

PROLIFERATING SEMI-SKILLED JOB TITLES IN CONSTRUCTION: AN UNHERALDED BUT SERIOUS PROBLEM FOR PREVAILING WAGE ADMINISTRATION

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In 1982, a coalition of Merit Shop contractors and unaffiliated observers convinced federal legislators to include a provision in Davis-Bacon regulations recognizing the existence of semi-skilled categories of workers in the construction industry called “helpers,” and authorizing the issuance of “prevailing rates” for them. This seemed an entirely reasonable modification, given the changes taking place in employment practices in construction, but was not well received by the Department of Labor which spent most of the next nearly two decades challenging or ignoring the legislative mandate before moving to rescind it entirely in 1999. The Department of Labor claims to have made a good-faith effort to implement helper regulations, but was thwarted by the imprecision of the job of the “helper” job title, which is not found in the classic taxonomy of construction jobs.

The construction industry follows the ancient craft guild system contemplated only two levels of skill. The system’s premise is that all construction tasks can be performed by a combination of workers who are either skilled journeymen fully initiated to the secrets of one of about a dozen trades, or are unskilled laborers (prohibited from using the tools of any trade). Provisions were also made for those in the process of becoming journeymen but who were still learners. These are called “apprentices.”

Some time after 29 January 1992, the Department of Labor (DOL) allowed prevailing rates to be established in Davis-Bacon wage determinations for an expanded number of categories of semi-skilled construction workers identified as “helpers,” as had been called for in revised departmental regulations originally promulgated in 1982 but suspended for various reasons over all but about one month of the next ten years. The period of implementation lasted until 05 November 1993, after which time DOL again suspended the changes, returning them to limbo for yet another five years, where they remain, today.

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Summary of DOL Position

Concerning the brief period of non-suspension, DOL has asserted four major points:

1. that implementation of helper rates was adequately tested by their being considered for inclusion in 78 prevailing wage surveys—all of the project surveys actually conducted—during the 1992 and 1993 period of non-suspension;
2. that implementation of helper rates was troublesome (“more difficult than was anticipated”) during the period of non-suspension, and was made more so because of court-ordered abandonment of a ratio provision limiting the use of helpers to two helpers per each three journeymen on prevailing rate jobs;
3. that few prevailing rates for helpers were established because there were found to be few persons working as helpers in the industry (“the use of helpers was not as widespread as previously thought”); and,
4. that a negative impact was suspected between the suspended regulation and formal apprenticeship and training programs.

DOL Conclusions

Because of these four factors, DOL concluded that, if implemented:

- the revised helper rule could not be enforced effectively (because of administrative difficulties associated with searching for helper titles, assessing whether they were validly applied, and determining if their use prevailed in areas where project surveys were performed);
- the revised rules would have little impact on construction employment patterns or costs of Davis-Bacon projects (because of the dearth of actual helpers); and that
- the revised rules might have a large, negative effect on the system of apprenticeship and training (by providing a newly found or expanded alternative to achieving journeyman status other than through certified apprenticeship or approved, formal training).

DOL has therefore proposed to rescind the helper rule changes entirely and to return to what it calls its “longstanding practice” of allowing the use of helpers only when all three of the following conditions obtain:

1. the duties of the helper are clearly defined and distinct from those of both the journeymen and laborers; and

2. the use of such helpers is an “established prevailing practice” in the area, and
3. “the term ‘helper’ is not synonymous with ‘trainee’ in an informal training program.”

Points Refuting DOL Positions

In the analysis that follows, I shall support the following contentions with evidence already in the record, mostly taken from the project wage surveys and determinations made during the period of non-suspension and from areas determinations put into effect then, or that went into effect before or after that period:

- **(Point 1)** that the length of the period of non-suspension and the small number of determinations issued during it was not a fair test of the implementation of the rule;
- **(Point 2)** that no special difficulty attended to implementation of the helper rate during the period of non-suspension, especially after the arbitrary and difficult-to-administer ratio provision was ordered to be abandoned by the court;
- **(Point 3)** that the actual use of helpers in the construction industry is at least sufficiently widespread that factors other than scarcity provide more reasonable explanation for why relatively few helper rates were determined to prevail during the period of non-suspension; and further, **(Point 3.1)** that a vigorous search for such rates, similar to searches for other construction categories actually made during the period of non-suspension, could have been but were not undertaken; and,
- **(Point 4)** that no evidence has been put forward demonstrating (or supporting DOL suspicions of) a negative relationship between allowing the use of helpers on Davis-Bacon projects and continuation of apprenticeship or other formal training methods, although **(Point 4.1)** there is evidence that a larger number of skilled journeymen will be needed to sustain the industry in the future than the number who can be provided by such programs, alone.

Conclusions From This Analysis

Based on these findings, which contradict those of DOL on each major point, I conclude that there is no reason why the suspended helper rule should not be implemented or could not be administered at least as effectively as any other rate setting aspect of Davis-Bacon administration.

I also conclude, based on additional analysis supported below by specific ex-

amples from prevailing rate determinations from appropriate periods, **(Point 5)** that DOL does not, in fact, have a “longstanding practice” of allowing the use of helpers only where their duties are clearly defined and distinct from those of journeymen or laborers, and that DOL has made no obvious reference (even with respect to jobs actually carrying the “helper” name) as to whether the work represented by such rates was or was not work independent of what would be performed by laborers or journeymen, whether the use of persons doing helper work was an “established prevailing practice” in the area, or whether the work’s title was or was not synonymous with “trainee” in an informal training program.

I further conclude, based on the evidence of the surveys and determinations, **(Point 6)** that DOL’s assertion of uniqueness of the helper category definition—that it would be “the first and only instance of determining a Davis-Bacon classification solely on the basis of the worker’s skill level and work site supervision”—is inaccurate, and that many such rates have been issued before, during, and after the period of non-suspension.

As an overall assessment, DOL is uncomfortable with the suspended helper category because it is “internally inconsistent,” defining a particularly named helper as either someone who is a trade-specific unskilled laborer in that trade or someone who is a semi-skilled person in that trade, although both would share the same job title at a determined minimum rate. It intimates that such a practice would be inequitable and that it opens the possibility of misuse. But the combination is not unusual, and the helper designation would be breaking no new ground in encompassing a range of skills. I will demonstrate **(Point 7)** that coverage of unskilled and semi-skilled persons by the same job title and wage rate and even unskilled and skilled persons by the same job title and wage rate is the Davis-Bacon norm for laborers.

Recommendations

DOL asserts, perhaps correctly, that implementation of the suspended helper regulation and establishment of prevailing rates for them would fail the test of being a regulatory scheme sufficiently capable of practical and efficient administration or enforcement to achieve the statutory purposes of the Davis-Bacon act. But this simply reflects characteristics of all of Davis-Bacon administration, and is not something specific to the suspended helper regulations. Either rescinding the regulatory changes recognizing helper use or continuing to fail to implement them would both leave a regulatory scheme in effect that is equally if not more incapable of achieving the statutory goals, while failing to provide whatever protection Davis-Bacon offers to an even greater number of workers performing jobs actually needed and being done on substantially all construction contracts. (I will provide specific examples, below.) Thus, the rescinding of the revised helper regulations or the continuing failure of the DOL to implement them cannot be sustained on these grounds, either.

Since DOL has provided no sustainable justification for why it should be allowed either to rescind the revised helper regulations (which have now been on the books and have withstood various challenges for 17 years) or continue to fail to implement them, I recommend it implement them while simultaneously opening for review the increasingly arbitrary and anachronistic system for wage information surveys now in effect.

Support For Point 1

The Period of Non-Suspension Did Not Provide an Adequate Period of Trial For the New Helper Provision

Determinations issued during the period of non-suspension were inadequate in both number and geographical spread to fairly reflect differing local conditions and standards of helper use. Tens of billions of dollars of construction work, widely geographically dispersed in all parts of the country, is done each year covered by the prevailing wage provisions of the Davis-Bacon act. The original and continuing theory of the act is that it would find the rates prevailing in each locality (never defined as anything larger than “county or other civil subdivision” of a state) for each prevailing category of laborers and mechanics doing similar work in each sector of the industry (residential, building, heavy, and highway) which would then be reflected back as the minimums allowed to be paid for similar work on similar covered projects in the future until another survey and determination are made.²

Thus, to cover the differences in prevailing local job delineation and payment practices adequately, surveys are needed in each of the 3,000 or so counties for each of four sectors of construction often enough that the information be reasonably current—say no more than 3 years old. This would require some 4,000 surveys per year. But during the 22-month period of non-suspension, DOL conducted 78 surveys,³ a rate of about 36 per year—one hundred times fewer than needed for adequacy.

