

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

E-Filed
3/4/16

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

**PETITION OF NORTH AMERICA'S BUILDING TRADES UNIONS
TO PARTICIPATE AS *AMICUS CURIAE***

Under the rules of practice of the Administrative Review Board, 29 C.F.R. Part 7, North America's Building Trades Unions ("NABTU"), aka Building and Construction Trades Department, AFL-CIO ("Building Trades Department"), hereby petitions this Board for permission to participate in the above-captioned consolidated cases as *amicus curiae* and file a brief in response to the opening briefs filed on behalf of the PWCA (formerly the Prevailing Wage Contractors Association, Inc.), sponsors of the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan, Plan, which offers a supplemental unemployment benefit program

to participating employer members (“PWCA SUB Plan”), and the National Association of Prevailing Wage Contractors (“NAPWC”), which sponsors the NAPWC Supplemental Unemployment Benefit Trust (“NAPWC SUB Plan”), and in support of the briefs filed on behalf of the Administrator of the Wage and Hour Division (“Administrator”) and the Indiana-Illinois-Iowa Foundation for Fair Contracting. In support of its Petition, NABTU says as follows:

1. Both Petitions for Review submitted in the above-captioned consolidated cases ask the Board to vacate the determinations issued by the Administrator on October 22, 2015, revoking the exceptions previously granted by the U.S. Department of Labor’s Wage and Hour Division (“Wage & Hour”) to employers participating in the PWCA SUB Plan and the NAPWC SUB Plan from complying with the “Annualization Principle.”

2. The “Annualization Principle,” which was adopted by Wage and Hour in 1978,^{1/} is a computational strategy devised to determine the hourly rate of contribution that is creditable against the obligation of a contractor or subcontractor performing work on a Federal or federally assisted construction project to pay the prevailing wages required under the Davis-Bacon Act, 40 U.S.C. §§ 3141 *et seq.*, and more than 70 other federal statutes that incorporate the Davis-Bacon prevailing wage requirement also known colloquially as “Davis-Bacon related acts” or “related acts.”

3. In practice, the “Annualization Principle” limits the amount of fringe benefit contributions a contractor or subcontractor can offset by restricting their Davis-Bacon credit to an amount equal to the hourly cost of the fringe benefit averaged over all hours of work performed by

^{1/} Wage and Hour developed the “Annualization Principle” to ensure that a contractor or subcontractor does not fund a fringe benefit plan – specifically, a plan that provides benefits/coverage to an employee for all hours he/she works – with wages earned solely on projects covered by the Davis-Bacon act or one or more of its “related acts.” *See* Wage & Hour Opinion Letter 459 1978 DOLWH LEXIS 18 (May 17, 1978) (“It is our position that sums due employees as prevailing wages on a Davis-Bacon project may not be used to defray the cost of fringe benefits for other employees”).

each of the contractor's or subcontractor's employees (both Davis-Bacon hours and non-Davis-Bacon hours).

4. NABTU 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 Davis-Bacon Act or one of the "related acts."

5. Since Wage & Hour recognized the "Annualization Principle" in 1978, NABTU has repeatedly engaged in efforts to preserve and extend its application and interpretation before the Administrator, this Board and its predecessor – the Wage Appeals Board,^{2/} and numerous federal district courts and courts of appeals^{3/} beginning when Wage and Hour determined in 1980 that contributions by contractors participating in the Builders, Contractors, and Employees Retirement Trust and Pension Plan, which only required participating contractors to make contributions for hours worked by their employees on projects covered by the Davis-Bacon Act and/or any of its "related

^{2/} *Builders, Contractors and Employers' Retirement Trust and Pension Plan*, WAB Case No. 85-06 (Dec. 17, 1986); *Miree Constr. Co.*, WAB Case No. 87-13, 1989 DOL Wage App. Bd. LEXIS 21 (Feb. 17, 1989); *Tom Mistick & Sons, Inc.*, WAB Case Nos. 88-25, 88-26, 1991 DOL Wage App. Bd. LEXIS 11 (May 30, 1991); *Cody-Zeigler, Inc.*, ARB Case Nos. 01-014, 01-015, 2003 DOL Ad. Rev. Bd. LEXIS 130 (Dec. 19, 2003); *Royal Roofing Co., Inc.*, ARB Case No. 03-127, 2004 DOL Ad. Rev. Bd. LEXIS 320 (Nov. 30, 2004).

