

CHAPTER 8 - AREA PRACTICE SURVEYS

8-1. General. At the core of the Contracting Officer's effort to ensure contractor compliance with the prevailing labor standards is the duty to be cognizant of "area practice." Whether to ensure the proper trade classification of specific workers or to ensure the application of the proper schedule of wage rates, the District Labor Advisor is frequently involved in the compilation and assessment of data relating to classification practices in the vicinity of Corps projects.

8-2. Trade Classification Issues. As has been noted previously, the most common violation of the Davis-Bacon Act is the incorrect classification of employees. The misclassification of employees and the detection of resulting wage underpayments will sometimes be a simple or readily recognizable situation. However, there are many occasions when the distinction between trade classifications is a matter of dispute. Further, disputes may arise which involve the Contracting Officer, contractors, contractor associations, contractor employees, unions and/or the DOL. All these disputes arise in an industry that is, by its nature, fragmented and secular. Thus, with the growth of open shop construction, there has been an increasing trend towards specialty or task-oriented trades (e.g., Metal-building Assemblers). This represents a diminished focus upon traditional craft classifications (e.g., Ironworker). This tendency would appear to underlie many of the additional classification requests that have been submitted to the DOL in recent years. The basis for the resolution of disputes involving these requests may be found in the Act which states in pertinent part

"...prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village or other civil subdivision of the State, in which the work is to be performed,..."

Thus, when a dispute concerning the proper trade classification arises, the District Labor Advisor should contact the appropriate DOL Regional Wage Specialist. The DOL policy in classification matters was established by the Wage Appeals Board in Fry Brothers Corporation (WAB Case No. 76-6, 14 Jun 77). It was reasoned that the proper classification of work performed by workers is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination. Thus, the first step in the process of determining proper classification would be to determine the nature of the contract wage determination. In the survey of wage conditions in the applicable area, the DOL will have already determined that one of three conditions prevails. The resulting DOL wage determination will be based on 1) union negotiated, 2) open shop (non-union) wage rates, or 3) a mixed schedule (e.g., union

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electricians and open shop laborers). The content of the area practice survey thus depends upon which of the three conditions apply. Information relating to which of these three conditions apply may be gathered from the "identifiers" provided by the DOL in the body of the wage determination. Above each classification (or group of classifications) listed within a particular determination, an alphanumeric "identifier" and date provide information about the source of the classification(s) and wage rate(s) listed for it. Thus, SU indicates that the rates were derived from survey data which may include union and non-union data. Any identifier beginning with characters other than SU is used where union classification(s) and wage rate(s) have been found prevailing. In each such identifier, the first four letters indicate the international union for the local union that negotiated the wage rates under that identifier. Then there is a four digit code that indicates the local union number. For example, for the identifier ELEV0101, ELEV represents the Elevator Constructors Union and 0101 represents their local union number. For purposes of determining appropriate classifications therefore, one of the following conditions may apply.

(1) If the applicable wage determination reflects union rates for the classifications involved, the unions whose jurisdiction the work may be within should be contacted to determine whether the respective union performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, each union should be asked how the individuals who performed that work were classified. The information provided by the unions should be confirmed with collective bargaining representatives of management (e.g., contractors' associations such as local chapters of the Associated General Contractors of America, the Associated Builders and Contractors, the National Electrical Contractors Association, etc.). If all parties agree as to the proper classification for the work in question, the area practice is established.

(2) If the applicable wage determination reflects open shop rates for the classifications involved, open shop contractors should be contacted and asked whether they performed the work in question on similar projects in the county in the period one year prior to the beginning of construction of the project at issue. If so, these contractors should be asked how the employees who performed this work were classified. If all contractors agree, or if a clear majority of the contractors agree, the area practice is established. If no open shop contractor performed the work at issue in the county in the time period one year prior to the beginning of construction, the Labor Advisor should contact the DOL's Regional Wage Specialist for further guidance.

(3) If the applicable wage determination reflects a mixed schedule of rates, it is necessary to contact the unions as well as union and open shop contractors (and/or their associations) to determine who performed the work at issue on similar projects in the area in the period one year prior to the beginning of construction of the project. If all parties agree, or if a clear majority of the parties agree on the classification, the area practice is established.

