DAVID A. ROSENFELD, Bar No. 058163
CAREN P. SENCER, Bar No. 233488
LISL R. DUNCAN, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501-1091
Telephone 510.337.1001
Fax 510.337.1023

Attorneys for Plaintiffs
LAVON GODFREY and GARY GILBERT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated, Plaintiffs, v. OAKLAND PORT SERVICES CORP. d/b/a AB TRUCKING, and DOES 1 through 20, inclusive, Defendants.	Case No. RG 08-379099 NOTICE OF LODGING OF OTHER AUTHORITIES

EXHIBIT	AUTHORITY
A	*Brown v. Federal Express Corp.*, (C.D. Cal. 2008) 249 F.R.D. 580
B	*Agsalud v. Pony Express Courier Corp. of Am.*, (9th Cir. 1987) 833 F.2d 809
C	*Keegan v. Ruppert*, (S.D.N.Y. 1943) 2 F.R.D. 8
D	*Overnite Transp. Co. v. Tianti*, (2d Cir. 1991) 926 F.2d 220
E	*Pettis Moving Co. v. Roberts*, (2d Cir. 1986) 784 F.2d 439
F	*Reich v. American Driver Serv.*, (9th Cir. 1994) 33 F.3d 1153
G	*Walling v. Silver Fleet Motor Express*, (W.D. Ky. 1946) 67 F. Supp. 846
H	*Watkins v. Ameripride*, (9th Cir. 2004) 375 F.3d 821
I	*White v. Starbucks Corp.*, (N.D.Cal.2007) 497 F.Supp.2d 1080

J *Williams v. W.M.A. Transit Co.*, (D.C. Cir. 1972) 472 F.2d 1258

K *Dep't of Labor and Indus. of the State of Wash. v. Common Carriers, Inc.*, (1988) 111 Wash.2d 586

L 29 U.S.C. § 213(b)(1)

M 29 C.F.R. § 782.2

N 29 C.F.R. § 782.3(b)

O 29 C.F.R. § 785.11

P 29 C.F.R. § 785.13

Q 49 U.S.C. § 31131 et seq.

R 49 C.F.R. §395.1-.13

S Oakland Municipal Code section 2.28

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WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway
Suite 200
Alameda, CA 94501-1091
510.337.1001

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Vincent Brown, et al. v. Federal Express Corporation, et al.

CV 07-5011 DSF (PJWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

249 F.R.D. 580; 2008 U.S. Dist. LEXIS 17125

February 26, 2008, Decided
February 26, 2008, Filed

SUBSEQUENT HISTORY: Related proceeding at *Mauro v. Fed. Express Corp., 2009 U.S. Dist. LEXIS 59954 (C.D. Cal., June 18, 2009)*

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff employees filed a motion for class certification under *Fed. R. Civ. P. 23* in their action against defendant employer, a corporation in the business of shipping packages and other freight to its customers on an express basis, for alleged violations of *Cal. Lab. Code §§ 226.7* and *512(a)*, as well as a claim under *Cal. Bus. & Prof. Code § 17200 et seq.* deriving from those violations.

OVERVIEW: Plaintiffs contended that drivers and couriers were put under excessive pressure to make deliveries as quickly as possible, such that they were unable to take meal breaks and rest breaks within the time required by California law. Plaintiffs also contended that defendant failed to pay an additional one hour of pay to employees who missed breaks. The court rejected plaintiffs' contention that California law required employers to ensure that meal breaks were actually taken. Therefore, plaintiffs could prevail only if they demonstrated that defendant's policies deprived them of the required breaks. The court concluded that class certification was inappropriate because plaintiffs did not meet the requirements of *Fed. R. Civ. P. 23(b)(3)*. Based on the variations in job classifications, job duties, level of monitoring, routes, and facilities, the court found that highly individualized factual inquiries predominated over the few legal and factual issues shared by the proposed class. Further, plaintiffs proposed no method of common proof. Class treatment was not a superior method for resolution of the claims because addressing the varied individual factual issues would be unmanageable.

OUTCOME: The court denied plaintiffs' motion for class certification. The court also ordered defendant to show cause why plaintiffs' individual claims should not be remanded to the state court.

LexisNexis(R) Headnotes

Civil Procedure > Class Actions > Certification
Civil Procedure > Class Actions > Prerequisites > General Overview

[HN1] Before certifying a class, the trial court must conduct a rigorous analysis to determine whether the party seeking certification has met the prerequisites of *Fed. R. Civ. P. 23*. The party seeking certification must satisfy all requirements of *Rule 23(a)*, which are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. The party seeking certification must also show that it satisfies one of the three provisions of *Rule 23(b)*. A class may be certified under *Rule 23(b)(1)* if the prosecution of separate actions would create a risk of inconsistent judgments. *Rule 23(b)(2)* certifications are appropriate where the party opposing the class has acted or refused to act on

EXHIBIT A

grounds generally applicable to the class, justifying injunctive or declaratory relief. A class may be certified under *Rule 23(b)(3)* where questions of law or fact common to members of the class predominate and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Civil Procedure > Class Actions > Certification
Evidence > Procedural Considerations > Burdens of Proof > Allocation
[HN2] *Fed. R. Civ. P. 23(c)(1)* directs the court to determine at an early practicable time whether to certify an action as a class action. At this stage of the proceedings, the court must accept the factual allegations in the complaint as true. However, the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Thus, in reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action. The proponent of the class bears the burden of demonstrating that class certification is appropriate.

Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN3] *Fed. R. Civ. P. 23(b)(3)* permits class certification if the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Civil Procedure > Class Actions > Prerequisites > Commonality
Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN4] The *Fed. R. Civ. P. 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Since this analysis presumes that common issues of fact or law have been established pursuant to *Rule 23(a)(2)*, commonality alone is not sufficient to satisfy *Rule 23(b)(3)*. In contrast to *Rule 23(a)(2)*, *Rule 23(b)(3)* focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis. Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.

Civil Procedure > Class Actions > Prerequisites > Maintainability
[HN5] To determine whether common issues predominate for purposes of *Fed. R. Civ. P. 23(b)(3)*, the court must first examine the substantive issues raised by plaintiffs and second inquire into the proof relevant to each issue.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN6] See *Cal. Lab. Code § 226.7.*

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN7] See *Cal. Lab. Code § 512(a).*

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN8] See Cal. Code Regs. tit. 8, § 11090(11) (2008).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN9] The California Supreme Court has described the interest protected by meal break provisions, stating that an employee forced to forgo his or her meal period has been deprived of the right to be free of the employer's control during the meal period. It is an employer's obligation to ensure that its employees are free from its control for 30 minutes, not to ensure that the employees do any particular thing during that time. Indeed, in characterizing violations of California meal period obligations in Murphy, the California Supreme Court repeatedly described it as an obligation not to force employees to work through breaks. Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who do not appear to remain in contact with the employer during the day. It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws. In the absence of California Supreme Court precedent, the federal court must apply the rule it believes the court would adopt under the circumstances. The United States District Court for the Central District of California does not believe that the California Supreme Court would adopt a rule that requires employers to ensure that meal breaks are actually taken.

Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN10] Pursuant to *Fed. R. Civ. P. 23(b)(3)*, certification is appropriate only if the court finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Rule 23(b)(3)* also sets forth specific factors that the court may consider when determining whether class certification is the superior option: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Civil Procedure > Class Actions > Prerequisites > Maintainability

[HN11] Even where there is a common nucleus of fact regarding a defendant's conduct, if each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not "superior" for purposes of *Fed. R. Civ. P. 23(b)(3)*.

COUNSEL: [**1] For Vincent Brown, individually and on behalf of all other similarly situated current and former employees, Jose Robert Rojas, individually and on behalf of all other similarly situated current and former employees, Deborah Snyder, individually and on behalf of all other similarly situated current and former employees, Charles Walker, individually and on behalf of all other similarly situated current and former employees, Mark B Tovsen, individually and on behalf of all other similarly situated current and former employees, Robert Arman, individually and on behalf of all other similarly situated current and former employees, John O'Neill, individually and on behalf of all other similarly situated current and former employees, Andre D Lawson, individually and on behalf of all other similarly situated current and former employees, Gregory A Sorells, individually and on behalf of all other similarly situated current and former employees, Plaintiffs: Ernest F Ching, Jr, LEAD ATTORNEY, Ching & Associates, Anaheim Hills, CA; James P Stoneman, II, LEAD ATTORNEY, James P Stoneman Law Offices, Claremont, CA; Yameen Zaki Salahuddin, LEAD ATTORNEY, Ching and Associates, Anaheim Hills, CA.

For [**2] Federal Express Corporation, Defendant: David S Wilson, III, LEAD ATTORNEY, Federal Express Corporation, Legal Department, Irvine, CA; Richard S McConnell, Jr, Sandra C Isom, LEAD ATTORNEYS, Federal Express Corporation, Memphis, TN.

JUDGES: Present: The Honorable DALE S. FISCHER, United States District Judge.

OPINION

[*581] **CIVIL MINUTES - GENERAL**

Proceedings: (IN CHAMBERS) Order DENYING Plaintiffs' Motion for Class Certification and ORDERING Defendant to Show Cause Why Individual Claims Should Not Be Remanded to State Court

This matter is before the Court on Plaintiffs' Motion for Class Certification. Plaintiffs Vincent Brown, Jose Robert Rojas, Deborah Snyder, Charles Walker, Mark B. Tovsen, Robert Arman, John O'Neil, Andre D. Lawson, and Gregory A. Sorrells seek certification of a subclass of Ramp Transport Drivers ("RTDs") and a subclass of Courier Drivers ("Couriers") that were allegedly denied meal breaks and rest breaks in violation of California wage and hour laws. Having considered the papers submitted by the parties and having heard the oral argument of counsel, the Court DENIES Plaintiffs' Motion for Class Certification.

I. FACTS

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1 For purposes of this Motion only, the Court accepts the facts alleged [**3] in the Complaint as true.

Defendant Federal Express Corporation ("FedEx") is a Delaware-based corporation [*582] in the business of shipping packages and other freight to its customers on an express basis. (Compl. P 15; Decl. of Eva M. Brown in Opp'n to Mot. for Class Certification ("Brown Decl.") P 3.) Plaintiffs and the putative class members are current and former non-exempt hourly RTDs and Couriers employed by FedEx during the four years preceding the filing of this action. (Compl. P 22.)

A. Types of FedEx Drivers

FedEx's truck fleet consists of different types of vehicles operated by different classifications of drivers. (Brown Decl. P 5.) These drivers include RTDs and Couriers. (Compl. PP 23-24.) Couriers are employed at approximately 80 locations in California, and RTDs are employed at approximately 34 locations in California. (Decl. of Amanda R. Adams in Supp. of Def. Federal Express Corp.'s Opp'n to Pls.' Mot. for Class Certification ("Adams Decl.") P 3.)

There are four types of RTDs: (1) station to ramp/ramp to station RTDs, also known as shuttle drivers; (2) heavyweight couriers, also known as pick-up and delivery RTDs; (3) long-haul RTDs; and (4) hostlers, also known as yard mules. [**4] (Decl. of Elizabeth D. Mason in Supp. of Def. Federal Express Corp.'s Opp'n to Pls.' Mot. for Class Certification ("Mason Decl.") P 14.) Each type of RTD performs different job duties.

Shuttle drivers use eighteen wheel tractor trailers to shuttle freight between FedEx airport facilities, or "ramps," certain high volume customer locations, and stations where freight is sorted and loaded onto smaller delivery vans and trucks for delivery to its final destination. *(Id.* P 17.) Shuttle drivers typically work in nine hour shifts. *(Id.* P 21.) During the first four and one half hours, those on the morning shift normally must make two round trips between a ramp and a station so that freight can be processed and delivered on time. *(Id.* P 22.) After this time, shuttle drivers engage in other tasks that FedEx asserts are less time sensitive. *(Id.* P 25.) Evening shift drivers engage in similar tasks, but in reverse order. *(Id.* P 28.)

Like Couriers, heavyweight couriers deliver freight between stations and customers, except that their freight is heavier, they average only 12 stops per day (as opposed to the average one hundred stops made by Couriers), and they drive eighteen wheel trucks. *(Id.* P 31.) [**5] They generally make deliveries in the morning and pick-ups in the afternoon. *(Id.* P 32.) Some heavyweight couriers cover larger geographic areas than others. *(Id.* P 33.) Those that cover smaller geographic areas have more frequent deadlines for deliveries. *(Id.)* Heavyweight couriers handle additional, "on-call" pickups and deliveries as they arise. *(Id.* P 34.)

Long-haul RTDs transport freight in eighteen wheelers between airports or sorting facilities in one city and airports or sorting facilities in another city. *(Id.* P 44.) Long-haul RTDs typically drive to a half-way point between the two cities, where the freight is handed over to another long-haul RTD. *(Id.* P 45.) They thus typically have only one stop per day. *(Id.)*

Hostlers do not go out on the road, but instead move trailers around at facilities. *(Id.* P 47.) They do not make pick-ups or deliveries. *(Id.)* Sometimes RTDs will perform a combination of some or all of these functions during a work shift. *(Id.* P 50.)

Couriers generally make deliveries in the morning and pick-ups in the afternoon and average 100 stops per day. (Brown Decl. P 11.) Their routes vary -- some are rural or mountainous while others are urban; some are primarily [**6] residential, while others are commercial. (Mason Decl. P 54.) Couriers are given stops per hour goals, which vary by route. *(Id.* P 56.) The number, size, shape, and weight of the packages they deliver vary by day. *(Id.* P 59.) Couriers also make unscheduled, "on-call" pick-ups during the day. (Brown Decl. P 12.)

B. FedEx's Alleged Failure To Provide Meal Periods and Rest Periods

Plaintiffs contend that FedEx was committed to making a large number of deliveries on time and devoted insufficient resources to this task. *(See* Compl. P 25.) As a result, RTDs and Couriers were put under excessive pressure to make deliveries as quickly as possible, such that they were unable to take meal breaks and rest breaks within the time required by law. *(Id.* PP 25-26.) Plaintiffs also contend that FedEx failed to pay an additional one hour of pay to RTDs and [*583] Couriers who missed their meal breaks and/or rest breaks. *(Id.* PP 27-28.)

II. LEGAL STANDARD

[HN1] Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of *Rule 23 of the Federal Rules of Civil Procedure. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).* [**7] The party seeking certification must satisfy all requirements of *Rule 23(a), id. at 1234*, which are:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

The party seeking certification must also show that it satisfies one of the three provisions of *Rule 23(b). Valentino, 97 F.3d at 1233.* A class may be certified under *Rule 23(b)(1)* if the prosecution of separate actions would create a risk of inconsistent judgments. *Rule 23(b)(2)* certifications are appropriate where the party opposing the class has acted or refused to act on grounds generally applicable to the class, justifying injunctive or declaratory relief. A class may be certified under *Rule 23(b)(3)* where questions of law or fact common to members of the class predominate and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

[HN2] *Rule 23(c)(1)* directs the court to determine "[a]t an early [**8] practicable time" [2] whether to certify an action as a class action. At this stage of the proceed-

ings, the Court must accept the factual allegations in the complaint as true. *Blackie v. Barrack, 524 F.2d 891, 901 n. 17 (9th Cir. 1975)*. However, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)* (internal quotation marks omitted). Thus, "[i]n reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 168 (3d Cir. 2001)*. The proponent of the class bears the burden of demonstrating that class certification is appropriate. *In re N.D. Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 854 (9th Cir. 1982)*.

2 In 2003 this language was adopted to replace the former guideline: "as soon as practicable after commencement of an action." *Fed. R. Civ. P. 23(c)(1)(A)*, Advisory Committee Notes, 2003 Amendments. This change reflects the [**9] view that additional time may be required to conduct discovery. "A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." *Id.*

III. DISCUSSION

To obtain certification, Plaintiffs must meet the requirements of *Rule 23(a)*, as well as one of the three alternative requirements of *Rule 23(b)*. *Valentino, 97 F.3d at 1233*. The Court concludes that class certification is inappropriate because Plaintiffs have not met the requirements of *Rule 23(b)(3)*, the only basis for class certification they assert.

[HN3] *Rule 23(b)(3)* permits class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(3)*. Here, [**10] individual issues predominate over common issues, and the class action is not a superior method for adjudicating Plaintiffs' controversy.

A. Predominance

[HN4] The *Rule 23(b)(3)* predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Since this analysis presumes that common issues of fact or law have been established pursuant to *Rule 23(a)(2)*, commonality alone is not sufficient [*584] to satisfy *Rule 23(b)(3)*. In contrast to *Rule 23(a)(2)*, *Rule 23(b)(3)* focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis. . . . Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy.

Wang v. Chinese Daily News, Inc., 231 F.R.D. 602, 612 (C.D. Cal. 2005) (internal citations and quotations omitted).

[HN5] "To determine whether common issues predominate, this Court must first examine the substantive issues raised [**11] by Plaintiffs and second inquire into the proof relevant to each issue." *Jiminez v. Domino's Pizza, Inc., 238 F.R.D. 241, 251 (C.D. Cal. 2006)*. Plaintiffs assert claims for failure to provide rest periods and meal periods required under California law, as well as a claim under *California Business and Professions Code § 17200 et seq.* deriving from those same violations. *(See* Compl. PP 35-46.)

The parties do not dispute that Plaintiffs can prevail on their rest period claim if they demonstrate that FedEx did not "provide" or "authorize and permit" rest breaks. *See 8 C.C.R. § 11090(12)*. However, the parties dispute what must be proved in order to demonstrate that Defendant did not provide meal breaks. Defendants argue that employers must only make meal breaks available to employees, and that employees may choose whether or not to take such breaks. Plaintiffs argue that California law requires employers to ensure that meal breaks are actually taken. The Court agrees with Defendants.

1. Employers Must Provide Meal Breaks, But Need Not Require that They Be Taken

California Labor Code Section 226.7 ("*Section 226.7*") provides:

[HN6] (a) No employer shall require any employee to work during any meal [**12] or rest period mandated by an ap-

plicable order of the Industrial Welfare Commission.

(b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

California Labor Code Section 512(a) ("*Section 512(a)*") provides:

[HN7] An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

The applicable [**13] Industrial Welfare Commission Wage Order here contains the following meal time provision:

[HN8] (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and employee.

(B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

(C) Unless the employee is relieved of all duty during a 30 minute meal period, the [*585] meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state [**14] that the employee may, in writing, revoke the agreement at any time.

(D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.

8 C.C.R. § 11090(11) (2008).

None of these provisions supports Plaintiffs' position that Defendant was required to ensure that Plaintiffs took meal breaks. *Section 226.7(a)* states that "[n]o employer *shall require any employee to work during any meal or rest period." (Emphasis added.)* This is clearly inconsistent with Plaintiffs' position. *Section 226.7(b)* imposes liability "[i]f an employer *fails to provide* an employee a meal period in accordance with an applicable order of the Industrial Welfare Commission." (Emphasis added.) *Section 512(a)* likewise states that "[a]n employer may not employ an employee for a work period of more than five hours per day *without providing* the employee with a meal period of not less than 30 minutes." (Emphasis added.) The word "provide" means "to supply or make available." *Merriam Webster's Collegiate Dictionary* [**15] 937 (10th ed. 2002). It does not suggest any obligation to ensure that employees take advantage of what is made available to them.

The language of the Industrial Welfare Commission Wage Order applicable to Defendant comes closest to imposing a duty to enforce meal breaks, stating that "[n]o employer shall employ any person for a work period of more than five (5) hours without a meal period of not

less than 30 minutes." *8 C.C.R. § 11090(11)*. However, this language is also consistent with an obligation to provide a meal break, rather than to ensure that employees cease working during that time. [HN9] The California Supreme Court has described the interest protected by meal break provisions, stating that "[a]n employee forced to forgo his or her meal period . . . has been deprived of the right to be free of the employer's control during the meal period." *Murphy v. Kenneth Cole Prods., Inc., 40 Cal. 4th 1094, 1104, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2007)*. It is an employer's obligation to ensure that its employees are free from its control for thirty minutes, not to ensure that the employees do any particular thing during that time. Indeed, in characterizing violations of California meal period obligations in *Murphy*, the California [**16] Supreme Court repeatedly described it as an obligation not to force employees to work through breaks. [3] *See id. at 1102* ("The trial court concluded that KCP did not provide Murphy the required meal or rest periods and accordingly awarded Murphy an 'additional hour of pay' for each day Murphy was forced to work through a meal or rest period."), *1104* ("*Section 226.7, subdivision (b)* requires that employees be paid 'one additional hour of pay' for each work day that they are required to work through a meal or rest period. . . . An employee forced to forgo his or her meal period . . . loses a benefit to which the law entitles him or her.").

> 3 This characterization by the California Supreme Court is instructive, rather than conclusive, because the California Supreme Court was not considering this issue directly, but instead determining whether payments for missed meal break and rest break periods should be considered wages or penalties. *See Murphy, 40 Cal. 4th at 1099*.

Requiring enforcement of meal breaks would place an undue burden on employers whose employees are numerous or who, as with Plaintiffs, do not appear to remain in contact with the employer during the day. *See White v. Starbucks Corp., 497 F. Supp. 2d 1080, 1088-89 (N.D. Cal. 2007)*. [**17] It would also create perverse incentives, encouraging employees to violate company meal break policy in order to receive extra compensation under California wage and hour laws. *Id.* In the absence of California Supreme Court precedent, this Court must apply the rule it believes the court would adopt under the circumstances. *See Wyler Summit P'ship v.* [*586] *Turner Broad. Sys., Inc., 135 F.3d 658, 663 (9th Cir. 1998)*. The Court does not believe that the California Supreme Court would adopt the enforcement rule advocated by Plaintiffs.

The Court is not persuaded of the contrary by the holding in *Cicairos v. Summit Logistics, Inc., 133 Cal. App. 4th 949, 962, 35 Cal. Rptr. 3d 243 (2005)*, that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" (Quoting Dept. of Industrial Relations, DLSE, Opinion Letter No. 2002.01.28 (Jan. 28, 2002) at 1.) Decisions of the California courts of appeal are not themselves binding. *Guebara v. Allstate Insurance Co., 237 F.3d 987, 993 (2001)*. *Cicairos* in turn relies exclusively on a non-binding opinion letter by the California Department of Labor Standards Enforcement. *See Murphy, 40 Cal. 4th at 1106*. In any event, the above language is [**18] consistent with an obligation to make breaks available, rather than to force employees to take breaks. Indeed, in *Cicairos*, the court found liability where an employer simply assumed breaks were taken, despite its institution of policies that prevented employees from taking meal breaks. *133 Cal. App. 4th at 962-63*.

2. Individual Issues Predominate

Because FedEx was required only to make meal breaks and rest breaks available to Plaintiffs, Plaintiffs may prevail only if they demonstrate that FedEx's policies deprived them of those breaks. Any such showing will require substantial individualized fact finding.

FedEx drivers' duties vary significantly by job classification. Although FedEx may have consistent policies that apply across job classifications, their impact on employees' ability to take breaks necessarily depends on each individual's job duties. Analysis of whether drivers' job duties precluded taking meal and rest breaks would vary widely among Couriers, who make one hundred stops a day, heavyweight couriers, who make only 12, long haul RTDs, who travel long distances to make one stop, and hostlers, who do not leave FedEx facilities at all. *(See* Mason Decl. PP 14, 17, 31, 44, [**19] 47.)

In addition to differences in sheer volume of work, different types of drivers experience different ebbs and flows in workload during the day, leading to a different analysis of when they might take breaks. For example, it appears that shuttle drivers have most of their time-sensitive work concentrated at the beginning or end of their shifts *(id.* PP 22-23), while heavyweight couriers have two to three delivery deadlines spaced throughout the day. *(Id.* PP 31, 33-34.)

Different types of drivers are also subjected to different levels of monitoring. Couriers and heavyweight couriers are given stops per hours goals, which they must document. *(Id.* PP 55-56, 58.) It appears that Couriers may be subjected to higher expectations of efficiency than heavyweight couriers. *(Id.* P 58.) It is unclear whether other types of drivers have similar objective monitoring of their volume of work that would put pres-

sure on them to skip required breaks. This also leads to an individualized inquiry.

Even within classifications, individual drivers work on different routes. Some routes are urban, while others are rural or mountainous. (Mason Decl. P 54.) Some cover larger geographic distances than others. *(Id.* P 33.) [**20] Some involve highly concentrated commercial areas, while others involve residential areas with greater distances between stops. *(Id.* P 54.) Moreover, the demands of the job change with the volume of deliveries presented on any given day. *(Id.* P 59.) The number, shape, and weight of packages vary. *(Id.)* Couriers and heavyweight couriers may be called on to make "on-call" pick-ups that increase their workload. *(Id.* P 34; Brown Decl. P 12.) FedEx's expectations for drivers, such as the stops per hour goals given to Couriers or heavyweight couriers, also vary along with a number of factors. (Mason Decl. P 56.) Determining whether the specific expectations for any given driver sufficiently account for variances in route and daily fluctuations such that drivers may take required breaks would require a highly individualized inquiry. [4]

> 4 For this reason, Plaintiffs' proposal to certify four subclasses (Mot. 3-4) would not change the predominance of individual issues here.

[*587] The drivers also work in many different facilities across California. (Adams Decl. P 3.) In addition to introducing variations in the routes and conditions that drivers must face, the variation in facilities introduces the additional [**21] complexity of understanding the management policies unique to each facility and how they impact drivers' schedules.

Faced with this variance, Plaintiffs propose no method of common proof that would establish that FedEx's policies prevent drivers from taking required breaks, regardless of their individual circumstances. Although Plaintiffs assert in the Complaint that FedEx's policies put such pressure on drivers that they cannot take required breaks, they propose no means of proving this claim on a class-wide basis. The Court thus concludes that the highly individualized factual inquiries just described predominate over the few legal and factual issues shared by the proposed class. Plaintiffs advocate for class certification primarily based on the efficiency of using time sheets as a common method of proof for establishing the number of meal breaks and rest breaks missed by the class. Whether this is a sufficient means of actually establishing when breaks missed is in dispute, as the time sheets are recorded by drivers who may or may not accurately record the time of breaks. *(Compare* Decl. of Ronald J. Carlson in Supp. of Def. Federal Express Corp.'s Opp'n to Mot. for Class Certification [**22] PP 3, 5, 7 (stating that drivers often estimate their break times at the end of the day) *with* Decl. of Robert Firman in Supp. of Pls.' Mot. for Class Certification P 6 (stating that his time records are accurate).) But even assuming that the records are accurate, the resources that would be expended on determining the reason for missed breaks would exceed those saved by classwide determination of the number of breaks missed. Assuming that the timesheets are accurate, it would take little time for the number of missed breaks to be established in separate actions.

B. A Class Action Is Not a Superior Method of Adjudication

[HN10] Pursuant to *Rule 23(b)(3)*, certification is appropriate only if the Court finds "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3)* also sets forth specific factors that the court may consider when determining whether class certification is the superior option:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against [**23] class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

The first three factors do not weigh heavily on either side of certification, but the fourth consideration persuades the court that class treatment is not a superior means of adjudicating Plaintiffs' claims. A class action addressing the varied individual factual issues raised by Plaintiffs is likely to be unmanageable. [HN11] Even where there is a common nucleus of fact regarding a defendant's conduct, "[i]f each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1192 (9th Cir. 2001).* Here, there are likely more than 5,500 potential class members. (Decl. of Art Mendoza in Supp. of Def. Federal Express Corp.'s Notice of Removal P 4, Ex. A.) These class members are spread among 80 facilities for Couriers and 34 locations for RTDs. (Adams Decl. P 3.) In order to prevail, each will have to demonstrate that he or she was not able to take breaks required [**24] by California law.

Without a viable method of common proof for evaluating the ability of 5,500 class members to take

breaks as required by law, the Court will be mired in over 5000 mini-trials regarding individual job duties and expectations. The difficulties in managing such a wide-ranging factual inquiry persuade the Court that class treatment is not a superior method for resolution of the class members' potential claims. Moreover, because class treatment here would nonetheless require individual class members to establish the reason for their missed breaks, class members [*588] would face many of the same difficulties in motivation and expenditure of resources that they would encounter in separate actions. In addition to this, they would face the inevitable delay imposed by waiting for the resolution of thousands of individual factual claims in the class action. Class treatment is not a superior means of adjudicating this controversy.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Class Certification is DENIED. Defendant is ORDERED to show cause in writing by March 17, 2008 why Plaintiffs' individual claims should not be remanded to the Superior Court of California for the [**25] County of Los Angeles. Defendant may request additional time to engage in jurisdictional discovery, provided that such a request is made on or before the above deadline. Plaintiffs may submit a response in the same time period. The parties are reminded that courtesy copies are to be delivered to Chambers. Failure of Defendant to respond by the above date may result in the Court remanding this action to state court.

The Court further orders the Court Clerk promptly to serve this order on both parties.

IT IS SO ORDERED.

LEXSEE 833 F2D 809

Joshua Agsalud, Director of Labor and Industrial Relations, State of Hawaii, Plaintiff-Appellee, v. Pony Express Courier Corporation of America, Defendant-Appellant

No. 86-2852

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

833 F.2d 809*; *1987 U.S. App. LEXIS 15642*; *110 Lab. Cas. (CCH) P55,950

November 4, 1987, Argued and Submitted
December 1, 1987, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Hawaii, Harold M. Fong, Chief Judge, Presiding, D.C. No. CV-86-93.

COUNSEL: Barbara A. Petrus, for the Plaintiff-Appellant.

Bruce W. Rudeen, for the Defendant-Appellee.

JUDGES: James R. Browning, Chief Judge, Eugene A. Wright and Edward Leavy, Circuit Judges.

OPINION BY: PER CURIAM

OPINION

[*810] Appellant Pony Express, a carrier regulated under the federal Motor Carrier Act, *49 U.S.C. § 3101 et seq.*, argues that the Motor Carrier Act preempts *Hawaii Revised Stat. § 387-3(a)* requiring employers to pay time-and-one-half for work in excess of 40 hours per week.

Three circuits have considered this contention and have rejected it. *See Pettis Moving Co. v. Roberts, 784 F.2d 439 (2nd Cir. 1986)*; *Central Delivery Serv. v. Burch, 486 F.2d 1399 (4th Cir. 1973)*, *mem. aff'g 355 F. Supp. 954* (D. Md.); *Williams v. W.M.A. Transit Co., 153 U.S. App. D.C. 183, 472 F.2d 1258 (D.C. Cir. 1972)*. We agree for the reasons adequately stated in these opinions.

Pony Express offers only one new contention, arguing the federal and [**2] state statutes conflict because the "practical effect" of the Hawaii overtime pay law is to set the maximum number of hours at 40 per week, whereas Department of Transportation regulations generally provide for a maximum workweek of 60 hours. *49 C.F.R. § 395.3(b)*. Pony Express did not show that Hawaii's overtime pay statute has the same effect as a regulation setting a firm maximum on hours worked. One need not be an economist to realize that some employers may continue to provide more than 40 hours of work even though an overtime premium is required, because paying the premium may be cheaper than the alternatives of not providing service to customers or hiring more help.

AFFIRMED.

EXHIBIT B

1 of 1 DOCUMENT

KEEGAN et al. v. JACOB RUPPERT et al.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2 F.R.D. 8; 1941 U.S. Dist. LEXIS 2072

June 17, 1941

OPINION BY: [**1] KNOX

OPINION

[*8] KNOX, District Judge.

As recently was said in 16 State Bar Journal of California, 120, April 1941, "The new Rules * * * require only 'a short and plain statement of the claim showing that the pleader is entitled to relief' (Rule 8(a) (2) [*28 U.S.C.A. following section 723c*]). 'To indicate the * * simplicity and brevity of statement which the Rules contemplate' (Rule 84), 'there is included an appendix of forms which are considerably more general in statement than the usual pleadings under the code. All this is in line with the decreased importance of be attached to the role of pleading in a system where, as indicated above, discovery and pre-trial better perform pleading's former tasks of fact revelation and issue-formulation, leaving to pleading chiefly the function of notice giving."

