wage & Hour Opinion Letter 459, 1978 DOLWH LEXIS 18 at *3-5 (May 17, 1978).

Wage & Hour's "annualization principle" was incorporated in its Field Operations Handbook,[4/] which is now set forth in Chapter 15, §§ 15f11(b) & (c) and 15f12(b) & (c).

4/ Wage & Hour describes its Field Operations Handbook ("FOH") as:

> an operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance. The FOH was developed by the WHD under the general authority to administer laws that the agency is charged with enforcing. ***The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretative policy.***

www.dol.gov/whd/FOH/index.htm (site last accessed on April 10, 2016).

www.dol.gov/whd/FOH/FOH_Ch15.pdf (site last accessed on April 10, 2016). This policy is generally applicable to employer contributions that financially support all kinds of employee fringe benefits that are restricted to hours worked on DBA-covered projects or at different rates of contribution depending on whether the employees worked on DBA or private non-publicly funded projects. *See also* U.S. Dep't of Labor Prevailing Wage Resource Book ("DOL Prevailing Wage Resource Book"), DBA/DBRA Compliance Principles (May 2015), at 21-22. www.dol.gov/whd/recovery/pwrb/Tab9.pdf (site last accessed on April 10, 2016).[5/]

However, almost immediately after Wage & Hour issued its Opinion Letter 459, the author of that opinion issued a determination dated September 30, 1980, to Dennis J. Fitzpatrick, who represented the Builders, Contractors and Employers Retirement Trust and Pension Plan ("Builders Plan"). The Builders Plan was a retirement trust and pension plan established by the National Western Life Insurance Co. that permitted its participating employers to contribute amounts on behalf of each employee who worked on a construction project covered by the DBA or a DBRA, or a state prevailing wage statute for each hour worked on the project. *Builders, Contractors and Employees Retirement Trust and Pension Plan*, WAB Case No. 85-6, 1986 DOL

5/ The preface of the DOL Prevailing Wage Resource Book contains a legal disclaimer, which states:

> This publication contains materials developed primarily for use in prevailing wage training conferences. The contents are designed to enhance the knowledge of procurement personnel and others whose responsibilities include work with the Davis-Bacon and related Acts and the Service Contract Act. Study of this volume should facilitate dissemination of information to those who are interested in the administration and enforcement of these laws. ***This publication is intended to provide practical guidance to procurement personnel and the general public rather than definitive legal advice.***

www.dol.gov/whd/recovery/pwrb/Tab1_TOC.pdf (site last accessed on April 10, 2016).

Wage App. Bd. LEXIS 11 (WAB Dec. 17, 1986) at *3-4. The amount contributed varied depending on the wage rate determination to which the project was subject and the amount the employer wished to contribute. *Id.* at *4.

NABTU challenged the exception to the annualization principle Wage & Hour granted to the Builders Plan in 1980. Pursuant to this challenge Wage & Hour requested a legal opinion form the Solicitor of Labor ("SOL") concerning the issue. As a result, SOL issued a memorandum dated September 23, 1983, that advised Wage & Hour that defined contribution pension plans providing immediate vesting routinely have penalties for early withdrawal or a specified waiting period before employees can withdraw the amounts in their accounts; therefore, it was inappropriate to liken contributions to such plans to a cash wage, which under the DBA is due and payable in full each week. In addition, SOL counseled Wage & Hour that granting preferential treatment to a pension plan because of its vesting provisions appeared inconsistent with the legislative history of the 1964 DBA fringe benefits amendments, which indicated that Congress did not intend to impose any vesting requirements on fringe benefit plans used to satisfy the DBA prevailing wage requirements. After reviewing the SOL opinion, Wage & Hour changed its position and once again began applying the "annualization principle" to all defined contribution plans irrespective of their vesting provisions.

Subsequently, the Administrator issued a ruling in 1984, which stated that annualization must be applied to a pension plan sponsored by Dyad Construction, Inc. The Dyad plan was a defined contribution pension plan similar to the Builders Plan, which provided for virtually immediate vesting (100 percent vesting after 500 hours or fewer). However, the Dyad plan

provided for employer contributions for both hours worked on DBA and DBRA construction projects and private project, albeit in different amounts.

