U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

NOV 9 1962

MEMORANDUM # 44

TO : AGENCIES ADMINISTERING STATUTES REFERRED TO IN 29 CFR, SUBTITLE A, PART 5.

FROM : E. Irving Manger
Associate Administrator

SUBJECT: Opinions on application of the Davis-Bacon and related Acts.

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Enclosed with previous covering memoranda, copies of opinions on the application of the Davis-Bacon and related Acts were furnished you for information and guidance in your enforcement programs under those Acts.

We are now enclosing a copy of a recent opinion on this same general subject, which we are sure will be of further interest and assistance to you.

Enclosure

cc - Messrs. Saylor, Gregory, Saylor, Divs. & Districts, D-B Act

U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
WASHINGTON 25

November 6, 1962

Mr. R. L. Tollefsen
Secretary and General Counsel
Douglas Oil Company of California
Douglas Oil Building
816 West Fifth Street
Los Angeles 17, California

Re: DB-28; Application of the Davis-Bacon Act to "Oil Spreading" Activities involved in the Construction of Roads and Aircraft Runways at Navy Installations, California
Our Files: E-61-676 thru 686

Dear Mr. Tollefsen:

This will reply to your communication of October 15, 1962, requesting amplification of our opinion (DB-28, October 8, 1962) in the above-captioned matter.

That opinion held that the spreading of "road oils", as described therein, by employees of a bona fide supplier of liquid bituminous products is a part of the construction process and, as such, constitutes the work of a subcontractor. Accordingly, we held that the individuals performing this on-site work are entitled to the benefits of the Act.

You now inquire as to whether this ruling applies when the work is performed by employees of a common carrier.

The Davis-Bacon Act and related statutes are minimum wage laws designed for the benefit of construction workers. Since they are remedial in nature, exemptions which limit their application are strictly construed. None of these Acts exempt from their minimum wage requirements, individuals whose employment is subject to regulation by the provisions of the Interstate Commerce Act or the Motor Carrier Act of 1935. It is significant that where a similar exemption from the overtime provisions of the Fair Labor Standards

Act was intended, the same was expressly provided by Congress. Under these circumstances, the Department of Labor cannot create an exemption from the labor standards provisions of the Davis-Bacon Act and related statutes where Congress has not seen fit to do so. Thus, if the conditions described in our opinion of October 8, 1962 (DB-28) are present, the fact that the supplier or his contract hauler may be operating under common carrier requirements would not militate against Davis-Bacon coverage of the bootmen and drivers performing the on-site work.

You also inquire as to whether the wage requirements of the Act are applicable during the time the employees are loading, driving and returning or only while they are spreading "oil" on the job site.

The answer to this question depends upon the point at which the Douglas Oil Company, a bona fide materials supplier, is deemed to become a subcontractor within the meaning of the contract labor standards provisions. This does not occur until the bootmen and drivers undertake the spreading of "road oils" at the construction site. Accordingly, these individuals would not be considered covered by the provisions of the Davis-Bacon Act or related statutes while loading the liquid bituminous products at Douglas' regular plant, transporting them to the site of the work, or returning to the plant.

I trust these views will be of help to you. If I can be of further assistance, please let me know.

Yours sincerely,

Charles Donahue
Solicitor of Labor

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U.S. DEPARTMENT OF LABOR

OFFICE OF THE SOLICITOR

WASHINGTON 25

October 15, 1962

Mr. W. Darlington Denit
Assistant Commissioner
Bureau of Reclamation
U. S. Department of the Interior
Washington 25, D. C.

Re: Electrical Constructors
Creamer Industries, Inc.
Contract No. 14-06-D-4075
New Mexico
Your Reference: 800
Our files: E-63-152 & 153

Dear Mr. Denit:

Reference is made to our letter and enclosure of July 20, 1962, and to your response of August 14, 1962, regarding the Bureau's previous finding that the contract labor standards provisions were applicable to the operations of Creamer Industries, Inc., at its steel reinforcement fabricating plant at or near Shiprock, New Mexico.

From the record furnished, it appears that the subject contract for the construction of the Glen Canyon - Shiprock 230-KV Transmission Line, Colorado River Storage Project, was awarded to Electrical Constructors of Columbus, Ohio, on September 6, 1961. The specifications contained schedules of classifications and wage rates as predetermined by this Department in Wage Decisions Y-28,132 (for the contract work performed in Arizona) and Y-28,164 (for the contract work in New Mexico).

