

DBRA-122

August 19, 1982

This is in reference to an inquiry raised by Local Union 13 of the International Brotherhood of Electrical Workers concerning whether the Davis-Bacon prevailing wage labor standards provisions of the Urban Mass Transportation Act of 1964 (49 U.S.C. 1609) are applicable to Metropolitan Atlanta Rapid Transit Authority (MARTA) Contract CN 710. The bid solicitation for this contract issued on June 23, 1982, does not contain the prevailing wage labor standards provisions. In examining this issue we have sought and obtained information and the views of MARTA, the North Georgia Building and Construction Trades Council, and the Urban Mass Transportation Administration (UMTA) of the Department of Transportation.

It is our conclusion that under the facts as they exist today, MARTA Contract CN 710 is not covered by the prevailing wage labor standards provisions of the Urban Mass Transportation Act. This determination constitutes an authoritative ruling under section 5.12 of Department of Labor Regulations (29 CFR 5.12), which may be appealed to the Wage Appeals Board of the Department of Labor pursuant to 29 CFR 7.9.

The facts are as follows: MARTA is in the process of constructing a rapid transit rail system to serve the metropolitan Atlanta area. The rail system has been divided into three phases (A, B, and C). Phase A, the initial phase, was partially financed by grants made by UMTA. A portion of Phase B (Phase B1), which extends the system to three additional stations and is expected to be in operation by the end of 1982, is also being partially funded by an UMTA grant. An UMTA grant has not yet been approved for the remaining portion of Phase B (Phase B2), which extends the system to four additional stations. However, UMTA has issued a letter of no prejudice covering Phase B2.

As stated by UMTA:

A letter of no prejudice is an administrative tool whereby a grantee can incur costs in advance of any grant approval, and preserve the eligibility of such costs in the event a grant is ever approved at a later date. In order to claim such costs if a grant is ever awarded, however, the grantee must demonstrate that all applicable Federal requirements were followed, including Davis-Bacon requirements. Failure to comply with these regulations would risk UMTA's future participation in the costs incurred. * * * While the letter of no prejudice is a valuable method of protecting future eligibility, it in no way constitutes either a Federal obligation or an administrative commitment to ever make a grant.

Although no UMTA grant has been approved for Phase B2, MARTA has gone ahead with construction of Phase B2 and is complying with all federal grant requirements in order to preserve the eligibility of the costs under the letters of no prejudice. As a consequence, all construction contracts for Phase A and B contain the Davis-Bacon prevailing wage provisions as required by 49 U.S.C. 1609(a).

MARTA Contract CN 710, which is a part of Phase C, provides for the Construction of approximately one mile of trackway (including earthwork, structures, and a parking lot), which will connect MARTA's Lenox Square Station is the northernmost station included within Phase B, and Contract CN 710 will extend the system north to the proposed Brookhaven station.

In 1980 MARTA applied for an UMTA grant for the construction of Phase C. In November of 1981, MARTA requested that UMTA issue a letter of no prejudice for a reduced portion of Phase C, which would include the work under Contract CN 710. UMTA has not approved any grant or issued any letter of no prejudice for this Phase C work. UMTA has stated that it does not have the necessary policy clearances from OMB to issue a letter of no prejudice for the start of a new rail system or for extensions to existing rail systems.

Despite this, MARTA has elected to proceed with Contract CN 710 relying solely on local funding. By so doing, MARTA will be precluded from receiving any reimbursement from UMTA for the work performed under Contract CN 710. As stated by UMTA:

UMTA will not reimburse MARTA for construction work performed by MARTA, its contractors or subcontractors, where such work is performed without prior documented approval by UMTA as the Federal grantor agency. Without prior approval, the cost of such work is not an allowable cost under the provisions of Office of Management and Budget (OMB) Circular A-87, January 28, 1981, 46 CFR 553 and UMTA Order 1000.2, External Operating Manual, Change 4, May 23, 1974, Paragraph 5, IIID-31.

Section 13(a) of the Urban Mass Transportation Act of 1964, as amended, states that:

The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction¹ work financed with the assistance of loans or grants under this Act shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. The Secretary shall not approve any such loan or grant without first obtaining adequate assurance that required labor standards will be maintained upon the construction work. [Emphasis added.]