² Thus both local wage rates and local work delineations are involved. It may or may not be the prevailing practice in Adams County, Ohio, for sheet metal workers to do HVAC duct work, (which might also be done by plumbers or carpenters or laborers or HVAC mechanics) and they may or may not use helpers to assist them. But if it turns out to be the particular practice in Adams County for this work to be done by sheet metal workers, the rates paid to those workers become the prevailing rate, and all who would do similar work on covered projects would do it using sheet metal workers at the determined rate—except (unless the suspended regulations are implemented) if it also turns out that their use of helpers is found to be the prevailing practice, which fact would be neglected and no rates would be issued—effectively eliminating the prevailing practice.

³ As will be discussed subsequently in the text, the number of viable surveys is actually much less, perhaps as few as 58.

Under strict interpretation of the regulatory requirement, this process could not be shortened by using a structured or unstructured random sample. The intent of the Davis-Bacon act is to reflect local practice, whatever it is, and there is no such thing as a national local helper-use practice, any more than there is a national locally prevailing tile-setter wage rate. Nevertheless, it might be argued that the standard practice of DOL has come to define “locality” in broader terms than “county” so as to ease administration of the act, especially with respect to highway projects, and this practice was followed by DOL in surveys conducted during the period of non-suspension. Setting aside arguments about the validity of DOL’s present patterning, which is haphazard, if a full set of surveys for national coverage were conducted with locality groupings proportional to those used in the surveys carried out during the period of non-suspension (but eliminating the 4 “landscape only” and 3 “water and sewer only” surveys as meaningless), an average of 35 counties per survey would be covered by highway surveys, 1.9 in the building sector, 3 in the residential sector, and 5.3 in the heavy construction sector. Applying these same ratios across the board, for reasonable currency and proper evaluation of whether using helper categories were the prevailing practice in local construction around the country, 333 residential surveys, 526 building surveys, 28 highway surveys, and 190 heavy surveys, a total of 1,077, would be required each year on a 3-year cycle.

Even under these broadened conditions of defining locality, no reasonable conclusions about the use of helpers or their prevailingness in local construction practices could possibly be drawn from the very few surveys that were actually performed—over 1,000 per year short of full coverage. Furthermore, among the surveys actually performed there was massive concentration in a very few parts of the country: 12 of the 16 highway surveys were in a single state; 17 of the 34 building surveys were in only 3 states; all 5 of the heavy surveys were done in 2 contiguous states; and 10 of the 14 residential surveys were done in only two states. Thus, not only was the number of surveys actually performed grossly inadequate, their geographical concentration made them even more so.

Secondly, the time during which the period of non-suspension applied was too short to provide a meaningful test. Details of the temporal horizons of DOL’s 78 listed surveys during the non-suspension period are not available, but typically the time over which rates are collected for survey purposes extends back 18 months to 2 years, or even longer. For example, a wage survey and determination for building work in Montgomery County Maryland, 94 MD 022, was conducted in October 1994 based on work performed in the county (selected from the Dodge Reports, as is the common DOL practice) between July 1993 and August 1994. The determination was actually issued 15 November 1995. Thus a time span of more than 2 years applied between when rates were actually paid and when the determination was issued for new work. Since it may be presumed that allowing helper rates on Davis-

Bacon work would encourage the use and reporting of helper rates on non-Davis-Bacon work, also (and thus influence the basis of survey submissions), a minimum of 18 months to 2 years of implementation of the revised helper rule should be expected to be needed before a fair assessment of the change could be begun. This was possibly reflected in the surveys that were actually performed. Among residential and building surveys dated 1992, 18 of 25 (72%) did not have any helper rates established (other than for the traditional union category of elevator helper), whereas in residential and building surveys dated 1993, 11 of 17 (65%) did have such rates. Whether or not the simple passage of time was a factor (there are other possible explanations), it is quite clear that inadequate time was allowed by DOL to test the revisions, especially as there is no evidence that DOL made any particular effort to inform contractors or others of the non-suspension.

Support For Point 2

No Difficulties Attendant to Implementation of the Revised Helper Regulations Are Apparent in the Surveys or Determinations Issued During the Period of Non-Suspension

DOL has suggested that it experienced great difficulties in implementing the revised helper regulations during the period of non-suspension, but has given no hint as to what those difficulties were, except to note that they were made worse by the court-ordered elimination of a ratio provision that would have allowed no more than two helpers per each three journeymen on covered work. There are, in fact, only three possibilities for where difficulty might arise in setting or administering rates for any particular construction work designation: 1) in surveying for the rates; 2) in determining if the particular job title and the work content it represents are the prevailing local practice; and 3) in administering the applicability of the rate subsequent to its having been established to ensure persons paid under it are doing the same work as were the persons whose rate established the rate in the first place.

It might be noted that on the basis of DOL's assessment of the ratio provision (that its elimination increased difficulty), only the third of the three possibilities could remain, since a ratio provision could have no impact whatsoever on either collecting helper rate information from contractors, to whose private work it would not apply, or in determining the prevailingness of the practice of using helpers on non-Davis-Bacon work in a locality, with respect to which the existence of a ratio provision would simply be irrelevant. Nevertheless, we'll evaluate all three areas.

1) There are no apparent difficulties in surveying for helper rates that do not already exist in surveying for all other Davis-Bacon rates, and no incremental difficulty attends to having helpers in the mix of construction jobs surveyed. It

is the practice of wage survey specialists when doing surveys of an area to use the Dodge Reports of construction work put into place there in the recent past as a starting point, mailing to the general and specialty contractors listed as participants on the projects a form (Form WD-10) on which they can submit information about the job titles and numbers of persons employed during the peak week of employment for their trade, and what such persons were actually paid in wages and benefits.⁴ (Others may also submit information of a similar nature, if known.) Many aspects of this process deserve further consideration, but of interest to the discussion at hand is the fact that DOL does not suggest a list of job titles to be included, nor constrain them in any way, because part of the function of the survey process is to see what job-naming and job-content practices prevail in the local market, as well as what wages and benefits were paid them.

Consider, for example, employees engaged in hanging and taping drywall, a type of construction work needed to be done in almost every residential or building project. In some areas, by some contractors, persons who do this work might be called carpenters, and be paid as such; in others, they might be called specialty carpenters (eg., carpenter, drywall mechanic) and paid at a different rate from other carpenters; or the hanging might be done by either of the above and the taping done by persons called laborers, or specialty laborers, or journeymen painters, or specialty painters, or plasterers; in yet others, they might simply be called drywall hangers and drywall tapers; or the hangers might be carpenters and the tapers might be painters; or the tapers might be called finishers instead.⁵ But it is the practice of DOL to accept the rates and job titles as submitted by the contractors who paid them, whatever those titles might be. Exhibit 1, which follows, is a sampling from the residential and building surveys conducted during the period of non-suspension, showing some of the variation in work title submitted in this limited number of surveys. (The titles in bold face were those for which at least one prevailing determination was made.) There are more than 200 job titles and variations in the list.⁶ Although a few of the helper titles shown may not have appeared in

⁴ Although Form WD-10 requires union as well as nonunion contractors to provide specific wage and benefit amounts, the actual amounts reported by union contractors are sometimes irrelevant. Wage specialists of DOL are directed to update and count all “negotiated” rates as if they were at the amount in the current contract if the only difference was the passage of time. Thus for “majority rule” purposes, any “negotiated” rate (of the same union) would be counted as being identical to the penny, even if actual reported rates varied. It is unclear if, in the event that no majority rate is determined to prevail, the average rates promulgated include similar phantom updates.

⁵ The variations in job titles in drywall work are substantially endless, principally because drywall work—like work associated with heating and air conditioning installation, alarm and telecommunications wiring, metal building erection and metal studding, concrete block, concrete slip form and machine finishing, and a number of others—was work developed after the building trades were organized into their established crafts, and “ownership” of it varies from place to place.