The line being constructed is a 230-KV, 3-phase, 60-cycle, single circuit, steel tower transmission line, approximately 182 miles long, except that the steel towers (structures) and the structure foundations (footings) for

cc: Messrs. Saylor, Gregory, Saylor, Divs. & Districts
D-B Act

approximately 7 miles of this line near the center are to be constructed under a separate contract. The transmission line extends from the Glen Canyon Powerplant switchyard located near Page, Arizona, to the site of the Shiprock Substation located North of Shiprock, New Mexico.

By Purchase Order No. GS-4, dated February 16, 1962, the prime contractor entered into an agreement with Creamer Industries, Inc., of Fort Worth, Texas, for "Furnishing reinforcing steel as required by Bid Item 17 of the Bureau of Reclamation Specifications No. DC-5610 entitled Glen Canyon - Shiprock 230-KV Transmission Line --- approx. 715,000 lbs. Fabricated in accordance with approved drawings, including the welding of stub into cage ---.". Bid Item 17 requires the furnishing and placing of steel bars in reinforced concrete footings. Each tower has four footings and each footing consists of a steel stub angle embedded in reinforced concrete. The contract requires the construction of approximately 3,080 footings or 770 tower foundations. The bar steel used for reinforcing the concrete footings is fabricated into steel "cages" with the stub angle attached.

In March, 1962, Creamer Industries, Inc., established a fabrication facility near Shiprock, New Mexico, and proceeded to fabricate steel "cages" for use in tower footing construction by the prime contractor. Creamer Industries' fabrication yard or plant is located on the outskirts of Shiprock. Reinforcement bars are obtained from the Colorado Fuel and Iron Corporation at Pueblo, Colorado, and transported to the fabrication facility near Shiprock by truck. The reinforcement steel, thus obtained, is cut, bent, formed into "cages" by use of a jig, and spot welded with the stub angle welded into place in the fabrication facility. Completed "cages" are placed in a storage yard for delivery to the transmission line tower locations between Shiprock Substation and Glen Canyon Powerplant switchyard as required.

Exhibits C, D, E, and F, included in the record provide a visual indication of the Creamor Industries' fabrication facility and storage yard. Exhibits G, H, and I provide a visual indication of the actual excavation, placement of reinforcement cages, and construction of concrete footings. It has been noted that the work involved in the excavation and placement of cages is not a matter of controversy under the subject contract. Likewise, it has been noted that the steel for the towers, fabricated and furnished the prime contractor by Creamer Industries, Inc., from its permanent plant located at Fort Worth, Texas, is not here in issue and, in fact, no coverage question arose as to the fabrication of such tower steel at the Fort Worth plant of Creamer Industries, Inc.

The Bureau's review, however, of Creamer Industries, Inc., steel cage fabrication facility and the work performed thereat, near Shiprock, New Mexico, led the Bureau to conclude that the steel cage fabrication work being performed at this latter location for the tower footings was actually a construction-type activity being performed at a facility located within the general construction area of the subject contract for the exclusive purpose of performing work called for by the prime construction contract. In this connection, it is noted from the record that the Shiprock fabrication facility was established by Creamer Industries in March, 1962 for the express purpose of fabricating the steel cages to be used by the prime contractor in constructing the Glen Canyon - Shiprock Transmission Line. It is located on the outskirts of Shiprock, about 8 miles distant from the nearest point of the transmission line. The entire capacity of this fabricating facility in terms of equipment, materials, and employees is being utilized exclusively to fabricate the reinforcement steel for the footings of the above transmission line. This fabrication facility is temporary in nature and, from all indications, will be removed upon completion of the Creamer Industries' contract with the Bureau's construction contractor, Electrical Constructors.

Under the circumstances here involved, as revealed from the record furnished us, we agree with the Bureau's decision that Creamer Industries, Inc., with respect to this Shiprock fabricating facility, is performing as a subcontractor to Electrical Constructors, and that its laborers and mechanics employed at this Shiprock fabricating facility are within the protection of the Davis-Bacon and related Acts and the contract labor standards provisions.