This pleading purports to state two causes of action. The first is based upon plaintiffs' claim of a right to recover unpaid overtime compensation, and for liquidated damages in like amount, together with counsel fees, as provided by the terms of the Fair Labor Standards Act of 1938, commonly known as the Wage and Hour Law, *29 U.S.C.A. § 201 et seq.*

Defendants' attack [**2] upon the first cause of action centers upon the allegation that plaintiffs were employed both by Jacob Ruppert, a New York corporation, and John J. Casale, Inc., a company organized [*9] under the laws of Delaware, and that there is no statement in the pleading as to whether plaintiffs were employed jointly by both defendants, or by one defendant at a particular time, and by the other defendant at a different time. It is likewise urged that, in the first cause of action, there is no averment which sets forth definitely the relationship, if any, between the two defendants. Objection to the pleading is also made upon the ground that it fails to state a claim whereon relief can be obtained from either or both of the defendants.

In my opinion, defendants' objections are well taken. The complaint makes no clear disclosures as to when, and by which of the defendants they were respectively employed. While the contract between plaintiffs' Union and Jacob Ruppert is attached to the pleading now under assault, there is nothing to show whether the Union had a contract with John J. Casale, Inc., and if so, the terms therein contained. The schedules accompanying the complaint fail to [**3] show the defendant for which certain hours were worked, and make no showing as to when, and in whose employment, overtime work was done.

From the allegations now before me, it is impossible to tell whether it is sought to hold defendants under Paragraph 16 or 17 of the Interpretative Bulletin 13, issued by the Wage and Hour Administration.

On the whole, therefore, I think the first cause of the complaint fails to satisfy the "notice" requirement of the rule.

Defendants' motion to dismiss the first cause of action set forth in the complaint will be granted, without prejudice to the right to amend within fifteen days of the date of the order to be entered herein.

The second count, also, must be dismissed. In the first place, it is exceedingly doubtful if the Court has jurisdiction of the claim here set forth. This is to say that, as between plaintiffs and Jacob Ruppert, there is probably no diversity of citizenship, and as between each of the plaintiffs and the defendant just named, the amount in controversy is less than $3,000. But, beyond this there is no showing that there has been a compliance

EXHIBIT C

with paragraph nine of the contract upon which plaintiffs declare. Such compliance, [**4] it would seem, is a condition precedent to the maintenance of plaintiffs' second cause of action.

LEXSEE 926 F2D 220

OVERNITE TRANSPORTATION CO., Plaintiff-Appellant, v. BETTY L. TIANTI, Commissioner of Labor of the State of Connecticut, Defendant-Appellee

No. 90-7754

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

926 F.2d 220; 1991 U.S. App. LEXIS 2700; 118 Lab. Cas. (CCH) P56,577; 30 Wage & Hour Cas. (BNA) 281

January 7, 1991, Argued
February 19, 1991, Decided
February 19, 1991, Filed

PRIOR HISTORY: [**1] Appeal from a judgment of the United States District Court for the District of Connecticut, Alan H. Nevas, District Judge, entered upon a motion for summary judgment concluding that the Motor Carrier Act, *49 U.S.C. § 3101 et seq.*, and the exemptions to the Fair Labor Standards Act, *29 U.S.C. § 213(b)(1)*, do not preempt the Connecticut Wage and Hour Act, *Conn. Gen. Stat. § 31-76c*, and that interstate trucking company was not exempt from providing overtime benefits under the Connecticut law.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff appealed the United States District Court for the District of Connecticut order holding that plaintiff's loading dock employees were not exempt from the overtime wage provisions of the Connecticut Wage and Hour Act (WHA), *Conn. Gen. Stat. § 31-76b et seq.* The district court also held that the Motor Carrier Act, *49 U.S.C.S. § 3101 et seq.* and the exemptions to the Fair Labor Standards Act, *29 U.S.C.S. § 213(b)(1)* did not preempt the WHA.

OVERVIEW: Plaintiff filed an action against defendant, seeking a declaratory judgment that it was not obligated to pay overtime wages to its loading dock employees who worked more than 40 hours in one week. The district court held that plaintiff's loading dock employees were not exempt from the overtime wage provisions of the Connecticut Wage and Hour Act (WHA), *Conn. Gen. Stat. § 31-76b et seq.* The district court also held that the Motor Carrier Act (MCA), *49 U.S.C.S. § 3101 et seq.* and the exemptions to the Fair Labor Standards Act (FLSA), *29 U.S.C.S. § 213(b)(1)* did not preempt the WHA. Plaintiff appealed, claiming that its loading dock employees were helpers under the WHA and thus, were exempt under *Conn. Gen. Stat. § 31-76i*. The court affirmed. The court found that the legislative history amply supported the district court's conclusion that *section 31-76i* did not equate loaders with helpers or driver's helpers, and did not exempt loaders from the overtime wage benefits of *Conn. Gen. Stat. § 31-76c*. In addition, because the instant matter concerned a state law regulating overtime wages the court found that it was not preempted by the MCA or the FLSA. Accordingly, the court affirmed.

OUTCOME: The court affirmed the judgment finding that plaintiff's loading dock employees were not exempt from the overtime wage provisions of the state's wage and hour law, and the finding that said law was not preempted by federal law. The court found that the state's wage and hour law did not equate loaders with helpers or driver's helpers.

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN1] See *Conn. Gen. Stat. § 31-76c.*

EXHIBIT D

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries
[HN2] The overtime wage requirements of *Conn. Gen. Stat. § 31-76c* are not applicable to any driver or helper, excluding drivers or helpers employed by exempt employers, with respect to whom the Interstate Commerce Commission or the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of applicable federal law or regulation.

Labor & Employment Law > Employment Relationships > At-Will Employment > Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries
[HN3] The Fair Labor Standards Act, *29 U.S.C.S. § 213(b)* exempts federal overtime wage laws for any employee with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service. Any employee is defined as drivers, driver's helpers, loaders and mechanics.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
Transportation Law > Water Transportation > U.S. Federal Maritime Commission
[HN4] Congress does not prevent the states from regulating overtime wages paid to workers exempt from the Fair Labor Standards Act, *29 U.S.C.S. § 213(b)(1)*.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
[HN5] See *29 U.S.C.S. § 213(b)(1)*.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN6] See 49 U.S.C.S. § 3102(b)(1).

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN7] See *29 U.S.C.S. § 207(a)(1)*.

Civil Procedure > Federal & State Interrelationships > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Transportation Law > Commercial Vehicles > Rates & Tariffs
[HN8] Congress' intent to allow state regulation to coexist with the federal scheme can be found in the Fair Labor Standards Act, *29 U.S.C.S. § 18(a)*. *Section 18(a)* explicitly permits states to mandate greater overtime benefits. State overtime wage law is not preempted by the Motor Carrier Act, *49 U.S.C.S. § 3101 et seq.* or the Fair Labor Standards Act, *29 U.S.C.S. § 213(b)(1)*.

COUNSEL: Steven R. Humphrey, Hartford, Connecticut (Robert A. Izard, Jr. and Duncan Ross Mackay, Robinson & Cole, Hartford, Connecticut, of Counsel) for Appellant.

Patricia M. Strong, Assistant Attorney General (Clarine Nardi Riddle, Attorney General of the State of Connecticut, Hartford, Connecticut) for Appellee.

JUDGES: Feinberg, Newman and McLaughlin, Circuit Judges.

OPINION BY: PER CURIAM

OPINION

[*220] Plaintiff-appellant Overnite Transportation Co. ("Overnite"), an interstate trucking concern, filed this action against defendant-appellee Betty L. Tianti, Commissioner of Labor of the State of Connecticut (the "Commissioner") seeking a declaratory [**2] judgment that it is not obligated to pay overtime wages to its loading dock employees who work more than forty hours in one week. In a separate action that was consolidated with Overnite's suit, the Commissioner, on behalf of thirty-two loading dock workers, sought overtime wages from Overnite.

On cross-motions for summary judgment, the district court found that (1) Overnite's [*221] loading dock employees were not exempt from the overtime wage provisions of the Connecticut Wage and Hour Act (the "WHA"), *Conn. Gen. Stat. § 31-76b et seq.*; and (2) the WHA is not preempted by the Motor Carrier Act ("MCA"), *49 U.S.C. § 3101 et seq.*, and the exemptions to § 7 of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 213(b)(1)*. We affirm.

Section 31-76c of the WHA provides that [HN1] any employee who works more than forty hours per week is entitled to one and one half times his regular hourly

wage. *See Conn. Gen. Stat. § 31-76c.* [HN2] The overtime wage requirements of *§ 31-76c* are not applicable, however, to

> any driver or helper, excluding drivers or helpers employed by exempt employers, with respect to whom the Interstate Commerce Commission or the Secretary of Transportation has power to establish [**3] qualifications and maximum hours of service pursuant to the provisions of applicable federal law or regulation.

Conn. Gen. Stat. § 31-76i.

Overnite claims that its loading dock employees are "helpers" under the WHA and thus are exempt under *§ 31-76i*. Overnite makes this argument notwithstanding its concession that its loading dock employees are "loaders" under the FLSA. *See 29 C.F.R. § 782.2(b)(2)* (listing loaders as one of the employees exempt from § 7 of the FLSA); *29 C.F.R. § 782.5* (defining loaders).

We reject this argument. When the Connecticut legislature enacted *§ 31-76i* in 1967, it was virtually identical to its federal counterpart, § 13(b) of the FLSA, *29 U.S.C. § 213(b)*, which [HN3] exempts federal overtime wage laws for "*any employee* with respect to whom the Secretary of Transportation has the power to establish qualifications and maximum hours of service." (emphasis added). *See* Conn. Pub. Act No. 493 § 8(a) (1967). [1] "*Any employee*" is defined as drivers, driver's helpers, loaders and mechanics. *29 C.F.R. § 782.2(b)(2).* The Connecticut statute was amended in 1969 changing "any employee" to "any driver, excluding drivers employed by exempt employers." *See* [**4] Conn. Pub. Act No. 548 (1969). In 1971, *§ 31-76i* was amended again to change "any driver, excluding drivers employed by exempted employers" to its present form exempting "any driver or helper, excluding drivers or helpers employed by exempt employers." *See* Conn. Pub. Act No. 93 (1971).

1 The original version of § 37-76i read "the interstate commerce commission" rather than "the Secretary of Transportation." *See* Conn. Pub. Act No. 493 § 8(a) (1967). Authority over motor carrier workers was transferred from the Interstate Commerce Commission to the Secretary of Transportation in 1966. *See 49 U.S.C. § 1655(e).*

This legislative history amply supports the district court's conclusion that *§ 31-76i* does not equate "loaders" with "helpers" (as defined in WHA *§ 31-76c*) or "driver's helpers" (as defined in *29 C.F.R. § 782.4*), and does not exempt loaders from the overtime wage benefits of *§ 31-76c*. Clearly, had Connecticut intended the WHA exemptions to be identical to the exemptions provided under the FLSA, it would [**5] have retained the original language of *§ 31-76i*. Accordingly, we find that Overnite is not exempt from providing overtime wages to its loading dock employees under Connecticut's WHA.

Overnite also challenges the district court's conclusion that neither the MCA nor the exemptions of the FLSA preempt the Connecticut wage law. Overnite concedes that to find error with the district court's conclusion, we must overrule our decision in *Pettis Moving Co. v. Roberts, 784 F.2d 439 (2d Cir. 1986).* In *Pettis*, we held that although § 13(b)(1) of the FLSA, *29 U.S.C. § 213(b)(1)*, [2] exempts employees subject to the maximum hour limitations of *§ 304* of the MCA, *49 U.S.C. § 304*, [3] from [*222] the overtime benefits provided in § 7(a)(1) of the FLSA, *29 U.S.C. § 207*, [4] *see 29 U.S.C. § 213(b)(1)*, "[HN4] Congress did not prevent the *states* from regulating overtime wages paid to workers exempt from the FLSA." *Pettis, 784 F.2d at 441* (emphasis added). *Pettis* thus concluded that because New York's overtime wage law did not interfere with the MCA's regulation of safety, it was not preempted. *See id.*

2

> [HN5] The provisions of *Section 207* of this title shall not apply with respect to -- any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of *Section 304* of Title 49.

29 U.S.C. § 213(b)(1).

[**6]

3 *Section 304*, which was repealed, Pub. L. No. 95-473 § 4(b), Oct. 17, 1978, *see Pettis, 784 F.2d at 441*, was subsequently reenacted, Pub. L. No. 97-449, Jan. 12, 1983, and is codified at 49 U.S.C. § 3102(b)(1). Section 3102(b)(1) provides that

> [HN6] the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier.

49 U.S.C. § 3102(b)(1).

4 Section 7(a)(1) provides that

> [HN7] except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1).

Overnite claims, however, that *Pettis* misinterpreted *Levinson v. Spector Motor Service,* [**7] *330 U.S. 649, 91 L. Ed. 1158, 67 S. Ct. 931 (1947).* In *Levinson,* the Supreme Court explained that although there was "no necessary inconsistency" between the enforcement of both the MCA's maximum hour limitations, imposed for reasons of safety and the FLSA's overtime wage regulations, Congress did not authorize such "overlapping". *Id. at 661-62.* Our position in *Pettis,* which we reaffirm here, is that Congress did not intend to supersede the "traditional police powers of the states" merely because it chose not to permit these two federal statutes to "overlap." *Pettis, 784 F.2d at 441.* [HN8] Congress' intent to allow state regulation to coexist with the federal scheme can be found in *§ 18(a)* of the FLSA, which explicitly permits states to mandate greater overtime benefits. *See 29 U.S.C. § 218(a).* We also note that every Circuit that has considered the issue has reached the same conclusion -- state overtime wage law is not preempted by the MCA or the FLSA. *See, e.g., Agsalud v. Pony Express Courier Corp., 833 F.2d 809 (9th Cir. 1987); Williams v. W.M.A. Transit Co., 153 U.S. App. D.C. 183, 472 F.2d 1258 (D.C. Cir. 1972); Central Delivery Service v. Burch, 355 F. Supp. 954* (D. Md.), *aff'd mem., 486 F.2d 1399* [**8] *(4th Cir. 1973).*

Overnite's further claim that the viability of *Pettis* has been called into question by *Farley v. Metro-North Commuter Railroad, 865 F.2d 33 (2d Cir. 1989),* must also be rejected. *Farley* involved overtime wage claims brought by certain employees of the Metro-North Commuter Railroad. Significantly, however, the employees claimed that they were entitled to overtime wages pursuant to § 7 of the FLSA, not a state statute. We held that Metro-North remained "subject to the provisions . . . of the Interstate Commerce Act," *29 U.S.C. § 213(b)(2),* and thus exempt from § 7 of the FLSA, notwithstanding its exemption from the Interstate Commerce Act regulations, provided the regulations "were 'not necessary to carry out the [national] transportation policy.'" *Farley, 865 F.2d at 36* (quoting *49 U.S.C. § 10505(a)(1) (1982)*) (footnote omitted).

Overnite does not challenge the appropriateness of the FLSA's § 13(b)(1) exemption and its employees do not seek overtime wages pursuant to § 7(a)(1) thereof. Rather, this case concerns a *state* law regulating overtime wages. We conclude that *Farley* is inapplicable and that *Pettis* is controlling. Overnite's preemption [**9] argument thus must be rejected.

We have considered Overnite's remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

FOCUS - 2 of 12 DOCUMENTS

PETTIS MOVING CO., INC., Appellant, v. LILLIAN ROBERTS, Industrial Commissioner of the State of New York, Appellee

No. 85-7533

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

784 F.2d 439; 1986 U.S. App. LEXIS 22213; 103 Lab. Cas. (CCH) P34,743; 27 Wage & Hour Cas. (BNA) 945

November 19, 1985, Argued
February 10, 1986

PRIOR HISTORY: [**1] Judgment of the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, holding that New York's minimum wage law was not preempted by Motor Carrier Act of 1935 or ICC regulation issued thereunder, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant corporation sought review of the judgment of the United States District Court, Northern District of New York, which granted summary judgment in favor of appellee, Industrial Commissioner, and dismissed appellant's complaint, where appellant had sought a declaration that an order directing it to comply with the minimum wage statute was in conflict with the Motor Carrier Act of 1935.

OVERVIEW: Following the discovery that appellant corporation failed to pay employees for certain overtime hours, appellee, Industrial Commissioner, ordered appellant to pay a sum that would be disbursed to appellant's employees. Subsequently, appellant sought a declaration that the order directing it to comply with the state's minimum wage statute was in conflict with the Motor Carrier Act of 1935 (Act). The district court after finding that the state's minimum wage law was not preempted by the Act, granted summary judgment in favor of appellee and dismissed appellant's complaint. On review, the court affirmed the district court. The court held that it could find nothing that indicated Congress had intended to regulate economic competition through the Act. The court noted that the Act gave the Interstate Commerce Commission the power to set maximum hours of service for employees of interstate motor carriers and that the courts had long held this power to be directed at highway safety, not economic or wage regulation. The court stated that traditional police powers of the states were not superseded by federal acts unless that was the clear and manifest purpose of Congress.

OUTCOME: The court affirmed the judgment of the district court, which ruled that the state's minimum wage law was not preempted by the Motor Carrier Act of 1935 (Act). The court found that it could find nothing that indicated Congress had intended to regulate economic competition through the Act. The court noted that the traditional police powers of the states were not superseded by federal acts unless that was the clear and manifest purpose of Congress.

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > Statutory Application > General Overview
Transportation Law > Air Transportation > Charters
Transportation Law > Interstate Commerce > Federal Powers

[HN1] The Motor Carrier Act of 1935, *49 U.S.C.S. § 304(a)*, gives the Interstate Commerce Commission power to set maximum hours of service for employees of interstate motor carriers. The courts have long held this power to be directed at highway safety, not economic or wage regulation.

EXHIBIT E

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries Transportation Law > Air Transportation > Charters Transportation Law > Water Transportation > U.S. Federal Maritime Commission

[HN2] Congress specifically exempted employees subject to the Interstate Commerce Commission's maximum hour regulations under the Motor Carrier Act of 1935, *49 U.S.C.S. § 304(a)*, from the overtime benefits of the Fair Labor Standards Act, *29 U.S.C.S. § 207. 29 U.S.C.S. § 213(b)(1).*

Constitutional Law > Supremacy Clause > General Overview

[HN3] Traditional police powers of the states are not superseded by federal acts unless that was the clear and manifest purpose of Congress.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries Transportation Law > Commercial Vehicles > Maintenance & Safety

[HN4] There is no necessary inconsistency in joint Fair Labor Standards Act (Act), *29 U.S.C.S. § 207*, overtime wage regulation and Interstate Commerce Commission safety regulation. Congress did not prevent the states from regulating overtime wages paid to workers exempt from the Act. The Act, *29 U.S.C.S. § 218(a)*, explicitly permits states to set more stringent overtime provisions than the Act.

COUNSEL: James L. Burke, Elmira, New York, for Appellant.

Harvey M. Berman (Robert Abrams, Hermann, Solicitor General of New York; William J. Kogan, Assistant Solicitor General; John Q. Driscoll, Assistant Attorney General, of Counsel), for Appellee.

JUDGES: Feinberg, Chief Judge, Lumbard and Oakes, Circuit Judges.

OPINION BY: OAKES

OPINION

[*440] OAKES, Circuit Judge:

Pettis Moving Co. ("Pettis") appeals from the order of the United States District Court for the Northern District of New York, Howard G. Munson, Chief Judge, denying its motion for summary judgment, granting the cross-motion by the defendant New York State Industrial Commissioner ("Commissioner") for summary judgment and dismissing the complaint. Appellant sought a declaration that a Commissioner's order directing Pettis to comply with New York's minimum wage statute was in conflict with the Motor Carrier Act of 1935 ("the Act"), *49 U.S.C. §§ 301* [**2] *-327* (since repealed), and an injunction against enforcement of such order. We affirm.

BACKGROUND

Pettis is a New York corporation doing business as a motor carrier certified by the Interstate Commerce Commission ("ICC") and subject to regulation by the New York State Department of Transportation. An investigation by the Division of Labor Standards found that appellant had failed to pay certain of its employees at a premium rate (time and one-half) for work over and above forty hours per week. These employees were engaged in the interstate transportation of goods in appellant's trucks. On January 2, 1980, the Commissioner directed appellant to pay $1,357.69 to the Department of Labor, to be disbursed to appellant's employees found to be entitled thereto, and to comply in the future with the wage rates specified in the order.

Pettis appealed the Commissioner's order to the Industrial Board of Appeals ("IBA"), alleging that the order was improper as a matter of law because the affected employees were engaged in interstate commerce and subject to the exclusive jurisdiction of the Secretary of Transportation in relation to maximum hours of service, and that the New York State Department [**3] of Labor lacked jurisdiction "to set maximum hours or a penalty for exceeding standard hours of employment for the affected employees." Following a formal hearing, [1] IBA issued its decision on January 28, 1981, affirming the Commissioner's order. The IBA expressly considered the question of federal preemption of state wage regulation of interstate motor carriers, concluding that federal regulation of hours worked by employees of interstate carriers was directed primarily to considerations of highway safety, and was not intended either to regulate wages or to preclude states from doing so. Appellant instituted this action in May 1982. [2]

1 The IBA states in its decision that the parties were represented by counsel during the hearing; that they were afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues raised in the proceeding; and that counsel filed post-hearing memoranda.

2 Pursuant to *N.Y. Lab. Law § 657(2)* (McKinney 1977), Pettis appealed the IBA's decision to the New York Supreme Court, Appellate Divi-

sion, Third Department. When appellant failed timely to perfect its appeal, the Commissioner moved to dismiss and appellant consented to dismissal. On March 23, 1982, the Appellate Division dismissed the appeal. Because the dismissal was not on the merits, the state court proceeding has no res judicata effect on this action. *See Schanbarger v. New York State Comm'r of Social Servs., 99 A.D.2d 621, 472 N.Y.S.2d 175* (3d Dep't 1984); *DeRonda v. Greater Amsterdam School Dist., 91 A.D.2d 1088, 458 N.Y.S.2d 310* (3d Dep't 1983). Appellee does not make such a res judicata claim before us.

[**4] DISCUSSION

The Commissioner puts forth two grounds for affirming the district court. [3] First, she claims that because the issues before the federal court are identical to the issues decided by the IBA, this action is barred by the doctrines of issue and claim preclusion. Second, she argues that the Act does not preempt state regulation of overtime wages. Although it is the ordinary practice of this court to decide a res [*441] judicata claim before reaching the merits, when the res judicata issue raises difficult and important questions of federalism and comity, and the merits can be readily decided in favor of the party urging preclusion, we think it better to avoid the unnecessary resolution of the res judicata question. [4]

3 The record does not contain the reasoning behind Judge Munson's decision, which was issued without opinion. Appellee states in her brief that summary judgment was granted "on the ground that the action was barred by the doctrine of *res judicata*," but she provides no basis for that statement.

4 In *Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42, 46 (2d Cir. 1985)*, this court recently held that a state quasi-judicial administrative decision, unreviewed in state court, bars a subsequent section 1983 action in federal court if the state courts would have given the administrative decision preclusive effect. Although the author of this opinion concurred in *Zanghi*, he now questions the correctness of that result. We note that the issue may be reviewed by the Supreme Court this term. *Elliott v. University of Tennessee, 766 F.2d 982 (6th Cir. 1985), cert. granted, 474 U.S. 1004, 88 L. Ed. 2d 455, 106 S. Ct. 522, 54 U.S.L.W. 3374 (1985).*

[**5] [HN1]

Section 204(a) of the Act, *49 U.S.C. § 304(a)*, [5] gave the ICC power to set maximum hours of service for employees of interstate motor carriers. The courts have long held this power to be directed at highway safety, not economic or wage regulation. *See Morris v. McComb, 332 U.S. 422, 431-32, 92 L. Ed. 44, 68 S. Ct. 131 (1947); Levinson v. Spector Motor Service, 330 U.S. 649, 674-79, 91 L. Ed. 1158, 67 S. Ct. 931 (1947).* We find nothing that would indicate Congress intended to regulate economic competition through the Act.

5 The events at issue in this action arose while the 1935 Act was in force. Pertinent portions of the Act were repealed by Pub. L. No. 95-473, § 4(b), Oct. 17, 1978. The relevant portions were ultimately reenacted with modifications in Pub. L. No. 97-449 (codified in scattered sections of 49 U.S.C.).

[HN2]

Congress specifically exempted employees subject to ICC maximum hour regulations under *section 304* from the overtime benefits [**6] of *section 207* of the Fair Labor Standards Act ("FLSA"), *29 U.S.C. § 207 (1982). See 29 U.S.C. § 213(b)(1) (1982).* Appellant argues that this exemption demonstrates that Congress intended to give the ICC exclusive regulatory authority over these employees. [HN3] Traditional police powers of the states, however, are not superseded by federal acts unless that was the clear and manifest purpose of Congress. *See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157, 55 L. Ed. 2d 179, 98 S. Ct. 988 (1978)*, citing *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947).* None of the well-settled standards for finding preemption are shown here. The Act regulates safety by setting maximum numbers of hours to be worked. New York does not interfere with such regulation; it merely requires that an employer pay time and one-half for all hours over forty that its employees work. *See Williams v. W.M.A. Transit Co., 153 U.S. App. D.C. 183, 472 F.2d 1258, 1263-64 (D.C. Cir. 1972); Central Delivery Service v. Burch, 355 F. Supp. 954, 959* (D. Md.), *aff'd* [**7] *mem., 486 F.2d 1399 (4th Cir. 1973).* As the Court stated in *Levinson, 330 U.S. at 661*, [HN4] "there is no necessary inconsistency" in joint FLSA overtime wage regulation and ICC safety regulation. Congress did not prevent the states from regulating overtime wages paid to workers exempt from the FLSA. *Section 218(a)* of the FLSA, *29 U.S.C. § 218(a)(1982)*, explicitly permits states to set more stringent overtime provisions than the FLSA. *See Williams, 472 F.2d at 1261; Plouffe v. Farm & Ranch Equipment Co., 174 Mont. 313, 570 P.2d 1106, 1109 (1977)* (farm implement workers exemption, *29 U.S.C. § 213(b)(10)(A)*). In short, this court will not convert a federal law that regulates safety into one that preempts states from exercising their traditional powers of economic regulation. [6]

6 *Central Delivery Service, 355 F. Supp. at 959*, points out that Department of Transportation regulations do not even preempt state *safety* regulations that do not interfere with federal regulations. *See, e.g.*, 49 C.F.R. § 390.30 (1984).

[**8]

LEXSEE 33 F3D 1153

ROBERT B. REICH, * SECRETARY OF LABOR; U.S. DEPARTMENT OF LABOR, Plaintiffs-Appellants, v. AMERICAN DRIVER SERVICE, INC., a corporation; JAMES I. ROBERTS, individually, Defendants-Appellees.

* Robert B. Reich is substituted for his predecessor, Lynn Martin, as the Secretary of Labor. Fed. R. App. P. 43(c)(1).

No. 92-35369

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

33 F.3d 1153; 1994 U.S. App. LEXIS 23813; 128 Lab. Cas. (CCH) P33,135; 2 Wage & Hour Cas. 2d (BNA) 417; 94 Cal. Daily Op. Service 6599; 94 Daily Journal DAR 12130

November 3, 1993, Argued, Submitted, Seattle, Washington
August 30, 1994, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Montana. D.C. No. CV-90-172-JDS. Jack D. Shanstrom, District Judge, Presiding.

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Secretary of Labor appealed from a decision of the United States District Court for the District of Montana, which granted summary judgment to defendant motor contract carrier, and adopted a decision of a magistrate recommending that defendant be considered under the jurisdiction of the Secretary of Transportation, and thus exempt from the Fair Labor Standards Act, pursuant to *29 U.S.C.S. § 203(d)*.

OVERVIEW: Plaintiff Secretary of Labor appealed the district court's grant of summary judgment to defendant motor contract carrier. Plaintiff challenged the district court's decision to include defendant's drivers, fuelers and utility workers within the Secretary of Transportation's jurisdiction, and to exempt defendant from the maximum hours provisions of the Fair Labor Standards Act (FLSA), *29 U.S.C.S. § 203(d)*. Plaintiff argued that the Secretary of Transportation's own interpretation of the extent of his jurisdiction required that a motor contract carrier actually engage in interstate commerce before it was exempt from the maximum hours provisions of the FLSA. Plaintiff also argued that the district court erred in concluding that the liability of defendant's owner was a moot issue. On appeal, the court reversed the decision of the district court and remanded the case for further proceedings. The court held that, from the beginning of each harvesting season and continuing until one of its drivers actually engaged in interstate commerce, defendant was subject to the maximum hours provisions of the FLSA. The court remanded the case for a determination of defendant's liability.

OUTCOME: The court reversed the district court's grant of summary judgment to defendant motor contract carrier, as plaintiff Secretary of Labor was correct in asserting that the maximum hour provisions of the Fair Labor Standards Act applied to defendant. The court remanded the case to the district court for a determination of defendant's liability.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > De Novo Review

EXHIBIT F

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries
[HN1] A grant of summary judgment is reviewed de novo.

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries Transportation Law > Intrastate Commerce
[HN2] Any motor carrier that engages in interstate commerce is subject to the Secretary of Transportation's jurisdiction, pursuant to *49 U.S.C.S. § 10521*, and is thus exempt from the maximum hours provisions of the Fair Labor Standards Act (FLSA), pursuant to *29 U.S.C.S. § 213(b)(1)*. Upon engaging in such interstate commerce, the Secretary of Transportation may prescribe the requirements for the qualifications and maximum hours of service of employees of, and safety of operation and equipment of, the motor carrier. 49 U.S.C.S. § 3102(b)(1). Any motor carrier that engages in wholly intrastate commerce, however, is subject to the Secretary of Labor's jurisdiction, and consequently, to the maximum hours provisions of the FLSA.

Transportation Law > Air Transportation > Charters Transportation Law > Carrier Duties & Liabilities > Definitions
[HN3] A "motor carrier" is defined as a "motor common carrier" or a "motor contract carrier." *49 U.S.C.S. § 10102(13)*. A "motor common carrier" is defined as a motor carrier that holds itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both. *49 U.S.C.S. § 10102(14)*. A "motor contract carrier" is defined as a motor carrier that "provides motor vehicle transportation of property for compensation under continuing agreements with one or more persons. *49 U.S.C.S. § 10102(15)(B)*.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview Transportation Law > Carrier Duties & Liabilities > General Overview Transportation Law > Intrastate Commerce
[HN4] A motor carrier cannot be subject to the jurisdiction of both the Secretary of Labor and the Secretary of Transportation.

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
[HN5] An employer who claims an exemption from the Fair Labor Standards Act, *29 U.S.C.S. § 213(b)(1)* has the burden of showing that the exemption applies. Any exemption must be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress.

COUNSEL: Anne P. Fugett, United States Department of Labor, Washington, D.C., for the plaintiffs-appellants.

Thomas F. Dowd, Omaha, Nebraska, for the defendants-appellees.

JUDGES: Before: Thomas Tang, Jerome Farris and Pamela Ann Rymer, Circuit Judges. Opinion by Judge Tang; Dissent by Judge Farris.