Dyad appealed the Administrator's ruling to the Wage Appeals Board contending that it should receive dollar-for-dollar DBA credit for its higher contributions to its defined contribution pension plan for hours worked by its employees on DBA and DBRA projects than it made for hours worked on private jobs inasmuch as its employees received a dollar-for-dollar benefit from the plan. Wage & Hour responded to Dyad's appeal by asking the Wage Appeals Board to remand the case to the Administrator for reconsideration, which the Board granted. *Dyad Construction, Inc.,* WAB Case No. 84-15 (DOL Wage App. Bd. Nov. 26, 1984). Upon remand, the Administrator reversed his 1984 ruling and allowed full DBA credit for the higher contributions Dyad made for its employees' hours of work on DBA and DBRA projects instead of applying the "annualization principle." Thereafter, the Administrator advised NABTU by letter dated July 18, 1985 that Wage & Hour would no longer apply the annualization principle to defined contribution pension plans that provide immediate participation and immediate (or virtually immediate) vesting.[6/]

The Administrator's apparently continues to relieve certain defined contribution pension plans from applying the "annualization principle." *See* DOL Prevailing Wage Resource Book, DBA/DBRA Compliance Principles at 23-24 ("For contributions made to defined contribution

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[6/] The Administrator informed NABTU of the reversal in policy because NABTU instigated the prior change in policy through its challenge of employer contributions to the Builders Plan. Notwithstanding the Administrator's waffle on the issue, the Builders Plan was eventually scuttled because the court found it violated various provisions of ERISA. *See Arakelian v. National Western Life Insurance Co.,* 748 F. Supp. 17 (D.D.C. 1990); *Arakelian v. National Western Life Insurance Co.,* 724 F. Supp. 1033 (D.D.C. 1989); *Arakelian v. National Western life Insurance Co.,* 126 F.R.D. 1 (D.D.C. 1989); *Arakelian v. National Western life Insurance Co.,* 680 F. Supp. 400 (D.D.C. 1987).

pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), a contractor may take Davis-Bacon credit at the hourly rate specified by the plan, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects").[7] Notwithstanding this exemption of some defined contribution pension plans from its application, Wage & Hour has continued to apply the "annualization principle" to employer contributions to all manner of other types of fringe benefit plans as a means of preventing DBA contractors from using contributions made for hours worked on DBA projects to fund benefits for periods of non-DBA work, thereby preventing the underpayment of employees for their DBA work. This policy was once again challenged in the *Miree* case.

In *Miree*, the Administrator applied the "annualization principle" to a contractor that contributed $.25 per hour to the Apprenticeship Plan of the Associated Builders and Contractors of Alabama, Inc. ("ABC Plan") on behalf of each of its employees working on five construction

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[7] Although the record is far from clear, it appears that the justification for not applying the "annualization principle" to defined contribution pension plans like Dyad's, which provide for immediate participation and immediate or essentially immediate vesting even though they are funded exclusively by employer contributions solely for hours worked by participating employees on DBA-covered projects, because the plan by its very nature involves deferred compensation for retirement that Wage & Hour apparently regards as not being continuously available on a year-round basis thus relieving such defined contribution pension plans from the annualization requirement. This distinction fails, however, to explain why employers that contribute to defined contribution pension plans on for hours worked on DBA projects are funding this fringe benefit, which after all is available to participating employees upon their retirement even though they could easily be employed on non-DBA private work at the time they become eligible for retirement under the pension plan. If this is correct, such employees are deprived of being paid the full prevailing wage rate while working on DBA-covered projects no less so that other workers employed by contractors that only contribute to other fringe benefit plans for hours worked on DBA-covered projects. There is simply no good reason for this distinction in treatment of employer contributions to defined contribution pension plans and, therefore, the Administrator should revisit this practice as soon as possible.

contracts at three different locations, all of which were covered by DBA prevailing wage requirements. *Miree Constr. Corp.*, WAB Case No. 87-13, 1989 DOL Wage App. Bd. LEXIS 21 at *1 (WAB Feb. 17, 1989).

The contractor did not make any contributions for its employees working on its private construction projects. The contractor only had one employee registered in the ABC Plan for whom the contractor paid a $ 500 tuition fee for this employee in addition to the $.25 per hour contribution. *Id.* As a result, the ABC Plan received payment of almost all of the $ 11,293.52 for which the contractor sought credit toward its DBA prevailing wage and fringe benefit obligation along with the $ 500 tuition payment. *Id.*

The Administrator determined that only the actual costs necessary to provide bona fide apprenticeship training to its one employee enrolled in the ABC Plan was creditable toward the contractor's DBA prevailing wage obligations. *Id.* at *3-4. Therefore, the Administrator determined that only actual training costs were creditable for DBA purposes. *Id.* at *12. Accordingly, the Administrator ruled that the contractor would only be given DBA credit based on the "effective annual rate of contribution, which is computed by dividing the total contributions made in each classification for which apprentices were being trained during the year by the total number of hours worked in the same classification on both government and non-government work. This method of computing credit is based on the annualization principle." *Id.* (quoting Administrator's July 9, 1986, determination).