The Davis-Bacon Act provides ". . . the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work . . ." minimum wages which are based upon those determined by the Secretary of Labor to be prevailing in the area, whereas the Eight Hour Laws provide for the payment of premium hourly rates for hours of work beyond eight in a day, to laborers and mechanics employed by a contractor or any subcontractor on ". . . any part of the work contemplated by the contract . . ." (emphasis furnished).

Specific definitions of the terms "subcontractor" (within the coverage language of the Davis-Bacon and related Acts), and "materialman" (within the traditional exempted views of this Department of such materialmen who serve the public generally), are not to be found in the Davis-Bacon and related Acts, nor in Regulations, Part 5, of this Department. Neither is there any exemption specified in those laws and regulations of so-called "materialmen", as such. However, Section 5.2(f) of Regulations, Part 5, does set forth that: "The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a 'building' or 'work'" within the meaning of the Davis-Bacon and related Acts or of the regulations, "unless conducted in connection with and at the site of such a building or work . . . or, under the Housing Act of 1949, in the construction or development of the project."

In accordance with the foregoing, this Department has traditionally considered the manufacture and delivery to the work site of supply items, when accomplished by bona fide materialmen serving the public in general, as noncovered activities. On the other hand, where a facility (such as a

batching plant, quarry or fabrication facility) is set up or opened, in the vicinity of a covered construction site, exclusively to serve the needs of the particular covered construction contract, we have historically held that the operator of such a facility is a subcontractor (as to his relationship with the contract in question and with the prime contractor to whom it was awarded), subject to the contract labor standards requirements, and not a materialman excluded from the above requirements. This view is consonant with that expressed by the Supreme Court in MacEvoy v. United States, 322 U. S. 102 (1944), wherein it was stated that ". . . a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers or materialmen." (emphasis furnished).

The fact that a coverage decision such as here involved would affect an otherwise generally recognized supplier presents no difficulty since a firm can well be a supplier serving the public from its regular establishment, and, as to a specific facility set up exclusively to serve the needs of a covered construction contract, become as to that operation, a subcontractor within the meaning of the Davis-Bacon Act. Or, to utilize the language of the Supreme Court in the MacEvoy case cited above, such a firm would be an ordinary materialman as to his regular establishment serving the public generally, and a subcontractor as to his facility specifically set up to serve the needs of a covered construction contract. To consider this latter type of operation, so set up to meet the needs of the covered contract and, therefore, so intimately tied in to the contract, as not covered by the contract labor standards requirements, would defeat the admitted, basic purposes of the labor standards statutes here involved.

With respect to the statutory and contractual language regarding the "site of the work" and its applicability in the subject case, to the Shiprock fabrication facility, it is to be noted that the phrase "site of the work" appears not only in section 1 of the Davis-Bacon Act but also in section 2 which provides for contract termination in the event of failure to pay required wages to "any laborer or mechanic employed * * * directly on the site of the work covered by the contract." (40 U.S.C. 276a, 276a-1). The phrase, as noted above, does

not appear in the Eight Hour Laws which refer rather to any "laborer or mechanic doing any part of the work contemplated by the contract" (40 U.S.C. 324) and to "every laborer and mechanic employed by any contractor or subcontractor engaged in the performance of any contract" of a character subject to the eight hour requirements (40 U.S.C. 325a).

In order to apply the phrase "site of the work" in a sound and realistic manner, it becomes important to examine both the geographical and functional aspects of the work in question with some care. Geographically, the phrase "site of the work" normally contemplates a larger area than that which the completed building will actually occupy and will vary in size with the nature of the work required to be done on the project. Obviously, on some all of the work may be performed within a few feet from where the installation is or will be located, while on others requiring elaborate facilities such as a dam or flood control project or a transmission line extending 180 miles, such as here involved, the area may be quite extensive. To allow that an employer could escape coverage of this type of remedial legislation simply by removing his facility from the geographical site of the installation would be to defeat the clear intent of the statute. In this connection also, Black's Law Dictionary says of "site" that "the term does not of itself necessarily mean a place or tract of land fixed by definite boundries."