⁶ Adding heavy and highway titles to the list would increase it by 50 percent or so, but these are of little interest to questions involving helpers, since they are mostly improbably precise lists of equipment (some-

earlier or other surveys—helper titles have been as routinely submitted as any other job titles and appear in surveys before and after the period of non-suspension—clearly there is nothing special about them, nor any reason why DOL should have any more difficulty accept them on form WD-10 than it does to accept any of the hundreds of other job titles that appear in the survey listings.

times by brand name) in various sizes that can be driven by operating engineers (or sometimes by truck drivers or specialty laborers). The specificity at times defies credulity and at times is impenetrable. A Maryland (building) determination MD 960002 based on union rates is brief, but contains instances of both. In this determination, truck drivers are divided into 7 groups, each paid separately. Group 6 establishes the specialty rate that will apply to driving the following list of equipment of exactly 50 tons capacity (since Group 6 applies to “over 49 ton capacity to 59 ton capacity” while Group 7 applies to “over 50 ton capacity”): Dump trucks over 15 yard capacity, bottom and end dump euclids [a brand name, and a category made redundant by the category next in the list], all other euclid type trucks, turnarockers, ross carriers, atthey wagons, A frames, mechanics, utility drivers [two category who cannot reasonably have a capacity], semi-trailers or tractor-trailers, low-boy trucks [already covered by semi-trailers], asphalt distributor trucks, agitator mixer, dumpcrete or batch trucks, specialized earth moving equipment [concrete pump, concrete mixer, and earth rollers are also assigned to two different wage categories of power equipment operators], off-highway tandem back-dump [already covered as a euclid type], and double hitched equipment (where not self-loaded) [leaving one to wonder how to handle double-hitched equipment that is self-loaded]. Another example is from the New Jersey general determination NJ 950002, where in some counties truck drivers are divided into two groups and others into four. Different rates are set by group. In the four-group set, Group 1 contains, among others, flats, floats, water sprinkler, road oil, stringer, transit mixers, agitator mixers, winch trucks, stringers [again], asphalt distributors, seeding, mulching, tractors, and wagons. Group 3 also contains, among others, flats, floats, water sprinkler, stringer, road oil, transit mixer, agitator mixer, winch trucks, etc. [entirely duplicated, though not in the same order, without distinction].

Exhibit 1

**Some Job Titles Submitted to
Prevailing Wage Residential or Building Surveys
During Period of Non-Suspension
(Bold Face Titles Were Found Prevailing)**

Acoustical Ceiling Mechanic
 Acoustical Installers
Aluminum Siding Installer
 Air Balance Technician
 Air Compressor
 Air Tool Operator
 Asbestos Laborers
Asbestos Removers
Asbestos Workers
 ASP Distributors
 Asphalt Distributor
 Asphalt Paving Machine Operator
 Automatic Door Installer
Backhoe
 Bidwell Operator
 Blasters
 Boilermaker
Bobcat
Bricklayer
 Bricklayer's Apprentice
 Bricklayer's Helper
 Brick Mason Tender
 Broom Operator
 Bulldozer
 Carpenter
 Carpenter's Apprentice
 Carpenter Helper
 Carpenter Tender
 Carpenter, Acoustical Only
 Carpenter, Acoustical Helper
Carpenter – Cabinet
Carpenter (Drywall Only)
 Carpenter, Drywall Hanging Helper
 Carpenter, Drywall Also
 Carpenter, Drywall & Acoustic
Carpenter, Excluding Drywall
 Carpenter, Excluding Drywall Apprentice

Carpenter, Excluding Drywall Helper

Carpenters, Including Carpenters, Excluding Acoustic Ceiling Mechanics

Carpenter, Excluding Drywall, Batt & Acoustic

Carpenter Helper, Excluding Drywall, Batt & Acoustic

Carpenter Formsetting Only

Carpenter Formwork Helper

Carpenter Formwork Apprentice

Carpenters Including Drywall & Batt Insulation

Carpenter, Insulation Also

Carpenter, Insulation & Acoustic Also

Carpenter, Insulation & Forms Also

Carpenter, Only

Carpenter, Overhead Door

Carpenter, Piledriverman

Caulkers

Cement Mason

Cement Mason Apprentice

Cement Mason Helper

Cement Mason Tender

Cherry Picker

Concrete Finish Machine

Concrete Flatwork

Concrete Finishers

Concrete Finishers Helper

Concrete Workers

Cranes

Drillers

Drill Rig

Drywall Finisher

Drywall Finisher Helper

Drywall Hanger

Drywall Hanger Helper

Drywall Hanger

Drywall Mechanics

Drywall Mechanics Helper

Electrician

Electrician Apprentice

Electrician Helper

Electrician Trainee

Electrician, Alarms

Electrical, Excluding HVAC Control Wire

Electric – Low Voltage Also

Electronic Technician

Elevator Constructor

Elevator Constructor Helper

Elevator Constructor 70%

Elevator Constructor Probationary Helper

Elevator Mechanics

Elevator Mechanics Helper

Fence Erectors

Fork Lift

Formsetter

Front End Loader

Garage Door Installer

Garage Door Helper

Glaziers

Glaziers Helper

Grader

Gutter Installers

Heat & Fros Insulator

Heat & Frost Aprentice

Hoist Operator

HVAC Mechanic

HVAC Mechanic Helper

HVAC Mechanics Duct Work

HVAC Mechanics Duct Work Helper

HVAC Mechanic – Pipe, Duct

HVAC Mechanic – Wiring / Startup / Unit

Insulators, Batt

Insulator Helper, Batt

Insulator, Batt & Blown

Insulator Helper, Batt & Blown

Insulator, Blown

Insulator Helper, Blown

Insulators, Pipe

Insulator Pipe, Apprentice

Insulator, Pipe, Helper

Ironworkers

Ironworkers Apprentice

Ironworkers, Ornamental

Ironworker, Reinforcing

Ironworkers, Structural

Ironworker, Structural Apprentice

Jackhammer Operator

Landscape Laborer

Landscape Operator

Laborers

Laborer, Common

Laborers, Landscaping Also

Laborers, Landscaping Only

Laborers, Semi-Skilled

Laborer - Skilled

Laborers, Unskilled

Mason Tender

Mason Tender, Brick

Mason Tender, Cement

Mechanic

Millwright

Mortar Mixers

Oiler

Painters

Painters, Brush

Painters Brush, Helpers

Painters, Brush & Roller

Painter's Helper, Brush & Roller

Painters, Drywall Also

Painters Excluding Drywall

Painters Only

Painters, Spray

Painter / Wallpaper Apprentice

Paperhangers

Pavers

Piledrivermen

Pipe Coverer

Pipefitters

Pipefitter's Apprentice

Pipefitter's Helper

Pipefitter Trainee

Pipefitters, HVAC Also

Pipefitters, HVAC Only

Pipefitter – Fire

Pipefitter - Irrigation

Pipefitter, Pneumatic

Pipefitter, Sprinklerfitter

Pipelayers

Plasterers

Plasterer Tender

Plasterer Helpers

Plumbers

Plumbers, Including HVAC Pipe

Plumbers / Pipefitters

Plumber / Pipefitter Apprentice

Plumber / Pipefitter Helper

Plumber, HVAC Only

Plumbers Only

Plumber's Apprentice

Plumber Helper

Pump Operators

Raker

Refrigeration Mechanic

Roller, All Types

Roofers

Roofer Helper

Saw Man – Brick, Block

Screed Operator

Sheet Metal, Duct & Set Unit

Sheet Metal, Duct & Set Unit Apprentice

Sheet Metal, Duct & Set Unit Helper

Sheet Metal, Duct & Set Unit Trainee

Sheet Metal HVAC Only

Sheet Metal, Including HVAC

Sheet Metal, Including HVAC Apprentice

Sheet Metal, Including HVAC Helper

Sheet Metal Workers

Sheet Metal Workers (Only)

Sheet Metal Apprentice

Sheet Metal Helper

Sheet Metal Worker, Metal Building

Shingler

Shingler Helper

Shover Dozer

Skidder

Soft Floor Layers

Soft Floor Layer's Apprentice

Soft Floor Layer Helper

Sprinklerfitter

Sprinkler Apprentice

Sprinklerfitter's Helper

Stone Mason

Tile Setter

Tile Setter Helper

Tile Setters / Mechanics

Trackhoe

Trailer Driver

Truck Drivers

Truck Drivers – 1X

Truck Drivers, 2 Axle

Truck Drivers, 3 Axle

Truck Drivers, 4 - X

Truck Drivers to Site Only

Truck, Lowboy

Vinyl Siding Installer

Waterproofers

Waterproofer Helper

2) There are no apparent difficulties in determining if the particular job title and the work content it represents are the prevailing local practice, but whatever difficulties there might be would be no greater for helpers than for any other group or job title. The "Davis-Bacon Construction Wage Determinations Manual of Operations" is the document used by DOL in establishing proce-

dures for collecting and evaluating wage data, but it is almost entirely silent about establishing or selecting which job titles prevail, contenting itself with noting that “the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area.”⁷ (In other words, whatever gets submitted, if the rates prevail, so does the work.) It is not up to the wage specialists or the DOL to analyze job content, only to record it. The only question before DOL, then, should be that of determining the adequacy of response—whether 3 rates in the survey from 2 firms are enough to set a rate, etc. No greater difficulty should present itself to the wage specialists determining if the job title “mason’s helper” prevails in the area than in determining if the job title “mason tender” prevails. If wage data for either title were submitted in statistically sufficient quantity to issue a rate, a rate should be issued. Thus rates have been determined for a gutter installer, a trowel machine operator, and a material handler for pipefitters, and should always be equally easily set for a carpenter’s helper. (All of these were, in fact, determined during the period of non-suspension.) One is no more difficult to do than another.