OPINION BY: THOMAS TANG

OPINION

[*1154] OPINION

TANG, Senior Circuit Judge:

The Secretary of Labor appeals the district court's decision to include within the Secretary of Transportation's jurisdiction, the drivers, fuelers and utility workers of American Driver Services, Inc. ("ADS"), a motor contract carrier. The district court's decision exempts ADS from the maximum hours provisions of the Fair Labor Standards Act ("FLSA"). The Secretary of Labor argues that the Secretary of Transportation's own interpretation of the extent of his jurisdiction requires that a motor contract carrier actually engage in interstate commerce before it is exempt from the maximum hours provisions of the FLSA. The Secretary of Labor also argues that the district court erred in concluding [**2] that the liability of ADS's owner was a moot issue. We reverse and remand.

BACKGROUND

ADS provided motor carrier services to various businesses throughout the United States. On June 1, 1985, ADS entered into a contract with the Western Sugar Company ("Western") to transport sugar beets by truck from various receiving stations in Montana and Wyoming, to Western's processing plant in Billings, Montana. The contract and subsequent addendum covered the sugar beet harvesting seasons from 1985-86 to 1990-91. Those harvesting seasons took place from September to January or February of the following year.

Although ADS engaged in some interstate commerce during each harvesting season in question, it engaged in wholly intrastate commerce for the first months of each season. [1] ADS indiscriminately assigned any interstate travel to its drivers using a "first in, first out" method, and therefore, all of its drivers reasonably could

have been expected to engage in interstate commerce. Additionally, the parties have stipulated that the duties of ADS's fuelers and utility workers affected the safety of the vehicles engaged in interstate commerce, and that for purposes of an exemption from the maximum [**3] hours provisions of the FLSA, they should be treated in the same manner as ADS's drivers.

1 The Secretary of Labor's complaint alleges that ADS has been in violation of the maximum hours provisions of the FLSA since September 12, 1987. Although not absolutely clear from the record, it appears that ADS did not engage in any interstate commerce until at least December of any harvesting season in question.

The Secretary of Labor brought this action under § 16(c) and § 17 of the FLSA, seeking to enjoin ADS and its president and principal shareholder, James Roberts, from violating overtime and record keeping requirements, and to recover unpaid overtime compensation for ADS's drivers, fuelers and utility workers. [*1155] Both ADS and Roberts filed motions for summary judgment, ADS arguing that its drivers, fuelers and utility workers were exempt from the maximum hours provisions of the FLSA, and Roberts arguing that he could not be found personally liable for violations of the maximum hours provisions of the FLSA because he was [**4] not an "employer" under *29 U.S.C. § 203(d)*. The Secretary of Labor filed a cross-motion for partial summary judgment on the issue of Roberts' status as an "employer."

The case was referred to a magistrate judge who determined that ADS's drivers were exempt from the maximum hours provisions of the FLSA, and that as a consequence, the issue of Roberts' liability was moot. The Secretary of Labor objected to the magistrate judge's findings and recommendations. The district court undertook a de novo review as required under *28 U.S.C. § 636(b)(1)(C)*, and adopted the magistrate judge's findings and recommendations. The Secretary of Labor timely appeals.

STANDARD OF REVIEW

[HN1] A grant of summary judgment is reviewed de novo. *Jones v. Union Pacific R.R. Co., 968 F.2d 937, 940 (9th Cir. 1992)*. Whether ADS's drivers, fuelers and utility workers were exempt from the maximum hours provisions of the FLSA is a question of law that is reviewed de novo. *Jones v. Giles, 741 F.2d 245, 248 (9th Cir. 1984)*.

DISCUSSION

I.

[HN2] Any motor carrier that engages in interstate commerce [**5] is subject to the Secretary of Transportation's jurisdiction, *see 49 U.S.C. § 10521*, and is thus exempt from the maximum hours provisions of the FLSA, *see 29 U.S.C. § 213(b)(1)*. Upon engaging in such interstate commerce, the Secretary of Transportation may prescribe the requirements for the "qualifications and maximum hours of service of employees of, and safety of operation and equipment of, [the] motor carrier. . . ." 49 U.S.C. § 3102(b)(1). [2] Any motor carrier that engages in wholly intrastate commerce, however, is subject to the Secretary of Labor's jurisdiction, and consequently, to the maximum hours provisions of the FLSA. [3]

2 [HN3] A "motor carrier" is defined as a "motor common carrier" or a "motor contract carrier." *49 U.S.C. § 10102(13)*. A "motor common carrier" is defined as a motor carrier that "holds itself out to the general public to provide motor vehicle transportation for compensation over regular or irregular routes, or both." *49 U.S.C. § 10102(14)*. A "motor contract carrier" is defined as a motor carrier that "provides motor vehicle transportation of property for compensation under continuing agreements with one or more persons. . . ." *49 U.S.C. § 10102(15)(B)*. It is undisputed that ADS was a motor contract carrier.

[**6]

3 If the wholly intrastate commerce is merely part of a "continuing transportation" in interstate or foreign commerce, though, the motor carrier is subject to the Secretary of Transportation's jurisdiction. *See Burlington Northern, Inc. v. Weyerhaeuser Co., 719 F.2d 304, 309-10 (9th Cir. 1983)*.

Although many motor carriers engage in both interstate and intrastate commerce, [HN4] a motor carrier cannot be subject to the jurisdiction of both the Secretary of Labor and the Secretary of Transportation. *Giles, 741 F.2d at 249*. When determining to which Secretary's jurisdiction such a motor carrier's employees are subject, courts have consistently looked to the Supreme Court's decision in *Morris v. McComb, 332 U.S. 422, 92 L. Ed. 44, 68 S. Ct. 131 (1947)*. *See e.g. Brennan v. Schwerman Trucking Co. of Virginia, Inc., 540 F.2d 1200 (4th Cir. 1976)*; *Crooker v. Sexton Motors, Inc., 469 F.2d 206 (1st Cir. 1972)*; *Starrett v. Bruce, 391 F.2d 320* [**7] (10th Cir.), *cert. denied, 393 U.S. 971, 21 L. Ed. 2d 384, 89 S. Ct. 404 (1968)*. Under *Morris*, even a minor involvement in interstate commerce as a regular part of an employee's duties can subject that employee to the Secretary of Transportation's jurisdiction. *Morris, 332 U.S. at 432-35*. Nevertheless, an employee's minor involvement in interstate commerce does not necessarily subject that employee to the Secretary of Transportation's jurisdiction

for an unlimited period of time, *see Baird v. Wagoner Transp. Co., 425 F.2d 407, 412-13* (6th Cir.), *cert. denied, 400 U.S. 829, 91 S. Ct. 58,* [*1156] *27 L. Ed. 2d 59 (1970)*, and if the employee's minor involvement can be characterized as de minimis, that employee may not be subject to the Secretary of Transportation's jurisdiction at all, *see Coleman v. Jiffy June Farms, Inc., 324 F. Supp. 664, 669-70 (S.D. Ala. 1970), aff'd by, 458 F.2d 1139 (5th Cir. 1971), cert. denied,* [**8] *409 U.S. 948 (1972).*

Recognizing the need for clarification of the extent of his jurisdiction over motor carriers, the Secretary of Transportation, through the Federal Highway Administration ("FHWA"), promulgated a notice of interpretation. That interpretation provides, in relevant part, that:

The FHWA view is that in order to establish jurisdiction under *49 U.S.C. 304* the carrier must be shown to have engaged in interstate commerce within a reasonable period of time prior to the time at which jurisdiction is in question. The carrier's involvement in interstate commerce must be established by some concrete evidence such as an actual trip in interstate commerce or proof, in the case of a "for hire" carrier, that interstate business had been solicited. If jurisdiction is claimed over a driver who has not driven in interstate commerce, evidence must be presented that the carrier has engaged in interstate commerce and that the driver could reasonably have been expected to make one of the carrier's interstate runs. Satisfactory evidence would be statements from drivers and carriers, and any employment agreements.

Evidence of [**9] driving in interstate commerce or being subject to being used in interstate commerce should be accepted as proof that the driver is subject to *49 U.S.C. 304* for a 4-month period from the date of the proof. The FHWA believes that the 4-month period is reasonable because it avoids both the too strict week-by-week approach and the situation where a driver could be used or be subject to being used once and remain subject to jurisdiction under *49 U.S.C. 304* for an unlimited time.

46 Fed. Reg. 37,902, 37,903 (1981).

The district court determined that under this interpretation, a motor carrier's reasonable expectation of engaging in interstate commerce is sufficient to trigger the interpretation's four month exemption. It further determined that once the exemption is triggered, interstate commerce must in fact occur within a four month period. Because the district court found that ADS had a reasonable expectation of engaging in interstate commerce at the beginning of each sugar beet harvesting season in question and that it actually engaged in interstate commerce within four months of the [**10] beginning of each of those seasons, the district court concluded that ADS was under the Secretary of Transportation's jurisdiction and thereby exempt from the maximum hours provisions of the FLSA. We agree with the Secretary of Labor that this construction is erroneous.

[HN5] "An employer who claims an exemption from the FLSA has the burden of showing that the exemption applies. . . ." *Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983).* Any exemption must "be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress." *Id.* (quoting *A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 89 L. Ed. 1095, 65 S. Ct. 807 (1945)*; *accord Giles, 741 F.2d at 250.* "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people." *Donovan, 703 F.2d at 1151* (quoting *Walling, 324 U.S. at 493*). [4]

4 While the Secretary of Transportation's interpretation of the extent of his jurisdiction as to motor carriers is entitled to due deference, *see Marshall v. Union Pac. Motor Freight Co., 650 F.2d 1085, 1090 (9th Cir. 1981)*; *Dole v. Circle "A" Constr. Inc., 738 F. Supp. 1313, 1322-23 (D. Idaho 1990),* that is not what is at issue in this case. The Secretary of Labor does not disagree with the FHWA's interpretation. Rather, the Secretary of Labor appeals the district court's construction of the interpretation.

[**11] In this case, at the beginning of each sugar beet harvesting season, ADS engaged in wholly intrastate commerce for several months before engaging in any interstate [*1157] commerce. The interpretation states that "to establish [the Secretary of Transportation's] jurisdiction . . . the carrier must be shown to have *engaged* in interstate commerce within a reasonable period of time prior to the time at which jurisdiction is in question. The carrier's involvement in interstate commerce *must be established by some concrete evidence such as an actual trip in interstate commerce* or proof, in the case of a 'for hire' carrier, that interstate business had been solicited." *46 Fed. Reg. at 37,903* (emphasis added). If ADS engaged in wholly intrastate commerce at the beginning of each harvesting season, it did not engage in any interstate commerce during this time. [5]

5 ADS argues briefly that any exemption in effect at the end of a sugar beet harvesting season would still be in effect at the beginning of the next season. Its argument is premised on its contention that the interpretation's four month exemption applies only to operational months, and ADS's sugar beet hauling business was not in operation from the end of one season to the begin-

ning of the next. We find this argument unpersuasive. Nowhere does the interpretation state that the four month exemption is applied differently to operational and nonoperational months, and ADS does not offer any other support for such an application.

[**12] Additionally, construing the interpretation narrowly, we do not think that ADS's arguably reasonable expectation of engaging in interstate commerce was sufficient to trigger the exemption. The interpretation's only reference to "reasonable expectations" concerns claims of jurisdiction over a motor carrier's drivers who have not driven in interstate commerce when there is evidence that other drivers employed by the motor carrier *have* driven in interstate commerce. In such a case, those drivers would be subject to the Secretary of Transportation's jurisdiction if they could "reasonably have been expected to make one of the carrier's interstate runs." The interpretation does not indicate that a driver's or motor carrier's reasonable expectations are otherwise relevant.

We conclude therefore that ADS has not met its burden of showing that an exemption to the FLSA was in effect at the beginning of any sugar beet harvesting season in question; ADS was not "plainly and unmistakably" within the terms of such an exemption until one of its drivers actually engaged in interstate commerce. Thus, from the beginning of each harvesting season and continuing until one of its drivers actually [**13] engaged in interstate commerce, ADS was subject to the jurisdiction of the Secretary of Labor, and consequently, to the maximum hours provisions of the FLSA. As such, we reverse the district court's grant of summary judgment and remand so that the district court can determine the amount of overtime compensation owed to ADS's drivers, fuelers and utility workers.

II.

The district court concluded that the issue of Roberts' personal liability for violations of the FLSA was moot because ADS was exempt from the maximum hours provisions of the FLSA. Because we find that ADS was not exempt from those provisions, the issue is not moot, and should be addressed by the district court on remand.

REVERSED AND REMANDED.

DISSENT BY: JEROME FARRIS

DISSENT

FARRIS, Circuit Judge, dissenting:

As I understand it, the central question is whether American Driver Service, Inc., a seasonal carrier, should be judged on the same basis as year-round carriers. Because I am of the opinion that to do so would be "unreasonable," I respectfully dissent.

American Driver argues that it is exempt from the maximum hours requirements of the Fair Labor Standards Act, *29 U.S.C. § 207*, because it is a motor [**14] contract carrier subject to the jurisdiction of the Secretary of Transportation. The district court determined that American Driver is exempt from FLSA's maximum hours provisions. There is no material question as to the fact that American Driver is a motor contract carrier engaged in interstate commerce whose drivers all have a reasonable expectation that they will engage in interstate commerce. There is evidence that American Driver actually engaged in interstate commerce a "reasonable time prior to the time at which [the Secretary of Transportation's] jurisdiction [came] into question." The opinion of the district court should be affirmed.

[*1158] Congress has stated that "the provisions of [the Fair Labor Standards Act, *29 U.S.C. § 207*] shall not apply with respect to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of *section 304* of Title 49. . . ." *29 U.S.C. § 213(b)(1)*. [1] The Secretary of Transportation has the authority to prescribe the qualifications and the maximum hours of service or employees of "motor [**15] carriers." 49 U.S.C. § 3102(b). Under *49 U.S.C. § 10102(13)* a "motor carrier" can be either a "motor contract carrier" or a "motor common carrier." A "motor contract carrier" is defined as a "person providing motor vehicle transportation of property for compensation under continuing agreements with one or more persons." *49 U.S.C. § 10102(15)(B)*.

1 *49 U.S.C. § 304* was repealed and revised as 49 U.S.C. § 3102(b).

In order to be considered a motor contract carrier, and therefore exempt from the maximum hours requirements of FLSA, a corporation need not have all of its drivers actually undertake trips across state lines, but rather, all of its drivers must have a reasonable expectation that they will engage in interstate commerce. *Morris v. McComb, 332 U.S. 422, 434, 92 L. Ed. 44, 68 S. Ct. 131 (1947)*. [**16] All of its drivers can be said to have a reasonable expectation of engaging in interstate commerce if the carrier's work is "shared indiscriminately," that is, if it is apportioned in such a way as to ensure that all drivers are likely to engage in interstate commerce. *Id. at 433*; *Marshall v. Aksland, 631 F.2d 600, 602 (9th Cir. 1980)*; *Brennan v. Schwerman Trucking Co., 540 F.2d 1200, 1205 (4th Cir. 1976)*.

It is undisputed that American Driver is a motor contract carrier that has engaged in some interstate commerce. It is also undisputed that the manner in which American Driver assigns its work, first in/first out, is an indiscriminate system of apportioning work as contemplated in *Morris v. McComb* and *Brennan v. Schwerman Trucking*. Thus, the only question remaining is whether American Driver has established that all of its drivers were in a position to be called upon to drive in interstate commerce and therefore subject to the jurisdiction of the Department of Transportation during the periods that the Department of Labor claims it failed to pay overtime [**17] as required under the FLSA.

The Federal Highway Administration, which acts under the authority of the Department of Transportation, has published its opinion as to what evidence is required to establish that a driver is in a position to be called upon to drive in interstate commerce as part of the driver's regular duties. *46 Fed. Reg. 37902, 37903 (1981)*. The Federal Highway Administration's interpretation of its own jurisdiction is entitled to deference. *Jones v. Giles, 741 F.2d 245, 249 (9th Cir. 1984)*.

The FHWA's interpretation provides that "in order to establish jurisdiction under *49 U.S.C. 304*, the carrier must be shown to have engaged in interstate commerce within a reasonable period of time prior to the time at which jurisdiction is in question." *46 Fed. Reg. at 37903*. [2] Once the carrier establishes that it had engaged in interstate commerce, jurisdiction under the FHWA is extended "for a 4-month period from the date of the proof." *Id.* Thus, based on the Administration's interpretation, American Driver will be considered subject to the jurisdiction [**18] of the FHWA if it engaged in interstate commerce within a "*reasonable* period of time prior to the time at which jurisdiction is in question." *Id.* (emphasis added).

2 The full text of the FHWA's interpretation is included in the majority opinion at page 9872.

American Driver Service contends that what constitutes a "reasonable" time period can only be interpreted on a case by case basis. I agree. The term "reasonable" can only be understood on a case by case basis. *See* Black's Law Dictionary 1265 (6th ed. 1990) (Reasonable is defined as "fair, proper, just, moderate, suitable under the circumstances.").

American Driver operated on a seasonal basis. Thus, the fact that American Driver did not engage in interstate commerce for six to eight months prior to the season during which it did engage in interstate commerce does not mean it did not engage in interstate [*1159] commerce a reasonable time prior to the time at which jurisdiction is in question. The record shows that American Driver engaged in interstate commerce [**19] at the close of all of the seasons in question and then again some time after the start of each new season that followed. Viewing American Driver in terms of the periods of time that it was actually in operation, the gaps during which its drivers were not engaged in interstate commerce were relatively short. For a year-round carrier, such gaps would not result in the carrier's being subject to the FLSA. *See 46 Fed. Reg. 37903* (jurisdiction under the FHWA is extended "for a 4-month period from the date of the proof [that the carrier engaged in interstate commerce]").

In light of the seasonal nature of American Driver's operations, there is evidence that American Driver actually engaged in interstate commerce a "reasonable time prior to the time at which [the Secretary of Transportation's] jurisdiction [came] into question." The opinion of the district court should be affirmed. The district court's holding that the issue of Roberts' liability is moot should also be affirmed in light of the fact that American Driver Service is exempt from the maximum hour requirements of the FLSA.

LEXSEE 67 FSUPP 846

WALLING, Administrator of Wage and Hour Div., U.S. Dept. of Labor, v. SILVER FLEET MOTOR EXPRESS, Inc.

No. 828

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

67 F. Supp. 846; 1946 U.S. Dist. LEXIS 2249; 11 Lab. Cas. (CCH) P63,365

September 20, 1946

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, Administrator of the Wage and Hour Division, brought an action against defendant employer, a motor carrier, under § 17 of the Fair Labor Standards Act of 1938 (the Act), *29 U.S.C.S. §§ 201-219*, to restrain the employer from violating the provisions of § 15(a)(2), (5) of the Act, *29 U.S.C.S. § 215(a)(2), (5)*, which made it unlawful for any person to violate §§ 6, 7, or 11(c) of the Act.

OVERVIEW: Although the employer's employees were engaged in interstate commerce and were not being paid the overtime compensation required by the Act, allegedly such employees were exempt from the Act's provisions by reason of § 13(b)(1) of the Act, *29 U.S.C.S. § 213(b)(1)*, which provided that § 7 of the Act should not apply with respect to any employee with respect to whom the Interstate Commerce Commission had the power to establish qualifications and maximum hours of service under the provisions of § 204 of the Motor Carrier Act, *49 U.S.C.S. § 304*. The court granted the administrator an injunction against the employer to prevent further violations. The court found that (1) a motor carrier that claimed an exemption of the wage and hours laws had the burden of showing that its employees were exempt; (2) although § 11(c) of the Act required the motor carrier to maintain and preserve "payroll or other records" containing specified information on employees, the records did not have to be shown on a single record; and (3) the employees were only exempt under § 13(b)(1) of the Act if their activities in their employment by the employer affected the safety of operation of the employer's vehicles.

OUTCOME: The court granted the administrator an injunction against the employer to prevent further violations of the maximum hours and overtime compensation provisions of the Act, but it denied an injunction as to the employer's method of payroll and employee record-keeping, which was not required to be contained in one record.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Records
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN1] Section 15(a)(2), (5) of the Fair Labor Standards Act of 1938 (Act), *29 U.S.C.S. § 215(a)(2), (5)* provides that it shall be unlawful for any person to violate the provisions of §§ 6, 7 of the Act, which relate to minimum wages and maximum hours, or to violate any of the provisions of § 11(c) of the Act, which require the making and keeping of records of employees with respect to wages, hours, and other conditions, and practices of employment.

Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries

EXHIBIT G

Transportation Law > Carrier Duties & Liabilities > State & Local Regulation
Transportation Law > Water Transportation > U.S. Federal Maritime Commission
[HN2] Section 13(b)(1) of the Fair Labor Standards Act of 1938 (Act) provides that § 7 of the Act shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act of 1935, *49 U.S.C.S. § 304*.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
[HN3] The exemption provisions of the wage and hour law are restricted to those whose work affects the safety of operation of the motor vehicles, and does not include the office employees.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Transportation Law > Carrier Duties & Liabilities > State & Local Regulation
Transportation Law > Commercial Vehicles > Rates & Tariffs
[HN4] Section 13(b)(1) of the Fair Labor Standards Act of 1938 (Act), *29 U.S.C.S. § 213(b)(1)*, provides that the provisions of § 7 of the Act, *29 U.S.C.S. § 207* dealing with maximum hours and overtime compensation shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of § 204 of the Motor Carrier Act of 1935.

Communications Law > U.S. Federal Communications Commission > Jurisdiction
Transportation Law > Commercial Vehicles > Maintenance & Safety
Transportation Law > Commercial Vehicles > Traffic Regulation
[HN5] Section 204(1) of the Motor Carrier Act of 1935, *49 U.S.C.S. § 304(1)*, reads as follows: It shall be the duty of the CommissionInterstate Commerce (commission) to regulate common carriers by motor vehicles as provided in 49 U.S.C.S. pt. 304, and to that end the commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage, and express, uniform system of accounts, records, and reports, preservation of records, qualifications, and maximum hours of service of employees, and safety of operation and equipment. The scope and coverage of § 204 of the Motor Carrier Act of 1935 is limited to those employees whose activities affect the safety of operation, and the commission has no jurisdiction to regulate the qualification or hours of service of any other employees.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
Transportation Law > Commercial Vehicles > Licensing & Registration
[HN6] In order for these employees to be exempt by reason of § 13(b)(1) of the Fair Labor Standards Act of 1938 , their activities in their employment by defendant must affect the safety of operation of defendant's vehicles. The activities of the following classes of employees affect the safety of operation, namely, drivers, drivers' helpers, loaders, and mechanics who actually perform work on trucks such as inspecting and repairing lights, brakes, transmissions, differentials, motors, and steering apparatus, while on the other hand the activities of the following classes of employees are not such as affect the safety of operation, namely, washing of trucks, the unloading of freight at a trucking terminal, and the moving of it by handcarts to outgoing trucks, tarpaulin worker, porter, stockroom boy, night watchman, and employees engaged in repairing used or damaged bodies on trucks and trailers. The fact that an employee is a carpenter or mechanic by trade is not decisive, but the true test is what the particular employee actually does rather than what he may be qualified to do.

Governments > Legislation > Interpretation
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Transportation Law > Commercial Vehicles > Rates & Tariffs
[HN7] The word "employee" as used in § 204(a) of the Motor Carrier Act of 1935 is not to be construed in its broadest meaning, but is to take its color from its surroundings.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries

Transportation Law > Commercial Vehicles > Licensing & Registration

[HN8] Drivers, including yard drivers and C and D drivers, drivers' helpers, mechanics, and loaders perform work, which directly affects the safety of operation and are exempt from the provisions of the wage and hour law. Loaders, include the chief loader, assistant loader, and loaders, in that the crew works as a unit and the supervision and overall inspection and approval of the work rest upon the chief loader and assistant loader. However, the work of unloading, wheeling, and working in the warehouse has no direct connection with the safety of operation, and such work is not included within the exempt provision. There is very little difference between inspection and proper maintenance of the tractor and motor and the inspection and proper maintenance of the trailer where such work remedies defects, which have a direct causal connection with the safe operation of the unit as a whole.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview
Transportation Law > Commercial Vehicles > Licensing & Registration

[HN9] The work of trailer mechanics and body mechanics in inspecting trailers and repairing such defects thus discovered as might normally result in an accident on the highway if not discovered and repaired, and the proper maintenance of the trailers to prevent such defects from coming into existence, also have a direct causal connection with the safety of operation and are within the exempt provision. But the building of new bodies, the rebuilding of badly damaged bodies, and any work, which is construction rather than maintenance and repair, are not within the exempt provision. The work of the painter and letterer is too indirectly connected with the safety of operation to be included within the exempt provision.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > General Overview

[HN10] The person claiming the exemption the wage and hours laws has the burden of showing that such employee is exempt.

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > Rulemaking Authority
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Recordkeeping Requirements

[HN11] Section 11(c) of the Fair Labor Standards Act of 1938, *29 U.S.C.S. § 211(c)*, requires the making and keeping of such records of employees and of wages, hours, and other conditions and practices of employment as the Administrator of the Wage and Hour Division shall prescribe by regulation or order as necessary or appropriate.

Labor & Employment Law > Posting & Recordkeeping
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period

[HN12] 5 C.F.R. § 516.2 requires the employer to maintain and preserve "payroll or other records" containing specified information on employees to whom § 7(a) of the Fair Labor Standards Act of 1938 applies. The regulations do not require that all the required information be shown on a single record, but specifically refers to "payroll or other records." The fact that some so-called "casual" employees are for a while carried on a daily payroll instead of the regular weekly payroll for regular employees after they have changed from casual to regular employees, does not cause any failure to supply by records the information required.

COUNSEL: [**1] William S. Tyson, Acting Sol., and Jeter S. Ray, Asst. Sol., both of Washington D.C., Glenn M. Elliott, Acting Regional Atty., of Nashville, Tenn., George W. Jansen, Supervising Atty., of Washington, D.C., and David V. Manker, Atty., and John L. Young, Associate Atty., both of Nashville, Tenn., all of Department of Labor, for plaintiff.

James E. Fahey and Skaggs, Hays & Fahey, all of Louisville, Ky., for defendant.

OPINION BY: MILLER

OPINION

[*847] This action was brought by the plaintiff, Administrator of the Wage and Hour Division, under Section 17 of the Fair Labor Standards Act of 1938, *29 U.S.C.A. §§ 201-219*, to restrain the defendant, Silver Fleet Motor Express, Inc., from violating the provisions of Sections 15(a)(2) and 15 (a)(5) of the Act, *29 U.S.C.A. §§ 215(a)(2)* and *215(a)(5)*. [HN1] Those sections pro-

vide that it shall be unlawful for any person to violate the provisions of Section 6 or Section 7 of the Act, which relate to minimum wages and maximum hours, or to violate any of the provisions of Section 11(c) of the Act which require the making and keeping of records of employees with respect to wages, hours and other conditions and practices of employment. The complaint [**2] alleges that the defendant has violated provisions of Section 7 of the Act in failing to pay certain of its employees overtime compensation as required by the Act, and the provisions of Section 11(c) of the Act in failing to make and preserve adequate and accurate records as required by the Act and regulations of the Administrator. The defendant admits that the employees involved are engaged in interstate commerce and are not being paid the overtime compensation required by the Act. It contends, however, that such employees are exempt from the provisions of the Act by reason of [HN2] Section 13(b)(1) thereof, which provides that Section 7 of the Act shall not apply with respect to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of [*848] Section 204 of the Motor Carrier Act, *49 U.S.C.A. § 304*. The defendant denies the plaintiff's claim that it has violated the record-keeping provisions of the Act.

Findings of Fact.

The defendant is engaged as a common carrier in the interstate transportation of goods by motor vehicle. It has branches located in six different states, [**3] including terminals at Louisville and Middlesboro, Kentucky; Chattanooga, Kingsport, Knoxville and Nashville, Tennessee; Cincinnati and Columbus, Ohio; Chicago, Illinois; Anderson, Columbus, Elwood, Fort Wayne, Indianapolis, La Fayette, Marion, Muncie and Seymour, Indiana; and Birmingham, Alabama. Throughout the system it has six garages which are located at Chicago, Illinois; Indianapolis, Indiana; Cincinnati, Ohio; Louisville, Kentucky; Nashville, Tennessee, and Middlesboro, Kentucky, in which about fifty employees are employed. The Company operates approximately 95 tractors, 184 trailers and 82 pick-up and delivery trucks. Freight is hauled in what is termed a 'unit' which is composed of a tractor and a trailer, which are hooked together by means of a connection termed a 'fifth wheel.' The general office of the Company is located at Louisville, Kentucky.

The defendant's Louisville garage can accommodate ten vehicles at a time for repair work. Twenty-three employees work in that garage. It has a body shop adjoining the garage which can service two or three vehicles at a time. Each garage is staffed with a superintendent or a garage foreman, under whose direct jurisdiction [**4] there are mechanics, mechanics' helpers, service mechanics, trailer mechanics, tire mechanics and body mechanics, representing various grades of mechanics in accordance with their expertness. Each mechanic is skilled to be versatile so as to be able to take over the duties of other employees in the shop when such employee may be absent. The Company's maintenance program is divided into six different classifications, as follows: (1) General overhaul work, which is work done on the vehicle itself when mechanical defects develop, consisting of such work as repairing broken crankshafts and pistons. (2) General service work, which consists of repairing less serious mechanical failures, which in most instances are brought to the attention of the maintenance department by drivers or the vehicles by means of daily gasoline and oil card records kept by all drivers. This work includes defective brakes, defective lights, defective steering, defective springs, minor motor failures, improperly functioning carburetors and defective tires. (3) Preventive maintenance program, which includes an A inspection given every seven days, a B inspection given every fourteen days and a C inspection given [**5] every six months. These inspections are given by the mechanics, mechanics' helpers and service mechanics and are necessary in order to avoid breakdowns and accidents on the highway. (4) Safety lane program. Even though each trailer and each tractor has been previously inspected, after they are hitched together, they are given a final safety inspection in the safety lanes, through which they pass, in order to be sure that the hitch or connection has been properly made. This includes not only the proper connection of the fifth wheel but also proper connection of the air hose and light wires, which involve the proper operation of the trailer brakes and trailer lights. This inspection also includes inspection of windshield wiper and horn, inspection of transmissions and differentials, and the careful inspection of tires, wheels, lugs and bolts. (5) Tire maintenance. When tractors and trailers are driven into the terminal it is the duty of the tire mechanic to inspect the condition of all tires, lugs, bolts and rims and a notation is made by him with respect to any tire that has been damaged enroute or which should be removed for recapping, or which contains a leaky valve, and such [**6] defects are later corrected by replacing the damaged or defective tire with a good one drawn from the Company's stock in its garage. Tire mechanics do both the repair work and the work involved in switching the tires. (6) Trailer repairs and maintenance. Trailer mechanics inspect the wheels, wheel bearings, brakes, springs, axles, and auxiliary [*849] wheels and the condition of the fifth wheel. Body mechanics inspect the fifth wheel, the upper fifth wheel, all doors, floors, roofs, side panels, rub rails, and moldings. Proper maintenance of the bodies of the trailers is a great contributing factor to the safety of operation. If the doors are not properly fitted and maintained they may fly open and strike objects on the highway. If the body of the trailer is faulty

freight may fall through the floor and become engaged in the wheels of the trailer. Defective roofs may cause leaks with resulting damage to lights and to the freight itself. The trailers are first painted silver and are then streamlined with black so that they can readily be seen from a distance. Safety markings are painted on the rear of the trailers which enables them to be seen at great distances both [**7] at night and day. Visibility is pronounced due to the combination of colors, in that the silver at night acts as a reflector and the black as an outline. One employee, William Rupple, called a letterer, does all the painting and gives his entire time to such jobs. The work of the body mechanic in the body shop is almost entirely repair work, repairing the defects discovered from the inspections above referred to and damage resulting from accidents. During the period of 1930-1945 only 10 new bodies were constructed. In some instances extensive damage requires extensive repairs or replacements, although some of the more extensive repair work is done by private garages. The majority of the employees' time in the different classifications above referred to is spent in making repairs, such as have been detailed above.