The U.S. District Court affirmed the Wage Appeals Board's February 17, 1989, plurality decision affirming the Administrator's July 9, 1986, determination and ruling. *Miree Constr.*

Corp. v. Dole, 730 F. Supp. 385 (N.D. AL. 1990), and the contractor challenged the District Court's judgment in an appeal to the U.S. Court of Appeals for the Eleventh Circuit.

In *Miree Constr. Corp. v. Dole*, 930 F.2d 1536, 1545 (11th Cir. 1991), after determining that whether an employee benefit plan is funded in accordance with section 1(b)(2)(B)(i) of the DBA, 40 U.S.C. § 3141(2)(B)(i) ("The rate of contribution irrevocably made . . . to a trustee or to a third person pursuant to a fund, plan, or program," or section 1(b)(2)(B)(ii) of the Act, 40 U.S.C. § 3141(2)(B)(ii) ("The rate of costs . . . which may be reasonably anticipated in providing benefits . . . pursuant to an enforceable commitment to carry out a financially responsible plan or program. . . ."), an employer may only receive DBA credit for contributions that are reasonably related to the cost of the benefit provided, which in this case was apprenticeship training, the court held the amount of the contractor's contributions determined creditable toward its DBA prevailing wage obligations must be converted into an hourly rate.

The contractor contended that its contributions were reasonably related to the cost of apprenticeship training and, therefore, the contributions adequately paid for such training during the DBA work, and there was not "extra" left to fund non-DBA training and whether or not the contractor provided training during its non-DBA work was of no concern to the Government. *Id.* The court rejected this argument holding that the employee received a year-round benefit the cost of which must be divided by the number of hours worked in the year. *Id.* Thus, the court held the Administrator was correct in annualizing the contractor's contributions for purposes of DBA compliance. *Id.*

After turning down the contractor's argument that application of the "annualization principle" to contributions for apprenticeship training is inappropriate because it is "inherently

different" from other types of fringe benefits since the employee whose wages are reduced for contributions to an apprenticeship program receives no direct pecuniary benefit from the training, *id.* at 1545-46; the court discussed the contractor's final argument that application of the "annualization principle" "amounts to a *de facto* requirement that a contractor make such contributions for jobs in which the federal government admittedly has ***no*** interest whatsoever." *Id.* at 1546 (quoting Appellant Contractor's Brief at 28 (emphasis original).

The court also rebuffed this argument saying:

> Again, this argument misunderstands the purpose of the annualization principle. The annualization principle is simply a method of computing the appropriate amount of certain contributions to be credited for Davis-Bacon purposes. Under the statute, employers are free to pay their employees in cash, fringe benefits, or "a combination thereof," so long as the total wage is no less than the prevailing wage in the locality. ***If an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work.***

Id. (emphasis added).

This Board subsequently endorsed the Eleventh Circuit's holding in *Miree* that annualization is required if an employer provides a year-round benefit to ensure "that a disproportionate amount of that fringe benefit is not paid out of wages earned on government Davis-Bacon work." *Cody-Ziegler, Inc. v. Adm'r*, ARB Case Nos. 01-014, 01-015, 9 Wage Hour Cas.2d (BNA) 557, 572 (ARB Dec. 19, 2003) (quoting *Miree Constr. Corp. v. Dole*, 930 F.2d at 1546). *See also Royal Roofing Co., Inc.*, ARB Case No. 03-127, 2004 DOL Ad. Rev. Bd. LEXIS 320 at *14-18; *Independent Roofing Contractors v. Chao*, 300 Fed. Appx. 518, 521-22 (9th Cir. 2008) (annualization principle must be applied where a fringe benefit was provided year-round but funded only from wages earned by participating employees for hours of work on DBA-covered

projects thereby resulting in the participating contractor paying a disproportionate amount of the cost out of wages earned on DBA work, thus underpaying them for their DBA work).