3) The third area of possible difficulty concerns administration. Does administration become harder when helper rates are in effect? DOL has presented no evidence that it actually found it so during the period of non-suspension, but it has expressed concern that unscrupulous contractors, given the availability of helper rates, might misuse them, presumably by paying workers whose work might also be done by laborers at rates other than laborers’ or by paying workers doing semi-skilled trade work at rates other than the journeymen’s rates for that trade. What misuse this actually entails, if paying such wages on private work in the area is the prevailing practice, is difficult to quantify, but no doubt ensuring against this might require difficult and arduous work. It is not work DOL has undertaken for other craft-specific or semi-skilled jobs.

Only with respect to helpers named as such does DOL express a concern for the task differentiation that it does not apply to other categories. But if it is the prevailing local practice for drywall mechanics to use drywall helpers, it should not matter to DOL if the job of those helpers contains work that would otherwise be done by laborers, any more than it matters that cement block tenders, mason tenders (brick or cement) or plasterers tenders also do jobs that could otherwise be done by laborers, as do asphalt rakers, caulkers, cement finishers, form setters, pipe insulators, or pipefitter material handlers, to name a few at random. It also should not matter to DOL if it is the local practice to employ helpers in semi-skilled categories where they are doing sub-journeymen-level work at less than journeymen’s rates, because this is also the case with respect to frame setters and form builders, acoustical ceiling installers, drywall hangers, fence erectors, or metal building studders, to again

⁷ Wage Appeals Board ruling in *Fry Brothers Corp*, WAB Case No., 76-6, 06/14/77.

name only a few, all of whom are sub-journey-level carpenters who are typically paid less than full carpenters' rates. DOL may spend its time evaluating job content and auditing it with respect to helpers, admittedly difficult work, but there is nothing in Davis-Bacon administration that compels it, nor anything that makes doing it for helpers any different from doing it for the other jobs mentioned or for many others similar ones. DOL has no mandate to establish job content beyond identifying what prevails in a locality, or establishing "ownership" of various pieces of construction work by one trade or another, or of imposing union systems of job delimitation on nonunion contractors. Therefore post-determination administration should be no more difficult for helpers than anyone else.

Support For Point 3

The Actual Use of Helpers in the Construction Industry Is at Least Sufficiently Widespread that Factors Other than Scarcity Must Explain Why So Few Rates Were Set During the Period of Non-Suspension

The Current Population Survey, maintained by the Bureau of Labor Statistics, estimates that as of 1995 there were about 2.3 million wage-earning journeymen in the construction industry, 744 thousand laborers, 54 thousand trade apprentices, and 94 thousand construction helpers. If they all had the same title, helpers would outnumber the journeymen in 10 of the 16 trades listed (tile setters, carpet installers, drywall installers, plasterers, glaziers, insulation workers, paving and surfacing workers, roofers, sheet metal workers, and those not otherwise classified). In a 1980s analysis, DOL expected that if helper rates were allowed, they would be found in 2/3 of all rate determinations. Why is it then that during the period of non-suspension in "only 20 of the 78 surveys conducted, covering only 52 of 328 counties surveyed, were any open shop helper classifications found to prevail" by DOL? Furthermore, why, in 13 of the 35 surveys where a helper classification was issued was it issued for the union helper classification of elevator helper? How could it be that "of the 69 classifications in which helpers prevailed, only 48, or 2.7 percent of the 1,763 classification, were in the non-union sector"? "This is particularly noteworthy," says DOL, "because it had been assumed in the past that helpers would almost always be found to prevail for classifications in the nonunion sector."

Actually, if DOL can be said to have exaggerated helper use in past, it can also be said that it grossly underreports helper use in the above statistical summaries, before making the statistically unjustified leap of suggesting that the results of these few surveys say anything about the usage of helpers in the overall nonunion sector of the industry.

First, there were not 78 viable surveys conducted during the period of non-

suspension. Four of those surveys were for settling union jurisdictional disputes for a non-standard construction regime limited to landscape work; 3 other surveys were limited to water and sewer work as a separated sub-part of heavy work; 2 Tennessee building surveys which were counted as different were close duplicates of two others, each sharing over 95 percent of its survey findings, and have no business being counted separately. Additionally, 12 of the 16 remaining highway surveys were in a single state (whereas all 58 counties of another state were covered by a single survey), so the total number of defensibly different surveys done during the 22 month period of non-suspension was realistically only 58.⁸

For the purpose of evaluating helper use in the country as a whole, the heavy and highway surveys should also be eliminated, since helpers are rare and uncharacteristic in these areas. In the two all-union building determinations (Allegheny County, Maryland and Mercer County, New Jersey, the number of rates issued is substantially larger than the number of rates determined by survey to have been prevailing, because the issued rates followed union contracts, each having multiple categories of truck drivers, operating engineers, and laborers who were not identified or found as such in the surveys. Taking these corrections into account, the number of nonunion helpers remains the same, but the number of counties decreases from 328 to 105, the number of classifications decreases from 1,763 to 920.

Second, even this reduced level vastly underestimates the nonunion sector classifications in which nonunion helpers were found to prevail, because many of the remaining 920 classifications were union classifications. Eliminating the 56 union classifications in residential construction and the 355 in building construction drops the total number of not-union categories to 509. Of these, 48 were classifications of helpers. Of the remaining 461 classifications, 45 were of general or unskilled laborers, 27 were of specialty unskilled laborers, identified as such, in the landscape, asbestos removal, concrete, or asphalt specialties, 15 were of craft tenders, 24 were for truck drivers, and 82 were for various equipment operators—over and above those already designated as being in the “negotiated rate” category. None of the above classifications would themselves have helpers. Thus there were 313 relevant survey classifications which could possibly use helpers. As a measure of helper use in nonunion construction found in the relevant surveys made during the period 48/331 (14.5 percent) of all possible classifications were actually found to have helpers prevailing.

⁸ It might reasonably be argued that the number is even smaller, since the 5 Massachusetts residential surveys, the 5 Wisconsin residential surveys, the 3 Arizona building surveys, and others were done at the same time in the same states with data collected and analyzed in the same way, etc. But sometimes, as in the 7 Maryland building surveys or the 5 Virginia building surveys there are demonstrable differences between sub-groups. So with the exception of the 2 Tennessee surveys, which were clearly no more than 2 different by-county issues of the same survey (differing only with respect to one trade's work patterns), and which we have already eliminated, we shall not make further distinctions among the rest.

Third, this number also vastly under-represents “helper use in the nonunion sector,” because the surveys that took place during the period of non-suspension were not a structured or a random sample, and certainly were not a sample designed to test the use of helpers in nonunion construction. Among the residential surveys, 5 were in Massachusetts, the most union-dominated construction market in the country, 5 were in Wisconsin, which is not far behind Massachusetts, 2 were in Philadelphia and its suburbs, and only two were in Virginia in areas of considerable open shop activity. The building surveys were more dispersed, with about half of them in heavily union areas such as New York and New Jersey, but about half, also, in places like Florida, Texas, Tennessee, where there is greater nonunion activity.

Although the above three reasons give some indication of why a higher proportion of helper rates were not determined to be prevailing, the evidence from the surveys raises the additional question of whether DOL wage specialists may have been applying different and more stringent standards to finding nonunion helper rates prevailing than finding rates for equivalent union job titles prevailing. Exhibit 2 shows the survey results for the residential and building surveys during the period of non-suspension, and shows the number of wage rate submissions which in each case resulted in the rate being found to be prevailing or not. Although there are several instances where the elevator constructor helper rate was found to be prevailing based on a single survey rate, and two other helper categories in which rates were deemed to be prevailing based on a single wage submission, it would be unreasonable to expect all rates to be set that way, and if only one or two rates were received in the survey, one would expect the rate to be rejected. Above 3, however, the unexplained rejections of helper rates as prevailing begin to become suspicious, and into the teens and higher, they begin to become questionable.

Perhaps valid reasons exist for the rejection of each of the 148 helper rates in the survey which were supported by 3 or more rates but which were rejected as lacking sufficient data for a rate to be determined. Categories which seemed to have especially large number of survey rates ignored were bricklayers, carpenters, electricians, plumbers, and sheet metal workers.

