SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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ELEVATOR INDUSTRIES ASSOCIATION, INC., P.S. MARCATO ELEVATOR COMPANY, INC.

Petitioners,

DECISION & ORDER
Index No. 159134/2016

-against-

Mot. Seq. 001

SCOTT M. STRINGER, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF THE CITY OF NEW YORK,

Respondent.

For a judgment pursuant to CPLR Article 78

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The petition brought by petitioners to annul respondent's decision to designate the International Union of Elevator Constructors, Local No. 1 AFL-CIO (Local 1) for the July 1, 2016 to June 30, 2017 New York City Prevailing Wage Schedule (Prevailing Wage Schedule) for elevator service and modernization mechanics for public work projects is denied and this proceeding is dismissed.

Background

Petitioner Elevator Industries Association, Inc. (EIA) is an association of employer members who contract with public agencies and private companies for projects requiring elevator service, repair and modernization in New York City. Petitioner P.S. Marcato Elevator Company, Inc. is a member of Elevator Industries Association and has a collective bargaining agreement with IBEW Local 3.

Petitioners challenge the determination made by respondent, pursuant to Labor Law § 220(5)(a), to set the prevailing rate of wages and supplemental benefits for elevator repair workers. Petitioners take issue with the designation of Local 1 as the predominate union rather than Local 3 and claim that Local 1 has members who perform new construction and do work outside of New York City. Petitioners insist that Local 3 should have been the predominant union designated because its members do elevator service and modernization exclusively and this union does not have an office in New Jersey like Local 1.

Petitioners argue that respondent designated Local 3 as the predominate union for over three decades. Petitioners contend that respondent used to conduct wage surveys among employers who did elevator work in New York City and employers were required to list the number of employees covered by these prevailing wage surveys. Petitioners argue that Local 1 brought its own Article 78 proceeding in 2008, in which respondent eventually vacated the prevailing wage determination and identified Local 1 as the predominant union. Petitioners maintain that after the 2008 matter, respondent began using annuity records of Local 1 to calculate the number of employees who perform elevator service work rather than surveying employers. Petitioners further argue that Local 1's annuity records show contributions made by Local 1 employers on behalf of all Local 1 employees including those who do elevator construction. Petitioners add that these records also do not demonstrate whether the work of these employees was done within New York City.

Petitioners claim that a review of records obtained from the New York City Department of Buildings (DOB) revealed that Local 3 does the predominant amount of maintenance, repair

and modernization work on elevators in New York City. Petitioners contend that these findings were shared with respondent, who refused to change its determination.

In its answer, respondent claims that many employers failed to respond to its surveys and there was no way for respondent to verify the information provided in response to these surveys. Respondent observes that the Court, in the previous Article 78 proceeding brought by Local 1, criticized respondent's use of surveys because of the low response rate. During a subsequent prevailing wage determination in 2012, respondent chose to use annuity records because they purportedly have different contribution rates for repair and maintenance work compared with contributions for construction work. Respondent also insists that annuity contributions are only made for employees who are working, which further supports the accuracy of respondent's investigation.

Respondent claims that for the 2016 prevailing wage determination, respondent met with representatives from EIA and requested a written submission from petitioners showing that Local 1 did not represent 30 percent of the workers doing elevator repair and maintenance. Respondent claims they received a submission from EIA which showed information about DOB elevator testing and work applications. Respondent disputes petitioner's claim that because Local 3 members submitted more work applications of a certain type than Local 1, Local 3 members did more repair and maintenance work. Respondent rejected petitioner's request that respondent use a 'one trade per worker rule' which would exclude from consideration workers who performed both elevator construction and repair work. Respondent insists that it must consider the number of workers employed in elevator repair and maintenance rather than the number of jobs or amount of work done by an employee.

Respondent contends that after its discussions with EIA, it conducted an investigation in early 2016. Respondent claims that Local 1 provided a full set of requested records and Local 3 did not fully comply. Respondent insists that EIA provided the missing information for Local 3.

Respondent contends that the records showed that Local 1 had many more members performing repair and maintenance work than Local 3 and the prevailing wage schedule was published using Local 1's rates. Respondent says that after EIA objected to this preliminary determination, respondent requested from DOB a list of all New York City licensed elevator repair and maintenance contractors. Respondent argues that after it excluded all of the companies without New York City licenses from the employer lists provided by both unions, Local 1 still had 380 more members who did elevator repair and maintenance work in the latter half of 2015.

In reply, petitioners assert that respondent did not seek any information to allow it to determine how many of Local 1's members listed in the annuity contribution reports ever worked in New York City.

Discussion

In an article 78 proceeding, "the issue is whether the action taken had a rational basis and was not arbitrary and capricious" (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*id.*). "If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable" (*id.*). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

The New York State Constitution provides, for wages in public work projects, that:

> "No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency; nor shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used."
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> (NY Const art I § 7).