The following employees of the defendant worked for the defendant as indicated in each instance: George Prewitt and Ben H. Stewart -- mechanics' helpers; Richard Butler, Harvey Goodman and Allen Richard Schmidt -- service mechanics; Richard Dowery, Merrill Fultz and Emil Watts -- tire mechanics; William Moore and Lavour Wenning -- trailer mechanics; John [**8] Klemenz, T. H. McKune, Russell Miller and Ernest Railing -- body mechanics. Arnold Meeks worked as a driver for the defendant except during the period of July 8, 1944, to September 22, 1944, during which period he worked in the body shop.

The freight transported by the defendant is loaded on the defendantS vehicles and taken off of its vehicles at its different terminals. Each terminal is in the charge of a terminal superintendent. In the larger terminals he has assistants, one of whom assists in handling the platform work and the city drivers. At each terminal there are in addition to the large tractor-trailer units one or more semi-tractor trailer units or street trucks which are used for city collection and delivery purposes, whose operators are known as city drivers. The city driver superintendent has charge of that work. At the Louisville terminal there is a superintendent of city loaders who has complete charge of the men who operate solely on the platform. He divides these men into crews, each crew being made up of a chief loader and three loaders. He directs the activities of the crew through the chief loader, who has the supervision of the crew. The chief loader [**9] and his crew perform the actual work of loading and unloading the vehicles that carry the freight between the cities. The usual procedure in loading is as follows: A trailer is parked at the platform. The chief loader reports to the superintendent of loaders that his crew is ready for an assignment. The superintendent hands him a stack of freight bills for freight which is to be loaded off of the platform on to the highway trailer. The chief loader takes his crew to where the freight is located and through experience knows the type of trailer he is to load. His first duty is to see that the trailer is fit for loading, which he does by walking inside the trailer and examining the floor and the roof, and by ascertaining from the outside that the trailer is resting properly on the pavement and not leaning to one side. He then proceeds by checking his freight bills and loading the trailer evenly from the front to the rear, distributing the freight as evenly as possible. An improperly loaded trailer can cause an accident on the highway. Heavy freight should be placed on the bottom and light freight on the top. If too much freight is loaded on one side the [*850] trailer will [**10] lean to that side and may blow a tire in going around a curve. If too much weight is placed in either the nose or the rear of the trailer it causes difficulty in steering the tractor with resulting danger to the safe operation of the tractor-trailer unit on the highway. The chief loader has complete say as to where the freight is to be placed in the truck, but during the loading of the truck the loaders constantly advise the chief loader as to how the trailer is loading, what freight in their opinion should be loaded next, or whether they want floor freight or top freight. The chief loader generally selects a member of his crew to act as his assistant. Loaders will at times advise that certain freight is not fit for loading or is too heavy or that it should not be placed on the particular side of the truck. The chief loader and his assistant watch for dangerous shipments or shipments that are improperly packed, such as a leaking drum of paint which could drip out and make the road slippery. At times it is necessary that the chief loader and the assistant give assistance in loading heavy merchandise into the truck. Some times a trailer will be loaded with freight part of which [**11] goes to a certain city and the remainder of which goes through that city. This may require a rearrangement of the freight in the trailer at the terminal where part of the freight is to be unloaded. Such work is under the supervision of the chief loader and his assistant. Such rearrangement is necessary for the safe operation of the trailer, so that the freight remaining on the trailer can be evenly distributed. The unloading of freight at a terminal is also done by such a crew. The chief loader has supervision of unloading and advises the loaders where the freight is to be placed, some of it being placed in the terminal and some of it at times being placed on a pick-up truck to be taken to another unit that is outbound to another terminal. At times the crew will unload one trailer and also load some of the freight to another trailer. In the Louisville terminal approximately 50% of the ton-

nage of freight handled is outbound freight and approximately 50% of the tonnage is inbound freight. The chief loaders are also called at times checkers. The assistant chief loaders are sometimes called breakers, stackers, and pullers. The two loaders are also called wheelers, in that they [**12] also operate the 2-wheel trucks trucking the freight into the warehouse from the incoming trucks and trucking it into the outbound trucks. The Company has no employees who do nothing but load. At the Louisville terminal the Company operates two crews that start at 8:00 a.m. and work until 5:30 p.m. Another crew starts at 10:00 a.m. and works until about 7:30 p.m. The crew works as a unit in loading a trailer, and all of the crews work as a unit in handling what comes in and goes out of the terminal each day. There is no routine or settled custom determining how much time in any particular day any crew will give to loading and how much time it will give to unloading. Sometimes a whole day may be spent by a crew in loading. At other times the crew may spend a whole day unloading trucks when such trucks are immediately needed for other purposes. On the whole, the loaders in the early crews spend approximately 25% of their time in loading, and the remainder of their time in wheeling and unloading, while the loaders in the later crews spend the majority of their time in loading.

The Company also employs men at the Louisville terminal known as yard drivers whose duty it is to park [**13] trailers, drop them at the dock or hook up road equipment to trailers. The assistant terminal superintendent will tell a yard driver that a certain trailer is ready to be hooked to a certain tractor. The yard driver then goes to the garage and ascertains that the tractor is ready for the highway. It is part of his duty to lubricate the fifth wheel when he obtains the tractor from the garage. He then hooks the tractor to the trailer making the necessary brake connections and the light connections, pulls it away from the platform, closes the rear doors of the truck and applies the seal. He then pulls the complete unit out of the yard and around the city streets to the safety land, which necessitates driving on the city street approximately a city block. In driving the unit to the safety lane it is also his duty to notice whether or not anything appears radically [*851] wrong with the loading of the truck. About 50% of a yard driver's occupied time is spent in driving on city streets. It takes him about five minutes to drive from the company property and go out on the city streets and then come back into the safety lane.

The defendant employs approximately 35 men on the [**14] dock at its Louisville terminal. George W. Streckfus is superintendent of the Louisville terminal and has C. B. Graves as the assistant terminal superintendent. Directly under Streckfus and Graves there are two superintendents of loaders, Geisler and Cannon. Edward Gibson, Chester Graves, K. Krumpleman and Walter Wilkerson are chief loaders. J. T. Baumgartner, Richard Browning and Harvey J. Curtis are yard drivers. John Corcoran, Frank Estis, K. Geisler, K. Rocpey and Wesley L. Stevens are city drivers, otherwise known as C and D (collection and delivery) drivers. M. Burge, B. Campfield, J. Cronan, Sam Hecht and William Thurman are loaders and chief loaders. W. Combs, James Edwards, Willis Froman, James R. Gaither, Fred Graves, William E. Huddleston, Charles Keller, L. K. Louderback, George Malone, William Shaw, Edwin Stiles, John A. Zumer, James Baum, Martin Evans, B. Jarboe, C. A. Leake and B. V. Pearson are loaders. J. Francis worked as a driver part of the time and as a loader part of the time. An employee, George Hoke, spent practically all of his time as a janitor for the dock, terminal and office, from the start of his employment on June 10, 1943, until about April [**15] 19, 1945, at which time his duties were changed so as to work four of his nine hours a day on the dock. His work on the dock consists of loading, unloading, wheeling, and as a driver's helper, with no definite allocation of time to any of each particular type of work. Lewis Strain formerly worked as a wheeler and loader, spending three-fourths of his time on incoming freight and one-fourth of his time on outgoing freight and in the warehouse. Approximately an hour a day was spent by him in actually stacking freight in the outgoing trucks. Shortly before the trial, his duties were changed, at his own request, to those of a night watchman.

The defendant makes and keeps the following records for its employees subject to the provisions of the Act: (1) A time card which shows the full name of the employee, the occupation in which he is employed, the time of day and the name of the day on which the employee's work week begins, the hours worked each day and the total hours worked each work week. (2) The information shown on these time cards is summarized upon a weekly payroll report. From the time card just described the Company transfers the regular and overtime hours, the regular [**16] and overtime rates and the total earned compensation to a weekly payroll report called Form A-45. That report shows the gross earnings, the social security number, payroll deductions, job classification, the net earnings and the check number. (3) Payroll for extra or casual labor. The Company employs at each terminal at times certain men for extra or casual labor that are employed for that day only. These men are paid at the close of that day or the next morning. Such men may work for merely one day, and then skip a day, or at times they may work for two or three days before skipping a day, or at times they may work for two or three days before skipping a day or so. This payroll is in the same form as the regular payroll report, except that it applies to only one day, while the other report previously referred to applies to the period of a week. This report

shows the employee's name, his social security number, his job classification, total hours worked separated between regular hours and overtime hours, rates of pay for the respective divisions of hours and the gross earnings for overtime and for regular time. Then the deductions are shown, then the net amount of earnings [**17] together with the check number. This daily payroll report contains as much information concerning one employee for one day as the weekly reports show for the full week. These daily payroll reports for extra or casual labor are not summarized or totalled at the end of the week. As a general rule, such casual employee would be carried on the daily report only while he continued to be a casual employee, and if his employment became regular or continuous his name would then be transferred to the weekly payroll report. In [*852] some few instances, however, casual employees who worked continuously over a period of several months were nevertheless carried on the daily payroll report as casual employees for that period of time. (4) Job classification cards. These cards show the name and location and job classification, rates of pay and reasons for changes in rates of pay and reasons for changes in rates of pay of all office and supervisory employees. (5) Personnel cards on all employees including casual labor showing the name, address, job classification, date of birth and additional personal information. (6) Form A-6 known as the temporary and part-time employment application, [**18] showing the name, address, social security number and other personnel information which is used for casual or extra labor. (7) Payment checks, which carry a lower stub which the employee tears off and keeps for his permanent records, and which shows both his net earnings and his deductions, including the withholding tax.

The weekly payroll report (Form A-45) was changed for the work week of October 26, 1940, so as for the first time to show for office employees the division between regular hours and overtime hours, regular and overtime rates, and regular and overtime gross earnings. This change promptly followed the final ruling of the Supreme Court of October 14, 1940, that [HN3] the exemption provisions of the Wage and Hour Law was restricted to those whose work affected the safety of operation of the motor vehicles, and did not include the office employees. Prior thereto the question was in considerable doubt, the United States District Court for the District of Columbia having ruled that the exemption provisions included all employees. In April 1941 a new form was devised to better carry that information. In October 1941 the form was again revised for better arrangement and spacing.

[**19] The plaintiff and defendant have stipulated the names of 55 employees of the defendant who the plaintiff claims are paid in violation of the provisions of the Fair Labor Standards Act. Under this stipulation other employees are not involved in this action. The foregoing findings include 53 of the 55 employees so named. The Court has not found any evidence relating to the duties of the other two employees, namely, W. Johnson and Carl R. Jackson.

Conclusions of Law.

[HN4] Section 13(b)(1) of the Fair Labor Standards Act, *29 U.S.C.A. § 213(b)(1)*, provides that the provisions of Section 7 of the Act, *29 U.S.C.A. § 207* dealing with maximum hours and overtime compensation 'shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935; * * * .' [HN5] Section 204 of the Motor Carrier Act of 1935, *49 U.S.C.A. § 304*, reads as follows:

'It shall be the duty of the Commission -- (1) To regulate common carriers by motor vehicles as provided in this part, and to that end the Commission may establish reasonable [**20] requirements with respect to continuous and adequate service, transportation of baggage and express, uniform system of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.'

In *United States v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 1062, 84 L.Ed. 1345*, the Supreme Court construed the scope and coverage of Section 204 of the Motor Carrier Act and held that it was 'limited to * * * those employees * * * whose activities affect the safety of operation' and that the Interstate Commerce Commission had no jurisdiction to regulate the qualification or hours of service of any other employees. It is conceded by the parties in this case that the employees involved are subject to the wage and hour provisions of the Fair Labor Standards Act unless they are exempt by reason of Section 13(b)(1) of that Act, referred to above. [HN6] In order for these employees to be exempt it follows from the foregoing Supreme Court decision that their activities in their employment by the defendant must affect the safety of operation of defendant's vehicles. The question [*853] of what activities [**21] of employees of interstate motor carriers affect the safety of operation and what activities do not affect the safety of operation has received considerable judicial consideration. The question was considered by this same Court and the same Judge thereof in the case of *Keeling v. Huber & Huber Motor Express, D.C.W.D. Ky., 57 F.Supp. 617, 619*. In that case the Court referred to several decisions from other districts which held that the activities of the following classes of employees affected

the safety of operation, namely, drivers, drivers' helpers, loaders, and mechanics who actually perform work on trucks such as inspecting and repairing lights, brakes, transmissions, differentials, motors and steering apparatus, while on the other hand the activities of the following classes of employees were not such as affected the safety of operation, namely, washing of trucks, the unloading of freight at a trucking terminal, and the moving of it by handcarts to outgoing trucks, tarpaulin worker, porter, stockroom boy, night watchman, and employees engaged in repairing used or damaged bodies on trucks and trailers. It was also there stated that the fact that an employee is a carpenter or mechanic [**22] by trade is not decisive but the true test is what the particular employee actually does rather than what he may be qualified to do. The different classes of work referred to in that opinion were not actually involved in that case, and the case must accordingly be considered as a discussion of the authorities and their respective rulings rather than as a ruling in itself.

My present further consideration of the question leads to the conclusion that such rulings are largely correct and to that extent should be followed in this case, although some of the activities included in the exemption were not originally contemplated by the Supreme Court. In *United States v. American Trucking Ass'ns, supra*, the Supreme Court held that [HN7] the word 'employee' as used in Section 204(a) of the Motor Carrier Act was not to be construed in its broadest meaning, but should take its color from its surroundings. Its legislative history is cited as showing a construction of the word limited to 'matters of movement and safety only' and 'careful operation for safety on the highways.' In its later opinion in *Southland Gasoline Co. v. Bayley, 319 U.S. 44, 63 S.Ct. 917, 87 L.Ed. 1244*, the Supreme Court apparently [**23] assumed, but without so ruling because the question was not involved, that the power of the Interstate Commerce Commission was limited to the regulation of hours of drivers. The opinion *on page 48 of 319 U.S., on page 919 of 63 S.Ct.*, refers twice to maximum hours for drivers and then expressly states that the exemption provision of the Fair Labor Standards Act 'was adopted to free operators of motor vehicles from the regulation by two agencies of the hours of drivers (italics our own).'See pages 48 and 49 of 319 U.S., pages 919, 920 of 63 S.Ct. This same thought was expressed in the opinion of the *Court for the Second Circuit in Walling v. Comet Carriers, 151 F.2d 107, at page 111*, where it said that the power of the Interstate Commerce Commission to limit maximum hours was 'obviously intended to prevent accidents due to fatigue.' But it is quickly recognized that other activities have just as important effect on the safety of operation of a vehicle on the highway as does the driving of the vehicle in question. The proper mechanical functioning of the vehicle when in operation is vitally important. Failure of brakes, lights or steering apparatus to function properly are just a [**24] few instances of what may cause a serious accident on the highway. Proper loading of the trailer with resulting proper balance and proper connection with the tractor by means of the fifth wheel have a direct causal connection with the safe operation of the vehicle. The Interstate Commerce Commission in considering the question after the ruling in *United States v. American Trucking Ass'ns, supra*, ruled that mechanics and loaders were included within the exemption. See Report, Maximum Hours of Service of Motor Carrier Employees, 28 M.C.C. 125, 132, 133. As pointed out by the Supreme Court in the American Trucking Associations case, such [*854] an interpretation is entitled to great weight. *310 U.S. 534 at page 549, 60 S.Ct. 1059 at page 1067, 84 L.Ed. 1345.* The Administrator of the Wage and Hour Division has apparently agreed with and adopted that ruling. See Interpretative Bulletin No. 9, Revised October 1943, Par. 4. I accordingly rule that [HN8] drivers (including yard drivers and C and D drivers), drivers' helpers, mechanics and loaders perform work which directly affects the safety of operation and are exempt from the provisions of the Wage and Hour Law. Loaders include the [**25] chief loader, assistant loader and loaders, in that the crew works as a unit and the supervision and overall inspection and approval of the work rest upon the chief loader and assistant loader. However, the work of unloading, wheeling and working in the warehouse has no direct connection with the safety of operation, and such work is not included within the exempt provision. I see very little difference between inspection and proper maintenance of the tractor and motor and the inspection and proper maintenance of the trailer where such work remedies defects which have a direct causal connection with the safe operation of the unit as a whole. Accordingly, [HN9] the work of trailer mechanics and body mechanics in inspecting trailers and repairing such defects thus discovered as might normally result in an accident on the highway if not discovered and repaired, and the proper maintenance of the trailers to prevent such defects from coming into existence, also have a direct causal connection with the safety of operation and are within the exempt provision. But the building of new bodies, the rebuilding of badly damaged bodies, and any work which is construction rather than maintenance and [**26] repair are not within the exempt provision. The work of the painter and letterer is, in my opinion, too indirectly connected with the safety of operation to be included within the exempt provision. *Keeling v. Huber & Huber Motor Express, supra.*

Proceeding on the basis of the foregoing rulings, there is still presented the question of whether or not an employee is exempt who spends part of his time each week in exempt activities and part of his time each week

in non exempt activities. The Administrator's contention that such an employee is not exempt unless he spends fifty per cent of his time in the exempt activities is not sustained by the ruling heretofore made by the Circuit Court of Appeals for this Circuit. It was stated in *Walling v. Morris, 6 Cir., 155 F.2d 832*, following *Fletcher v. Grinnell Bros., 6 Cir., 150 F.2d 337, 340*, and *West Kentucky Coal Co. v. Walling, 6 Cir., 153 F.2d 582*, that such an employee is in the exempt classification if he devotes a substantial part of his time during the work week to work of the exempt classification. In *Richardson v. James Gibbons Co., 4 Cir., 132 F.2d 627* (affirmed at *319 U.S. 44, 63 S.Ct. 917, 87 L.Ed. 1244*, without discussion [**27] of that issue), the Circuit Court held that an employee who devoted twenty-five per cent of his time during the work week to exempt activities was exempt from the provisions of the Wage and Hour Law. In *Walling v. Comet Carriers, supra*, the Circuit Court of Appeals stated, without it being necessary to so rule, that one day's work in any one week could reasonably be considered substantial. In my opinion, each of the named employees of the defendant hereinabove referred to with the exception of William Rupple, George Hoke and Lewis Strain, devoted a substantial part of his time during the work week to exempt activities and accordingly is within the exempt provision. Although George Hoke was at the time of the trial working in an exempt classification, he had only recently changed to that type of work, and at the time when the action was filed was employed in a non exempt classification and had been so employed for approximately a year and a half prior thereto. Since [HN10] the person claiming the exemption has the burden of showing that such employee is exempt (*Fletcher v. Grinnell Bros., supra*, C.C.A. 6th), the exemption claimed by the defendant for the employees W. Johnson and Carl R. [**28] Jackson is not established in this hearing.

The foregoing five instances of violation of the maximum hours and overtime [*855] compensation provisions of the Act authorize an injunction against further violations of that section of the Act. See *Bowles v. May Hardwood Co., 6 Cir., 140 F.2d 914, 196.* Any subsequent contempt proceedings thereunder should be controlled by the views expressed herein pertaining to the nature and extent of exempt activities until changed or modified by higher authority.

[HN11] Section 11(c) of the Act, *Section 211(c), Title 29 U.S.C.A.*, requires the making and keeping of such records of employees and of wages, hours and other conditions and practices of employment as the Administrator shall prescribe by regulation or order as necessary or appropriate. Such regulations were promulgated, effective September 15, 1941, Title 29, Chapter 5, Code of Federal Regulations, Part 516. [HN12] Section 516.2 requires the employer to maintain and preserve 'payroll or other records' containing specified information on employees to whom Section 7(a) of the Act applies. The defendant has kept such records. All the information called for is recorded at some place or in some [**29] way, although it is not all included on the payroll or any other single record. The Regulations do not require that all the required information be shown on a single record, but specifically refers to 'payroll or other records.' The fact that some so-called 'casual' employees are for a while carried on a daily payroll instead of the regular weekly payroll for regular employees after they have changed from casual to regular employees, does not cause any failure to supply by records the information required. I am not impressed by the Administrator's effort in seeking an injunction on that phase of the case. The defendant appears to have gone to great lengths to record and make available to the Administrator all the information required. That phase of the injunctive relief requested is denied. Compare *Hecht Co. v. Bowles, 321 U.S. 321, 329, 330, 64 S.Ct. 587, 88 L.Ed. 754.*

Counsel for plaintiff will tender judgment for entry.

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JOHN WATKINS, Plaintiff-Appellant, v. AMERIPRIDE SERVICES, dba Ameripride Uniform Services, Defendant-Appellee.

No. 02-56082

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

375 F.3d 821; 2004 U.S. App. LEXIS 13790; 149 Lab. Cas. (CCH) P59,868; 15 Am. Disabilities Cas. (BNA) 1229; 9 Wage & Hour Cas. 2d (BNA) 1317

July 7, 2003, Argued and Submitted, Pasadena, California
July 6, 2004, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-01-01038-DOC. David O. Carter, District Judge, Presiding.

DISPOSITION: Reversed in part, affirmed in part and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a disabled former employee, appealed decisions of the United States District Court for the Central District of California, which granted defendant former employer partial summary judgment, finding that the employee was exempt from the state's overtime pay requirements, and entered judgment in favor of the employer, finding that the employer reasonably accommodated the employee's disability under *Cal. Gov't Code § 12940(m)*.

OVERVIEW: The employee's regular duties included delivering uniforms and products to customers on a designated route and picking up soiled uniforms for laundering. The employee's position involved heavy lifting, including loading and unloading uniforms and garment racks at several customer stops along his route. The employee suffered a permanent wrist injury while lifting a rack of uniforms. He was offered a telephone position at a lower wage because there were no other vacant positions for which he was qualified. In reversing the district court's decision that the employee was exempt from overtime pay requirements, the court held that, because the great majority of his work consisted of picking up dirty uniforms and delivering clean uniforms for customers, it was clear that the work was not in interstate commerce within the meaning of the Motor Carrier Act exemption, *29 U.S.C.S. § 213*. In affirming the judgment on the accommodation claim, the court held that the employer was only obligated to reassign the employee to another position within the company if there was an existing, vacant position for which he was qualified and was not required to create a new position to accommodate him.

OUTCOME: The court affirmed the judgment of the district court as to the reasonable accommodation claim and reversed and remanded the judgment of the district court as to the overtime claim.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] The court of appeals reviews the district court's grant of summary judgment de novo. Viewing the facts in the light most favorable to the nonmoving party, the court of appeals must determine whether a genuine issue of material fact exists, and whether the district court applied the law correctly.

Civil Procedure > Trials > Bench Trials

EXHIBIT H

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN2] The district court's findings of fact following a bench trial are reviewed for clear error and its legal conclusions are reviewed de novo.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN3] Regulations governing overtime pay in California are issued by California's Industrial Welfare Commission (IWC). Wage orders issued by the IWC are quasi-legislative regulations that are to be interpreted in the same manner as statutes. *Cal. Lab. Code § 1185.*

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Governmental Employees
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries
[HN4] California Industrial Welfare Commission Wage Order No. 9, regulating wages, hours and working conditions in the transportation industry, excludes from its overtime pay requirements employees whose hours of service are regulated by 49 C.F.R. § 395.1-395.13. Cal. Code Regs. tit. 8, § 11090(3)(L)(1)(2004). 49 C.F.R. § 395.1-395.13 set the federal maximum hour restrictions for employees of motor carriers. However, these regulations are only applicable to motor carriers and drivers engaged in interstate commerce. The Fair Labor Standards Act (FLSA) contains a similar exemption, which applies to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service. *29 U.S.C.S. § 213(b)(1).* Federal case law interpreting the FLSA exemption is therefore instructive in determining whether an employee was sufficiently engaged in interstate commerce to bring him within the scope of the U.S. Department of Transportation regulations.

Transportation Law > Intrastate Commerce
[HN5] The interstate or intrastate character of a shipment is determined only after considering the entire panoply of facts and circumstances surrounding the transportation. Even intrastate deliveries can be considered part of interstate commerce if the property in question was originally delivered from out-of-state and the intrastate route is merely part of the final phase of delivery.

Transportation Law > Intrastate Commerce
[HN6] Indefinite storage in a warehouse may transform goods shipped from out-of-state into intrastate deliveries.

Business & Corporate Law > Foreign Businesses > General Overview
Contracts Law > Sales of Goods > Performance > Seller's Delivery & Shipment of Goods
Transportation Law > Intrastate Commerce
[HN7] If a company places orders with an out-of-state vendor for delivery to specified intrastate customers, a temporary holding of the goods within an intrastate warehouse for processing does not alter the interstate character of the transportation chain culminating in delivery to the customer. If, on the other hand, a customer places orders with an out-of-state vendor, with delivery to the company's intrastate warehouse for future delivery to customers yet to be identified, the transportation chain culminating in delivery to the customer is considered intrastate in nature.

Labor & Employment Law > Discrimination > Disability Discrimination > Coverage & Definitions > Discriminatory Conduct
Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN8] See *Cal. Gov't Code § 12940(a).*

Labor & Employment Law > Discrimination > Disability Discrimination > Federal & State Interrelationships
[HN9] The Fair Employment and Housing Act, *Cal. Gov't Code § 12940,* protects employers from liability for discharging an employee with a disability or medical condition when the employee is unable to perform his or her essential duties in a manner that would not endanger his or her health or safety. *Cal. Gov't Code § 12940(a)(1).*

Labor & Employment Law > Discrimination > Accommodation
[HN10] The Fair Employment and Housing Act, *Cal. Gov't Code § 12940,* provides that it is an unlawful employment practice for an employer to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. *Cal. Gov't Code § 12940(m).* A reasonable accommodation may include job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or poli-

cies and other similar actions. Cal. Code Regs. tit. 2, § 7293.9(a)(2).

Labor & Employment Law > Discrimination > Accommodation

[HN11] An employer can prevail on a reasonable accommodation claim by showing, among other things, one of the following: (1) a reasonable accommodation was offered and refused; or (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation.

COUNSEL: Lloyd C. Ownbey, Jr., Pasadena, California, for the plaintiff-appellant.

C. Craig Woo and Scott C. Lacunza, Jackson Lewis LLP, Los Angeles, California, for the defendant-appellee.

JUDGES: Before: Barry G. Silverman, William A. Fletcher, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Rawlinson; Concurrence by Judge W. Fletcher.

OPINION BY: Johnnie B. Rawlinson

OPINION

[*823] RAWLINSON, Circuit Judge:

Plaintiff-Appellant John Watkins (Watkins) unfortunately became disabled during his otherwise productive stint as an employee with Defendant-Appellee Ameripride Services (Ameripride). Ameripride tried to salvage Watkins' career by placing him on special assignment and on a leave of absence. However, Watkins was unable to recover sufficiently to resume his former position. Watkins sued Ameripride under the California Labor Code for improperly classifying him as exempt from overtime pay and thus failing to pay him for overtime work, and under *California's Fair Employment and Housing Act* (FEHA) for failure to accommodate his disability. [**2] The district court granted partial summary judgment in favor of Ameripride, finding that Watkins was exempt from California's overtime pay requirements under the motor carrier exemption to the California Labor Code. At the conclusion of a bench trial on the remaining claims, the district court entered judgment in favor of Ameripride, finding that Ameripride reasonably accommodated Watkins' disability. Because there is a genuine issue of material fact as to whether Watkins was engaged in interstate commerce while performing his duties, we reverse the grant of summary judgment in favor of Ameripride on the overtime claim. Because the district court properly concluded that Ameripride fulfilled its obligations under the FEHA, we affirm the judgment in [*824] favor of Ameripride on Watkins' reasonable accommodation claim.

I.

BACKGROUND

Ameripride supplies businesses with uniform rental, sales and laundry services, and building maintenance products. It maintains a warehouse in California, where it keeps a stock of uniforms and other products that it sells. Ameripride maintains its stock by ordering products from out-of-state manufacturers.

Watkins worked as a Customer Service [**3] Representative (CSR) for Ameripride. His regular duties included delivering uniforms and products to customers on his designated route and picking up soiled uniforms for laundering. Watkins' position involved heavy lifting, including loading and unloading uniforms and garment racks at approximately thirty-five customer stops along his route. Watkins was generally expected to do his job alone. While Ameripride had on occasion assigned assistants to ride with various CSRs for limited periods of time, these assistants were taken from other duties at Ameripride and were, of necessity, temporary. Occasionally, a CSR is assigned to make special deliveries ("specials") in addition to his regular route. Ninety percent of specials are handled by the CSR who covers the route of the customer requiring the special delivery. Consequently, there is no full-time position for a CSR making special deliveries only.

On November 11, 1999, Watkins injured his wrist while lifting a rack of uniforms as part of his CSR duties. As a result, Watkins was rendered unable to perform the job duties of a CSR. Watkins discussed his injury with a Co-Service Manager at Ameripride, who assigned Watkins to deliver specials [**4] and to perform some telephone duties. Watkins continued to receive his former rate of pay, which consisted of a 10 percent commission from the revenue on his route.

On January 6, 2000, another Co-Service Manager informed Watkins that Ameripride could no longer pay him at his former rate for doing specials work. The manager offered Watkins a telephone position at $ 9-$ 10 per hour, because there were no other vacant positions at Ameripride for which Watkins was qualified. Watkins rejected the offer and was placed on a leave of absence. Watkins' CSR position remained open for approximately one year, during which time Watkins underwent surgery on his wrist. Regrettably, despite the surgery, Watkins remained totally disabled due to his wrist injury.

II.

STANDARDS OF REVIEW

[HN1] We review the district court's grant of summary judgment de novo. *See PLANS, Inc. v. Sacramento City Unified School Dist., 319 F.3d 504, 507 (9th Cir. 2003).* Viewing the facts in the light most favorable to the nonmoving party, we must determine whether a genuine issue of material fact exists, and whether the district court applied the law correctly.

Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). [**5] [HN2] The district court's findings of fact following a bench trial are reviewed for clear error and its legal conclusions are reviewed de novo. *Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002).*

III.

DISCUSSION* A. *Watkins' Overtime Pay Claim

Watkins asserts a claim for overtime pay, premised on his contention that [*825] throughout the course of his employment, Ameripride deprived him of overtime pay by erroneously designating his position as exempt from the regulations governing overtime pay. [HN3] Regulations governing overtime pay in California are issued by California's Industrial Welfare Commission (IWC). Wage orders issued by the IWC are quasi-legislative regulations that are to be interpreted in the same manner as statutes. *See Cal. Lab. Code § 1185; see also Collins v. Overnite Trans. Co., 105 Cal. App. 4th 171, 174, 178-79, 129 Cal. Rptr. 2d 254 (2003).*

[HN4] IWC Wage Order No. 9, regulating wages, hours and working conditions in the transportation industry, excludes from its overtime pay requirements "employees whose hours of service are regulated by . . . the United States Department

of Transportation [**6] Code of Federal Regulations, *Title 49, Sections 395.1 to 395.13*." *Cal. Code Regs. tit. 8, § 11090(3)(F)(1); id. § 11090(3)(H)(1)*(1997). [1]

1 The current exemption is contained at *Cal. Code Regs. tit. 8, § 11090(3)(L)(1)*(2004).

Sections 395.1 to 395.13 set the federal maximum hour restrictions for employees of motor carriers. However, these regulations are only applicable to motor carriers and drivers engaged in interstate commerce. [2] Thus, the issue before us is whether Watkins, as a CSR for Ameripride, was engaged in transporting property in interstate commerce so as to be subject to the federal regulations referenced in the IWC order. If so, Watkins is not entitled to overtime pay in California. [3]

2 The FLSA contains a similar exemption, which applies to "any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service[.]" *29 U.S.C. § 213(b)(1).* Federal case law interpreting the FLSA exemption is therefore instructive in determining whether Watkins was sufficiently engaged in interstate commerce to bring him within the scope of the Department of Transportation regulations.