Exhibit 2

**Disposition of Wage Rate Survey Information for Helpers
Submitted to Prevailing Wage Residential or Building Surveys
During Period of Non-Suspension**

<i>HELPERS SUBMITTED</i>	<i># in Survey, Rate Is- sued</i>	<i># in Survey, Rate Ig- nored</i>
Automatic Door Helper		2
Batt Insulator Helper		2
Bricklayer Helper	12	6, 10, 5, 4
Cabinet Installer Helper		1
Carpenter('s) Helper	14, 27, 9 (found pre- vailing, but no rate issued), 9	9, 10, 14, 35, 5, 13, 14, 16, 22, 7, 5, 41, 20, 14, 7, 1, 61, 22, 4, 1, 13, 10, 9, 1, 3, 21, 15
Carpenter, Acoustical (Acoustic Tile) (Acoustical Ceiling) Helper		6, 10, 2
Carpenter, Acoustical Partition Helper		2
Carpenter, Excl'd Drywall Helper		3
Carpenter, Formwork Helper		11
Carpenter, Metal Structure Erector Helper		2
Carpet Layer Helper		6
Carpeting & Resilient Floor Helper	3	
Cement/Concrete Finisher Helper		5, 9
Cement Finisher Helper		2
Cement Mason Helper		2, 2, 8, 3, 3, 4
Concrete Finisher Helper		3
Drywall Finishing Helper		1, 1, 2
Drywall Hanger & Studs Helper		14, 1

Drywall Hanging Helper		2, 2, 7, 1, 3, 1, 6
Drywall Mechanic Helper	14	4
Drywall Taper Helper		6
Electrician Helper	5, 5, 10, 18, 5, 69, 10	3, 3, 5, 23, 4, 84, 13, 2, 5, 27, 38, 20, 14, 2, 2, 3, 7, 7, 1, 3, 2, 7, 1, 1
Elevator (Constructor) (Mechanic) Helper	8, 4, 5, 4, 2, 32, 1, 1, 1, 1	2, 1, 2, 2, 7, 1, 5, 1, 8, 1, 4, 1, 1, 2, 2
Elevator Constructor – 70%	4, 4	
Elevator Constructor (Probationary) Helper		2
Fabric Awning Installer Helper		1
Fence Erector Helper		4
Garage Door Helper		1, 1
Glazier's Helper	18, 4, 4	1, 6, 3, 1, 2, 3, 2, 6, 5, 1
Heat & Frost Helper		2
HVAC Installer Duct Helper	27	5, 1
HVAC Mechanic Helper	8	17, 2
Insulator Helper		1
Insulator Helper - Blown		27, 2
Insulator Helper - Batt		27, 2
Ironworker, Ornamental Helper		2
Ironworker, Reinforcing Helper		1, 1, 1
Ironworker, Structural Helper		2, 2, 3, 1, 1
Landscape Laborer Helper		1
Marble Setter Helper		1, 3
Metal Building Erector Helper		3
Painter Helper	1	1, 1
Painter, Brush Helper		5, 3, 3, 1, 6
Painter - Brush, Roller Helper		2
Painter – Roller Helper		1
Painter, Spray Helper		2, 1
Pipe Insulator Helper	6, 1	1, 1

Pipe/Steamfitter Helper		2
Pipefitter's Helper	8	1, 4, 10, 7, 1, 1
Plasterer's Helper		1, 2, 2, 2, 7
Plumber Helper	16, 24, 15	4, 2, 7, 11, 2, 5, 2, 26, 5, 20, 3, 2, 4, 2, 3, 3
Plumber/HVAC Helper	23	
Plumber/Pipefitter Helper	2	8, 19, 32
Resilient Flooring & Carpet Laying Helper		3
Roofer Helper	4, 4, 11, 6	10, 3, 7, 13, 3, 5, 2, 1, 4, 8, 11, 4
Sheet Metal Worker Duct/Set Unit Helper		2
Sheet Metal (Worker) Helper	9, 3, 3	4, 14, 30, 8, 1, 1, 3, 2, 3, 3, 11, 9, 4
Sheet Metal Worker HVAC Helper	5	9, 23, 4, 1
Soft Floor Layer (/Carpet) Helper	3	1, 2, 3, 3, 1, 1, 2
Soft Floor Layer (exc. carpet) Helper		1
Sprinkler Fitter Helper	4, 11, 11	1, 16, 3, 2, 5, 5, 3, 2, 1, 2, 1, 7, 1, 1, 3
Sprinkler Fitter (Irrigation) Helper		3
Steamfitter – HVAC Unit Helper		1, 1
Steel Fabricator Helper		1
Terrazzo Helper		1, 5
Tile Helper		12, 5, 3
Tile Setter Helper	10	2, 2, 2, 2, 1, 4, 9, 3, 7, 11, 1, 1, 1, 1, 1
Tile Terrazzo Helper		7
Waterproofer Helper		2, 3, 12, 2

Of the categories of helpers represented in the surveys and shown in Exhibit 2, 53 instances occurred where the rate was found to be prevailing (regardless of how many survey submissions there were), whereas 148 rates were rejected although at least 3 survey rates had been submitted. Thus, for help-

ers, the success ratio was only slightly higher than 26 percent.

By contrast, Exhibit 3 shows the disposition of rates for the union equivalent of helper rates—rates for tenders, such as carpenters' tenders, or mason's tender. (The title is sometimes used in nonunion construction, also, and not all of those shown here are union or at negotiated rates.) In Exhibit 3, the job category was held to be prevailing 24 times, but rejected only 13 times when 3 or more rates were found in the survey. Thus, the success ratio for the equivalent union category was almost 65 percent—more than twice the success ratio of the nonunion job title.

Exhibit 3

**Disposition of Wage Rate Survey Information for Tenders
Submitted to Prevailing Wage Residential or Building Surveys
During Period of Non-Suspension**

<i>TENDERS SUBMITTED</i>	<i># in Survey, Rate Is-sued</i>	<i># in Survey, Rate Ig-nored</i>
Brick Tender		11, 8
Carpenter Tender		1
Cement Block Tender	56	
Hod Carrier/Brick Tender		8
Laborer, Brick Mason Tender	32	
Laborer, Mason Tender	6, 4, 4	
Mason Tender	14, 29, 85, 5, 4	14, 20, 3, 1, 2, 1
Mason Tender, Brick	7, 19, 14, 14, 41, 31, 16, 17, 18, 7	1, 6, 12
Mason Tender, Cement	24, 23	2, 1, 3, 2, 1, 3, 2, 4
Plasterer Tender	11, 1	7, 28, 2, 2

Exhibit 4 gives a similar picture for categories of workers who might be called "hidden helpers." These are categories used by both union and nonunion contractors for specialized categories of laborers who, like tenders, have as the principal duties the support of either trade journeymen or more skilled laborers, but who are not always called laborers. In Exhibit 4, they are shown with their most likely trade superior. This group has a success ratio between the others, at about 50 percent. Thus the pattern is consistent: in the residential and building surveys done during the period of non-suspension, job titles encompassing helper duties were most likely to be found prevailing if they were union titles, least likely to be found prevailing if they were nonunion titles, and in between if they were titles used in both areas.

Exhibit 4

**Disposition of Wage Rate Survey Information for
Helper-Like Laborers
Submitted to Prevailing Wage Residential or Building Surveys
During Period of Non-Suspension**

<i>HELPER-LIKE LABORERS SUBMITTED</i>	<i>HELPER TO</i>	<i># in Survey, Rate Issued</i>	<i># in Survey, Rate Ignored</i>
Asphalt Distributor	Paver	3	1, 3, 1
Ashpalt Luteman	Paver		2
Asphhalt Raker	Paver	38, 5,6	1, 6, 36, 30, 2, 7, 5, 3, 4, 4, 1, 1
Ashphalt Screedman	Paver	6	5, 2, 2, 3, 5, 4, 1, 2, 1, 1, 1, 1, 2
Asphalt Wacker	Paver		3
Asphalt Worker	Paver	6	3, 10
Caulker	Waterproofer	22, 5, 4	6, 2, 11
Cement Block Layer	Mason	63	10
Cement Finisher	Mason	66, 42, 31, 5	
Concrete Finish Machine		2	1, 1
Concrete Finisher	Mason	11	4
Concrete Pumper	Mason		11, 1, 1
Concrete Worker	Mason	13, 8, 28, 66	4, 4, 11, 1
Electrician Trainee	Electrician		2
Elerctical Groundman	Electrician	4	3
Form Setter	Mason		2, 2, 2, 5, 4, 8, 5, 5
Galzier Finisher	Glazier		1
Laborer – Hod Carrier	Bricklayer	16	
Lather	Plasterer	33, 3	
Materials Handler, Pipe-fitter	Pipefitter	12	
Mortar Mixer	Mason	7	1, 10, 1, 1, 2, 1, 3, 5, 5, 8