In 1963, prior to the Act's passage, then Secretary of Labor W. Willard Wirtz was asked by Congressman Patman for an explanation of how these labor standards provisions would be applied. In a letter to Congressman Patman, Secretary Wirtz stated that:

It is my understanding that any application for loan or grant under the bill will include a complete description of all capital improvements that will be undertaken. The labor standards provisions of section 11 of the bill will apply to contracts for construction which are entered into to carry out the improvements described in the application for the loan or grant. [Emphasis added. Hearings on H.R. 3881 Before the Committee on Banking and Currency, House of Representatives, 88th Cong., 1st Sess. 493.]

As stated previously, although MARTA has submitted grant applications which include the work to be performed under Contract CN 710, no grant has been approved, nor has a letter of no

prejudice been issued. By proceeding with Contract CN 710, MARTA has effectively removed this work from any grant applications it has submitted to UMTA. Any subsequent grant approval or letter of no prejudice concerning any Phase C work will not include the work to be performed under Contract CN 710.

Further, there is no indication that MARTA has attempted to configure or reconfigure contracts for the purpose of avoiding or otherwise limiting application of the Act's labor standards provisions. MARTA submitted grant applications and requested that UMTA issue a letter of no prejudice covering the work to be performed under Contract CN 710. If UMTA had issued a letter of no prejudice, MARTA's past actions indicate it would have included the prevailing wage standards in this contract.

The North Georgia Building and Construction Trades Council has stated that there will be work performed under Phase A and B contracts (subject to Davis-Bacon prevailing wage provisions) simultaneously with and at the same site as work performed on Contract CN 170. The Trades Council argues that the entire MARTA rapid rail system should be viewed as a single project, and because there is federal funding of some of the system, the Davis-Bacon labor standards requirements should be applied to all construction work performed throughout the system.

The Department cannot accept the proposition that because there was federal assistance in the initial phase of the rapid rail system, construction of the entire system, including all of Phase C (estimated to cost in excess of one billion dollars) must be subject to Davis-Bacon requirements. A more difficult question is raised by the Trades Council's argument that the work in Contract CN 710 will be so intermingled with other contracts receiving federal assistance and subject to Davis-Bacon, that Contract CN 710 must be subject to Davis-Bacon as well.

MARTA has explained that there are Phase B2 contracts which contain options which have not yet been exercised for additional work extending into Phase C geographical areas. The work under these options includes trackwork, traction power, train control, and the communications system. MARTA stated that when it was preparing the Phase B2 contracts, it anticipated that short extensions beyond Phase B2 might be undertaken while work under the Phase B2 contracts was still underway. If this is the case, MARTA believes it could save money by having these contractors continue with the additional trackwork, traction power, train control, and communications. It is our understanding that in the event MARTA elects to exercise these options, this work will be performed in Phase C geographical areas under the Phase B2 contracts which require the payment of Davis-Bacon prevailing wages.

It is also our understanding that the request for funding of these options is included in the grant application for Phase C, as well as the February 1982 request for a reduced scope letter of no prejudice. Because the work under the options is integral to the segment of the rail system to be built under Contract CN 710, such that this segment cannot function without the option work, it is our view that Contract CN 710 and the options pertaining to this segment must be treated consistently for purposes of Davis-Bacon. At this time, MARTA has received no federal assistance and no letter of no prejudice for the work under these options which would be performed at the site of Contract CN 710. Furthermore, it is our understanding that there is little likelihood that federal funds will be approved for the options. Therefore under the facts as they

exist today, Contract CN 710 is not covered by the Act, and MARTA may award the contract without Davis-Bacon provisions. As stated above with regard to Contract CN 710, it is our understanding that performance of the construction covered by the options without such a letter of no prejudice precludes future federal assistance for the work.

We note, however, that the application for funds is still pending and the options have not yet been exercised. Thus there is still a remote possibility that federal funds may be obtained for the work under the options. If MARTA goes forward on CN 710 without Davis-Bacon provisions, and later obtains federal funds for the options pertaining to that segment of track, it is our view that the Davis-Bacon provisions of UMTA would be applicable to all construction work on that segment of track. Accordingly, Davis-Bacon provisions would then have to be incorporated in Contract CN 710.

Sincerely,

William M. Otter
Administrator
Wage and Hour Division