Here, the Administrator applied the "annualization principle," which based on this recitation of case law has become an "interpretive rule."[8/] The Administrator clearly explained in both challenged October 22, 2015, determinations:

> WHD [Wage & Hour] normally bars an employer from applying all its fringe benefit contributions to a plan in a given year to meet the prevailing wage obligation when employees also work for the employer on private projects in that year. This prohibition prevents the use of DBA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work, both OBA and private. See Wage & Hour Field Operations Handbook ("FOH") 15f11(b); *see also, Miree Construction Corp. v. Dole*, 930 F.2d 1536, 1546 (11th Cir. 1991). By precluding contractors from crediting contributions attributable to work on private jobs to meet their prevailing wage obligation, WHD assures mechanics and laborers receive the prevailing wage on DBA jobs.
>
> The "annualization" principle operationalizes this policy by averaging the contributions an employer makes to a plan over all of an employee's hours of service for the employer in that year. For example, if an employer contributes $5,000.00 to a plan on behalf of an employee who performs one thousand hours of OBA work and one thousand hours of private sector or otherwise non-DBA work, under the annualization principle it can only declare $2.50 per work hour toward meeting its OBA prevailing wage obligation to that employee, i.e., $5,000.00/2,000 hours = $2.50 per hour. WHD has applied the annualization principle to contributions made to other fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, and defined benefit pension plans.

8/ The term "interpretive rule" is not defined by the Administrative Procedure Act, which establishes the procedures federal administrative agencies use for "rule making," which is defined as the process of formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). Although the precise meaning of an "interpretive rule" is the source of much scholarly and judicial debate, *Perez v. Mortgage Bankers Ass'n*, ___ U.S. ___, 135 S. Ct. 1199, 1204, 191 L. Ed. 2d 186, 195 (2015) (citing Pierce, Distinguishing Legislative Rules from Interpretative Rules, 52 Admin. L. Rev. 547 (2000); Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893 (2004)), the Supreme Court recently stated "it suffices to say that the critical feature of interpretive rules is that they are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Id. (*quoting *Shalala v. Guernsey Memorial Hospital,* 514 U. S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995) (internal quotation marks omitted)).

> WHD also requires contractors to annualize contributions to fund defined contribution pension benefits. But it makes an exception if the defined contribution benefit plan provides for immediate participation and essentially immediate vesting (100% vesting after an employee works 500 or fewer hours). *See* FOH 15f14(f)(l). WHD has granted similar annualization exceptions to three SUB plans. In each instance, WHO specified it was making the exception because the applicable plan "ensure[d] that almost every employee will ... receive the full cash benefit of the contributions made on the employee's behalf."

A.R. TAB A at 2-3; A.R. TAB E at 3 (parenthetical quotations omitted).

The Administrator acknowledged in both challenged October 22, 2015, determinations that his predecessors have previously granted annualization exceptions because they concluded nearly all employees would receive the full cash benefit of the contributions submitted on behalf of the employees participating in both the PWCA SUB Plan and the NAPWC SUB Plan "without addressing whether the fringe benefit was continuous in nature and actually constitutes compensation for private work." A.R. TAB A at 4; A.R. TAB E at 5. Consequently, the Administrator conceded that his predecessors determinations "effectively focused on whether the benefit amounts contributed bore a reasonable relationship to the actual contributions required to provide the benefit," which is relevant in determining whether a fringe benefit is "bona fide," but separate and distinct from determining whether the benefit amounts should be annualized. *Id.*

Instead, the Administrator concluded:

> a [supplemental unemployment benefit] plan could only qualify for an annualization exception if (in addition to providing for immediate participation and essentially immediate vesting) the benefit provided is not continuous in nature and does not compensate employees for both private and public work. When a fringe benefit is continuously available and compensates employees in connection with private as well as public work, the employer is effectively providing the benefit for all services rendered during the year. To not annualize such a benefit permits an employer to unduly subsidize the benefit's cost through OBA fringe benefit contributions, whereas compelling annualization produces a fringe benefit figure that is consistent with the actual value of the contribution the employer is making for DBA work. Thus, as with other fringe benefits, applying the traditional

> requirement will serve to ensure that laborers and mechanics on whose behalf employers make contributions to a SUB plan receive the prevailing wage on DBA jobs.

Id.

The Administrator described fringe benefit contributions that must be annualized as those that are "continuously available and compensates employees in connection with private as well as public work" in the challenged October 22, 2015, determinations and the case law discussed hereinabove consistently described fringe benefit contributions that must be annualized as those that provide "year-round" benefits. However, the difference between the terminology used by the Administrator in his October 22, 2015, determinations and that used in the applicable case law is purely semantic. The terms mean the same thing.