[**7]

3 *See 49 U.S.C. § 13501(1)(A)* (giving the Department of Transportation jurisdiction over transportation by motor carriers taking place "between . . . a State and a place in another State").

To determine whether or not Watkins was engaged in interstate commerce, we must examine the character of the shipments he was charged with delivering, and the intent of the shippers as to the ultimate destination of the goods. *Klitzke v. Steiner Corp., 110 F.3d 1465, 1469 (9th Cir. 1997).* [HN5] The interstate or intrastate character of the shipment is determined only after considering the entire panoply of "facts and circumstances surrounding the transportation." *Id.* (citation omitted). We have held that even intrastate deliveries can be considered part of interstate commerce if the property in question was originally delivered from out-of-state and the intrastate route is merely part of the final phase of delivery. *See id.*

In *Steiner*, the company received orders from its customers and placed the orders with out-of-state vendors. The goods were shipped [**8] to the company, which in turn distributed them to the specific customers who placed the orders, usually within a two-day period. We held that the company was engaged in interstate transportation, despite the fact that the delivery between the company and its customers was intrastate rather than interstate. *Id. at 1470.* We followed the United States Supreme Court's holding in *Walling v. Jacksonville Paper Co., 317 U.S. 564, 568-69, 87 L. Ed. 460, 63 S. Ct. 332 (1943)* that "[a] temporary pause in a warehouse does not mean that . . . the goods are no longer in commerce within the meaning of the motor carrier act." *Id.* (internal quotation marks [*826] and alterations omitted). Recognizing the "practical continuity of movement" from the out-of-state shipper to the product's final in-state destination, the intrastate portion of the delivery route was characterized as transportation in interstate commerce. *Id. at 569.* Adhering to the decision of the Supreme Court in *Jacksonville Paper*, we ruled that intrastate deliveries may be considered in the stream of interstate commerce if the property in question originated from out-of-state, and the intrastate [**9] portion of the

route is merely part of the final phase of the unmistakably interstate transport. *Steiner, 110 F.3d at 1470.*

However, in *Jacksonville Paper*, the Supreme Court also held that a certain category of goods was not shipped in interstate commerce. These were goods ordered by the wholesaler and kept in its warehouse. The orders were made by the wholesaler whose customers were "a fairly stable group," whose needs the manager could "estimate with considerable precision." *317 U.S. at 569.*

[HN6] Indefinite storage in a warehouse may transform goods shipped from out-of-state into intrastate deliveries. *See Southern Pac. Transp. Co. v. Interstate Commerce Comm'n, 565 F.2d 615, 618 (9th Cir. 1977)* (holding that goods retained their intrastate character when they were delivered to and stored in the in-state company warehouse, with no designated designation at the time of delivery to the warehouse). The case we now consider is the converse of *Southern Pac.* In *Southern Pac.*, the goods originated intrastate and terminated interstate, with an intervening stay in the company warehouse. Here, the goods originated interstate and terminated [**10] intrastate, with an intervening stay in the company warehouse. In *Southern Pac.*, the determining factor was that the company "did not decide the final destination of any shipment of goods until after the goods had come to rest in the [intrastate] warehouse." *Id.* Consequently, the drivers who drove between the intrastate canning plants and the intrastate warehouse were not engaged in interstate commerce, because the intrastate warehouse was the only designated destination at the time of the transport.

Reading *Steiner*, *Jacksonville Paper*, and *Southern Pac.* together, we can garner the following guidance for this case: [HN7] if a company places orders with an out-of-state vendor for delivery to specified intrastate customers, a temporary holding of the goods within an intrastate warehouse for processing does not alter the interstate character of the transportation chain culminating in delivery to the customer. If, on the other hand, a customer places orders with an out-of-state vendor, with delivery to the company's intrastate warehouse for future delivery to customers yet to be identified, the transportation chain culminating in delivery to the customer is considered [**11] intrastate in nature.

Watkins' affidavit in the district court described the nature of his work. The great majority of his work consisted of picking up dirty uniforms and delivering clean uniforms for AmeriPride customers. It is clear that this work is not in interstate commerce within the meaning of the *Motor Carrier Act* exemption. Watkins also delivered new uniforms and other new products to customers on his route. This work was less than three percent of his overall work. Watkins describes his delivery of new materials as follows:

> The delivery of new materials [to customers] was less than three-percent of the work I performed.

The new materials would arrive from Cleveland, Tennessee in full interstate truck loads, and be placed in the cage at [*827] the plant, and uniforms in the warehouse would be classified by type, color and size of product. It was not set aside or earmarked for a particular customer. The only customers that had identifiable mats was [sic] Reynolds Metals. The identification was on the mats when I began servicing the accounts, and was there when I left. I received no orders from Reynolds for mats from Cleveland, Tennessee while I serviced the account.

[**12] All uniforms arrived without specific identification by customer. Should a customer want special identification, he would order it by general description and order what identification should appear on the uniform. The uniform or other material would be taken from inventory, and the identification work would be done in the warehouse by persons specifically designated to do that work (in emergencies it would be done at the plant).

When I needed new uniforms, I would obtain them from the warehouse. Other new materials would be obtained from the plant. (There was appropriate security at both locations.) I would go to the employee in charge for access, and he would pick out whatever that customer needed.

In 8-1/2 years of employment, I did not see any orders where customers bought specific materials from Cleveland, Tennessee with delivery merely transhipped at the plant or warehouse. The orders were simply filled from fungable [sic] goods that were stored in the cage in the plant and uniforms from the warehouse.

It is misleading to state that the products from out-of-state would be received and redelivered to waiting customers. The new materials would remain in the plant cage undesignated [**13] until the customer in [sic] weeks or months later decided he was in need of an item from the fungable [sic] goods stored in either of AmeriPride's facilities.

I was not requested at any time in my employment to pick up any material to be shipped out of state.

Watkins' affidavit, if believed, shows that the new materials were not delivered in interstate commerce, under the reasoning of *Jacksonville Paper*. Rather, the new materials delivered by Watkins were fungible, and were taken from general inventory after the customer made an

order. Only the mats labeled Reynolds Metals might fit within the categories of goods that *Jacksonville Paper* held were shipped in interstate commerce. But Watkins states that in the eight and one-half years of his employment he never delivered any of the mats.

It would not be a fair reading of *Steiner*, *Jacksonville Paper*, and *Southern Pac.* to characterize these intrastate deliveries as within the "practical continuity of [interstate] movement" from the out-of-state vendor through the in-state company (Ameripride) to the in-state customer. *See Jacksonville Paper, 317 U.S. at 569.* Although Ameripride presented evidence [**14] that some of its merchandise was delivered directly to customers from out-of-state vendors, the evidence is disputed. In the face of such a dispute, summary judgment is not appropriate. *See Lolli v. County of Orange, 351 F.3d 410, 421 (9th Cir. 2003).* **B. *Watkins' Reasonable Accommodation Claim***

California's Fair Employment and Housing Act, *Cal. Gov't Code § 12940*, [HN8] provides that "it shall be an unlawful employment practice . . . for an employer, because of the . . . physical disability . . . of any person . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." *Cal. Gov't Code § 12940(a).* [HN9] [*828] The FEHA, however, protects employers from liability for discharging an employee with a disability or medical condition when the employee "is unable to perform his or her essential duties . . . in a manner that would not endanger his or her health or safety[.]" *Id.* at *§ 12940(a)(1)*; *see also id.* at *§ 12940(a)(2).* Ameripride does not challenge the district court's conclusion that Watkins' wrist injury constitutes a disability under the FEHA. The only issue before [**15] us is whether Ameripride provided Watkins with a reasonable accommodation as required under the FEHA.

[HN10] The FEHA provides that it is an "unlawful employment practice . . . for an employer . . to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." *Cal. Gov't Code § 12940(m).* A reasonable accommodation may include "job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modification of examinations, training materials or policies . . . and other similar actions." *Cal. Code Regs. tit. 2, § 7293.9(a)(2).*

Watkins asserts that Ameripride should have accommodated him by offering him a full time position as a "specials" driver. In the alternative, he contends that Ameripride should have modified his CSR job by providing him with an assistant and/or equipment such as carts and dollies. As we discuss below, the accommodations requested by Watkins are either not required under the FEHA or would not, as a factual matter, have permitted Watkins to resume his duties as a CSR.

Ameripride was only obligated to [**16] reassign Watkins to another position within the company if there were an *existing, vacant* position for which Watkins was qualified. *See Hanson v. Lucky Stores, Inc., 74 Cal. App. 4th 215, 227, 87 Cal. Rptr. 2d 487 (1999).* It is undisputed that Ameripride had no existing position involving exclusively specials deliveries. Furthermore, Ameripride was not required to create a new position to accommodate Watkins. *See McCullah v. Southern California Gas Co., 82 Cal. App. 4th 495, 501, 98 Cal. Rptr. 2d 208 (2000).* Accordingly, Ameripride was not required to create a "specials" driver position or permanent assistant position to accommodate Watkins.

Following a bench trial, the district court made a finding of fact that, even with a cart, Watkins would be required to engage in the heavy lifting that he was unable to do. This finding was not clearly erroneous. Following Watkins' wrist surgery, he underwent physical therapy to strengthen his wrist and continued to follow prescribed exercises. However, Watkins' ability to lift and grab objects with his right hand never improved to the extent that he could use it on a consistent basis, as required by the CSR position.

Ameripride subsequently offered [**17] Watkins a vacant position doing telephone surveys, but he declined it. No other vacant positions were available for which Watkins was qualified. [4]

> 4 While Watkins identifies in his brief several existing positions that he could possibly have qualified for, he does not dispute Ameripride's showing that these positions were not vacant.

Ameripride also accommodated Watkins in other ways. Ameripride allowed Watkins to do specials deliveries at his former rate of pay for two months. Ameripride then left Watkins' job open for a year in order to allow Watkins to reclaim his position after surgery. Finally, Ameripride offered Watkins a job that he could perform despite his disability, which Watkins declined. Ameripride's actions satisfied its [*829] obligation to reasonably accommodate Watkins' disability.

In *Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 102 Cal. Rptr. 2d 55 (2000)*, the court held that [HN11] an employer can prevail on a reasonable accommodation claim by showing, among other things, one of the following: "(1) [**18] [a] reasonable accommodation was offered and refused; [or] (2) there simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or

without accommodation[.]" *Id. at 263*. Ameripride has shown both. Because Ameripride reasonably accommodated Watkins' disability, we affirm the district court's judgment in favor of Ameripride on Watkins' FEHA claim. [5]

> 5 The fact that Ameripride reasonably accommodated Watkins' disability forecloses his allegation that Ameripride failed to engage in the interactive process. *See Hanson, 74 Cal.App.4th at 229*.

IV.

CONCLUSION

A material issue of fact existed in the record regarding the extent to which the deliveries made by Watkins as an Ameripride employee were of an interstate character. In view of the existence of a material issue of fact, summary judgment on Watkins' overtime claim was not appropriate. The district [**19] court properly entered judgment in favor of Ameripride on Watkins' reasonable accommodation claim. Accordingly, the judgment of the district court is reversed as to the overtime claim and affirmed as to the reasonable accommodation claim.

REVERSED in part, AFFIRMED in part and REMANDED. Each party will bear its costs on appeal.

CONCUR BY: W. FLETCHER

CONCUR

W. FLETCHER, Circuit Judge, concurring:

I concur fully in the court's opinion. I write separately to point out that a potentially relevant legal issue was not argued and is not decided in this case.

When the federal *Fair Labor Standards Act ("FLSA")* was passed in 1938, it established federal standards for wages and hours. *Section 7 of the FLSA* limited the number of hours that could be worked in a given week, and provided for wages at one and one-half the regular rate for hours worked in excess of the limit. *See 29 U.S.C. § 207(a)*. However, *Section 13(b)(1) of the FLSA* exempted from its overtime requirements employees within the regulatory power of the Interstate Commerce Commission ("ICC") under the federal *Motor Carrier Act. See id. § 213(b)(1); see also Morris v. McComb, 332 U.S. 422, 423-25, 92 L. Ed. 44, 68 S. Ct. 131 (1947)*; [**20] *Levinson v. Spector Motor Serv., 330 U.S. 649, 660, 91 L. Ed. 1158, 67 S. Ct. 931 (1947)*. After the dissolution of the ICC in 1995, the relevant regulatory authority became the Secretary of Transportation rather than the ICC, but the substance of the exemption from the FLSA remained. *See Klitzke v. Steiner Corp., 110 F.3d 1465, 1468* & n.2 (9th Cir. 1997). *Section 13(b)(1) of the FLSA* contains the current Motor Carrier Act exemption, which provides:

> The provisions of *section 207* of this title [regulating overtime] shall not apply with respect to --
>
> (1) any employee with respect to whom the Secretary of Transportation *has power to establish* qualifications and maximum hours of service pursuant to [*830] the provisions of *section 31502 of Title* 49[.]

29 U.S.C. § 213(b)(1) (emphasis added).

California law contains a Motor Carrier Act exemption similar, but not identical, to the exemption in *Section 13(b)(1) of the FLSA*. California law provides that rules and regulations governing overtime pay in California are promulgated by the Industrial Welfare Commission ("IWC"). *Cal. Lab. Code § 1173*. Orders adopted by the [**21] IWC have the force of law. *See id. § 1185*. Under IWC Wage Order 9, regulating wages and hours of workers in the transportation industry, employers are required to pay not less than time-and-a-half for overtime work. *Cal. Code Regs. tit. 8, § 11090(3)(A)* ("Wage Order 9"). However, Wage Order 9 contains an exemption for certain transportation workers from the other-wise applicable overtime pay requirements. That Order provides, in relevant part:

> The provisions of this section are not applicable to employees whose hours of service *are regulated* by . . . the United States Department of Transportation Code of Federal Regulations, *Title 49, Sections 395.1 to 395.13*, Hours of Service of Drivers . . . regulating hours of drivers.

Cal. Code Regs. tit. 8, § 11090(3)(F)(1)(1998) (emphasis added). [1] The issue in this case is the scope of the Motor Carrier Act exemption in Wage Order 9.

> 1 The Motor Carrier Act exemption is now contained at IWC Wage Order 9-2004(3)(L), *Cal. Code Regs. tit. 8, § 11090(3)(L)(1)*(2004).

[**22] Watkins argued his case by analogy to the Motor Carrier Act exemption under the FLSA. That is, Watkins argued that the Secretary of Transportation does not have the "power to establish" regulations concerning his employment. Watkins did not rely on the actual words of Wage Order 9, which pro-vide that drivers

whose hours of service "are regulated" by the Secretary of Transportation are not entitled to overtime pay. Read literally, the scope of the exemption under Wage Order 9 appears to extend no farther than the actual regulation of driver hours by the Secretary of Transportation. The scope of the Motor Carrier Act exemption from the FLSA thus may be broader than under Wage Order 9, because the FLSA exemption is determined by the power of the Secretary to regulate, not by the regulations actually adopted.

California has the power to adopt a narrower exemption from its overtime laws than the Motor Carrier Act exemption under the FLSA. Every appellate court to consider the question (including our court) has concluded that state overtime laws are not preempted by the Motor Carrier Act exemption under the FLSA. *See Agsalud v. Pony Express Courier Corp. of Am., 833 F.2d 809, 810 (9th Cir. 1987)*; [**23] *see also Overnite Transp. Co. v. Tianti, 926 F.2d 220, 221-22 (2d Cir. 1991)*; *Pettis Moving Co. v. Roberts, 784 F.2d 439, 441 (2d Cir. 1986)*; *Williams v. W.M.A. Transit Co., 153 U.S. App. D.C. 183, 472 F.2d 1258, 1263 (D.C. Cir. 1972)*; *Dep't of Labor and Indus. of the State of Wash. v. Common Carriers, Inc., 111 Wn.2d 586, 762 P.2d 348, 349 (Wash. 1988)*. Because there is no federal preemption, the words "are regulated" in Wage Order 9 may be read (so far as federal law is concerned) to mean that the Motor Carrier Act exemption applies to California overtime laws only to the extent that the Secretary actually regulates the hours of the drivers in question.

There is some evidence in the record to suggest that Ameri-Pride's drivers are not actually regulated by the Secretary of [*831] Transportation. For example, Watkins states in his affidavit filed in the district court, "In my 8 years of employment as a CSR, I was not required to comply with the Department of Transportation regulations concerning employment physicals, interstate log books, written and practical driving tests, and drug tests as would be required were I an [**24] interstate driver." However, while counsel for Watkins argued in his brief to us that California overtime law is not preempted by the federal Motor Carrier Act exemption of the FLSA, he made no argument, based on the text of Wage Order 9, that the exemption under California law is narrower than under the FLSA. The court's opinion therefore appropriately does not reach the issue of whether the exemption under Wage Order 9 depends on the existence of actual regulation rather than merely the power to regulate.

LEXSEE 497 FSUPP2D 1080

STEVE WHITE, Plaintiff, v STARBUCKS CORP, Defendant.

No C 06-3861 VRW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

497 F. Supp. 2d 1080*; *2007 U.S. Dist. LEXIS 48922

July 2, 2007, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former employee claimed defendant employer failed to pay overtime wages in violation of *Cal. Labor Code §§ 201*-204 and Cal. Code Regs. tit 8, § 11070(12)(A), provide meal and rest periods in violation of *Cal. Labor Code §§ 226.7* and *512*, and provide correct itemized wage statements in violation of *Cal. Labor Code § 226*, and competed unfairly in violation of *Cal. Bus. & Prof. Code §§ 17200*-17208. The employer sought summary judgment.

OVERVIEW: The employee, hired as a store manager, quit his job only 11 days after starting work at his assigned store. Though he admittedly did not notify the employer that he had worked overtime (off-the-clock), the employee claimed that the employer had such intimate knowledge of store managers' activities that it had actual or constructive knowledge that he had worked off-the-clock. Inter alia, the court held that, based on the employee's evidence, no reasonable jury could conclude that the employer knew about the alleged unpaid time. The employee's theories for imputing knowledge to the employer were pure conjecture. Furthermore, the employee had reported and been paid for significant overtime and had not been criticized for doing so. Although the claim for missed meal and rest breaks was timely, the employee failed to present evidence showing that he was not authorized or permitted to take rest breaks. Moreover, the employer was required to offer meal breaks but was not required to ensure that workers took such breaks. The employee had not been forced to forego meal breaks. The unfair competition and inaccurate wage statement claims failed as they were derivative of the other claims.

OUTCOME: The employer's summary judgment motion was granted.

LexisNexis(R) Headnotes

Labor & Employment Law > Wage & Hour Laws > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN1] Although the Industrial Welfare Commission was defunded by the California Legislature effective July 1, 2004, its wage orders remain in effect.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN2] In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the nonmoving party.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN3] Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence

EXHIBIT I

is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Materiality
[HN4] Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Materiality
[HN5] On a motion for summary judgment, the burden of establishing the absence of a genuine issue of material fact lies with the moving party. Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c).*

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Summary Judgment > Standards > General Overview
[HN6] On a motion for summary judgment, the nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence, by affidavit or as otherwise provided in *Fed. R. Civ. P. 56*, supporting the claim that a genuine issue of material fact exists. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. The evidence presented by the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor.

Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
[HN7] On a motion for summary judgment, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
[HN8] On a motion for summary judgment, the evidence presented by both parties must be admissible. *Fed. R. Civ. P. 56(e).*

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
[HN9] Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.

Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
Evidence > Hearsay > General Overview
[HN10] On a motion for summary judgment, hearsay statements in affidavits are inadmissible.

Labor & Employment Law > Wage & Hour Laws > Administrative Proceedings & Remedies > Burdens of Proof
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN11] To prevail on an off-the-clock claim, a plaintiff must prove that the employer had actual or constructive knowledge of his alleged off-the-clock work.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
[HN12] See *Cal. Labor Code § 226.7(a).*

Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview
[HN13] See *Cal. Labor Code § 226.7(b).*

Governments > Legislation > Statutes of Limitations > Time Limitations
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Remedies > General Overview

[HN14] A three-year statute of limitations applies to *Cal. Labor Code § 226.7(a)* (*Cal. Code Civ. Proc. § 338 (a)* covers an action upon a liability created by statute, other than a penalty or forfeiture), while a one-year statute of limitations governs claims for penalties (*Cal. Code Civ. Proc. § 340 (a)* covers an action upon a statute for a penalty or forfeiture).

Governments > Legislation > Statutes of Limitations > Time Limitations
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN15] According to the California Supreme Court, the "additional hour of pay" for failure to provide an employee with meal or rest periods imposed by *Cal. Labor Code § 226.7* constitutes a "wage," rather than a "penalty," and accordingly, is governed by a three-year statute of limitations.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN16] Industrial Welfare Commission (IWC) Wage Order No. 7 requires California employers to authorize and permit a 10-minute rest period for every four hours of work. IWC Order No. 7-2001, P12(A), Cal Code Regs. tit 8, § 11070(12)(A). The California Labor Code provides that an employer may not require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission. *Cal. Labor Code § 226.7.* However, the words "authorize" and "permit" only require that the employer make rest periods available.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN17] See *Cal. Labor Code § 512.*

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN18] See Cal. Code Regs tit. 8, § 11070(11).

Civil Procedure > Federal & State Interrelationships > Erie Doctrine
[HN19] In the absence of controlling state supreme court precedent, a federal district court is Erie-bound to apply state law as it believes that court would do under the circumstances.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN20] According to the United States District Court for the Northern District of California, the California Supreme Court, if faced with the issue, would require only that an employer offer meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was forced to forego his meal breaks as opposed to merely showing that he did not take them regardless of the reason.

COUNSEL: [**1] For Steve White, individually, and on behalf of all others similarly situated, Plaintiff: Clyde Hobbs Charlton, LEAD ATTORNEY, Matthew Roland Bainer, LEAD ATTORNEY, Scott Edward Cole, LEAD ATTORNEY, Scott Cole & Associates, APC, Oakland, CA.

For Starbucks Corporation, Defendant: Chelsea Munday, LEAD ATTORNEY, Gregory William Knopp, LEAD ATTORNEY, Akin Gump Strauss Hauer & Feld LLP, Los Angeles, CA; Joel M. Cohn, Akin Gump Strauss Hauer & Feld LLP, Washington, DC.

JUDGES: VAUGHN R WALKER, United States District Chief Judge.

OPINION BY: WALKERVAUGHN R WALKER

OPINION

[*1081] ORDER

This action is brought by Steve White, a former store manager of defendant Starbucks Corp (Starbucks), who purports to represent a class consisting of individuals who work or worked as managers in Starbucks' California stores. No class has been certified. Starbucks moves for summary judgment on all claims. For reasons [*1082] discussed below, Starbucks' motion is GRANTED.

I

The following facts are undisputed. On May 3, 2004, Starbucks hired White as a store manager, and White entered the Starbucks Retail Management Training (RMT) program. Doc # 43, Ex A at 16:1-14, Ex B at 95:24-96:11. The program lasted approximately eight weeks and included classroom instruction, [**2] which took place in Berkeley, California, as well as in-store training, which took place in a Starbucks store in Concord, California. Id, Ex A at 24:4-25:20. On June 28, 2004, after completing the RMT program, White became the store manager of the Countrywood store in Walnut Creek, California. Doc # 43, Ex A at 16:22-17:9. White ended his employment with Starbucks on July 8, 2004, only 11 days after starting work at the Countrywood store. Doc # 43, Ex A at 17:6-9; 63:24-64:6.

White filed this action on June 21, 2006. Doc # 1. White asserts four claims: (1) unlawful failure to pay overtime wages in violation of *Cal Labor Code §§ 201-204* and Industrial Welfare Commission (IWC) Wage Order No 7 ("off-the-clock claim") [1]; (2) failure to provide meal and rest periods in violation of *Cal Labor Code §§ 226.7* and *512*; (3) failure to provide accurate itemized wage statements in violation of *Cal Labor Code § 226*; and (4) violation of *Cal Bus & Prof Code §§ 17200-17208* ("unfair competition law claim"). Doc # 1 at 9-13. This case is before the court under its diversity jurisdiction.

> 1 [HN1] Although the Industrial Welfare Commission (IWC) was defunded by the California Legislature effective July 1, 2004, [**3] its wage orders remain in effect. *Bearden v US Borax, Inc, 138 Cal App 4th 429, 434, 41 Cal. Rptr. 3d 482 (2006).*

II

[HN2] In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the nonmoving party. [HN3] "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* [HN4] "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. [HN5] The burden of establishing the absence of a genuine issue of material fact lies with the moving party. *Celotex Corp v Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. *FRCP 56(c).*

[HN6] The nonmoving party may not simply rely on the pleadings, however, but must produce significant probative evidence, by affidavit or as otherwise provided in *FRCP 56*, supporting the claim that a genuine issue of material fact exists. *TW Elec Serv v Pacific Elec Contractors Ass'n, 809 F.2d 626, 630 (9th Cir 1987).* [**4] [*1083] Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publishing Co, Inc v GTE Corp, 594 F.2d 730, 738 (9th Cir 1979).* The evidence presented by the nonmoving party "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson, 477 U.S. at 255.* [HN7] "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id at 249.*

[HN8] The evidence presented by both parties must be admissible. *FRCP 56(e).* [HN9] Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publishing Co, Inc v GTE Corp, 594 F.2d 730, 738 (9th Cir 1979).*[HN10] Hearsay statements in affidavits are inadmissible. *Japan Telecom, Inc v Japan Telecom America Inc, 287 F.3d 866, 875 n 1 (9th Cir 2004).*

A

Starbucks argues that it is entitled to summary judgment on White's off-the-clock claim for two independent reasons: (1) White cannot prove that Starbucks had knowledge that White worked off-the-clock; and (2) White cannot produce [**5] sufficient evidence to show the amount and extent of uncompensated work as a matter of just and reasonable inference. Doc # 42 at 6-16. As discussed below, the court need only address Starbucks' first argument.

[HN11] To prevail on his off-the-clock claim, White must prove that Starbucks had actual or constructive knowledge of his alleged off-the-clock work. *Morillion v Royal Packing Co, 22 Cal 4th 575, 585, 94 Cal. Rptr. 2d 3, 995 P.2d 139 (2000).* Starbucks points out that White admitted in deposition that he never told anyone at Starbucks about working off-the-clock:

> Q: Did you tell anybody at Starbucks Coffee that you had worked off the clock when you were employed by the company?
>
> A: No.

Doc # 43, Ex A (White dep) at 102:11-14.

> Q: All right. Mr White, you testified that you didn't inform anybody of your off-the-clock work?
>
> A: I did not.
>
> Q: And you testified that as far as you know nobody knew that you were working off the clock. Do you recall that testimony?
>
> A: Yes.

Id at 188:24-189:5.

White never told his district manager that he had worked off-the-clock (id at 98:23-24, 102:15-17); never told the individual who conducted his exit interview that he had worked off-the-clock (id at 100:7-10, 102:8-10, 102:15-17); and never [**6] used Starbucks' dedicated hotline to report his complaint anonymously because he "didn't feel a need to" and "there was no reason." Id at 145:21-146:9.

Starbucks also points out that, during the 11 days he worked in the Countrywood store, White *did* record and *was* paid for nearly eight hours of overtime, one hour of which was paid at a double-time rate. Doc # 43, Ex A (White dep) at 68:11-15, 69:14-72:8, 17:6-12. White admits he was never criticized or disciplined for working overtime:

> Q: And you said earlier that you were never criticized or disciplined for working overtime, as far as you can recall?
>
> A: Me, personally?
>
> Q: Yes.
>
> A: Yes.
>
> Q: That's true?
>
> A: That's true.

Id at 103:18-25. In addition, White knew that other employees were also reporting and being paid for overtime. Id at 123:12-25.

White does not dispute that he never told anyone at Starbucks about working off-the-clock. White does not dispute that he and others recorded and were paid for overtime work. Rather, White attempts to create a dispute of fact whether Starbucks knew about some unspecified time worked off-the-clock by showing that "[d]efendant knew how much time it took to perform much of the work required by the [**7] SMs [store managers]." Doc # 46 at 8. Specifically, White points to the deposition testimony [*1084] of Starbucks vice president Cindy Chrispell:

> Q: Have there, to your knowledge, ever been any time work studies done with regard to the work performed by store managers?
>
> A: I know there were some done as part of the earlier work when we were making the adjustments, changing them from exempt to non-exempt.
>
> Q: To your knowledge a time motion study was done around that point in time for the store managers. Is that your testimony?
>
> A: Yes.

Doc # 47, Ex B (Chrispell dep) at 103:19-104:3. White also offers evidence that Starbucks formulated estimates of the amount of time required for baristas (though not store managers) to perform customer service tasks. Doc # 47, Ex D. And White points out that district managers performed monthly audits of individual, stores. Doc # 47, Ex B at 78:3-14. White concludes that "[t]his level of intimate knowledge of the SMs activities, in and of itself, would support a reasonable conclusion that the Defendant should have known what its SMs were doing." Doc # 46 at 8.

Finally, White contends that "Starbucks admits it knew that Store Managers worked off-the-clock in violation [**8] of the written policies," doc # 46 at 9, based on the following testimony given by Ms Chrispell:

> Q: Are store managers, to your knowledge, ever expected to perform work from home?
>
> A: Not expected to, no.
>
> Q: Do they, as far as you know, ever do that?
>
> A: They sometimes do. They are not supposed to. I mean they are directed to perform their work at work. But it does happen sometimes, yes.

Doc # 47, Ex B at 113:6-12.

The court is troubled by plaintiff's evidence. While plaintiff may be able to show a material dispute whether Starbucks had actual or constructive knowledge that

some store managers sometimes worked off-the-clock, plaintiff has not submitted evidence that Starbucks had actual or constructive knowledge that Steve White worked off-the-clock. Furthermore, Chrispell testified that store managers are paid for the time spent working at home. Doc # 49, Ex B at 136:13-15. In any event, the testimony is irrelevant as to White himself because White does not claim to have worked at home. Doc # 49, Ex A at 174:6-8.

Regarding White's other evidence, White does not provide the time motion study of the store manager position or present any evidence of its findings. White fails to explain how [**9] this study, which was conducted in 2002 or 2003 (doc # 49, ex B at 103:25-104:17), would give Starbucks constructive knowledge of his alleged off-the-clock work in 2004. White does not explain how time standards applied to baristas would make Starbucks aware that he was working off-the-clock. Finally, White does not explain how the district manager's store visits translate into actual or constructive knowledge. On the contrary, White testified that when she worked off-the-clock during store hours, other employees "had no knowledge if [he] was on or off the shift." Doc # 49, Ex A at 119:11-12. Further, White never testified that his district manager observed him working off-the-clock. Rather, White stated that he simply "assumed" that his district manager came to the store when *White was not present* and that he didn't know what the store manager "looked [*1085] into." Id at 189:6-16; Doc # 43, Ex A at 189:25-190:12.

In sum, White has failed to raise genuine issues of fact. Based on White's "evidence," the court finds that no reasonable jury could conclude that Starbucks knew about White's alleged unpaid time. White's theories for imputing knowledge to Starbucks are pure conjecture. Imputing [**10] constructive knowledge would be particularly inappropriate given that White was paid for significant overtime during his brief tenure and admitted that he was never criticized for working overtime. Accordingly, Starbucks' motion for summary judgment on White's first claim for unlawful failure to pay overtime wages ("off-the-clock claim") is GRANTED.

B

Starbucks argues that it is entitled to summary judgment on White's meal and rest break claims because (1) the claims are untimely under the applicable statute of limitations and (2) White voluntarily chose to forego his breaks. Doc # 42 at 17-24. The court addresses each argument below.