Labor Law § 220 details the process by which the Comptroller complies with the above provision of the New York Constitution (*see Lantry v State*, 6 NY3d 49, 54, 810 NYS2d 729 [2005]). The Comptroller determines the prevailing wage rates for New York City in a two-step process (*id.*). "First, the [Comptroller] must classify the work by assigning the task performed by an employee to a specific trade or occupation. Second, the [Comptroller] must ascertain the prevailing rate for that trade or occupation in the relevant locality" (*id.* [citations omitted]).

"[T]he Legislature amended the Labor Law in 1983 to authorize the Commissioner [here, Comptroller] to dispense with the survey process and instead adopt the rate paid in a locality by referring to collective bargaining agreements between labor organizations and private sector employers, provided that such agreements covered at least 30% of the workers in that trade or occupation" (*id.* at 54-55).

"In the absence of a statutory directive, this Court will uphold the Commissioner's methodology as long as it is not unreasonable" (*id.* at 55).

Here, the question for this Court is whether Comptroller's method for picking Local 1, rather than Local 3, was reasonable. Critically, the issue is not whether this Court would have reached a different determination.

30% Determination

In its moving papers, petitioners argue that there is no factual finding by respondent that Local 1 represents 30% of the elevator service/modernization mechanics in New York City. Contrary to petitioners' claim, it is petitioners who bear the burden to rebut the 30% threshold. "Petitioner's contention that the Comptroller must numerically establish that the 30% threshold had been met through, in effect, a census of all workers employed in the trade in New York City . . . would contravene the purpose of the 1983 overhaul of Labor Law § 220, which was to free fiscal officers from the heavy administrative burden of performing industry surveys of actual wages received by trade workers, and substitute for such surveys the more expedient proxy of reliance on CBAs" (*Matter of New York Ind. Contrs. Alliance v Liu*, 144 AD3d 505, 507, 41 NYS3d 277 [1st Dept 2016]). This decision is dated after petitioners' initial moving papers.

In reply, petitioners attempt to distinguish the *Liu* case by asserting that unlike the *Liu* case, this matter involves two unions that both meet the 30% threshold. Petitioners claim that in this matter, where two unions have met the 30% threshold, respondent must pick the union that has the most members employed in that trade within New York City. Therefore, the Court must consider whether respondent's decision to pick the wage rates of Local 1 was rational.

Rationality of Respondent's Decision

Petitioners insist that consideration of the annuity contribution rates is misplaced because the contributions, which detail the number of hours worked, do not differentiate for work done outside of New York City. Petitioners maintain that respondent should have requested further information about the location of Local 1 members' work. Although petitioners acknowledge that

the contribution rates for construction and repair/modernization work are different, they insist that the number of workers tabulated by respondent is inaccurate because it includes workers who worked very few hours during a six-month period evaluated. Petitioners also argue that the exclusion of Unitec, a well-established elevator contractor, was arbitrary because this company is licensed to perform elevator work in New York City under the name of one of its predecessor companies. Petitioners also claim that Local 1's numbers improperly include workers who do construction work and respondent ignored DOB records showing that Local 3 did significantly more service/modernization work than Local 1. Petitioners claim that these DOB records show that Local 3 had more than 500 more workers doing repair work because Local 3 affiliated employers filed more repair applications and an elevator repair is typically completed with two-person teams.

Respondent contends that it considered how many workers were able to perform work within New York City and whether they are covered by the collective bargaining agreement when performing work. Respondent insists that there is a difference in the annuity contribution rate for repair and maintenance workers for Local 1 (Kokkoris aff ¶ 21). The Kokkoris affidavit confirms that repair and maintenance workers receive a lower contribution rate, a fact demonstrated in respondent's annual review of Local 1's CBA (*id.*). Respondent contends this makes annuity contributions a reasonable and rational tool for making the prevailing wage determination.

Respondent insists that it listened to EIA's concerns in early 2016 and reviewed EIA's contentions concerning the DOB records (*id.* ¶ 27). Respondent claims that it declined to put an 'arbitrary' threshold on hours worked and that its focus was on the number of workers employed

in the elevator repair and maintenance trade rather than the amount of work done by certain employers (*id.* ¶¶ 27-28). Respondent argues that EIA tried to extrapolate the number of workers on each job from estimated labor costs (*id.* ¶ 29).

Despite respondent's reservations about EIA's submissions, respondent began a new investigation to determine whether circumstances had changed since the last prevailing wage determination in 2012 (*id.* ¶ 30). This investigation revealed that Local 1 had 1,958 workers doing elevator maintenance while Local 3 had 1,596 (verified answer, exh I). Respondent insists this conclusion was reached after reviewing all the signatory employers for Local 1 and Local 3, each union's benefit fund for annuity contributions and the benefit remittance forms for the three largest employers for Local 1 and Local 3 (Kokkoris aff ¶ 31). Respondent states that the purpose of reviewing this information was to verify the existence of bona-fide collective bargaining agreements for elevator maintenance, determine which union members worked during the chosen time period (last sixth months of 2015) and to cross-check employer records with union records (*id.* ¶ 33).