Pipe Insulator	Pipefitter	22, 5	2
Saw Man (brick, block)	Mason		1
Semi-skilled Laborers	Various		2
Pipefitter Trainee	Pipefitter		2
Scaffold Builder	Mason		3
Sheet Metal Worker Duct Set Trainee	SMW		2
Sheet Mtal Worker Set Unit Trainee	SMW		2
Terrazzo Finisher	Terrazzo Setter		5
Tile Setter Finisher	Tile Setter	6, 12	4, 1, 9
Tile Terrazzo Finisher	Tile or Terrazzo Setter	9	
Tool Material Handler – Pipefitter	Pipefitter		3
Tool Material Handler – Plumber	Plumber		6
Tool and Material Handler	Unknown		3
Trenching Machine Operator	Pipelayer		5
Trowel Machine Operator	Mason	20	1, 1, 1

In summary, DOL's failure to find helper rates prevailing during the period of non-suspension seems to have had more to do with what type of surveys if conducted, where it conducted them, and how it interpreted the results than with how many persons actually worked in the construction area as helpers. The few surveys that were done in nonunion areas, like western Virginia, Florida, Texas, parts of Maryland, or Tennessee, found a great deal (proportionately) of helper use. Not surprisingly, highly union areas, like New York, New Jersey, Massachusetts, or Wisconsin, found little.

If DOL were actually interested in finding out the degree to which helper categories are used in nonunion construction so as to form a better estimate of how they might impact Davis-Bacon determinations in the future, it has three options: 1) it could, as already suggested above in the discussion of point 1,

continue to conduct surveys until the entire country was covered (Since the entire country has never been surveyed for Davis-Bacon purposes in this 70-year history, that probably will not be done.); 2) it could conduct the surveys it does do in a more balanced fashion, including more sun-belt and fewer rust-belt areas, especially since the sun belt is where most construction activity takes place; 3) it could do specially-focused surveys in depth (with follow-up phone calls, etc.) in selected areas in the same way it did surveys for landscape concerns.⁹

Support For Point 4

No Negative Impact on Apprenticeship or Formal Training Programs

To the degree that the revised helper rules would allow semi-skilled, informal, on-the-job training to take place, they encourage rather than discourage upward mobility. Laborers have dead-end jobs, but helpers who use the tools of the trade under supervision of a journeyman are elevating themselves in the same way that persons in almost all other skilled fields elevate themselves—by accumulating enough on-the-job training and wisdom to advance. DOL need not concern itself that contractors seeking cheap semi-skilled workers might use helpers “who may never become journey level workers, in lieu of apprentices and trainees participating in formal programs” for whom they might otherwise set up apprenticeships to take advantage of their cheap rates, for two reasons.

First, it is not clear from the determinations made during the period of non-suspension that the economic advantages seen by DOL always obtain. For example, determination 92VA018 finds carpenters helpers at \$9.02 while carpenters’ apprentices are at the lesser rate of \$8.70, plumber helpers are at \$6.68 while plumbers’ apprentices are at \$6.38; and 93VA001 finds elevator constructor helpers at \$14.43 while elevator constructor (probationary), a training rate, are at \$7.20. In these and similar cases, a contractor driven by the idea of achieving semi-skilled work at the cheapest price would still find it

⁹ The apparent basis for the 4 (or 16, depending on how one counts) “landscape only” surveys conducted during the period of non-suspension was one of determining “ownership” of such work in Illinois, where Teamsters, Laborers, and Operating Engineers were all laying conflicting claim to various aspects of it. To resolve the question, DOL undertook extensive surveys simply to resolve inter-union conflicts and to establish whose negotiated rates would apply to what aspect of this hitherto ordinary and undifferentiated work. If, during this period of non-suspension, DOL had been conducting similar surveys to determine who “owned” what portion of trade-specific semi-skilled work so it could be differentiated between laborers and helpers (for example) DOL might have a justifiable claim of special difficulty and expense. But the surveys it actually conducted during this period, except for the landscape ones and 3 in the water-and-sewer-only area, were ordinary, and were handled in the ordinary way.

advantageous to use apprentices rather than helpers.¹⁰

Second, the premise that helpers (or other semi-skilled workers, regardless of their job names) may never rise to journeyman levels is demonstrably false. Although estimates vary somewhat, it is generally agreed that no more than one-third to one-half of the journeymen in the bigger construction trades (carpentry, electrical work, plumbing) achieved their status by completing formal apprenticeship programs, and the proportions rising that way in many of the smaller trades (ironwork, glazing) is even smaller. Those who achieved journeyman status by other means did so through military experience, on-the-job training, or self-instruction. Thus at least a measurable proportion of helpers and semi-skilled workers can be expected to move up, and the existence of helper categories facilitates this.

Furthermore, the present system, which prohibits helpers and therefore (by DOL logic) provides maximum support for the system of apprenticeship and formal training, is incapable of supplying a sufficient number of new journeymen to sustain the needs of the industry. Bureau of Labor Statistics Occupational Employment Statistics estimates that the construction trades are growing at about 1 percent per year, projected through 2005. The Bureau of Labor Statistics Current Population Survey estimates total employment in the skilled construction trades (counting the incorporated self employed, who can be presumed to have journeyman status) number 3.3 million. The industry's needs for new journeymen can thus be estimated by assuming an average working life of a journeyman after achieving journeyman status—say, 40 years. A turnover of 1/40th of 3.3 million per year creates an annual demand of 82,500. The 1 percent industry growth rate adds another 33,000, for a total of 115,000 new journeymen needed annually. The same source estimates that there are currently somewhere between 51,000 and 54,000 construction apprentices, and it is known that almost all of these are in four-year programs. Even neglecting the estimated 20 percent drop-out rate (much higher, by other estimates), the maximum number of new journeymen who can be produced by the apprenticeship program is that number divided by 4—less than 14,000 per year, which leaves a massive shortfall of skilled and trained journeymen of almost 100,000 per year. So long as there is room for different alternatives to reaching journeyman status, the fact that more than one route

¹⁰ Of course, no contractor would establish an apprenticeship program in order to pay trainees less than helpers, but it is unlikely one would do so to pay trainees less than journeymen, either. On a related question, the economically fine-tuned contractor would in many cases prefer to employ common laborers rather than craft-specific helpers. In 28 comparisons in ten different surveys between craft-specific helper rates and laborer rates from the same domain (both nonunion) only 5 found an economic advantage in using the craft-specific helper. In the other cases, laborers were cheaper. In these cases, and they can be hypothesized to the general situation in nonunion areas, because wage rates in helper categories will consist of some craft-specific unskilled work and some semi-skilled work, the rates coming out of a wage determination process will be higher than those that would apply strictly to unskilled work—so even if the helper category were to turn out to be dead-end, at least it would be dead end at more money than dead end as a laborer.

might be open is advantageous to all.

Support For Point 5

Despite Claims to the Contrary, DOL Has No “Longstanding Practice” of Limiting Helper Use to Cases Meeting Three Criteria

DOL proposes to return to establishing helper rates only when three conditions are met simultaneously:

1. the duties of the helper are clearly defined and distinct from those of both the journeymen and laborers; and
2. the use of such helpers is an “established prevailing practice” in the area, and
3. “the term ‘helper’ is not synonymous with ‘trainee’ in an informal training program.”

Starting with point 3, either the term “helper” is synonymous with “trainee in an informal training program” or it is not. No available reference source offers these terms as synonyms, so we can conclude point 3 is formally met by any helper category, and thus is meaningless.¹¹ Point 2 also fails as a criterion if its emphasis is on the word “established,” since the purpose of Davis-Bacon is to discover what rates and practices prevail, and it matters not at all if they did or did not do so in the past. Although in past years DOL has developed elaborate heuristics for establishing whether any particular job practice or job title or division of work between trades prevails, the simple answer is that a job title or work practice prevails (in all cases but those involving helpers, unless the changed regulations are implemented) if its rates prevail. Thus prevailing job titles and work delineations in the determinations include such things as gutter installer or, from a 1995 Montgomery County, Maryland, determination, a category of plumbers defined as one that works on,

Apartment Buildings over 4 stories (except hotels), schools, colleges, and speculative office buildings, strip shopping centers, churches, water coolers, room air conditioning units, appliances, packaged ice machines, and light commercial refrigeration and/or air conditioning systems serving a single business in a single story building and not to exceed 5 h.p. or tons, self-contained package

¹¹ Alternatively, point three might not be intended to be taken literally, but to might be meant to restrict application to only those helper categories that have no informal training component. But this, too would be meaningless, because there is no such thing as a job that has no informal training component—even a flagger learns and gets better as he goes along. Thus, taken literally, all helper categories meet criterion #3; taken generically, no helper (or any other job) categories meet criterion #3. Criterion #3 is meaningless.

unit up to and including 5 h.p. or tons.