1

Cal Labor Code § 226.7(a) provides, [HN12] "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." [HN13] *Subdivision (b) of section 226.7* further provides that, "If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, *the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation* for each work day that the meal or rest period is not [**11] provided." (Italics added.) The issue is whether the "additional hour of pay" describes a "wage" or a "penalty." [HN14] A three-year statute of limitations applies to the former (*Cal CCP § 338(a)* ["An action upon a liability created by statute, other than a penalty or forfeiture"]), while a one-year statute of limitations governs claims for penalties (*Cal CCP § 340(a)* ["An action upon a statute for a penalty or forfeiture"]). Starbucks argues that claims under *Cal Labor Code § 226.7* are claims for penalties. Doc # 42 at 17. This is incorrect. The California Supreme Court's April 16, 2007 decision in *Murphy v Kenneth Cole Productions, 40 Cal 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (2006)* holds that[HN15] the "additional hour of pay" for failure to provide an employee with meal or rest periods constitutes a "wage," rather than a "penalty," and accordingly, is governed by the three-year statute of limitations. *Murphy at 1114.* White's employment with Starbucks ended July 9, 2004. White filed the complaint in this matter on June 21, 2006. Accordingly, White's claim for missed meal and rest breaks is timely.

2

Starbucks next argues that White's rest and meal break claims fail as a matter of law because White voluntarily chose to [**12] forego those breaks. The parties address White's rest claim separately from his meal claim, and the court will do the same.

a

[HN16] Industrial Welfare Commission Wage Order No 7 requires California employers "to authorize and permit" a 10-minute rest period for every four hours of work. IWC Order No 7-2001, P12(A), *Cal Code Regs, tit 8, § 11070, subd 12(A).* The Cal Labor Code provides that an employer may not "require any employee to work during any meal or rest periods mandated by an applicable order of the Industrial Welfare Commission." *Cal Labor Code § 226.7* (emphasis added). Starbucks [*1086] argues that this language requires employers only to make rest breaks available, i e, employers need not ensure that employees actually take their rest periods. Doc # 42 at 19-20. White does not contend for a different interpretation, and the court agrees that the words "au-

thorize" and "permit" only require that the employer make rest periods available. See also DLSE (Division of Labor Standards Enforcement) Op Letter, 1/28/02 (available at http://www/dir.ca.gov/dlse/opinions/2002-01-28.pdf)("[A]n employer is not subject to any sort of penalty or premium pay obligation if ,an employee who was truly authorized [**13] and permitted to take a rest break, as required under the applicable wage order, *freely chooses without any coercion or encouragement* to forego or waive a rest period." (emphasis in original).

Starbucks argues, based on the following testimony, that White decided not to take breaks of his own accord:

> Q: Did you take rest periods?
>
> A: No, I did not.
>
> Q: Never?
>
> A: No.
>
> Q: Why?
>
> A: I just didn't feel the need to do it at that time. Again, like I said, it was a new store. I was new there. Didn't do it.
>
> Q: So that was your decision not to take the rest period? A: Yeah.

Doc # 43, Ex A at 77:25-78:10.

In opposition, White argues that "as outlined earlier [in his brief], Plaintiff's decision to work through his [rest and meal] breaks, like his decision to work off-the-clock, was a result of Starbucks' instructions to its SMs to 'do what you got to do to get the job done' combined with the company's instruction not to exceed an assigned labor budget which was not tied to any actual 'expectation as to how many hours per week the average store manager currently would need to work to manage the store properly." Doc # 46 at 20. The court understands White to be incorporating the evidence he presented [**14] on his overtime claims into his rest break claim. White's testimony and other evidence on unpaid overtime, however, never addressed the issue of unpaid rest breaks. Moreover, White's argument that a store labor budget prevented him from recording time or taking breaks lacks support. White relies on the following testimony of Starbucks vice president Cindy Chrispell:

> Q: Does the company have the expectation as to how many hours per week the average store manager currently would need to work to manage the store properly?
>
> A: No.
>
> Q: That would change from store to store, I would imagine?
>
> A: Yes.
>
> Q: One of the things that store managers are responsible for is managing their own labor budgets, correct?
>
> A: Yes.
>
> Q: And they don't set budgets, do they? That's set by a level higher than store manager, correct?
>
> A: Labor budgets or budgets in general?
>
> Q: Labor budgets.
>
> A: The labor budget doesn't specifically get - well, the labor budget gets managed as a percentage of sales.
>
> Q: Okay.
>
> A. So in a macro way, the labor budget is not a fixed dollar amount. It goes up and down based on whether your business has gotten bigger or smaller.
>
> Q: So, I'm sorry, as a percentage of sales you said, correct?
>
> [*1087] A: [**15] Yes.
>
> Q: Referring to the budget for a moment. The labor budget, which is handed down to the store manager by higher levels, from that budget is the - are the payroll dollars also to compensate the store manager, correct?
>
> A: Yes.
>
> * * *
>
> Q: Okay. When the store manager writes the schedule, as I think we discussed earlier, I'm, you know - he or she will include himself on the schedule also?
>
> A: Yes.

Doc # 47, Ex B at 55:5-11, 82:19-83:11, 96:13-23.

The court does not see how this evidence supports a finding that White was forced to forego rest breaks. And as Starbucks points out, Chrispell declined to characterize the labor budget as a fixed amount. Chrispell explained that (1) exceeding the labor budget was common; (2) she was unaware of a store manager being repri-

manded for exceeding a labor budget; and (3) exceeding the labor budget is often an indicator of increased sales. Doc # 49, Ex B at 98:17-23, 99:1-10.

White has produced no evidence showing that he was not authorized or permitted to take rest breaks. To the contrary, White specifically testified that nobody told him or instructed him not to take a rest period at either store. Doc # 49, Ex A at 152:23-25. White's mere suggestion that [**16] he was coerced into foregoing breaks, without more, is insufficient to defeat summary judgment. Accordingly, the court GRANTS Starbucks' motion for summary judgment on White's claim for unpaid rest breaks.

b

White makes his claim for missed meal breaks pursuant to *Cal Labor Code §§ 512* and *226.7*. [HN17] *Cal Labor Code § 512* provides in pertinent part:

> An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

Cal Labor Code § 512(a).

Cal Labor Code § 226.7, as already described above, provides:

> (a) No employer shall require any employee to work during [**17] any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
>
> (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal.

Cal Labor Code § 226.7.

White's *§ 226.7* claim is based on [HN18] IWC Wage Order No 7 which states:

> Meal Periods
>
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual [*1088] consent of the employer and the employee.
>
> (B) An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.
>
> (C) Unless the [**18] employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.
>
> (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

8 Cal Code Regs § 11070, section 11.

Starbucks argues that, similar to the rest break provision, the statutory term "provide" in *Cal Labor Code §§ 512* and *226.7* demonstrates that the California Legislature intended only for employers to *offer* meal periods - not to ensure that those periods were actually taken. Doc # 42 at 22-23.

White contends that employers must affirmatively enforce the meal break requirements. Doc # 46 at 17. White [**19] relies on *Cicairos v Summit Logistics, Inc, 133 Cal App 4th 949, 953, 35 Cal. Rptr. 3d 243 (2005)*. Cicairos was a case brought by truck drivers against their former employer. Plaintiffs' complaint included a claim for violation of the meal period provision of *Cal Labor Code § 512* and IWC Wage Order No 9, section 11. (IWC Wage Order No 9 applies to the transportation industry, while No 7, relied on by White, applies to the mercantile industry.) The court in Cicairos stated that, based on the facts presented there, the defendant's obligation to provide the plaintiffs with an adequate meal period was not satisfied "by assuming that the meal periods were taken." *Cicairos at 962-63* (citing DLSE Opinion Letter No 2002.01.28 (Jan 28, 2002) at 1).

Starbucks argues that the court should not follow Cicairos because it based its holding entirely on a DLSE opinion letter that interpreted only the rest break and meal period provisions of the IWC wage order, "not the plain language of *sections 226.7* and *512* of the Labor Code." Doc # 42 at 23. Starbucks also argued at the hearing on this motion that it cannot be the rule that employers must ensure that a meal period is actually taken, regardless of what an employee does, [**20] because that would create a strict liability standard.

The court agrees. [HN19] In the absence of controlling California Supreme Court precedent, the court is Erie-bound to apply the law as it believes that court would do under the circumstances. See *Wyler Summit Partnership v Turner Broadcasting System, Inc, 135 F.3d 658, 663 (9th Cir 1998)*. The interpretation that White advances - making employers ensurers of meal breaks - would be impossible to implement for significant sectors of the mercantile industry (and other industries) in which large employers may have hundreds or thousands of employees working multiple shifts. Accordingly, the court concludes that [HN20] the California Supreme Court, [*1089] if faced with this issue, would require only that an employer *offer* meal breaks, without forcing employers actively to ensure that workers are taking these breaks. In short, the employee must show that he was *forced to forego* his meal breaks as opposed to merely showing that he did not take them regardless of the reason.

Cicairos should be read under the facts presented by that case. There, the defendant employer had a computerized system on each truck that allowed defendant to keep track of the drivers' [**21] activities, such as speed, starts and stops, and time. *Cicairos at 962*. Furthermore, drivers had to input certain activities manually, such as road construction and heavy traffic. Id. Although the defendant was required to record employee meal periods under Wage Order No 9 and although a collective bargaining agreement required the company to schedule lunch periods, the employer did not schedule meal periods, did not include an activity code for them and did not monitor compliance. Id. Finally, evidence showed that the defendant's management pressured drivers to make more than one trip daily, making it harder to stop for lunch. Id. Under those facts, the court found that defendant failed to establish that it "provided" plaintiffs with their required meal periods. *Id at 963*. White harps on one sentence in the case stating that "employers have 'an affirmative obligation to ensure that workers are actually relieved of all duty.'" *Id at 962*. That language is consistent, however, with a rule requiring an employer to *offer* or *provide* or *authorize and permit* a meal break, i e, the interpretation that Starbucks endorses. The defendant in Cicairos *knew* that employees were driving while eating [**22] and did not take steps to address the situation. This, in combination with management policies, effectively deprived the drivers of their breaks.

In sum, Starbucks' construction of the applicable meal break provisions is consistent with the holding in *Cicairos*. Here, White offers no evidence that Starbucks pressured store managers to work through breaks and offers no Starbucks records showing that White missed meal breaks. Under White's reading of Cicairos, an employer with no reason to suspect that employees were missing breaks would have to find a way to force employees to take breaks or would have to pay an additional hour of pay every time an employee voluntarily chose to forego a break. This suggests a situation in which a company punishes an employee who foregoes a break only to be punished itself by having to pay the employee. In effect, employees would be able to manipulate the process and manufacture claims by skipping breaks or taking breaks of fewer than 30 minutes, entitling them to compensation of one hour of pay for each violation. This cannot have been the intent of the California Legislature, and the court declines to find a rule that would create such perverse and [**23] incoherent incentives.

White does not recall ever missing a meal period at the Concord store. Doc # 43, Ex A at 130:19-131:2. While White testifies that he sometimes missed meal periods at the Countrywood store, Starbucks points out, and White does not dispute, that it was White's decision to skip those meal periods. Doc # 43, Ex A at 153:3-8 (Q: And the few times that you did not take a meal period at the Countrywood store that was your decision as

well, correct? A: Correct.) Accordingly, Starbucks' motion for summary judgment on White's claim for missed meal breaks is GRANTED.

C

Starbucks seeks summary judgment on White's claims for inaccurate [*1090] wage statements and for violation of California's unfair competition law on the ground that these claims are derivative of White's off-the-clock claims and break claims. White does not dispute that his third and fourth causes of action derive from his off-the-clock and missed break claims. Accordingly, Starbucks' motion for summary judgment on White's third and fourth causes of action is GRANTED.

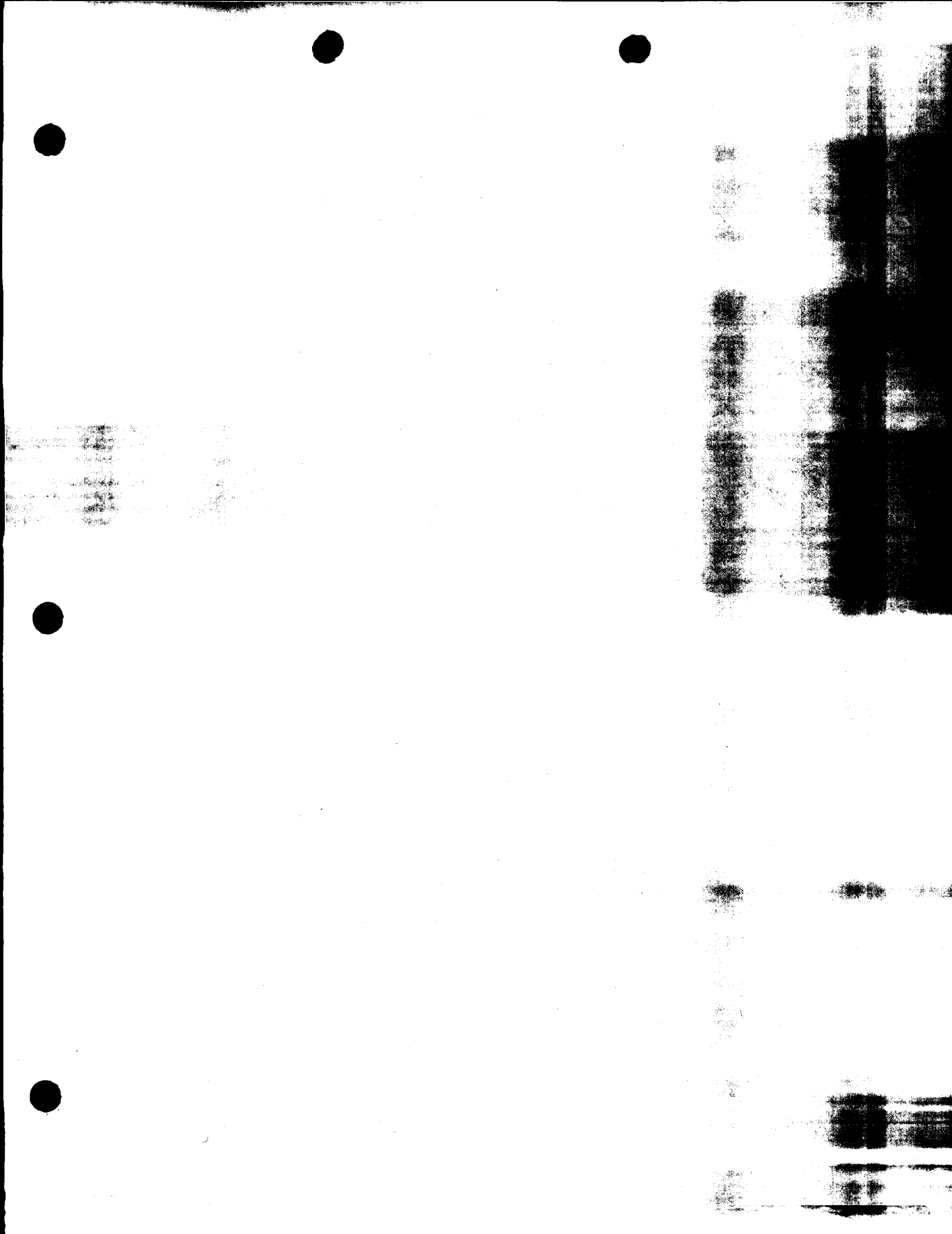
III

For reasons discussed above, Starbucks' motion for summary judgment is GRANTED in its entirety. The clerk is DIRECTED to close the file and terminate [**24] all motions.

SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge



LEXSEE 472 F2D 1258

Kenneth C. Williams et al., Appellants v. W.M.A. Transit Company, Appellee

No. 24,485

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

472 F.2d 1258; 153 U.S. App. D.C. 183; 1972 U.S. App. LEXIS 8676; 68 Lab. Cas. (CCH) P52,857

June 30, 1972, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant bus drivers sought review of a decision of the District of Columbia Court of Appeals that affirmed a trial court's summary judgment that sustained the contention of appellee transit company, the bus drivers' employer, that the District of Columbia Minimum Wage Act of 1996 (the D.C. Act), D.C. Code Ann. § 360-401 et seq., did not apply to the bus drivers.

OVERVIEW: The bus drivers filed an action against the transit company, a Delaware corporation, for its failure to pay overtime compensation for hours worked in excess of 40 hours per week. The bus drivers claimed that the overtime compensation was required by the D.C. Act. The trial court and the intermediate appellate court both found that the D.C. Act did not apply to the bus drivers. On further appeal, the court found that the D.C. Act was patterned on the Fair Labor Standards Act (FLSA), which required minimum wages and overtime compensation for workers in interstate commerce, and that Congress, in enacting the D.C. Act, omitted the FLSA exemption provision for employees as to whom the Interstate Commerce Commission (ICC) had the power to set maximum hours. The court held that Congress clearly intended to withhold from the D.C. Act any exemption for employees of bus and truck companies based merely on the fact that they were subject to ICC regulation due to hours in interstate operations. The court further held the mere vesting of jurisdiction in the ICC to control hours of bus drivers in interstate commerce did not necessarily exclude all state authority to legislate on drivers' wages.

OUTCOME: The court reversed the intermediate appellate court's decision that affirmed a summary judgment that sustained the contention that the District of Columbia Minimum Wage Act of 1996 did not apply to the bus drivers, and the court remanded the matter for further proceedings not inconsistent with its opinion.

LexisNexis(R) Headnotes

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property
Labor & Employment Law > Wage & Hour Laws > General Overview

[HN1] The District of Columbia Minimum Wage Act of 1996, *D.C. Code Ann. § 36-402*, provides that, as used in this subchapter, the term "employ" includes to suffer or permit to work. The term "employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee. The term "employee" includes any individual employed by an employer.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property
Labor & Employment Law > Wage & Hour Laws > General Overview

EXHIBIT J

[HN2] The District of Columbia Minimum Wage Act of 1996, *D.C. Code Ann. § 36-401(a)*, provides that the Congress hereby finds that there are persons employed in some occupations in the District of Columbia at wages insufficient to provide adequate maintenance and to protect health. Such employment impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that their wages be supplemented by the payment of public moneys for relief or other public and private assistance. Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of the District of Columbia and injures the overall economy.

Constitutional Law > Congressional Duties & Powers > District of Columbia & Federal Property
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Labor & Employment Law > Wage & Hour Laws > Defenses & Exemptions > Transportation Industries
[HN3] The District of Columbia Minimum Wage Act of 1996, *D.C. Code Ann. § 36-403(b)(1)(B)*, provides that no employer shall employ any of his employees for a workweek longer than 40 hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Minimum Wage
[HN4] *29 U.S.C.S. § 218* provides that no provision of this chapter or of any order thereunder shall excuse noncompliance with any federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
[HN5] There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done. A state may, for example, have an interest in creating job opportunities by overtime compensation even though extra hours may be worked without danger to the public.

Constitutional Law > Supremacy Clause > General Overview
[HN6] In general, a state's law is given effect unless it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

JUDGES: [**1] Leventhal, MacKinnon and Wilkey, Circuit Judges.

OPINION BY: LEVENTHAL

OPINION

[*1259] LEVENTHAL, C. J.:

This is a class action by 92 bus drivers, for themselves and others similarly situated, against the WMA Transit Company, their employer, for its failure to pay overtime compensation for hours worked in excess of 40 hours per week, claimed to be required by the District of Columbia Minimum Wage Act of 1966 (D.C. Act). [1] We need not and do not consider the Company's claims that it did not work its men overtime, and that it obtained a release. The case comes to us in the posture of a summary judgment entered by the Court of General Sessions (now Superior Court) sustaining the contention that the D.C. Act does not apply to these employees, which the District of Columbia Court of Appeals (DCCA) affirmed. [2]

1 *D.C. Code 1967, § 36-401 et seq.*, the D.C. Act, became effective Feb. 1, 1967. This Act amended the District of Columbia Minimum Wage Law of September 19, 1918, *D.C. Code 1961, § 36-401 et seq.*, so as to expand coverage to men and to provide for overtime compensation, *inter alia*.

[**2]

2 *Williams v. WMA Transit Co., 268 A.2d 261 (1970).*

While this case involves the construction of the D.C. Act, its sound disposition requires consideration of the interrelation between the D.C. Act and the Federal statutory provisions relating to minimum compensation and maximum hours for bus drivers in interstate commerce. We reverse and remand.

A. *Material Facts*

The material facts [3] may be briefly stated as follows:

3 Derived from plaintiffs' statement of uncontested material facts except where objection was

noted either in the trial court or in defendant's brief on appeal (which conceded that the statement of facts in appellants' brief was generally correct, except as to items specially noted).

The Company is a Delaware corporation with offices on the Maryland side of the District boundary. The Company has no facilities in the District of Columbia, but it stations dispatchers on the streets [**3] in the District, and its buses periodically wait at certain locations in the District. It operates three types of service. It runs a Government contract operation which is local within the District but relatively minor. It runs a charter operation -- accounting for 19% of driver hours. This is essentially a metropolitan area service. Approximately 60% of the charter groups are picked up in and returned to the District of Columbia, though the Company stresses that the drivers and buses start from and return to garages in Maryland.

The most significant part of the Company's business is its operation of 84 regular bus routes, of which 79 enter the District of Columbia. More than 50% of the regular route passengers are interstate passengers, either picked up in Maryland and discharged in the District, or vice versa. Some passengers are both picked up and discharged in the District, others are Maryland local passengers. The Company receives a cash subsidy from the District of Columbia for transporting D.C. public school children on its routes.

The Company requires its bus drivers to have both D.C. and Maryland licenses. The Company basically does not segregate its drivers according [**4] to particular routes or places of operation. They may be asked to move from route to route. The Company made a time study and from this estimates that on the average its bus drivers spend 38% of total pay time within the District. The underlying data show some drivers with work-weeks spent primarily (more than 50%) in the District of Columbia.

B. *Discussion of Statutory Provisions*

1. *District Act*

The District of Columbia Minimum Wage Act implements its spacious [*1260] purpose, [4] and its specific provisions requiring payment of minimum wages, and overtime compensation, at time and one-half the regular rate, for employees worked longer than 40 hours per week, [5] with broad coverage provisions. The basic definitions of "employer" and "employee" are not qualified. See [HN1] *D.C. Code § 36-402*:

> As used in this subchapter --
>
> * * *
>
> (3) The term "employ" includes to suffer or permit to work.
>
> (4) The term "employer" includes any individual, partnership, association, corporation, business trust, or any person or group of persons, acting directly or indirectly in the interest of an employer in relation to an employee. . . .
>
> (5) The term "employee" includes [**5] any individual employed by an employer. . . .

4 [HN2] *D.C. Code § 36-401*:

> (a) The Congress hereby finds that there are persons employed in some occupations in the District of Columbia at wages insufficient to provide adequate maintenance and to protect health. Such employment impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that their wages be supplemented by the payment of public moneys for relief or other public and private assistance. Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of the District of Columbia and injures the overall economy.

5 [HN3] *D.C. Code § 36-403(b)(1)(B)*:

> [No employer shall employ any of his employees] for a workweek longer than forty hours . . ., unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[**6] As passed in 1966 the D.C. Act juxtaposed its broad coverage definitions with exemption from overtime requirements for seven groups of employees -- including *e.g.*, "any employee employed by a railroad." These provisions, contained in § 36 -- 404 of the D.C. Code, in subsections (a)(1) and (2), and (b)(1)-(5), are not applicable to bus drivers. [6]

> 6 (a) The minimum wage and overtime provisions of *section 36-403* shall not apply with respect to --
>
> (1) Any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman (as such terms are defined by the Secretary of Labor under the Fair Labor Standards Act of 1938); or
>
> (2) any employee engaged in the delivery of newspapers to the home of the consumer.
>
> (b) The overtime provisions of *section 36-403(b)(1)* shall not apply with respect to --
>
> (1) any employee employed as a seaman;
>
> (2) any employee employed by a railroad;
>
> (3) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, or trucks. . .
>
> (4) any employee employed primarily to wash automobiles by an employer. . .
>
> (5) any employee employed as an attendant at a parking lot or parking garage.
>
> * * *

In brief and at argument plaintiffs leaned on an exemption provision, added to 36 D.C. Code 404(b) on January 15, 1971 (P.L. 91-650) with respect to employees of bus companies, as subsection (6). This statutory exemption provision purported to be effective as of 1967, but subsequent to submission of this case, on December 15, 1971, this law was repealed (P.L. 92-196), with legislative history making clear that Congress intended to avoid affecting court litigation. See Cong. Rec. S. 21194, December 10, 1971. We find this short-lived provision of little help as a guide to legislative intent concerning the meaning of the coverage provisions.

[**7] C. *Federal Legislation*

To ascertain relevant legislative intent we must, as will appear, consider provisions in Federal legislation. The D.C. Act was patterned on the Fair Labor [*1261] Standards Act of 1938, as amended, (FLSA) wherein Congress sought to ameliorate conditions found detrimental to the well-being of workers in interstate commerce or the production of goods therefor, by requirements of minimum wages and overtime compensation. In *29 U.S.C. § 207*, Congress provided for maximum hours in the work week, with time-and-a-half for overtime, subject to certain exemptions and qualifications. See *29 U.S.C. § 213. Section 213* sets forth a number of exemptions which are the same as those later incorporated into the D.C. Act -- for administrative, executive, and professional employees, seamen, railway employees, automobile servicemen and salesmen. Omitted from the D.C. Act is the provision in *29 U.S.C. § 213 (b)(1)* containing an exemption from overtime requirements as to any employees with respect to whom the ICC (now the Secretary of Transportation) has the power to set maximum hours, a provision [**8] applicable of course to employees of common carriers by motor in interstate commerce. [7]

> 7 See *29 U.S.C. § 213*:
>
> (b) The provisions of *section 207* of this title shall not apply with respect to --
>
> (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of *section 304* of Title 49 . . . .
>
> *49 U.S.C. § 304(a)* makes it the duty of the ICC
>
> (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to . . . qualifications and maximum

> hours of service of employees, and safety of operation and equipment.
>
> The functions were transferred from the ICC to the Secretary of Transportation by P.L. 89-670, 80 Stat. 931, October 15, 1966.

Another pertinent provision appears in [HN4] *29 U.S.C. § 218*:

> No provision [**9] of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter * * *.

This section expressly contemplates that workers covered by state law as well as FLSA shall have any additional benefits provided by the state law -- higher minimum wages; or lower maximum workweek. By necessary implication it permits state laws to operate even as to workers exempt from FLSA.

D. *Rulings of Statutory Interpretation*

1. In ascertaining the intent of Congress, we give great weight to the fact that in the 1966 D.C. Act, which was modeled on the FLSA, [8] Congress inserted exemptions from the overtime compensation requirements for seven classes of employees, including the substance, and indeed language, of exemption provisions of FLSA, but omitted the exemption provision set forth in FLSA, *§ 213(b)(1)*, for employees as to whom the ICC has power to set maximum hours. That exemption, if available, would extend to employees whose duties affect safety [**10] in interstate commerce even though only 3% of their time is spent in interstate commerce. *Morris v. McComb, 332 U.S. 422, 92 L. Ed. 44, 68 S. Ct. 131 (1947)*. Another part of the statutory pattern before us is the provision of the D.C. Act specifically exempting employees of railroads, which compete with buses and trucks. We discern a reasonably clear pattern of intent to withhold from the D.C. Act any exemption for employees, of bus and truck companies, merely because they are subject to ICC regulation due to hours in interstate operations.

> 8 See, *e.g.*, 111 Cong. Rec. 14860 (June 28, 1965) (Mr. Broyhill refers to the "careful consideration of the Federal Act"); 112 Cong. Rec. 749 (January 20, 1966) (Senator Morse points out that the FLSA was followed in drafting the District bill).

[*1262] Our view is in accord with an opinion of the D.C. Corporation Counsel, March 17, 1969, which is in the record. As to rulings of other states, [9] we are advised of a similar ruling, of August 7, 1970, by [**11] Maryland's Attorney General, which states that this is also the view obtained orally from the General Counsel of the U.S. Department of Labor. [10] The only other ruling, made in 1966 by Maine's Attorney General concludes that the exemption in *29 U.S.C. § 213(b)(1)* is applicable to the states, but it rests on premises which are doubtful if not erroneous, [11] as will appear from the next section of this opinion.

> 9 By memorandum of June 25, 1971, we asked counsel to file supplementary memoranda on the following questions:
>
> (1) Whether any court decisions or administrative rulings exist concerning the applicability of State laws relating to minimum wage, overtime, or maximum hours, or similar provisions, where employees work in more than one State. If so, as respects overtime hours, whether and -- if so -- how the total number of overtime hours are allocated between the two States, and what rules are applicable if the two States have different definitions of what constitutes overtime.
>
> (2) Whether there are any judicial, administrative or executive rulings under State Minimum Wage statutes -- containing no express exemption for employees subject to Interstate Commerce Commission regulations -- on the question of whether the exemption in Section 13(b)(1) of the Fair Labor Standards Act (*29 U.S.C. § 213(b)(1)*) implies that such employees are exempt from overtime pay provisions of such State statutes.
>
> Plaintiffs' counsel made inquiry of the 48 continental states and received replies from 29 states. The only two rulings from these states

which were pertinent were those made by the Attorney General of Maryland and the Attorney General of Maine, referred to in fns. 11 and 12.

[**12]

10 The ruling of the Maryland Attorney General, made to the Maryland Department of Labor and Industry, and digested in CCH Labor Law Reporter, State Laws, vol. 3, 49,997.27, states in pertinent part:

> "We believe that reasonable and proper construction of both the FLSA and the Maryland Wage and Hour Law includes the following:
>
> * * *
>
> "3. Where the employment is FLSA-exempt, but is not exempted by the provisions of the Maryland Wage and Hour Law, the employee is covered by the Maryland law.
>
> "4. Where the employment is exempted from the provisions of the FLSA, but is subject to the jurisdiction of one or more other federal agencies, if the Maryland law has higher standards or provides additional or superior benefits, then the employment would be subject to the provisions of the Maryland Wage and Hour Law."

In 1971, Maryland amended its law so as to incorporate the 213(b)(1) exemption, see Md. Laws 1971, ch. 709, effective July 1, 1971.

11 The opinion, digested tersely in 1966 CCH Labor Law Reporter State Laws, para. 49,726, is before us. Its principal premise is that the authority of the ICC prohibits state regulation of hours of employment, as to which see the discussion below of *Welch*.

The other premise is that the state's purpose in overtime wages is to protect the health of employees, which is also the concern of the ICC. Over and above the difference in emphasis for the ICC, which focuses on protection of the public, overtime compensation provisions -- which do not limit hours worked -- have the economic purpose of imposing cost burdens on the employer in order to give job opportunities to other workers.

[**13] 2. The trial judge held the D.C. Act inapplicable to the Company's bus drivers on the ground that (1) the Federal provisions clearly establish that "among Federal Agencies only the Department of Transportation has authority to regulate overtime pay of drivers employed by an interstate carrier," and (2) the D.C. Act is "purely local in scope and nature" and is inapplicable to this case in view of "the doctrine of federal supremacy in matters concerning interstate commerce."

We see relatively little significance for present purposes in the fact that Congress centralized responsibility in ICC, now DOT, as "among Federal agencies," for this provision, in *29 U.S.C. § 213*, was to obviate conflicting determinations as to the content of the Federal requirement. [*1263] [12] That is a different matter from the issue whether or to what extent Congress intended to permit State or District law to apply to bus drivers subject to ICC-DOT authority. We have already noted powerful indicators that Congress did so intend -- the provision in *29 U.S.C. § 218* permitting state law to extend benefits to employees given lesser benefits or none by FLSA; [**14] and the failure of the 1966 D.C. Act to include *§ 213(b)(1)* in the exemptions copied from FLSA. In contrast, the possibility of Congressional intent to prohibit D.C. coverage of interstate drivers would have to suppose that Congress was content with silence and reliance on the consequences of Federal supremacy doctrine. While we agree with the DCCA that in the D.C. Act Congress did not purport to be exercising power that would be unavailable to the states, [13] state power is not negatived by the doctrine of federal pre-emption.