The basic prerequisite for application of the "annualization principle" is that the fringe benefit is continuously available on a year-round basis without regard to whether the employee participating in the fringe benefit plan is employed on a private or DBA-covered project at the time the benefit is received. There is no question that the supplemental unemployment benefits provided under both the PWCA SUB Plan and the NAPWC SUB Plan meet that standard and, therefore, the Administrator properly applied the "annualization principle" to both of those plans.

C. The D.C. Circuit's Holding in *Tom Mistick & Sons* does not Support the Conclusion that Employer Contributions to the PWCA and NAPWC SUB Plans should be exempted from Application of the "Annualization Principle."

The PWCA and NAPWC maintain that their SUB Plans are fundamentally the same as a defined contribution pension plan, which are routinely exempted under the *Dyad* exception from application of the "annualization principle" to contributions by their participating employers. This is simply not true. The Wage Appeals Board held in *Tom Mistick & Sons, Inc.*, WAB Case Nos.

88-25 & 88-26, 1991 DOL Wage App. Bd. Lexis 11 (WAB May 30, 1991) at *21-22, that a defined contribution pension plan "by its very nature involves deferred compensation for retirement" that unlike most other fringe benefits such as supplemental unemployment benefits, is not continuously available on a year-round basis. Thus, although NABTU seriously questions the proposition that retirement benefits provided by defined contribution pension plans are not continuously available on a year-round basis once a participating employee retires, we suggest that the distinction drawn by the WAB in *Tom Mistick & Sons* is sufficient enough to distinguish SUB benefits from retirement benefits for the purpose of rejecting this argument presented by the PWCA and NAPWC SUB Plans.

Moreover, reliance by the PWCA and NAPWC SUB Plans on the D.C. Circuit's holding in *Tom Mistick & Sons, Inc. v. Reich,* 54 F.3d at 904-05, rejecting application of the "annualization principle" to a fringe benefit plan trust fund that permitted disbursements from the trust for any or all of the benefits listed in section 1(b) of the DBA to participating employees, a medical plan, and a working conditions fringe benefit plan. The court refused to assume that the employer's contributions to the fringe benefit funds that were funded by contributions for hours worked on DBA-covered projects either reduced the employer's contributions to its separate fringe benefit plan for private work or lowered the level of fringe benefits provided to employees for private work. *Id.* at 905. Therefore, the court concluded that it could not "find on the record . . . that employees did not receive the prevailing wage for their DBA work because that work subsidized their private work." *Id.*

Then, making a classic "strawman argument" the court explained:

> Moreover, we find that by allowing employees to draw on their individual trust accounts during periods of private work, the FBP benefits the employees. An

> employee may prefer to use funds in his trust account to cover vacation days, sick days or other expenses he incurs during private work periods. Equally important, an employee may use those funds for expenses not covered by Mistick's non-Davis-Bacon plan, such as, according to Mistick's counsel at oral argument, insurance deductibles. If we uphold the invalidation of a plan because employer contributions to it could finance fringe benefits used during private work, employers would then have to limit employees' use of their Davis-Bacon trust accounts to only those fringe benefits used during Davis-Bacon work. Such a result would ***dis***advantage employees. We decline, therefore, to uphold the Department's denial of Davis-Bacon credit for Mistick's contributions to the FBP merely because they could underwrite fringe benefits used by an employee during private work periods.

Id. (Emphasis in the original.) The court's rationale for rejecting application of the "annualization principle" to employer contributions used to fund a myriad fringe benefits each of which was undoubtedly continuously available to participating employees on a year-round basis blatantly begged the question of whether these employees were being paid the full amount of the prevailing wage they were entitled to receive under the DBA. For both these reasons, *Tom Mistick & Sons* is distinguishable from the consolidated cases before the Board.

CONCLUSION

For each of the foregoing reasons, NABTU recommends that the Board affirm the Administrator's October 22, 2015, determinations rescinding the exceptions from application of the "annualization principle" previously granted to the PWCA and NAPWC SUB Plans and deny their petitions for review.

Respectfully submitted,

Dated: April 11, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2016, I caused a copy of the foregoing *Amicus Curiae* Brief of the North America's Building Trades Unions in Response to the Opening Briefs filed on behalf of the PWCA and the National Association of Prevailing Wage Contractors, and in Support of the Briefs filed by the Wage & Hour Administrator and the Indiana-Illinois-Iowa Foundation for Fair Contracting to be served by electronic mail, on the following:

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