The main purpose of including point 2 may have been to try to carve out a niche for elevator constructor helpers, who have been used with that job title in union construction for decades, and who have been unwilling to change their designation to other things, although a few have gone over to “elevator constructors 70%” and variations on that theme. Point 2 does not save elevator helpers from being in violation of the DOL’s claim not to have set rates for such jobs in the past.¹²

Besides elevator constructor helpers, has DOL routinely set rates for other types of helpers, although their work is not clearly defined as being different from the work of both laborers and journeymen? Yes, routinely. (Only in the most narrow semantical sense of helpers actually being called “helpers” are rates disallowed for persons performing helpers’ work, even when that work is work that would otherwise be done at a different rate by laborers, or is work that would otherwise be done at a different rate by more fully skilled workers.) Exhibit 4 has already presented examples of wage rates set by determinations for helper-like laborers. Exhibit 5 looks at the semi-skilled aspect of the helper-like categories

Exhibit 5

Examples of Wage Rates Set For Semi-Skilled Helper-Like Journeymen

<i>SEMI-SKILLED OR SPECIALTY CARPENTERS WHO MIGHT ALSO BE LABORERS OR HELPERS</i>	<i># in Survey, Rate Is- sued</i>	<i># in Survey, Rate Ig- nored</i>
Acoustical Ceiling Mechanics	3, 9, 19, 69, 20	2, 2, 2
Carpenter - Acoustical	53, 198, 137	3
Carpenter- Form Work	86	37, 5
Carpenter Who Also Does Dry- wall	211	
Fabric Awning Installer		1

¹² Since the end of the period of non-suspension, DOL has taken to eliminating helper rates for elevator constructors, also, although that had not been done in the past under the “longstanding practice.” Apparently, if DOL now rescinds the helper regulation changes, it intends to drop coverage of this ancient helper category as well, which would interfere with the employment patterns that have prevailed for decades among contractors in this trade as well.

Fence Erector	22	1, 10, 4, 10, 6, 2, 1, 1, 2
Installer – Mini Blinds (Blinds, Chalkboard)		1, 2
Sign Erector		6, 25
Window Covering Installer		7

<i>SEMI-SKILLED OR SPECIALTY INSULATORS WHO MIGHT ALSO BE LABORERS OR HELPERS</i>	<i># in Survey, Rate Issued</i>	<i># in Survey, Rate Ignored</i>
Batt Insulators	3, 17, 15	4, 3, 3, 2, 6, 2, 2, 2
Blown Insulators	15	2, 2
Carpenter – Non-Mechanical Insulator	198	
Insulators, Batt, Blown	42, 21, 96	3, 21
Seal Coater, Concrete		8
Waterproofer	7	2, 2, 4, 3, 2, 3, 3

SPECIALTY EQUIPMENT OPERATORS WHO MIGHT ALSO BE LABORERS OR HELPERS	# in Survey, Rate Issued	# in Survey, Rate Ignored
Air Compressor		1
Bobcat		3, 2, 6, 1, 1, 2
Broom Operator		2, 5, 1
Cherry Picker		4
Compactor		1, 1
Forklift		1, 1
Hoist Operator		4, 1
Gannon Tractor		2, 1
Landscape Operator		1, 1
Oiler	6	5, 1, 1, 1, 1
Oiler, Crane		3
Oiler, Drill		2

Oiler – POE		1
Pickup Truck Operator		2
Roller, Roller/Compactor	19, 9, 3, 3, 3, 4, 3	20, 8, 1, 1, 1, 1, 6, 2, 1, 2, 1
Roller – Hot Mix	8	1, 1
Tractor Operator		4, 3, 1

None of these (or the job titles in Exhibit 4) meet the criteria for differentiation between their helper-like duties and the work of fully skilled journeymen. Although none have been called helpers, per se, they in fact do helper work in all but name. Thus, in addition to such obvious union-designated helpers as elevator constructor helpers, and in addition to helper categories that are included in determinations that are “all negotiated” and include such helper titles as line construction groundmen, plasterer and lather tenders, mortar tenders, hod carriers, boilermaker’s small boiler repair mechanic, and the like, DOL has consistently found rates jobs that fail to meet the criteria it says prevent it from finding rates for helpers.

Support For Points 6 and 7

The Helper Category Is Not Unique in Being a Davis-Bacon Classification Solely on the Basis of the Worker’s Skill Level; Nor Is It Unique in Setting a Single Rate for Multiple Levels of Skill

Examples supporting both of these points are readily found among the area wage determinations for laborers in effect before, during, and after the period of non-suspension. These are listed in Exhibit 6. All of the job titles presented in Exhibit 6 could be grouped into one category, or into, 2, 4, 6, 7, 10, or 11 different wage categories, differently defined and based on fine gradations of skill. Some of these (indented in the table) are differentiated from one another within the listing solely on the basis of workers’ skill levels. In all cases in determinations where laborers’ rates are not separately identified, such as, for example, in 92 TX 002, or 92 AZ 819, or 93 CO 003, it can be assumed that the same general laborer rate would apply to all the levels of skill and all the jobs listed (unless specific jobs are separately identified to the contrary)

Exhibit 6

Construction Laborer Job Descriptions Found in Prevailing Wage Determinations – Exclusive of Tunnel and Highway Specialities

(Helper and helper-equivalent designations found within the listing are underlined. Those set in bold font are designations identified in at least one determination as “skilled.” Those which are indented represent different skill levels of the same job.)

Adzeman

Air Blasting

Air Tool Operator

Air Trac Operator

Air Track Helper

Air Tamping Hammerman

Arc Welding (in connection with laborer’s work)

Asbestos Removal Labor

Asphalt Belly Dump Lay Down

Asphalt Headerboarder

Asphalt Ironer

Asphalt Lute Person

Asphalt Raker

Asphalt Rubber Distributor Bootperson

Asphalt Tamper, Smoother, and Raker

Asphalt Workers (shovelman, plant crew)

Astro Turf Layer

Backfiller

Bander

Bellmen

Bio Filer, pressman, installer, operator

Bit Grinder, Drill Doctor (in field)

Blacksmith Tender

Blaster

Blasterers Helper

Block/Bricklayer Tender

Blocklayer Tender

Bobcat Operator

Boring Machine Tender

Brick Cleaner (jobsite only)

Brick Paver (asphalt block paver, asphalt block sawman, asphalt block grinder; hastings block or similar type)

Bricklayer Tenders

Brush Cutters

Bucket Dumper

Buggymobile Operator

Burner Planer Operator

Burning and Cutting Torch

Button Setter

Caisson Workers

Camp Maintenance Laborer

Carpenter TendersCarpet Layer Tender

Caulker

Cement Dumper

Cement Finisher HelperCement Finisher TendersCement Mason Tender

Cement or Lime Dumper or Handler (sack or bulk)

Cemetery Laborers

Certified Hazardous Waste Worker

Cesspool Diggers and Installers

Chainman, Rodman, Grade Marker

Change House Attendant (Changehouse Person)

Chainsaw Operator (filer)

Chat Box Man

Chemical Grout Jet Person

Cherry Picker Person

Chipper (clearing and grubbing)

Choke Setters

Choker Splicer

Chucktender (wagon, airtrack and hydraulic drills)

Cleaner, Lumber, Brick

Cofferdam Worker

Compactors of all types

Concrete Burning Machine Operator

Concrete Chipper

Concrete Core Cutter

Concrete Curer

Concrete Cutting Torch

Concrete Finisher Tender

Concrete Forms Cleaning and Handling

Concrete Grinder and Sander

Concrete Gunman (pneumatic)**Concrete Laborers** (power buggy, concrete saws, pumpcrete nozzleman, vibratorman)**Concrete Laborer** (curb and gutter, chute handler, grouting, curing, screeding)Concrete Laborer (belt, pipe and/or hoseman)

Concrete Liquid Hardner

Concrete Mixer

Concrete Nozzleman (pneumatic)

Concrete Pipe Cutter

Concrete Puddler

Concrete Sawyer (hand guided) (Concrete Saw Operator)

Concrete Sealer

Concrete Shute Handler

Concrete Vibrating Machine

Conduit Layer (Conduit Layer, telephone and electrical)

Conveyor Operators used in tending Bricklayers, Plaster Tenders, and Window Cleaners

Corrugated Metal Culvert Pipe Layer

Covering of tanks, structures & material piles with tar-paulins

Creosote Material Handler Craft Tender

Cribber (Cribber and Shorer)