12 At the time § 13(b)(1) of the FLSA, *29 U.S.C. § 213(b)(1)*, was adopted, Senator Black said:

> It is my belief that it would be certainly unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission, since it has the power and has exercised it, should be the agency to be entrusted with this duty. 81 Cong. Rec. 7875, 75th Cong., 1st Sess. July 30, 1937.

See, also *Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48, 87 L. Ed. 1244, 63 S. Ct. 917 (1943)*:

> The amendment was adopted to free operators of motor vehicles

> from the regulation by two agencies of the hours of drivers.

[**15]

13 See 112 Cong. Rec. 750 (1966) (Senator Javits "this proposal really amounts to a State minimum wage law"; Senator Morse concurs.)

If the states are pre-empted by Federal authority, it must be as a result of *49 U.S.C. § 304*. The mere vesting of jurisdiction in the ICC to control hours of bus drivers in interstate commerce does not necessarily exclude all state authority to legislate on drivers' wages. As to the case law, we may put to one side the decisions [14] stressed by the Company, that establish the breadth of the employees subject to ICC regulatory jurisdiction under *49 U.S.C. § 304*. And all that was held in *Southland Gasoline Co. v. Bayley, 319 U.S. 44, 87 L. Ed. 1244, 63 S. Ct. 917 (1943)* is what is plain from the enactments, that ICC is the only Federal agency with jurisdiction over such employees, and that FLSA is inapplicable to the employees subject to the jurisdiction of the ICC, whether or not exercised.

14 *Morris v. McComb, 332 U.S. 422, 92 L. Ed. 44, 68 S. Ct. 131 (1947)*; *Levinson v. Spector Motor Service, 330 U.S. 649, 91 L. Ed. 1158, 67 S. Ct. 931 (1947)*; *Pyramid Motor Freight v. Ispass, 330 U.S. 695, 91 L. Ed. 1184, 67 S. Ct. 954 (1947)*.

[**16] When we come to the issue of concurrent State power, the precedent that affords illumination is *Welch Co. v. New Hampshire, 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 438 (1939)*, which involved a New Hampshire statute that made it unlawful for a driver of a truck on New Hampshire highways to operate his vehicle for more than twelve consecutive hours. The Court assumed without deciding that this state regulation would be superseded as to interstate drivers when a Federal standard for maximum hours of service was put into effect. But the Court also held that,

> Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways.

306 U.S. at 85. Thus, *Welch* decides that state regulations limiting the hours interstate bus drivers may operate could be enforced where the ICC-DOT had not exercised jurisdiction on the same subject matter, assuming the state has a legitimate interest in establishing that control.

Since the record and briefs do not bring before us any regulation of the ICC-DOT establishing maximum [**17] hours [*1264] of the Company's bus drivers for the period in question, we have no basis for finding a termination of the State's concurrent jurisdiction. Even if there were such a regulation, there is no necessary inconsistency between an ICC-DOT regulation limiting maximum hours for safety reasons, and a state statute, passed as an economic regulation, for overtime pay within those limitations. [HN5] "There is no necessary inconsistency between enforcing rigid maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime work done . . . ." *Levinson v. Spector Motor Service, 330 U.S. 649, 661, 91 L. Ed. 1158, 67 S. Ct. 931 (1947)*. The state may *e.g.*, have an interest in creating job opportunities by overtime compensation even though extra hours may be worked without danger to the public.

It may be that a State overtime pay provision might have to be suspended or terminated as an interference with an ICC-DOT regulation, or as a burden on interstate commerce, but any such contention would have to be supported by an express DOT determination, or a factual showing of burden, [**18] and not by abstract conception. [HN6] In general a state's law is given effect unless it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)*.

3. The DCCA concluded that since the D.C. Act is to be considered like any State law, its coverage extends "only to those individuals working entirely within the District of Columbia" and is inapplicable to any bus drivers in interstate commerce.

The DCCA was certainly correct insofar as its approach sought some territorial limitation on the definition of employer and employee. That is implicit in any state law, and in the finding in *D.C. Code § 36-401* (*supra*, note 4) that there is need for protection of persons employed in "occupations in the District of Columbia." But we see no warrant for saying that a person is not employed in the District of Columbia unless he is "working entirely within the District of Columbia." The legislative history references cited in footnote 10 of the DCCA's opinion do not impel such a conclusion. [15] The D.C. Minimum Wage Board and the Corporation Counsel have interpreted [**19] the law to apply though some work is done outside the District. These rulings are entitled to weight as construction of the District of Columbia

Code unless plainly unreasonable or contrary to ascertainable legislative intent.

15 Thus all we discern in 112 Cong. Rec. at 25160, is a reference by Senator Morse to protection of the "workers in this community," and to his belief that not many employers will "move to the suburbs" on account of this legislation.

The opinion of the Corporation Counsel rendered to the Board on March 17, 1969, related to three employers who maintain offices in the District -- a furniture retailer; a floor covering company; and a motor bus company -- and held the overtime compensation provisions of the D.C. Act applicable to motor vehicle drivers "who perform services, in varying degree, in the nearby areas of Virginia and Maryland." The opinion states that "overtime compensation is required regardless of whether the employee performs some portion of his duties outside the District.

[**20] The Corporation Counsel has filed a brief amicus curiae asking that the DCCA ruling be reversed because its effect is to remove from the Act "many thousands of employees who are employed in the District of Columbia but whose employment duties require them to go occasionally into the neighboring jurisdictions of Maryland and Virginia."

Defendant Company stresses that its case, unlike the employers referred to in the opinion of the Corporation Counsel, relates to employers maintaining premises in the District. While plaintiffs argue to the contrary, we think this has [*1265] some materiality in giving content to the concept of persons "employed . . . in the District of Columbia." [16] But that cannot be conclusive. Would an employee working full -time in the District of Columbia, except for checking in and out of his home office, be exempt because his employer's business locations were entirely in Maryland? Would he fail of clear coverage if 10% of his time were spent in Maryland? Is he not, in every meaningful sense of the term, employed in the District?

16 For one thing, the D.C. Act authorizes the D.C. Commissioner(s) to enter on and inspect the place of business of any employer in the District of Columbia, see *D.C. Code § 36-405.*

The employer is required to keep a copy of the law or any regulation or order issued under it, posted "in a conspicuous and accessible place in or about the premises wherein any employee covered by such regulation or order is employed." D.C. Code § 36-412.

[**21] The supplemental inquiry we caused to be made (*supra* note 9) reveals a lack of state rulings concerning the problem of persons working in more than one state. Plaintiffs apparently contend that if an employer has enough presence in the District of Columbia to be subject to process here, and to be subject to its licensing and tax laws, it is also subject to the minimum wage law -- even as to employees who perform only, say 5% of their services in the District of Columbia. This contention has conceptual symmetry, but exceeds, we think, the likely sense of Congress, and we reject it. In recent years, by legislation and court decisions, foreign corporations have been held to be doing business, for purposes of service of process, on narrow grounds involving a bare minimum of contacts, in order to accord a forum of litigation that is reasonably convenient to persons involved with the corporation even in isolated or occasional transactions. And even relatively minimal contacts with a state may mean exposure to licensing jurisdiction, for protection of the public, and to tax liability. But the fact that a corporation's transactions and contacts with a jurisdiction subject it to [**22] litigation in that forum, or perhaps other regulatory controls, does not subject it to minimum wage controls for any employee it happens to bring into the jurisdiction to handle or service the transaction. The considerations are entirely different.

At the end of the road we are left to interpret the concept of "employed . . . in the District of Columbia" for purposes of the D.C. minimum wage law, and its overtime compensation provisions, without any significant aid from legislative history or implementing regulations. We are in effect left, as we put it in *District of Columbia v. Orleans, 132 U.S. App. D.C. 139, 406 F.2d 957 (1968)*, with the task of projecting how the legislature would have dealt with the concrete situation before us if it had but spoken more completely. In our interpretation, we take guidance not only from the ordinary and natural meaning of the term "employed . . . in the District of Columbia," but also from the practicalities of the situation, which require a reasonably common sense rule which can be applied with reasonable simplicity by area businessmen.

We are of the view that the ordinary and natural meaning of the term "employed . . . in [**23] the District of Columbia" encompasses an employee who regularly spends more than 50% of his work time in the District. We are also of the view that if an employer has so organized work that an employee does not regularly spend 50% of his work time in any particular state (or the District), then he is considered "employed in the District" if his employment is based in the District of Columbia and he regularly spends a substantial amount of his working time in the District. We stress the feature of regularity; an employee does not lose his status of being employed in the District merely because he receives an assignment, for a relatively short period, that calls on

him to spend all his time for that period at some location outside the District. Otherwise, that status would be lost or suspended [*1266] through relatively isolated or occasional employment outside the District, and from the common sense of the matter we conclude that this is not the legislative intent.

Thus, the term "employed . . . in the District" applies, even though the employment is based outside the District (e.g., employer's offices, place of reporting for duty), if the employer's work is organized in such [**24] a way that there are employees who regularly spend the bulk of their working time in the District. This condition indentifies the substantial interest of the District in enhancing wages and job opportunities, and also brings into play the express purpose of the Act to preclude competitive disadvantages from hurting employers in compliance.

Since in general the plaintiff bus drivers are based outside the District, spend only 38% of their total pay time within the District, and are rotated among routes rather than segregated by routes, it seems unlikely that plaintiffs can obtain the recovery they seek. However, the present record does not permit us to dispose of the case definitively. We remand for a determination whether the Company has so organized its work that there are bus drivers who regularly spend more than 50% of their workweek in the District of Columbia. If there are such employees, we conclude that they are entitled to the benefits of the D.C. Act.

* * *

We are aware that the DCCA now has final authority to interpret a D.C. enactment. We think it appropriate on our part to express our considered view concerning a problem that was brought up for review in 1970 [**25] because of the implications of federal authority and legislation, even though our ruling was, regrettably, delayed. As to the case at bar, our order will provide for vacation of the judgment of the DCCA and remand for further proceedings not inconsistent with this opinion.

So ordered.

LEXSEE 111 WASH 2D 586

Department of Labor and Industries of the State of Washington, Petitioner, v. Common Carriers, Inc., a Washington corporation, Respondent

No. 55102-2

SUPREME COURT OF WASHINGTON

111 Wn.2d 586; 762 P.2d 348; 1988 Wash. LEXIS 247; 115 Lab. Cas. (CCH) P56

October 20, 1988, Filed

SUMMARY:

[***1] **Nature of Action:** The State sought overtime pay for a truck mechanic who had worked more than 40 hours during several weeks.

District Court: The Lower District Court for Kittitas County, No. 8413, Richard T. Cole, J., entered a judgment in favor of the employer on March 25, 1986.

Superior Court: The Superior Court for Kittitas County, No. 86-2-00064-2, Bruce P. Hanson, J., on May 29, 1987, *affirmed* the judgment.

Supreme Court: Holding that federal regulation of the maximum hours worked by the mechanic did not preempt state regulation of his overtime wages, the court *reverses* the judgment and *grants* judgment in favor of the State.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Statutes -- Construction -- Federal Statutes -- Preemption of State Law -- Test Federal preemption of state law depends on congressional intent and will not be found unless Congress expressed a clear intent to preempt state law, the scheme of federal regulation is so comprehensive that it leaves no room for supplementary state regulation, or an actual conflict exists between the federal and state laws.

[2] Statutes -- Construction -- Federal Statutes -- Preemption of State Law -- Actual Conflict No actual conflict exists between federal and state laws unless compliance with both laws is impossible or the state law acts as an obstacle to carrying out congressional [***2] intent.

[3] Statutes -- Construction -- Federal Statutes -- Preemption of State Law -- Presumption Federal law is strongly presumed not to preempt Washington law.

[4] Carriers -- Compensation -- Overtime -- Federal Preemption of State Law Regulation of the maximum hours that employees may work by the federal Motor Carrier Act (*49 U.S.C. § 3101 et seq.*) does not preempt regulation of the payment of overtime wages by the Washington Minimum Wage Act (RCW 49.46).

COUNSEL: *Kenneth O. Eikenberry, Attorney General,* and *Byron L. Brown, Assistant,* for petitioner.

Cone, Gilreath & Korte, by *John P. Gilreath,* for respondent.

Jerome L. Rubin on behalf of Washington Trucking Associations, amicus curiae for respondent.

JUDGES: En Banc. Dolliver, J. Pearson, C.J., and Utter, Brachtenbach, Dore, Andersen, Callow, Durham, and Smith, JJ., concur.

OPINION BY: DOLLIVER

OPINION

[*587] [**348] Roy A. Draper was employed by Common Carriers, Inc. (Carriers) as a truck mechanic from January 1, 1983, to July 17, 1984. Carriers is a Washington [***3] corporation licensed by the State of

EXHIBIT K

Washington and the Interstate Commerce Commission (ICC) to transport passengers and freight to Washington, interstate, and Canadian destinations. Draper worked entirely within the state of Washington and worked in excess of 40 hours per week in 35 pay periods. Carriers did not pay Draper any overtime wages.

The Department of Labor and Industries (Department), responsible for the enforcement of the Washington Minimum Wage Act (WMWA) (RCW 49.46), brought a derivative overtime wage claim in the Lower District Court for Kittitas County, which found for the defendant. The matter was appealed to the Superior Court for Kittitas County, which dismissed the claim. The Department appealed; the Court of Appeals certified the case to this court.

[*588] The facts of this case are not in dispute. The issue is whether regulation of maximum [**349] hours worked in the federal Motor Carrier Act (MCA) (*49 U.S.C. § 3101 et seq.*) preempts the overtime wage provision in the WMWA. Relying on *Levinson v. Spector Motor Serv., 330 U.S. 649, 91 L. Ed. 1158, 67 S. Ct. 931 (1947)*, [***4] the Superior Court held the MCA preempted the WMWA. We reverse.

[1] [2] Federal preemption of state law is governed by the intent of Congress. *California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987)*. Congressional intent to preempt state law may be found in three ways. First, Congress may express a clear intent to preempt state law. *E.g., Jones v. Rath Packing Co., 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977)*. Second, the "scheme of federal regulation [may be] sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Guerra, at 281* (quoting *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947))*. Third, preemption will be found when there is an actual conflict between federal and state law where (1) compliance with both the federal and state law is physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)*, [***5] or (2) the state law is an "obstacle" to the "full purposes and objectives of Congress." *Hines v. Davidowitz, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941)*; *see also Guerra, at 281*.

[3] In Washington, there is a strong presumption against finding preemption. *Pioneer First Fed. Sav. & Loan Ass'n v. Pioneer Nat'l Bank, 98 Wn.2d 853, 659 P.2d 481 (1983)*. Preemption may be found only if federal law "clearly evinces a congressional *intent* to preempt state law", or there is such a "'direct and positive'" conflict "that the two acts cannot 'be reconciled or consistently stand together' . . ." *Pioneer, at 856-57* (quoting *State v. Williams, 94 Wn.2d 531, 538, 617 P.2d 1012, 24 A.L.R.4th 1191 (1980))*.

[*589] The original MCA gave the ICC the power to set maximum hours of work for employees of interstate motor carriers. *49 U.S.C. § 304(a)*. This authority was later transferred to the Secretary of Transportation (Secretary) under former *49 U.S.C. § 1655* [***6] *(e)(6)(B)-(D)*, which was recodified as 49 U.S.C. § 3102. The original MCA was repealed and reenacted with minor modifications in 49 U.S.C. § 3102. Currently under the MCA, the Secretary "may prescribe requirements for . . . qualifications and maximum hours of service of employees of . . . a motor carrier . . ." 49 U.S.C. § 3102(b)(1).

The WMWA provides that no employer shall employ anyone for a work week longer than 40 hours unless such employees receive compensation for excess hours at a rate not less than 1 1/2 times the regular rate at which they are employed. RCW 49.46.130(1).

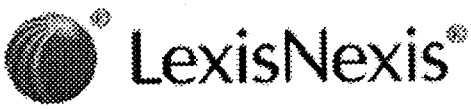
[4] None of the standards for finding preemption are shown here. Congress has not expressed a clear intent to preempt state overtime wage provisions. Neither Congress nor the Secretary has manifested an intent to occupy the field of overtime wage regulation. The MCA and the motor carrier regulations do not contain any requirements for rates of pay. *See* 49 U.S.C. § 3102; 49 C.F.R. §§ 301-399 (1987). The WMWA does not require any employee to work in excess of the maximum hours set by the Secretary [***7] nor is there any claim this occurred here. State economic regulation of hours worked up to the federal minimum safety standard does not, in the abstract, interfere with the safety goals of the MCA. *See Williams v. W.M.A. Transit Co., 472 F.2d 1258, 1264 (D.C. Cir. 1972)*. In this case, Draper worked entirely within the state of Washington and Carriers made no factual showing of interference. The possibility of interference does not justify preemption. *Hines v. Davidowitz, supra at 67*.

Levinson v. Spector Motor Serv., supra, relied upon by the defendant and the Superior Court does not apply. *Levinson* held the power of the ICC to establish maximum working hours precluded application of the overtime wage [*590] provision in the federal Fair Labor Standards Act. *Levinson,* [**350] *at 661-62*. The vesting of federal authority in the ICC, now in the Secretary, does not control the issue of concurrent jurisdiction between the federal government and the states. "There is no necessary inconsistency between enforcing rigid [***8] maximum hours of service for safety purposes and at the same time, within those limitations, requiring compliance with the increased rates of pay for overtime . . ." *Levinson, at 661*.

The four circuits which have considered this issue have rejected MCA preemption of state overtime wage statutes. *See Agsalud v. Pony Express Courier Corp. of Am., 833 F.2d 809 (9th Cir. 1987)*; *Pettis Moving Co. v. Roberts, 784 F.2d 439 (2d Cir. 1986)*; *Central Delivery Serv. v. Burch, 355 F. Supp. 954* (D. Md.), *aff'd mem., 486 F.2d 1399 (4th Cir. 1973)*; *Williams v. W.M.A. Transit Co., supra.* We concur in the results of these cases for the reasons adequately given therein.

Neither the Motor Carrier Act on its face and its interpretation by the federal courts nor the circumstances of this case dictate the preemption of the Washington Minimum Wage Act. Defendant's claim of the applicability of other statutes, *i.e., RCW 49.46.010*, .130 and .140 and *RCW 81.80.381*, to its position is unpersuasive.

The Superior Court is reversed.



LEXSTAT 29 USC 213

*** CURRENT THROUGH PL 111-112, APPROVED 11/30/2009 ***

TITLE 29. LABOR
CHAPTER 8. FAIR LABOR STANDARDS

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29 USCS § 213

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§ 213. Exemptions

(a) Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 [*29 USCS §§ 206, 207*] shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act [*5 USCS §§ 551* et seq.] except that [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) [Repealed]

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 6 and 7 [*29 USCS §§ 206* and *207*] provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 6 [*29 USCS § 206*], a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) [Repealed]

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agriculture labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is custom-

EXHIBIT L

arily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempt by regulations, order, or certificate of the Secretary issued under section 14 [*29 USCS § 214*]; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) [Repealed]

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) [Repealed]

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) [Repealed]

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under *section 5545a of title 5, United States Code*; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $ 27.63 an hour.

(b) Maximum hour requirements. The provisions of section 7 [*29 USCS § 207*] shall not apply with respect to--

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935 [*49 USCS § 31502*]; or

(2) any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle IV of title 49, United States Code [*49 USCS §§ 10101* et seq.]; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act [*45 USCS §§ 181-188*]; or

(4) [Repealed]

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7), (8) [Repealed]

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) (A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or

(B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a) [*29 USCS § 207(a)*]; or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1) [*29 USCS § 206(a)(1)*]; or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in the processing of maple sap into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18), (19) [Repealed]

(20) any employee of a public agency who in any workweek is employed in fire protection activities or any employee of a public agency who in any workweek is employed in law enforcement activities (including security personnel in correctional institutions), if the public agency employs during the workweek less than 5 employees in fire protection or law enforcement activities, as the case may be; or

(21) any employee who is employed in domestic service in a household and who resides in such household; or

(22), (23) [Repealed]

(24) any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children--

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such institution, and are together compensated, on a cash basis, at an annual rate of not less than $ 10,000; or

(25), (26) [Repealed]

(27) any employee employed by an establishment which is a motion picture theater; or

(28) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other transportation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

(29) any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(30) a criminal investigator who is paid availability pay under *section 5545a of title 5, United States Code.*

(c) Child labor requirements.

(1) Except as provided in paragraph (2) or (4), the provisions of section 12 [*29 USCS § 212*] relating to child labor shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed, if such employee--

(A) is less than twelve years of age and (i) is employed by his parent, or by a person standing in the place of his parent, on a farm owned or operated by such parent or person, or (ii) is employed, with the consent of his parent or person standing in the place of his parent, on a farm, none of the employees of which are (because of section 13(a)(6)(A) [subsec. (a)(6)(A) of this section]) required to be paid at the wage rate prescribed by section 6(a)(5) [*29 USCS § 206(a)(5)*],

(B) is twelve years or thirteen years of age and (i) such employment is with the consent of his parent or person standing in the place of his parent, or (ii) his parent or such person is employed on the same farm as such employee, or

(C) is fourteen years of age or older.

(2) The provisions of section 12 [*29 USCS § 212*] relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in an occupation that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, except where such employee is employed by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.

(3) The provisions of section 12 [*29 USCS § 212*] relating to child labor shall not apply to any child employed as an actor or performer in motion pictures or theatrical productions, or in radio or television productions.

(4) (A) An employer or group of employers may apply to the Secretary for a waiver of the application of section 12 [*29 USCS § 212*] to the employment for not more than eight weeks in any calendar year of individuals who are less than twelve years of age, but not less than ten years of age, as hand harvest laborers in an agricultural operation which has been, and is customarily and generally recognized as being, paid on a piece rate basis in the region in which such individuals would be employed. The Secretary may not grant such a waiver unless he finds, based on objective data submitted by the applicant, that–

(i) the crop to be harvested is one with a particularly short harvesting season and the application of section 12 [*29 USCS § 212*] would cause severe economic disruption in the industry of the employer or group of employers applying for the waiver;

(ii) the employment of the individuals to whom the waiver would apply would not be deleterious to their health or well-being;

(iii) the level and type of pesticides and other chemicals used would not have an adverse effect on the health or well-being of the individuals to whom the waiver would apply;

(iv) individuals age twelve and above are not available for such employment; and

(v) the industry of such employer or group of employers has traditionally and substantially employed individuals under twelve years of age without displacing substantial job opportunities for individuals over sixteen years of age.

(B) Any waiver granted by the Secretary under subparagraph (A) shall require that--

(i) the individuals employed under such waiver be employed outside of school hours for the school district where they are living while so employed;

(ii) such individuals while so employed commute daily from their permanent residence to the farm on which they are so employed; and

(iii) such individuals be employed under such waiver (I) for not more than eight weeks between June 1 and October 15 of any calendar year, and (II) in accordance with such other terms and conditions as the Secretary shall prescribe for such individuals' protection.

(5) (A) In the administration and enforcement of the child labor provisions of this Act [*29 USCS §§ 201* et seq.], employees who are 16 and 17 years of age shall be permitted to load materials into, but not operate or unload materials from, scrap paper balers and paper box compactors--

(i) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors; and

(ii) that cannot be operated while being loaded.

(B) For purposes of subparagraph (A), scrap paper balers and paper box compactors shall be considered safe for 16- or 17-year-old employees to load only if--

(i) (I) the scrap paper balers and paper box compactors meet the American National Standards Institute's Standard ANSI Z245.5-1990 for scrap paper balers and Standard ANSI Z245.2-1992 for paper box compactors; or

(II) the scrap paper balers and paper box compactors meet an applicable standard that is adopted by the American National Standards Institute after the date of enactment of this paragraph and that is certified by the Secretary to be at least as protective of the safety of minors as the standard described in subclause (I);

(ii) the scrap paper balers and paper box compactors include an on-off switch incorporating a key-lock or other system and the control of the system is maintained in the custody of employees who are 18 years of age or older;

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29 CFR 782.2

§ 782.2 Requirements for exemption in general.

(a) The exemption of an employee from the hours provisions of the Fair Labor Standards Act under section 13(b)(1) depends both on the class to which his employer belongs and on the class of work involved in the employee's job. The power of the Secretary of Transportation to establish maximum hours and qualifications of service of employees, on which exemption depends, extends to those classes of employees and those only who: (1) Are employed by carriers whose transportation of passengers or property by motor vehicle is subject to his jurisdiction under section 204 of the Motor Carrier Act (*Boutell v. Walling, 327 U.S. 463; Walling v. Casale, 51 F. Supp. 520;* and see Ex parte Nos. MC-2 and MC-3, in the *Matter of Maximum Hours of Service of Motor Carrier Employees, 28 M.C.C. 125, 132),* and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the *Motor Carrier Act. United States v. American Trucking Assns., 310 U.S. 534; Levinson v. Spector Motor Service, 330 U.S. 649; Ex parte No. MC-28, 13 M.C.C. 481; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Walling v. Comet Carriers, 151 F. (2d) 107* (C.A. 2).

(b)(1) The carriers whose transportation activities are subject to the Secretary of Transportation jurisdiction are specified in the Motor Carrier Act itself (see § 782.1). His jurisdiction over private carriers is limited by the statute to private carriers of property by motor vehicle, as defined therein, while his jurisdiction extends to common and contract carriers of both passengers and property. See also the discussion of special classes of carriers in § 782.8. And see paragraph (d) of this section. The U.S. Supreme Court has accepted the Agency determination, that activities of this character are included in the kinds of work which has been defined as the work of drivers, driver's helpers, loaders, and mechanics (see §§ 782.3 to 782.6) employed by such carriers, and that no other classes of employees employed by such carriers perform duties directly affecting such "safety of operation." *Ex parte No. MC-2, 11 M.C.C. 203; Ex parte No. MC-28, 13 M.C.C. 481; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Southland Gasoline Co. v. Bayley, 319 U.S. 44.* See also paragraph (d) of this section and §§ 782.3 through 782.8.

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(2) The exemption is applicable, under decisions of the U.S. Supreme Court, to those employees and those only whose work involves engagement in activities consisting wholly or in part of a class of work which is defined: (i) As that of a driver, driver's helper, loader, or mechanic, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce within the meaning of the *Motor Carrier Act. Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; Morris v. McComb, 332 U.S. 442.* Although the Supreme Court recognized that the special knowledge and experience required to determine what classifications of work affects safety of operation of interstate motor carriers was applied by the Commission, it has made it clear that the determination whether or not an individual employee is within any such classification is to be determined by judicial process. (*Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695;* Cf. *Missel v. Overnight Motor Transp., 40 F. Supp. 174* (D. Md.), reversed on other grounds *126 F. (2d) 98* (C.A. 4), affirmed *316 U.S. 572; West v. Smoky Mountains Stages, 40 F. Supp. 296* (N.D. Ga.); *Magann v. Long's Baggage Transfer Co., 39 F. Supp. 742* (W.D. Va.); *Walling v. Burlington Transp. Co. (D. Nebr.), 5 W.H. Cases 172, 9 Labor Cases par. 62,576; Hager v. Brinks, Inc., 6 W.H. Cases 262* (N.D. Ill.)) In determining whether an employee falls within such an exempt category, neither the name given to his position nor that given to the work that he does is controlling (*Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Porter v. Poindexter, 158 F.--(2d) 759* (C.A. 10); *Keeling v. Huber & Huber Motor Express, 57 F. Supp. 617* (W.D. Ky.); *Crean v. Moran Transp. Lines (W.D. N.Y.) 9 Labor Cases, par. 62,416* (see also earlier opinion in *54 F. Supp. 765));* what is controlling is the character of the activities involved in the performance of his job.

(3) As a general rule, if the bona fide duties of the job performed by the employee are in fact such that he is (or, in the case of a member of a group of drivers, driver's helpers, loaders, or mechanics employed by a common carrier and engaged in safety-affecting occupations, that he is likely to be) called upon in the ordinary course of his work to perform, either regularly or from time to time, safety-affecting activities of the character described in paragraph (b)(2) of this section, he comes within the exemption in all workweeks when he is employed at such job. This general rule assumes that the activities involved in the continuing duties of the job in all such workweeks will include activities which have been determined to affect directly the safety of operation of motor vehicles on the public highways in transportation in interstate commerce. Where this is the case, the rule applies regardless of the proportion of the employee's time or of his activities which is actually devoted to such safety-affecting work in the particular workweek, and the exemption will be applicable even in a workweek when the employee happens to perform no work directly affecting "safety of operation." On the other hand, where the continuing duties of the employee's job have no substantial direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis, the exemption will not apply to him in any workweek so long as there is no change in his duties. (*Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Morris v. McComb, 332 U.S. 422; Levinson v. Spector Motor Service, 330 U.S. 649; Rogers Cartage Co. v. Reynolds, 166 F. (2d) 317* (C.A. 6); *Opelika Bottling Co. v. Goldberg, 299 F. (2d) 37* (C.A. 5); *Tobin v. Mason & Dixon Lines, Inc., 102 F. Supp. 466* (E.D. Tenn.)) If in particular workweeks other duties are assigned to him which result, in those workweeks, in his performance of activities directly affecting the safety of operation of motor vehicles in interstate commerce on the public highways, the exemption will be applicable to him those workweeks, but not in the workweeks when he continues to perform the duties of the non-safety-affecting job.

(4) Where the same employee of a carrier is shifted from one job to another periodically or on occasion, the application of the exemption to him in a particular workweek is tested by application of the above principles to the job or jobs in which he is employed in that workweek. Similarly, in the case of an employee of a private carrier whose job does not require him to engage regularly in exempt safety-affecting activities described in paragraph (b)(1) of this section and whose engagement in such activities occurs sporadically or occasionally as the result of his work assignments at a particular time, the exemption will apply to him only in those workweeks when he engages in such activities. Also, because the jurisdiction of the Secretary of Transportation over private carriers is limited to carriers of property (see paragraph (b)(1) of this section) a driver, driver's helper, loader, or mechanic employed by a private carrier is not within the exemption in any workweek when his safety-affecting activities relate only to the transporation of passengers and not to the transportation of property.