Similar considerations are involved in treating the functional aspects of the work where the contractor is to perform a specific part of covered construction work. Clearly, the project in this respect should be treated as a whole, or in a realistic way, and it should not be broken down into its various phases where to do so would subvert the purposes of the statute. Cf. Bennett v. V.P. Loftis Co., 167 F. 2d 286, 288 (C.A. 4 1948); Goldberg v. Nolla, Galib & Cia., 291 F. 2d 371, 373 (C.A. 1 1961).

Very few reported cases deal with the applicability of the Davis-Bacon Act. There are, however, a number of cases which, while not arising under the Davis-Bacon Act or the Eight Hour Laws, involve factual situations similar to those here and which are considered relevant to the general approach indicated above. Although we have not attempted to set forth all of these cases, see, for example, Bone v. Hackett, 185 Pac. 131. Also, your attention is called to the following decisions:

The Supreme Court in U. S. Fidelity Co. v. Bartlett, 231 U. S. 237, held that under a prime contract for building a breakwater the labor at a quarry which was opened 50 miles away solely to furnish rock "was work done in the prosecution of the work," that is the breakwater. The decision of the Circuit Court, which was confirmed by the Supreme Court in that case, stated that "the quarrying of the stone, its transportation and dumping should be regarded as a continuous operation contributing in its entire progress to the prosecution of the work." Also, in United States v. D. L. Taylor Co., 268 Fed. 635, the Court held that "where the specifications and map for a proposed breakwater, with reference to which a contract for its construction was made, showed that the stone for the breakwater must be secured from distant quarries and transported by rail and barge to the site of the breakwater the term 'construction,' as used in the contract, is not confined to the last act of putting the stone in place in the water, but includes the esential steps for getting it to that place. . . ."

Similarly, the Supreme Court pointed our in Brogan v. National Surety Co., 246 U. S. 257, that whether the furnishing of board by a construction contractor was an integral part of the construction work depends upon whether the boarding house was established as an independent business or exclusively for the construction activities. See also Illinois Surety Co., v. John Davis, 244 U. S. 376.

In Archer v. Brown and Root, Inc., 241 F. 2d 663, the Court held that construction of a causeway was commerce, and workers producing materials going directly into its construction were producing goods for commerce. More pertinent to the case at hand, however, were the circumstances surrounding the construction of a field plant. This plant produced cylindrical pilings to be used in the causeway construction and without which the causeway, which is 25 miles long, could not have been built. With respect to the workmen engaged in the construction of this plant, the Court held that "those [employees] were, in effect also building the bridge." The Court further stated that, "Whether, as claimed by the employer, it chose to install a plant designed and equipped as a permanent plant for future use after completion of the bridge project, there can be no question whatsoever that this plant was indispensable to performance of this construction contract. The only reason it was built where it was and when it was, was because of this contract. It was an integral part of the whole project."

In the case under consideration, a similar situation obtains. The fabrication facility operations, although not physically located on the particular property where the completed transmission line is to be erected, are conveniently located close to and within the general area of this transmission line construction work and are so closely integrated with it as to be a part of it. Furthermore, Creamer set up the fabrication facility for the primary and express purpose of performing its contract with the prime contractor and its contract for furnishing steel cages for the footings relates exclusively to the performance of work called for by the prime contractor's contract with the Bureau. Under these circumstances, it would appear to follow that the laborers and mechanics employed at this Shiprock facility are within the coverage of the Davis-Bacon and related Acts, and of the contract terms.

In confirming your decision as to coverage in this Creamer Industries case, and consonant with the foregoing views, we would like to point out that this decision and related ones issued by this Department in the past in cases involving generally similar factual situations have stressed that certain essential elements are considered necessary to constitute a basis for coverage, such as: the temporary nature of the facility in question; its location within the general area of the construction work in question (in line with the basic concept of the Davis-Bacon Act, namely, the protection of local labor standards); its purpose in being set up, namely, to meet the needs of the contract in question (and not to serve generally the demands of the public).

When appropriate corrective action has been accomplished in this case, we would appreciate receiving a final report thereon.

A copy of this decision is being furnished counsel for prime contractor Electrical Constructors.

Yours sincerely,

Charles Donahue
Solicitor of Labor

Copy: Leonard L. Pickering
Attorney at Law
420 San Mateo, N.E.
Albuquerque, New Mexico

Enclosure