Crocklayer

Crusher Plant Laborer**Curb Asphalt Machine Operator****Cutting Torch Operator**

Deck Hand

Demolition Laborer

Diamond Driller

Ditch Digger

Ditch Witch Operator

Dredge Hand

Drillers (wagon drills, air-track drills, hydraulic drills, other)**Drill Doctor and/or Air Tool Repairman**

Dry-Pak-It Machine

Dry Packing of concrete, plugging, filling of she bolt holes

Dump Man

Electrician Laborer

Electric Tool Operator

Environmental Laborer (asbestos, hazardous and toxic waste, oil spill)

Environmental Laborer (marine work)

Excavator

Fence Installer

Final Clean-Up Labor

Fine Grader

Fire Watch Laborer

Flagman (Flag Person, Flag Waver, Flagger)

Floor Sanders (concrete)

Forklift Operator

Foam Gun or Foam Machine Operator

Form Blower

Form Builder

Form Builder Tender

Form Oiler

Form Raiser

Form Setter

Form Setter Tender

Form Stripper

Gardner, horticultural and landscape laborer

Gabion Setter

General Laborer

Grademan

Grade Setter (pipeline)

Grating and Grill Work for Drains
 Grout Gun Person
 Grout Mixer Person
 Grout Pump Person
 Green Cutter (dam work)
 Guardrail Laborer, Bridge Rail Installer
 Guardrail Machine Operator
 Guinea Chaser
Gunnite Gun
 Gunnite Industrial Fume Stack
 Gunnite Laborer
Gunnite Operator
Gunnite Nozzle and Rod
 Gunnite Rebound
 Heater Tender
Heat Welder of Plastics
High Rigger and Tree Topper
High Scaler
Hod Carrier
 Hook Tender
 Hookup Men
 House Mover
 Hydraulic Jacks and Similar Mechanical Tools
Ironworker Tenders
Jackhammer or Pavement Breakers (more than 45 pounds)
 Jacking of Pipe
 Jackleg Miner
 Jetter
 Jumbo Person
 Kettleman - tarman
 Hydro-Seeder Nozzleman
 Laborers (building)
 Laborer, General Clean-Up
Laborers working for mechanical & electric contractors (including but not limited to digging of all
 trenches, ditches, holes, paving of concrete & cleaning of all trash)
Lagger
 Lagging, sheeting, whaling, bracing, trenchjacking, lagging hammer
 Landscape and Planter
 Landscape Laborer
Laser Beam Operator
 Layton Box Spreader
 Leverman
 Line Construction Linemen
Line Construction Equipment Operators & Cable Man
 Line Construction Groundman
 Line Construction Inexperienced Groundman
Line Construction Driver Groundman (Material)
Line Construction Driver Groundman (Class I and III)

[each of the above Line Construction laborer titles had separate rates issued.]

Lighting Installer

Licensed Powdermen

Logloader

Magnesite, epoxy resin, fibeglass, mastic worker (wet or dry)

Man Mixing Cement for Cement Finisher

Mason Tender and Mud Mixer (sewer work)

Mason Tender

Mason Tender – Brick

Mason Tender (Brick/Block)

Mason Tender (Concrete)

Masonry Forklift Operator

Material Handlers

Material Hose Operator (walls, slabs, floors, and decks)

Membrane Vapor Barrier Installer

Metal Pan Handler

Masonry Tender

Mechanic Tenders

Men directly tending lathers, masons, cement masons, and plasterers

Miners

Miners Helpers

Mortarman for Mason & Plasterer

Mortar Mixers

Mortar Mixer used in connection with hose for gypsum roofs (roofer's tender)

Mortar Mixer used in connection with plastering

Mortar Mixer used in connection with fiber and soundproofing

Motormen

Mucking Machine Operators

Multi-Trade Tender

Nipper (Outside Nipper)

Packing Rod Steel and Pans

Paving Breakers

Pioneer Drilling and Drilling Off Tugger (all types drills)

Pipelayer, Pipe Builder, Plastic Welding

Pipelayer's Backup (coating, grouting, making of joints, sealing, caluking, diapering and including rubber gasket joints, pointing and any and all other services)

Pipelayer Tender

Pipe Caulker and/or backup man – pipeline

Pipe Cutter

Pipe Doper

Pipe Wrapper

Plastic Pipe Layer

Plasterer Tender

Plasterer Clean-Up Laborer

Plasterers Helper

Plumber Laborer

Pneumatic Gohper

Pneumatic Powder Person

Pneumatic or Power Tools Operator
 Porta Shot Blaster
 Portable or Chemical Toilet Serviceman
 Post Hole Digger

Pot Tender

Powderman (Powder Blaster)

Powderman Tender

Power Broom Sweeper
 Power Saw Operator

Power Tool Operator

Power Type Concrete Buggy
 Powerman & Chuck Tender

Powderman Tender

Precast Manhole Erector
 Precast Slab Layer (Floors, Roofs, Walks, Curbs)

Pressure Pipe Tester

Primer Person

Pump Man or Mixer Man

Railroad Bull Gang Trackman

Railroad – Mechanical Equipment (includes Spiker, Puller, Tie Cleaner, Tamper, Pipe Wrapper, Power-Driven Wheelbarrows, Operators of Hand Derricks, **Towmasters, Scootcretes, Buggymobiles,** and similar equipment.)

Railroad Switch Layout Laborer

Railroad Track Laborer

Rammer

Reinforcing Iron Worker Tender (carrying and hauling of all rods and materials for use in reinforcing concrete construction)

Reinforced Steel Handler

Retimber Person, wood or steel

Rigger

Rip Rap Stone Man

Rock Slinger

Roofer Tenders

Rotary Scarifier

Roto Scraper and Tiller

Roustabout

Salamander Heater, drying of plaster, concrete, mortar.

Sandblaster

Sandblaster Tailhoseman

Scaffolds and Staging for masons and plasterers

Scaffolds: Erection, planking and removal of all scaffolds used for support for lathers, plasterers, brick layers, and other construction crafts.

Scaffolds: (Specially designed by carpenters) laborers shall tend said carpenter on erection and dismantling thereof.

Scaffold Building and Erecting

Scale Man

Septic Tank Digger and Installer

Signalman

Sewer Caulker

Sewer Plant Maintenance Man

Saw Tender
Screeder (asphalt or concrete)
 Sewer Cleaner
 Sewer Pipe Layer
 Sewer Pipe Wiper & Pot Person
 Sewer Pipe Yarnier
 Signalman (including traffic control)
 Sign Erector
 Single-foot Tamper
Slip-Form Riser
 Sloper
 Slurry Seal Squeegee Man
 Slurry Work (Mixer Operator, Applicator, Squeegee Man, Shuttle Man, Top Man)
 Soil Test Operations
Spaders
 Spikers
 Spotters Trucks
 Stake Hopper (Stake Jumper)
 Steam Point or Water Jet Operator
 Steam Cleaner Operator
 Steel Form Raiser and Setter
Stonemason Tender
 Striper, concrete or other paved surfaces
 Stud Gunner
 Street Cleaner
 Swamper
 Tailhoseman (water)
Tamper
 Tank Cleaner
Tenders, All Crafts
Terrazzo Tender (Terrazzo Tile Tender)
 Thermal Plastic Applicator
Thermit Welder
 Tile Layer
 Tile Layer Tender
Timber Bucker
Timber Feller, chain saw operator
Timberman
 Tool Dispatcher or Checker (Tool Crib, Tool House Laborer)
Torchmen
Towmaster Operator
 Tree Climber
 Traffic Delineating Device Applicator
 Trencher (hand operated)
 Turbo Blaster
 Truck Drivers (flatbed up to 2-1/2 tons)
 Truck Driver (refuse and garbage disposal, job site to dump)
 Truck-spotter Dumper

Utiliwalk and Utilidor Laborer

Vibrascreed, bull float

Vibrator Operator

Victualic or similar

Wagon Drill Operator

Wagon Drill Helper

Walk-type Mech. used in tending plasterers and bricklayers

Waterboy (Water person)

Waterproofer

Watchman

Welder

Well Point Installer

Winch Handler

Window Cleaner

Wire Mesh Puller

Wire Winding Machine Operator

Work of an unskilled and semi-skilled nature

Work on and/or in bell hole footings and shafts thereof, and work on and in deep footings (15 feet or more in depth)

Work pertaining to or in connection with & Repair of Stove, Blast Furnace, Basic Oxygen Process Furnace, Steeple & Stack, Annealing Process Furnace, Kiln, Soaking Pit, Coke Battery on Industrial Work

Wrecker – Laborer

Wrecker – Semi-Skilled

Wrecker – Skilled

Wrenchers – creosote tiemen

Yard Maintenance Person

“&Etc.”