STATE OF CALIFORNIA
Arnold Schwarzenegger, *Governor*

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Dear Interested Parties:

The letter of July 2 was signed without my checking that it was the final, proofread version, and indeed it appears that at least one recipient received a much earlier version. The attached letter is the final which should have been sent out. It does not change any conclusions. Please discard the July 2, letter, and treat the enclosed as the Department's final resolution of the issue. I regret any inconvenience.

Very truly yours,

John M. Rea, Acting Director

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Re: Response to Alternative Prevailing Wage Rates for Owner-Operator Truckers Under Labor Code Section 1773

Dear Interested Parties:

As the Acting Director of the Department of Industrial Relations (DIR), I am writing you to report my conclusions regarding the Department's efforts to determine whether it is possible to set prevailing wage rates for owner-operator truckers who perform on- and off-haul trucking for California public works projects.

As many of you are aware, DIR has tried to accommodate requests by certain groups to adapt the prevailing wage statute requirements to meet the new economic realities of owner-operator on- and off-haul trucking in the construction market. DIR has concluded that it cannot do so, as the arguments advanced by Teamsters and some of the trucking associations are correct: the present statutes are limited to a wage and benefits calculation for what can "prevail," and these requirements cannot be adapted to accommodate the most common method of payment for owner–operator truckers, which is a unitary rate determined by a percentage of the value of the load hauled and vary by whether the trucker provides the trailer as well as his or her own tractor to accomplish the required hauling.

In its careful and broad ranging inquiry, the Division of Labor Statistics and Research (DLSR) determined that the vast majority (over 99%) of the hauling work brought to its attention was done by owner-operators. Their payment for both time and equipment use was a unitary sum which includes both the time and equipment usage rates. No historical precedent for turning this payment into a prevailing wage had been set, and the few suggestions on how to do so have proved infeasible.[1]

Therefore, DLSR's current publication of prevailing wages for on- and off-hauling, [2] which only provides rates that are able to be established under Labor Code Section1773 (wages and benefits

[1] This and subsequent prevailing wage rate results are rate settings not subject to the Administrative Procedure Act. (Government Code § 11340.9 (g).)

[2] DLSR publishes separate rates for the very different work of hauling within a construction site, which are not at issue here. These are distinguished in the rates now published (See also the discussion at the end). The scope of what work is covered as "on site," including reference to work between a dedicated site and a construction site, is not the subject of this inquiry (See generally *O.G. Sansone v. California Department of Transportation* (1976) 55 Cal.App.3d 434.).

for time only), and for only a few pieces of equipment, is correct.[3] A prevailing wage rate for the vast majority of on- and off-hauling work connected with construction cannot be established under the methodologies set forth in Labor Code Section 1773, and thus is not included in DLSR's publication.

Background

Teamsters Local 81 inquired about setting prevailing wage rates during the pendency of a coverage request that led to Public Works Case No. 2003-049, *Williams Street Widening Project/Off-Hauling of Road Grindings* (January 6, 2005), a determination which initially found that owner-operator truckers were entitled to prevailing wages.

This prevailing wage coverage determination addressed the off-hauling of asphalt grindings from a street repair project; however, because some of the work was done by owner-operators, the decision was preceded by an inquiry as to any history of prevailing wage enforcement for such owner-operators by the Division of Labor Standards Enforcement (DLSE). It was also established that there was no source of information for the value ascribed to the truck or truck and trailer that the owner-operator was driving, which was separate from the value of the labor provided by the owner-operator.

While the *Williams Street* determination was later withdrawn with respect to the coverage of owner-operators, the issue of whether the payment of prevailing wages to owner-operator truckers could be addressed by determination or enforcement under prevailing wage statutes remained unresolved. That DLSR had not established rate information from the sources listed in Labor Code Section 1773, and that DLSE lacked a standard protocol, did not determine that such rates could never be adapted to track the overwhelming change in the industry pay practices for this type of hauling work.

With the goal of reaching an appropriate resolution to the question of prevailing wage for such truckers, DIR staff met with groups of contractors during the period of time in which the section covering owner-operators in the *Williams Street* determination was under appeal. The interested parties with whom DIR communicated over the whole process included Associated General Contactors of San Diego and Southern California, Engineering and Utility Contractors Association and Association of Engineering Construction Employers, California Dump Truck Owners Association, Teamsters Local 36 and Local 853, Teamsters Joint Council 42, Operating Engineers Local 3 and Local 12, California Building and Construction Trades Council, Southern California Contractors Association, Redgwick Construction Company (dba Royal Trucking), and Bay Counties Dump Truck Association, among others. DIR received many suggestions about potential sources of rates for on- or off-haul trucking, including collective bargaining agreements

[3] Except in Alameda, Contra Costa, San Mateo, Santa Clara, Santa Cruz, and Solano County (where the prevailing wage rate applies to bottom dump, transfer rig or semi-end dump only).
[http://www.dir.ca.gov/dlsr/2005%2D2/pwd/determinations/northern/nc%2D023%2D261%2D4.pdf]

(CBA's). When these employer associations were asked by DLSR to furnish these CBA's, DIR was provided with fewer than those they actually had been told existed. DLSR therefore sought information from employers or brokers who hired truckers who paid truckers an hourly wage plus benefits, contacted various Teamster Locals, and explored other potential sources of information from state and federal sources. The federal counterpart of DLSR in the Department of Labor has never published, or required, prevailing wage rates for owner-operator truckers. In short, DLSR exhausted all of the initial sources of rates identified in Labor Code Section 1773.