8-3. Full Scale Area Practice Surveys. Whether the survey is conducted in order to evaluate a contractor's request for authorization of additional classification and rate or to identify a possible misclassification, it is essential that the District Labor Advisor document the steps undertaken in the survey. For each of the above conditions, there are many reasons why the parties may not agree (i.e., jurisdictional dispute between the unions, management does not agree with the union, or disagreement among the open shop contractors). In the absence of agreement or a clear majority of parties in agreement, it becomes necessary to conduct a full scale area practice survey. In recent years, the DOL has directed contracting agencies to conduct such full scale surveys. However, there is neither regulatory guidance (i.e., CFR, FAR) nor policy directives (i.e., All-Agency Memoranda) available for such efforts. Accordingly, agencies have naturally been reluctant to assume responsibility for such surveys, maintaining that this work should only be performed by DOL personnel since they are responsible for the predetermination of prevailing rates. DOL has maintained that Reorganization Plan No. 14 of 1950 tasks the Contracting Officer with the responsibility of day to day enforcement of labor standards. It is argued that a prerequisite to the exercise of such responsibility is a familiarity with classification practices within the project area. Without attempting to here resolve the issue of primary responsibility for full scale surveys, it can nonetheless be stated that for those districts with the resources to conduct such surveys, classification disputes will be more expeditiously resolved when they are forwarded to the DOL with as much area practice information as can be developed by the contracting agency. Experience has also demonstrated that contractor requests for authorization of additional classifications and rates are processed in a more timely manner when they are submitted with area practice information. The following section details the method of conducting a full scale area practice survey for purposes of determining the appropriate trade classification.

8-4. Documenting the Area Practice Survey. As with the survey procedures noted above, the District Labor Advisor should attempt to identify similar projects in the same geographical area as the project under investigation which were in progress during the period one year prior to the start of construction for the subject project. If no similar projects were built in the area during that time frame, it may be necessary to expand the survey in time (two or three years) and/or to contiguous counties. After establishing the framework for the survey, the following steps are to be taken:

(a) Determine what firms performed the work in question on these projects and contact those which are either open shop or union depending on the basis for the wage rates issued in the applicable wage determination. It is important to note that the existence of a classification within a collective bargaining agreement alone is not sufficient to determine the appropriate classification. It must be demonstrated that an existing classification actually performs the work in question (More Drywall, Inc., WAB 90-20, April 29, 1991; Miller Insulation Company, WAB 94-01, May 2, 1994; and Volkman Railroad Builders, WAB 94-10, August 22, 1994).

(b) From each firm contacted, determine the week in which the greatest number of employees performed such work on these projects (i.e., "peak week") and determine how such employees were classified.

(c) Compile all information received and total the number of employees in each classification which performed the work in question. The classification which has the clear majority of employees performing the work is the proper classification. However, if it is found that only 51% to 60% of the employees in a classification performed the work in question, contact the DOL's Regional Wage Specialist for further guidance. If no common, single classification practice is found to be predominant in the area or if no project involving work of a similar nature is found, the DOL generally will not take exception to the contractor's particular classification practices.

(d) The Dictionary of Occupational Titles, published by the Bureau of Labor Statistics may be used as reference material, it cannot be relied on for resolving Davis-Bacon classification questions.

8-5. Determining the Appropriate Schedule of Wage Rates.

(a) All Agency Memoranda Numbers 130 and 131 give general, broad outlines of the proper categories of the various types of construction (building, heavy, highway and residential) subject to "local or area practice". (These Memoranda are enclosed as Appendix K). For example, where a contract for a project (such as a sewage treatment plant) contains multiple wage schedules (e.g., building and heavy), it may be necessary to resort to area practice to determine which schedule of rates applies to various parts of a project.

(b) The survey is conducted in essentially the same manner as described in paragraph 8-4 above, except that the pivotal issue becomes the determination of which rates were paid on similar projects for the type of work in dispute rather than which

particular classification of laborer or mechanic performed a specific task. In conducting such a survey, all projects of a character similar are generally considered. However, in the case of either building or residential construction wage schedules, whether other Davis-Bacon Act covered projects may be included in the area practice survey must first be determined from the DOL's Regional Wage Specialist. This will depend upon whether such covered projects were included in the wage survey which served as the basis for issuing the wage rates in the applicable wage determination.