^{3/} *Miree Constr. Co. v. Dole*, 730 F. Supp. 385 (N.D. AL. 1990); *Miree Constr. Co. v. Dole*, 930 F.2d 1536 (11th Cir. 1991); *Indep. Roofing Contrs. v. Chao*, 300 Fed. Appx. 518 (9th Cir. 2008).

acts," were creditable toward meeting their prevailing wage payment obligations notwithstanding the "Annualization Principle."^{4/}

6. On April 25, 1983, Robert A. Georgine, President of the Building Trades Department challenged Wage and Hour's September 30, 1980 determination in a letter to Assistant Administrator Dorothy P. Come requesting a determination concerning application of "Annualization Principle" to employer contributions to the Builders, Contractors and Employers' Retirement Trust and Pension Plan.^{5/}

7. Wage and Hour Administrator William M. Otter, responded to the Building Trades Department's April 25, 1983, and June 7, 1983, letters in a letter dated August 31, 1984, which acknowledged that Wage and Hour was once again reviewing the Builders, Contractors and Employers' Retirement Trust and Pension Plan because of the "questions raised" about the plan since it was originally approved in 1980. However, the Administrator said that he would not determine whether the Builders, Contractors and Employers' Retirement Trust and Pension Plan would remain a bona fide fringe benefit for Davis-Bacon purposes until after the Department of Labor's Wage Appeals Board issued a decision concerning an appeal from his June 15, 1984, ruling that the "Annualization Principle" must be applied to a pension plan that permitted Dyad Construction, Inc.

^{4/} Letter to Dennis J. Fitzpatrick, dated September 30, 1980, from Dorothy P. Come, Wage and Hour Assistant Administrator.

^{5/} The Building Trades Department supplemented its April 25, 1983 challenge of Wage and Hour's September 30, 1980, determination concerning the Builders, Contractors, and Employees Retirement Trust and Pension Plan in a letter to Assistant Administrator Come dated June 7, 1983, which questioned whether operation of that plan also involved violations of the Employee Retirement Income Security Act ("ERISA") that should disqualify the plan as a "bona fide" fringe benefit for Davis-Bacon purposes.

to make higher contributions for hours worked on projects covered by the Davis-Bacon and related acts than it made for hours worked on projects not covered by these statutes.^{6/}

8. Thereafter, the Administrator issued a determination in a letter to the Building Trades Department dated January 30, 1985, in response to its April 25, 1983, and June 7, 1983, letters, which concluded the Builders, Contractors and Employers' Retirement Trust and Pension Plan would continue to qualify as a bona fide fringe benefit for Davis-Bacon purposes.

9. The Building Trades Department then filed a petition for review with the Department's Wage Appeals Board on April 1, 1985, seeking review of the Administrator's January 30, 1985, determination regarding the bona fides of the Builders, Contractors and Employers' Retirement Trust and Pension Plan.

10. Ultimately, the Wage Appeals Board affirmed the Administrator's January 30, 1985, determination and dismissed the Building Trades Department's petition for review over the exhaustive dissenting opinion written by WAB Member Thomas X. Dunn. *Builders, Contractors and Employers' Retirement Trust and Pension Plan*, WAB Case No. 85-06 (Dec. 17, 1986).^{7/}

^{6/} Subsequently, the Wage Appeals Board remanded the case to the Administrator for reconsideration. *Dyad Constr., Inc.*, WAB Case No. 84-15 (DOL WAGE App. Bd. Nov. 26, 1984). Following remand from the WAB, the Administrator determined that Wage and Hour would no longer apply the "Annualization Principle" to defined contribution pension plans such as the one sponsored by Dyad Construction, Inc. See Letter to Robert J. Shaw, dated June 6, 1985, from Herbert J. Cohen, Wage and Hour Deputy Administrator.


^{7/} The Builders, Contractors and Employers' Retirement Trust and Pension Plan was eventually scuttled because the U.S. District Court for the District of Columbia found the plan violated various provisions of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* See *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400 (D.D.C. 1987); *Arakelian v. National Western Life Ins. Co.*, 126 F.R.D. 1 (D.D.C. 1989); *Arakelian v. National Western Life Ins. Co.*, 724 F. Supp. 1033 (D.D.C. 1989); *Arakelian v. National Western Life Ins. Co.*, 748 F. Supp. 17 (D.D.C. 1990).

11. As a result of its interest and involvement in these matters related to interpretation and application of the "Annualization Principle," NABTU possesses a wealth of knowledge and experience that it will rely upon to present a brief as *amicus curiae* that will be informative and useful to the Board when it considers the issues presented in the above-captioned cases.

WHEREFORE, North America's Building Trades Unions moves this Board to enter an Order permitting it to file a brief not later than April 11, 2016, in the above-captioned consolidated cases as *amicus curiae* 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 Administrator's October 22, 2015, determinations revoking the exceptions from complying with the "Annualization Principle" previously granted to employers participating in the PWCA SUB Plan and the NAPWC SUB Plan.

Respectfully submitted,

Dated: March 4, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 2016, I caused a copy of the foregoing Petition of North America's Building Trades Unions to Participate as *Amicus Curiae* to be served by electronic mail, on the following:

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A handwritten signature in black ink, appearing to read "Terry R. Vellig", is written over a horizontal line.

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