DLSR's investigation showed that the labor market had moved away from payment of an hourly wage and benefits independent of equipment, a trend which the interested parties collectively attributed to two factors. The first was the Ninth Circuit Court of Appeals affirming a National Labor Relations Board order issued that halted an effort by construction unions, working on the construction site, to extend their requirements to use union labor beyond the site area so as to require that on- and off-haul trucking work be performed by unionized truckers exclusively (*Joint Council of Teamsters, No. 42 v. National Labor Relations Board* 702 F.2d 168 (9th Cir., 1983)). A second factor was a narrowed federal interpretation of the legal requirements of the Davis-Bacon Act, which governs federally aided projects, restricting the requirements for a wage and benefits prevailing wage to the site-of-work in a series of decisions, beginning with a case called *Midway* (*Building and Construction Trades Department, AFL-CIO v. Midway Excavators, Inc.*, 932 F.2d 985 (D.C. Cir. (1991); *Ball, Ball, & Brosamer v. Reich* 24 F.3d 1447 (D.C. Cir. 1994); *L.P. Cavett Company v. United States Department of Labor*, 101 F.3d 1111 (6th Cir. 1998)).[4] Together, these two developments hindered efforts by the unionized construction sector to extend requirements for "all union" co-workers' on the site to the hauling of the materials on to the site and off of the site.

During this inquiry, Royal Trucking provided an informal, but wide-ranging survey of payment information from multiple brokers who recorded data over a wide area of California for hundreds of owner-operators. This unverified summary of data conformed to the views presented to DLSR, and demonstrated that owner-operators did an overwhelming amount of the on-and off-hauling at construction sites.[5] Their unified payment system was a percentage of the value of the load for both the trucker's time and the equipment used. Most interestingly, however, the data also indicated that the percentages paid to owner-operators varied according to only two parameters: one rate existed for a driver and tractor only, and the other for a driver, tractor, and trailer; moreover, these percentages clustered around uniform figures (75% and 95%, respectively). This suggested that this particular labor market had a statistical tendency to produce certain majority and modal percentages for a driver and tractor or for a driver, tractor, and trailer – percentages set by the value of the load or by tonnage.

[4] *Midway* found that the Davis-Bacon Act did not extend to off-site trucking activities related to a construction project. *Ball* excluded from coverage batch plant and borrow pit workers located at facilities two miles away and *Cavett* excluded from coverage batch plant workers at facilities three miles away, limiting coverage to facilities "actually or virtually adjacent" to the site of the work.

[5] Indeed, if the summary data's number of owner-operators paid a unitary rate were to be measured against truckers who were paid wages and benefits, the former pay practice would certainly "prevail."

In response to this information, DLSR attempted to determine whether it would be mathematically possible to derive an appropriate prevailing wage rate for owner-operators for on- and off-haul trucking, providing it were legally valid. DLSR utilized Royal's survey data for a mock or test prevailing wage determination. Instead of displaying an hourly wage and associated benefits, it displayed what would be deemed "prevailing." DLSR then invited commentary from those involved in this prevailing wage inquiry, concerning the legalities involved with issuing such a rate, believing that proper investigation and verification would demonstrate Royal's survey data to be the most common method of payment in this labor market at the percentages cited. This legal inquiry invited the various parties' attention to the director's authority under Labor Code Section 1773.9 (b) (1):

> If a modal rate cannot be determined, then the director shall establish an alternative rate, consistent with the methodology for determining the modal rate, by considering the appropriate bargaining agreements, federal rates, rates in the nearest labor market area, or other data such as wage survey data. [6]

Teamsters filed the last response in April 2006, describing why such a "percentage of the load" rate was not legally permissible under Labor Code Section 1773-1773.9. On the whole, their arguments that the current prevailing wage law could accommodate only labor markets where wages were stated separately as an hourly rate, and where they were associated with benefits connected to an hourly rate, and which take no account of any amount or equipment use, appeared the more convincing. No rate such as DLSR displayed in its test determination will be published as prevailing in the next issued General Prevailing Wage Determinations.

DLSR also received additional suggestions on how to set a rate for owner-operator truckers, but no interested parties suggested that DLSR had failed, in its earlier inquiry, to find that the prevalent practice was hourly payment, independent of equipment rental, in the labor market for on-haul and off-haul trucking. One interested party suggested extending the Teamster rate for on-site work to off-site hauling. The suggestion was not accompanied by any evidence that DLSR's investigation had missed drivers working at that rate who were hauling on to or off of the site.