After receiving more complaints from petitioners, respondent excluded all companies without New York City licenses from the employer lists and found that Local 1 still had 380 more members (1,841 to 1,461) (*id.* ¶ 39; verified answer exh M). Respondent contends that EIA failed to provide any information regarding the status of New York City licenses for any of its members, including Unitec (Kokkoris aff ¶ 40).

The Court finds that respondent's determination was rational and neither arbitrary nor capricious. Although petitioners may have devised a way that, they claim, yields more accurate

results for determining the prevailing wage, this Court is unable to find that respondent's actions were unreasonable. Despite having doubts about petitioners' assertions, respondent conducted an investigation for the 2016 prevailing wage determination and reached a conclusion based on its interpretation of the data. To be clear, the methodology utilized by respondent is probably not perfectly accurate. But neither is the strategy employed by petitioners (the DOB applications).[1] An inaccurate decision does not necessarily mean the respondent's decision was arbitrary or capricious.

Further, "Nothing in the statute expressly requires the fiscal officer to set, as the prevailing wage rate, the one collective bargaining agreement that covers the greatest percentage of workers in the locality" (*Local 175 United Plant and Prod. Workers IUJA v Thompson*, 28 Misc 3d 283, 287 [Sup Ct, NY County 2010]). Of course, the Comptroller's decision must be rational, but it need not be based on a comprehensive analysis of the exact number of workers in a specific field. If the Legislature wishes to require the Comptroller to conduct a census of workers performing elevator repair/modernization, then that body can provide those directives. But this Court will not rewrite the statute or devise new obligations to impose on respondent.

Obviously, Labor Law § 220(5)(a)'s silence on how to choose the collective bargaining agreement of labor organizations that employ at least 30% of workers in the locality leaves ample room for a Comptroller to make a determination. It does not tell respondent how to deal with workers who do both elevator repair and construction jobs nor does the statute specify how many

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[1]Petitioners' method of using DOB applications relies upon the purported industry standard of two-person teams for elevator repairs. This assumption could mean that petitioners' method may be more accurate or it could be less accurate. In any event, it is still an estimate rather than an exact calculation.

hours a worker must work in a trade to be 'counted' as a worker. The statute does not explain how respondent should chose a collective bargaining agreement when two labor organizations meet the 30% threshold.

Here, respondents compared annuity contributions for two unions which do elevator repair work in New York City. Respondent considered petitioners' disagreements and eliminated workers for companies that did not have New York City licenses and still found that Local 1 had more than 300 more workers than Local 3. These actions evidence a rational decision by respondent reached after listening to petitioners' concerns rather than completely disregarding these issues. While petitioners would have respondent conduct more inquiry into where those workers do their work and request more information from employers, this Court cannot mandate the specific type of information respondent must consider.

The Court also finds that a hearing is not required because that proceeding would merely explore the accuracy of respondent's determination rather than whether it was arbitrary or capricious. The Court observes that Justice Lobis ordered a hearing, in part, because of the inherently flawed data the Comptroller used to support its determination (*International Union of Elevator Constructors, Local No. 1, AFL-CIO v Thompson*, 22 Misc3d 1136(A), 881 NYS2d 363 (Table) [Sup Ct, NY County 2009]).[2] Justice Lobis observed that respondent picked Local 3 despite the fact that only 15% of the contractors identified by Local 1 responded while nearly 75% of the contractors identified by Local 3 responded (*see id.*). Unlike the previous matter

[2]This hearing did not take place because the Comptroller agreed to review the process by which it reached its determination. The Comptroller later picked Local 1.

before Justice Lobis, the issue in the instant proceeding is not about inherently inaccurate data; instead it involves a debate about the preferred methodology and interpretation of data.

The Court notes that after respondent received criticism from Justice Lobis, respondent changed its methodology and now solicits information directly from the unions rather than from the employers. And while annuity contributions may not be the best way to make the prevailing wage determination, this Court is unable to find it is arbitrary given that, as petitioners acknowledge, the contributions are different for elevator repair workers than for elevator construction workers. The Labor Law was revised in 1983 in an effort to help alleviate the burden on respondent to conduct exhaustive investigations. In the instant proceeding, respondent sought to make a determination and consider petitioners' concerns without agreeing to a massive expansion of their decision making process.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and this proceeding is dismissed and the clerk is directed to enter judgment for respondent.

This is the Decision and Order of the Court.

Dated: May 15, 2017
New York, New York

ARLENE P. BLUTH, JSC