There were some suggestions that DLSR, despite the labor market's new unified payment system, ought nonetheless to adapt or synthesize a rate by dissecting the unified payment rate. The suggestion was that an artificial prevailing wage rate could be created by using CalTrans rental data, published as to certain equipment, and then deducting those rentals from the per-load payment to owner-operators, in order to derive an hourly wage and benefits pay rate for every load delivered. This assumed that such a derived rate could be calculated by the contractor on

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[6] The other sources referenced in this section were ones which, by this point, had proven fruitless: "the appropriate collective bargaining agreements, federal rates [and] rates in the nearest labor market are [...]." (Labor Code Section 1773.9 (b) (1).)

the job site, entering payment data into its certified payroll records for every load dumped on the site, by some process (involving the contractor's material-receiving employee) confirming the payment to the trucker from whomever dispatched the load, and then deducting the appropriate rental amount for that piece of equipment, which was current at that time. For the rental amount to be deducted, the suggestion pointed to CalTrans publications listing maximum rates for equipment.

The first difficulty is the complexity of a prevailing wage rate per load, especially if the owner-operator were to be dropping half a load at one prevailing wage site, and the other at a private construction site. The second is the source of the rental rate to be subtracted – the CalTrans figures are not market rates for equipment, but rather a maximum equipment amount that CalTrans will pay contractors, which it offers rates for only a limited number of trucks or trailers (for a list of truck rental rates, see http://www.dot.ca.gov/hq/construc/equipmnt.html). Because these are maximums, rather than market rates, and because they encompass only tractor-trailer combinations, the rates hardly address all of the varieties which are used by construction contractors. The rates set by CalTrans are for extra work (that which was not initially contemplated in the construction agreement) only performed by a contractor or subcontractor's employees and do not reflect the rates usually paid by CalTrans' contractors to owner-operator truckers they employ in the performance of CalTrans projects. These rates are added to wage rates reported by contractors for their employees for extra work for a total price set on a job-by-job basis when the extra work is necessary. Because these rates are used only for extra work and vary by job and location, they do not constitute an independent source by which to set a modal rate for the on- and off-haul work performed by owner-operator truckers.

Now that the investigation has been concluded and the necessary decisions regarding owner-operator truckers have been made as outlined below, DIR would like to thank the organizations and individuals that assisted in this extensive investigation.

Conclusions

1) While the labor market for on-haul and off-haul trucking is overwhelmingly paid as a percentage of the load value, and the work is done by owner-operator truckers rather than employees, the current prevailing wage law does not permit the labor market information about how this work is paid to be published as prevailing wage rates. The unitary payment practice may "prevail," but the practice does not produce a "prevailing wage" as defined by the Labor Code.

2) Within the constraints of the existing prevailing wage statutes' ability to measure rates of pay, there is simply no possibility, beyond the small number of counties and small number of the kinds of equipment for which DLSR could gather credible data that permits the traditional (i.e., purely wage and benefit rates per hour) prevailing wage rate to be published. [7] The information

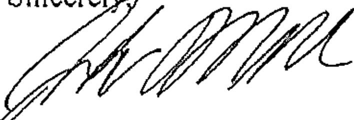
[7] Listed in footnote 2, above.

for the labor market is overwhelmingly that those paid in an hourly manner have, for the other reasons discussed above, no credible evidence that they perform this work. Thus, for the labor markets for which no rate is published, there is no prevailing rate in effect which DIR can enforce.

3) This DLSR examination of the current labor market does not make it impossible that a future shift in the labor market might allow the establishment of a rate by those paid by hours in wages and benefits. In view of the above, more than a claim would be required – proof would have to involve demonstrating that the petition requirements specified in California Code of Regulations, Title 8, Sections 16200 and 16302 have been met. [8] This information would then be verified, if necessary, by payroll records, showing that the on-haul and off-haul trucking more prevalent than the percentage-of-the-load payment to owner-operators.

None of the foregoing conclusions alter the existing prevailing wage rates established by DLSR for hauling within the construction site, which will continue to be published as they have been. For the labor relations reasons discussed above, this is a separate class, craft, or classification. [9] Thus far it has remained an area in which there is sufficient representation in the labor market under CBA's, which explicitly claim this work and where there is credible evidence truckers employed under those CBA's set the rate. In these circumstances, prevailing wage data is available, and thus the rates will remain published; and, their payment can and will be enforced by DIR.

Sincerely,



John M. Rea, Acting Director

CC: Robert A. Jones, Deputy Secretary for Policy and Enforcement

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[8] These section requires that any petitioner provide information about a number of factors, including: the basic hourly wage rate, overtime and holiday pay rates, and employer payments; the number of workers employed on the project during the payroll period for which data is submitted; the location of the project; the name and address of the contractors or subcontractors making the payments, and of all other contractors or subcontractors on the project; the type of construction (e.g. residential, commercial building, etc.); the approximate cost of construction; the beginning date and completion date, or estimated completion date of the project; the source of data (e.g. "payroll records"); and, the method of selection of the projects for which data is submitted, when data is not submitted for all projects recently completed or in progress in the locality or in the nearest labor market area.

[9] If on site work were not separate, then the rates would have to be compared to those for on and off-haul, whose differences as to who does the work, how they are paid, are discussed above, as well as the distances gone and management of the hauling.