(c) The application of these principles may be illustrated as follows:

(1) In a situation considered by the U.S. Supreme Court, approximately 4 percent of the total trips made by drivers employed by a common carrier by motor vehicle involved in the hauling of interstate freight. Since it appeared that employer, as a common carrier, was obligated to take such business, and that any driver might be called upon at any time to perform such work, which was indiscriminately distributed among the drivers, the Court considered that such trips were a natural, integral, and apparently inseparable part of the common carrier service performed by the employer and

driver employees. Under these circumstances, the Court concluded that such work, which directly affected the safety of operation of the vehicles in interstate commerce, brought the entire classification of drivers employed by the carrier under the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, so that all were exempt even though the interstate driving on particular employees was sporadic and occasional, and in practice some drivers would not be called upon for long periods to perform any such work. (*Morris v. McComb, 332 U.S. 422)*

(2) In another situation, the U.S. Court of Appeals (Seventh Circuit) held that the exemption would not apply to truckdrivers employed by a private carrier on interstate routes who engaged in no safety-affecting activities of the character described above even though other drivers of the carrier on interstate routes were subject to the jurisdiction of the Motor Carrier Act. The court reaffirmed the principle that the exemption depends not only upon the class to which the employer belongs but also the activities of the individual employee. (*Goldberg v. Faber Industries, 291 F. (2d) 232)*

(d) The limitations, mentioned in paragraph (a) of this section, on the regulatory power of the Secretary of Transportation (as successor to the Interstate Commerce Commission) under section 204 of the Motor Carrier Act are also limitations on the scope of the exemption. Thus, the exemption does not apply to employees of carriers who are not carriers subject to his jurisdiction, or to employees of noncarriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, firms engaged in the leasing and renting of motor vehicles to carriers and in keeping such vehicles in condition for service pursuant to the lease or rental agreements. (*Boutell v. Walling, 327 U.S. 463; Walling v. Casale, 51 F. Supp. 520).* Similarly, the exemption does not apply to an employee whose job does not involve engagement in any activities which have been defined as those of drivers, drivers' helpers, loaders, or mechanics, and as directly affecting the "safety of operation" of motor vehicles. (*Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Service, 330 U.S. 649; United States v. American Trucking Assn., 310 U.S. 534; Gordon's Transports v. Walling, 162 F. (2d) 203* (C.A. 6); *Porter v. Poindexter, 158 F. (2d) 759* (C.A. 10)) Except insofar as the Commission has found that the activities of drivers, drivers' helpers, loaders, and mechanics, as defined by it, directly affect such "safety of operation," it has disclaimed its power to establish qualifications of maximum hours of service under section 204 of the Motor Carrier Act. (*Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695)* Safety of operation as used in section 204 of the Motor Carrier Act means "the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce, and that alone." (*Ex parte Nos. MC-2 and MC-3 (Conclusions of Law No. 1), 28 M.C.C. 125, 139)* Thus the activities of drivers, drivers' helpers, loaders, or mechanics in connection with transportation which is not in interstate of foreign commerce within the meaning of the Motor Carrier Act provide no basis for exemption under section 13(b)(1) of the Fair Labor Standards Act. (*Walling, v. Comet Carriers, 151 F. (2d) 107* (C.C.A. 2); *Hansen v. Salinas Valley Ice Co. (Cal. App.) 144 P. (2d) 896; Reynolds v. Rogers Cartage Co., 71 F. Supp. 870* (W.D. Ky.), reversed on other grounds, *166 F. (d) 317* (C.A. 6); *Earle v. Brinks, Inc., 54 F. Supp. 676* (S.D. N.Y.); *Walling v. Villaume Box & Lumber Co., 58 F. Supp. 150* (D. Minn.); *Hager v. Brinks, Inc., 11 Labor Cases, par. 63,296 (N.D. Ill.), 6 W.H. Cases 262; Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938* (D. Minn.); *Dallum v. Farmers Cooperative Trucking Assn., 46 F. Supp. 785* (D. Minn.); McLendon v. Bewely Mills (N.D. Tex.); *3 Labor Cases, par. 60,247, 1 W.H. Cases 934; Gibson v. Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814;* cf. *Morris v. McComb, 332 U.S. 422.* See also § 782.1 and §§ 782.7 through 782.8.)

(e) The jurisdiction of the Secretary of Transportation under section 204 of the Motor Carrier Act relates to safety of operation of motor vehicles only, and "to the safety of operation of such vehicles on the highways of the country, and that alone." (*Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 192.* See also *United States v. American Trucking Assns., 319 U.S. 534, 548.)* Accordingly, the exemption does not extend to employees merely because they engage in activities affecting the safety of operation of motor vehicles operated on private premises. Nor does it extend to employees engaged solely in such activities as operating freight and passenger elevators in the carrier's terminals of moving freight or baggage therein or the docks or streets by hand trucks, which activities have no connection with the actual operation of motor vehicles. (*Gordon's Transport v. Walling, 162 F. (2d) 203* (C.A. 6), certorari denied *322 U.S. 774; Walling v. Comet Carriers, 57 F. Supp. 1018,* affirmed, *151 F. (2d) 107* (C.A. 2), certiorari dismissed, *382 U.S. 819; Gibson v. Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 128.* See also *Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Levinson v. Spector Motor Serv., 330 U.S. 949.)*

(f) Certain classes of employees who are not within the definitions of drivers, driver's helpers, loaders, and mechanics are mentioned in §§ 782.3-782.6, inclusive. Others who do not come within these definitions include the following, whose duties are considered to affect safety of operation, if at all, only indirectly; stenographers (including those who write letters relating to safety or prepare accident reports); clerks of all classes (including rate clerks, billing clerks,

clerks engaged in preparing schedules, and filing clerks in charge of filing accident reports, hours-of-service records, inspection reports, and similar documents); foremen, warehousemen, superintendents, salesmen, and employees acting in an executive capacity. (*Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Ex parte No. MC-28, 13 M.C.C. 481.* But see §§ 782.5(b) and 782.6(b) as to certain foremen and superintendents.) Such employees are not within the section 13(b)(1) exemption. (*Overnight Motor Transp. Co. v. Missel, 316 U.S. 572* (rate clerk who performed incidental duties as cashier and dispatcher); *Levinson v. Spector Motor Service, 330 U.S. 649; Porter v. Poindexter, 158 F. (2d) 759* (C.A. 10) (checker of freight and bill collector); *Potashnik, Local Truck System v. Archer (Ark. Sup. Ct.), 179 S.W. (2d) 696* (night manager who did clerical work on waybills, filed day's accumulation of bills and records, billed out local accumulation of shipments, checked mileage on trucks and made written reports, acted as night dispatcher, answered telephone calls, etc.).)

HISTORY: *36 FR 21778,* Nov. 13, 1971.

AUTHORITY: *52 Stat. 1060,* as amended; *29 U.S.C. 201* et seq.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
Social Security Administration: See Employees' Benefits, 20 CFR chapter III.
EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
American Fed'n of State, County & Mun. Emples., Council 17 v Louisiana ex rel. Department of Health & Hosps. (2001, ED La) 142 CCH LC P34195
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29 CFR 782.3

§ 782.3 Drivers.

(a) A "driver," as defined for Motor Carrier Act jurisdiction (49 CFR parts 390-395; *Ex parte No. MC-2, 3 M.C.C. 665;* Ex parte No. MC-3, 23 M.C.C.1; *Ex parte No. MC-4, 1 M.C.C. 1),* is an individual who drives a motor vehicle in transporation which is, within the meaning of the Motor Carrier Act, in interstate or foreign commerce. (As to what is considered transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act, see § 782.7). This definition does not require that the individual be engaged in such work at all times; it is recognized that even full-duty drivers devote some of their working time to activities other than such driving. "Drivers," as thus officially defined, include, for example, such partial-duty drivers as the following, who drive in interstate or foreign commerce as part of a job in which they are required also to engage in other types of driving or nondriving work: Individuals whose driving duties are concerned with transportation some of which is in intrastate commerce and some of which is in interstate or foreign commerce within the meaning of the Motor Carrier Act; individuals who ride on motor vehicles engaged in transportation in interstate or foreign commerce and act as assistant or relief drivers of the vehicles in addition to helping with loading, unloading, and similar work; drivers of chartered buses or of farm trucks who have many duties unrelated to driving or safety of operation of their vehicles in interstate transportation on the highways; and so-called "driver-salesmen" who devote much of their time to selling goods rather than to activities affecting such safety of operation. (*Levinson v. Spector Motor Service, 300 U.S. 649; Morris v. McComb, 332 U.S. 422; Richardson v. James Gibbons Co., 132 F. (2d) 627* (C.A. 4), affirmed *319 U.S. 44; Gavril v. Kraft Cheese Co., 42 F. Supp. 702* (N.D. Ill.); *Wallbing v. Craig, 53 F. Supp. 479* (D. Minn.); *Vannoy v. Swift & Co. (Mo. S. Ct.), 201 S.W. (2d) 350; Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125; Ex parte No. MC-4, 1 M.C.C. 1.* Cf. *Colbeck v. Dairyland Creamery Co. (S.D. Supp. Ct.), 17 N.W. (2d) 262,* in which the court held that the exemption did not apply to a refrigeration mechanic by reason solely of the fact that he crossed State lines in a truck in which he transported himself to and from the various places at which he serviced equipment belonging to his employer.)

(b) The work of an employee who is a full-duty or partial-duty "driver," as the term "driver" is above defined, directly affects "safety of operation" within the meaning of section 204 of the Motor Carrier Act whenever he drives a motor vehicle in interstate or foreign commerce within the meaning of that act. (*Levinson v. Spector Motor Service, 330*

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U.S. 649, citing *Richardson v. James Gibbons Co., 132 F. (2d) 627* (C.A. 4), affirmed *319 U.S. 44; Morris v. McComb, 332 U.S. 422; Ex parte No. MC-28, 13 M.C.C. 481, 482, 488; Ex parte Nos. MC-2 and MC-3, 28 M.C.C. 125, 139* (Conclusion of Law No. 2). See also *Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte No. MC-4, 1 M.C.C. 1.)* The Secretary has power to establish, and has established, qualifications and maximum hours of service for such drivers employed by common and contract carriers or passengers or property and by private carriers of property pursuant to section 204, of the Motor Carrier Act. (See *Ex parte No. MC-4, 1 M.C.C. 1; Ex parte No. MC-2, 3 M.C.C. 665; Ex parte No. MC-3, 23 M.C.C. 1; Ex parte No. MC-28, 13 M.C.C. 481; Levinson v. Spector Motor Service, 330 U.S. 649; Southland Gasoline Co. v. Bayley, 319 U.S. 44; Morris v. McComb, 332 U.S. 422;* Safety Regulations (Carriers by Motor Vehicle), 49 CFR parts 390, 391, 395) In accordance with principles previously stated (see § 782.2), such drivers to whom this regulatory power extends are, accordingly, employees exempted from the overtime requirements of the Fair Labor Standards Act by section 13(b)(1). (*Southland Gasoline Co. v. Bayley, 319 U.S. 44; Levinson v. Spector Motor Service, 330 U.S. 649; Morris v. McComb, 332 U.S. 422; Rogers Cartage Co. v. Reynolds, 166 F. (2d) 317* (C.A. 6). This does not mean that an employee of a carrier who drives a motor vehicle is exempted as a "driver" by virtue of that fact alone. He is not exempt if his job never involves transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act (see §§ 782.2 (d) and (e), 782.7, and 782.8, or if he is employed by a private carrier and the only such transportation called for by his job is not transportation of property. (See § 782.2. See also *Ex parte No. MC-28, 13 M.C.C. 481,* Cf. *Colbeck v. Dairyland Creamery Co. (S. Ct. S.D.), 17 N.W. (2d) 262* (driver of truck used only to transport himself to jobsites, as an incident of his work in servicing his employer's refrigeration equipment, held non exempt).) It has been held that so-called "hostlers" who "spot" trucks and trailers at a terminal dock for loading and unloading are not exempt as drivers merely because as an incident of such duties they drive the trucks and tractors in and about the premises of the trucking terminal. (*Keegan v. Ruppert (S.D. N.Y.), 7 Labor Cases, par. 61,726 6 Wage Hour Rept. 676,* cf. *Walling v. Silver Fleet Motor Express, 67 F. Supp. 846)*

HISTORY: *36 FR 21778,* Nov. 13, 1971.

AUTHORITY: *52 Stat. 1060,* as amended; *29 U.S.C. 201* et seq.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
Social Security Administration: See Employees' Benefits, 20 CFR chapter III.
EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

NOTES TO DECISIONS: COURT AND ADMINISTRATIVE DECISIONS SIGNIFICANTLY DISCUSSING SECTION --
Lambert v Statewide Transp., Inc. (2005, WD La) 2005 US Dist LEXIS 43920

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*** THIS SECTION IS CURRENT THROUGH THE DECEMBER 10, 2009 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER V -- WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER B -- STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS
PART 785 -- HOURS WORKED
SUBPART C -- APPLICATION OF PRINCIPLES
EMPLOYEES "SUFFERED OR PERMITTED" TO WORK

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29 CFR 785.11

§ 785.11 General.

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time. (Handler v. Thrasher, 191, F. 2d 120 (C.A. 10, 1951); *Republican Publishing Co. v. American Newspaper Guild, 172 F. 2d 943* (C.A. 1, 1949; *Kappler v. Republic Pictures Corp., 59 F. Supp. 112 (S.D. Iowa 1945),* aff'd *151 F. 2d 543* (C.A. 8, 1945); *327 U.S. 757 (1946); Hogue v. National Automotive Parts Ass'n. 87 F. Supp. 816 (E.D. Mich. 1949); Barker v. Georgia Power & Light Co., 2 W.H. Cases 486; 5 CCH Labor Cases, para. 61,095 (M.D. Ga. 1942); Steger v. Beard & Stone Electric Co., Inc., 1 W.H. Cases 593; 4 Labor Cases 60,643* (N.D. Texas, 1941))

HISTORY: *[26 FR 190,* Jan. 11, 1961]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
52 Stat. 1060; 29 U.S.C. 201-219.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
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EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

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29 CFR 785.13

§ 785.13 Duty of management.

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. The mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so.

HISTORY: *[26 FR 190,* Jan. 11, 1961]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
52 Stat. 1060; 29 U.S.C. 201-219.

NOTES: NOTES APPLICABLE TO ENTIRE SUBTITLE:
CROSS REFERENCES: Railroad Retirement Board: See Employees' Benefits, 20 CFR chapter II.
Social Security Administration: See Employees' Benefits, 20 CFR chapter III.
EDITORIAL NOTE: Other regulations issued by the Department of Labor appear in 20 CFR chapters I, IV, V, VI, VII; 30 CFR chapter I; 41 CFR chapters 50, 60, and 61; and 48 CFR chapter 29.

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LEXSTAT 49 USC 31131

*** CURRENT THROUGH PL 111-112, APPROVED 11/30/2009 ***

TITLE 49. TRANSPORTATION
SUBTITLE VI. MOTOR VEHICLE AND DRIVER PROGRAMS
PART B. COMMERCIAL
CHAPTER 311. COMMERCIAL MOTOR VEHICLE SAFETY
SUBCHAPTER III. SAFETY REGULATION

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49 USCS § 31131

§ 31131. Purposes and findings

(a) Purposes. The purposes of this subchapter [*49 USCS §§ 31131* et seq.] are--
(1) to promote the safe operation of commercial motor vehicles;
(2) to minimize dangers to the health of operators of commercial motor vehicles and other employees whose employment directly affects motor carrier safety; and
(3) to ensure increased compliance with traffic laws and with the commercial motor vehicle safety and health regulations and standards prescribed and orders issued under this chapter [*49 USCS §§ 31101* et seq.].

(b) Findings. Congress finds--
(1) it is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage;
(2) improved, more uniform commercial motor vehicle safety measures and strengthened enforcement would reduce the number of fatalities and injuries and the level of property damage related to commercial motor vehicle operations;
(3) enhanced protection of the health of commercial motor vehicle operators is in the public interest; and
(4) interested State governments can provide valuable assistance to the United States Government in ensuring that commercial motor vehicle operations are conducted safely and healthfully.

HISTORY:
(July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 999.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Revised Section	Source (U.S. Code)	Source (Statutes at Large)

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31131(a)... 49 App.:2501. Oct. 30, 1984, Pub. L. 98-554, Secs. 202, 203, 98 Stat. 2832.
31131(b)... 49 App.:2502.

In subsection (a)(3), the words "this chapter" are substituted for "this Act" because title II of the Act of October 30, 1984 (Public Law 98-554, 98 Stat. 2832), amended and enacted provisions restated in this chapter.

Other provisions:

Traffic law initiative. Act Dec. 9, 1999, P.L. 106-159, Title II, § 220, 113 Stat. 1769 (effective on enactment as provided by § 107(a) of such Act, which appears as *49 USCS § 104* note), provides:

"(a) In general. In cooperation with one or more States, the Secretary may carry out a program to develop innovative methods of improving motor carrier compliance with traffic laws. Such methods may include the use of photography and other imaging technologies.

"(b) Report. The Secretary shall transmit to Congress a report on the results of any program conducted under this section, together with any recommendations as the Secretary determines appropriate.".

NOTES:

Code of Federal Regulations:

Federal Motor Carrier Safety Administration, Department of Transportation--Compatibility of State laws and regulations affecting interstate motor carrier operations, *49 CFR 355.1* et seq.

Research Guide:

Federal Procedure:

32A Fed Proc L Ed, Transportation §§ 76:71, 74.

Texts:

4A Environmental Law Practice Guide (Matthew Bender), ch 29A, Hazardous Materials Transportation § 29A.01.

Interpretive Notes and Decisions:

No conflict exists between operation of state privilege law and Federal Motor Carrier Safety Act or regulations promulgated under Act; consequently, such privileges are not preempted. *Whatley v Merit Distrib. Servs. (2000, SD Ala) 191 FRD 655.*

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*** THIS SECTION IS CURRENT THROUGH THE DECEMBER 10, 2009 ISSUE OF ***
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TITLE 49 -- TRANSPORTATION
SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION
CHAPTER III -- FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION
SUBCHAPTER B -- FEDERAL MOTOR CARRIER SAFETY REGULATIONS
PART 395 -- HOURS OF SERVICE OF DRIVERS

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49 CFR 395.1

§ 395.1 Scope of rules in this part.

(a) General. (1) The rules in this part apply to all motor carriers and drivers, except as provided in paragraphs (b) through (q) of this section.

(2) The exceptions from Federal requirements contained in paragraphs (l) and (m) of this section do not preempt State laws and regulations governing the safe operation of commercial motor vehicles.

(b) Adverse driving conditions. (1) Except as provided in paragraph (h)(2) of this section, a driver who encounters adverse driving conditions, as defined in § 395.2, and cannot, because of those conditions, safely complete the run within the maximum driving time permitted by §§ 395.3(a) or 395.5(a) may drive and be permitted or required to drive a commercial motor vehicle for not more than 2 additional hours in order to complete that run or to reach a place offering safety for the occupants of the commercial motor vehicle and security for the commercial motor vehicle and its cargo. However, that driver may not drive or be permitted to drive --

(i) For more than 13 hours in the aggregate following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(ii) After the end of the 14th hour since coming on duty following 10 consecutive hours off duty for drivers of property-carrying commercial motor vehicles;

(iii) For more than 12 hours in the aggregate following 8 consecutive hours off duty for drivers of passenger-carrying commercial motor vehicles; or

(iv) After he/she has been on duty 15 hours following 8 consecutive hours off duty for drivers of passenger-carrying commercial motor vehicles.

(2) Emergency conditions. In case of any emergency, a driver may complete his/her run without being in violation of the provisions of the regulations in this part, if such run reasonably could have been completed absent the emergency.

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(c) Driver-salesperson. The provisions of § 395.3(b) shall not apply to any driver-salesperson whose total driving time does not exceed 40 hours in any period of 7 consecutive days.

(d) Oilfield operations. (1) In the instance of drivers of commercial motor vehicles used exclusively in the transportation of oilfield equipment, including the stringing and picking up of pipe used in pipelines, and servicing of the field operations of the natural gas and oil industry, any period of 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(2) In the case of specially trained drivers of commercial motor vehicles which are specially constructed to service oil wells, on-duty time shall not include waiting time at a natural gas or oil well site; provided, that all such time shall be fully and accurately accounted for in records to be maintained by the motor carrier. Such records shall be made available upon request of the Federal Motor Carrier Safety Administration.

(e) Short-haul operations -- (1) 100 air-mile radius driver. A driver is exempt from the requirements of § 395.8 if:

(i) The driver operates within a 100 air-mile radius of the normal work reporting location;

(ii) The driver, except a driver-salesperson, returns to the work reporting location and is released from work within 12 consecutive hours;

(iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 12 hours on duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 12 hours on duty;

(iv)(A) A property-carrying commercial motor vehicle driver does not exceed 11 hours maximum driving time following 10 consecutive hours off-duty; or

(B) A passenger-carrying commercial motor vehicle driver does not exceed 10 hours maximum driving time following 8 consecutive hours off duty; and

(v) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day; and

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

(2) Operators of property-carrying commercial motor vehicles not requiring a commercial driver's license. Except as provided in this paragraph, a driver is exempt from the requirements of § 395.3 and § 395.8 and ineligible to use the provisions of § 395.1(e)(1), (g) and (o) if:

(i) The driver operates a property-carrying commercial motor vehicle for which a commercial driver's license is not required under part 383 of this subchapter;

(ii) The driver operates within a 150 air-mile radius of the location where the driver reports to and is released from work, i.e., the normal work reporting location;

(iii) The driver returns to the normal work reporting location at the end of each duty tour;

(iv) The driver has at least 10 consecutive hours off duty separating each on-duty period;

(v) The driver does not drive more than 11 hours following at least 10 consecutive hours off-duty;

(vi) The driver does not drive:

(A) After the 14th hour after coming on duty on 5 days of any period of 7 consecutive days; and

(B) After the 16th hour after coming on duty on 2 days of any period of 7 consecutive days;

(vii) The driver does not drive:

(A) After having been on duty for 60 hours in 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week;

(B) After having been on duty for 70 hours in 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week;

(viii) Any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

(ix) The motor carrier that employs the driver maintains and retains for a period of 6 months accurate and true time records showing:

(A) The time the driver reports for duty each day;

(B) The total number of hours the driver is on duty each day;

(C) The time the driver is released from duty each day;

(D) The total time for the preceding 7 days in accordance with § 395.8(j)(2) for drivers used for the first time or intermittently.

(f) Retail store deliveries. The provisions of § 395.3 (a) and (b) shall not apply with respect to drivers of commercial motor vehicles engaged solely in making local deliveries from retail stores and/or retail catalog businesses to the ultimate consumer, when driving solely within a 100-air mile radius of the driver's work-reporting location, during the period from December 10 to December 25, both inclusive, of each year.

(g) Sleeper berths -- (1) Property-carrying commercial motor vehicle -- (i) In General. A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, (A) Must, before driving, accumulate

(1) At least 10 consecutive hours off duty;

(2) At least 10 consecutive hours of sleeper-berth time;

(3) A combination of consecutive sleeper-berth and off-duty time amounting to at least 10 hours; or

(4) The equivalent of at least 10 consecutive hours off duty if the driver does not comply with paragraph (g)(1)(i)(A)(1), (2), or (3) of this section;

(B) May not drive more than 11 hours following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(C) May not drive after the 14th hour after coming on duty following one of the 10-hour off-duty periods specified in paragraph (g)(1)(i)(A)(1) through (4) of this section; and

(D) Must exclude from the calculation of the 14-hour limit any sleeper berth period of at least 8 but less than 10 consecutive hours.

(ii) Specific requirements. -- The following rules apply in determining compliance with paragraph (g)(1)(i) of this section:

(A) The term "equivalent of at least 10 consecutive hours off duty" means a period of (1) At least 8 but less than 10 consecutive hours in a sleeper berth, and

(2) A separate period of at least 2 but less than 10 consecutive hours either in the sleeper berth or off duty, or any combination thereof.

(B) Calculation of the 11-hour driving limit includes all driving time; compliance must be re-calculated from the end of the first of the two periods used to comply with paragraph (g)(1)(ii)(A) of this section.

(C) Calculation of the 14-hour limit includes all time except any sleeper-berth period of at least 8 but less than 10 consecutive hours; compliance must be re-calculated from the end of the first of the two periods used to comply with the requirements of paragraph (g)(1)(ii)(A) of this section.

(2) Specially trained driver of a specially constructed oil well servicing commercial motor vehicle at a natural gas or oil well location. A specially trained driver who operates a commercial motor vehicle specially constructed to service

natural gas or oil wells that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, or who is off duty at a natural gas or oil well location, may accumulate the equivalent of 10 consecutive hours off duty time by taking a combination of at least 10 consecutive hours of off-duty time, sleeper-berth time, or time in other sleeping accommodations at a natural gas or oil well location; or by taking two periods of rest in a sleeper berth, or other sleeping accommodation at a natural gas or oil well location, providing:

(i) Neither rest period is shorter than 2 hours;

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed 11 hours;

(iii) The driver does not drive after the 14th hour after coming on duty following 10 hours off duty, where the 14th hour is calculated:

(A) By excluding any sleeper berth or other sleeping accommodation period of at least 2 hours which, when added to a subsequent sleeper berth or other sleeping accommodation period, totals at least 10.hours, and

(B) By including all on-duty time, all off-duty time not spent in the sleeper berth or other sleeping accommodations, all such periods of less than 2 hours, and any period not described in paragraph (g)(2)(iii)(A) of this section; and

(iv) The driver may not return to driving subject to the normal limits under § 395.3 without taking at least 10 consecutive hours off duty, at least 10 consecutive hours in the sleeper berth or other sleeping accommodations, or a combination of at least 10 consecutive hours off duty, sleeper berth time, or time in other sleeping accommodations.

(3) Passenger-carrying commercial motor vehicles. A driver who is driving a passenger-carrying commercial motor vehicle that is equipped with a sleeper berth, as defined in §§ 395.2 and 393.76 of this subchapter, may accumulate the equivalent of 8 consecutive hours of off-duty time by taking a combination of at least 8 consecutive hours off-duty and sleeper berth time; or by taking two periods of rest in the sleeper berth, providing:

(i) Neither rest period is shorter than two hours;

(ii) The driving time in the period immediately before and after each rest period, when added together, does not exceed 10 hours;

(iii) The on-duty time in the period immediately before and after each rest period, when added together, does not include any driving time after the 15th hour; and

(iv) The driver may not return to driving subject to the normal limits under § 395.5 without taking at least 8 consecutive hours off duty, at least 8 consecutive hours in the sleeper berth, or a combination of at least 8 consecutive hours off duty and sleeper berth time.

(h) State of Alaska -- (1) Property-carrying commercial motor vehicle. The provisions of § 395.3(a) and (b) do not apply to any driver who is driving a commercial motor vehicle in the State of Alaska. A driver who is driving a property-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive --

(i) More than 15 hours following 10 consecutive hours off duty; or

(ii) After being on duty for 20 hours or more following 10 consecutive hours off duty.

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(2) Passenger-carrying commercial motor vehicle. The provisions of § 395.5 do not apply to any driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska. A driver who is driving a passenger-carrying commercial motor vehicle in the State of Alaska must not drive or be required or permitted to drive --

(i) More than 15 hours following 8 consecutive hours off duty;

(ii) After being on duty for 20 hours or more following 8 consecutive hours off duty;

(iii) After having been on duty for 70 hours in any period of 7 consecutive days, if the motor carrier for which the driver drives does not operate every day in the week; or

(iv) After having been on duty for 80 hours in any period of 8 consecutive days, if the motor carrier for which the driver drives operates every day in the week.

(3) A driver who is driving a commercial motor vehicle in the State of Alaska and who encounters adverse driving conditions (as defined in § 395.2) may drive and be permitted or required to drive a commercial motor vehicle for the period of time needed to complete the run.

(i) After a property-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 10 consecutive hours before he/she drives again; and

(ii) After a passenger-carrying commercial motor vehicle driver completes the run, that driver must be off duty for at least 8 consecutive hours before he/she drives again.

(i) State of Hawaii. The rules in § 395.8 do not apply to a driver who drives a commercial motor vehicle in the State of Hawaii, if the motor carrier who employs the driver maintains and retains for a period of 6 months accurate and true records showing --

(1) The total number of hours the driver is on duty each day; and

(2) The time at which the driver reports for, and is released from, duty each day.

(j) Travel time -- (1) When a property-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 10 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(2) When a passenger-carrying commercial motor vehicle driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time must be counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he/she must be considered off duty for the entire period.

(k) Agricultural operations. The provisions of this part shall not apply to drivers transporting agricultural commodities or farm supplies for agricultural purposes in a State if such transportation:

(1) Is limited to an area within a 100 air-mile radius from the source of the commodities or the distribution point for the farm supplies, and

(2) Is conducted (except in the case of livestock feed transporters) during the planting and harvesting seasons within such State, as determined by the State.

(l) Ground water well drilling operations. In the instance of a driver of a commercial motor vehicle who is used primarily in the transportation and operations of a ground water well drilling rig, any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(m) Construction materials and equipment. In the instance of a driver of a commercial motor vehicle who is used primarily in the transportation of construction materials and equipment, any period of 7 or 8 consecutive days may end with the beginning of any off-duty period of 24 or more successive hours.

(n) Utility service vehicles. The provisions of this part shall not apply to a driver of a utility service vehicle as defined in § 395.2.

(o) Property-carrying driver. A property-carrying driver is exempt from the requirements of § 395.3(a)(2) if:

(1) The driver has returned to the driver's normal work reporting location and the carrier released the driver from duty at that location for the previous five duty tours the driver has worked;

(2) The driver has returned to the normal work reporting location and the carrier releases the driver from duty within 16 hours after coming on duty following 10 consecutive hours off duty; and

(3) The driver has not taken this exemption within the previous 6 consecutive days, except when the driver has begun a new 7- or 8-consecutive day period with the beginning of any off-duty period of 34 or more consecutive hours as allowed by § 395.3(c).

(p) Commercial motor vehicle transportation to or from a motion picture production site. A driver of a commercial motor vehicle providing transportation of property or passengers to or from a theatrical or television motion picture production site is exempt from the requirements of § 395.3(a) if the driver operates within a 100 air-mile radius of the location where the driver reports to and is released from work, i.e., the normal work-reporting location. With respect to the maximum daily hours of service, such a driver may not drive --

(1) More than 10 hours following 8 consecutive hours off duty;

(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

(3) If a driver of a commercial motor vehicle providing transportation of property or passengers to or from a theatrical or television motion picture production site operates beyond a 100 air-mile radius of the normal work-reporting location, the driver is subject to § 395.3(a), and paragraphs (p)(1) and (2) of this section do not apply.

(q) Transporters of grapes during harvest period in the State of New York. The provisions of this part shall not apply to drivers transporting grapes if such transportation:

(1) Is within the State of New York;

(2) Is west of Interstate 81;

(3) Is within a 150 air-mile radius of where the grapes were picked or distributed; and

(4) Is during the harvest period as defined by the State of New York. This provision expires September 30, 2009.

HISTORY: *[57 FR 33647,* July 30, 1992, as amended at *58 FR 33777,* June 21, 1993; *60 FR 38748,* July 28, 1995; *61 FR 14677, 14679,* April 3, 1996; *63 FR 33254, 33279,* June 18, 1998; *68 FR 22456, 22515,* Apr. 28, 2003; *68 FR 56208, 56211,* Sept. 30, 2003; *70 FR 49978, 50071,* Aug. 25, 2005; *72 FR 36760, 36790,* July 5, 2007; *72 FR 55697, 55703,* Oct. 1, 2007; *72 FR 71247, 71269,* Dec. 17, 2007, as confirmed at *73 FR 69567, 69586,* Nov. 19, 2008]

AUTHORITY: AUTHORITY NOTE APPLICABLE TO ENTIRE PART:
49 U.S.C. 504, 14122, 31133, 31136, 31502; Sec. 229, Pub. L. 106-159, *113 Stat. 1748;* Sec. 113, Pub. L. 103-311, *108 Stat. 1673, 1676;* and *49 CFR 1.73.*

NOTES: [EFFECTIVE DATE NOTE: *72 FR 36760, 36790,* July 5, 2007, amended this section, effective Sept. 4, 2007; *72 FR 55697, 55703,* Oct. 1, 2007, revised paragraph (g)(3), effective Oct. 1, 2007; *72 FR 71247, 71269,* Dec. 17, 2007, amended this section, effective Dec. 27, 2007.]

NOTES APPLICABLE TO ENTIRE CHAPTER:
[PUBLISHER'S NOTE: For interpretive guidance material for the Federal Motor Carrier Safety Regulations (FMCSRs), see *62 FR 16370,* Apr. 4, 1997.]

NOTES APPLICABLE TO ENTIRE PART:
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 395 Notice of Intrepretations, see: *63 FR 16697,* Apr. 6, 1998.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 395 Extension of Application Date, see: *64 FR 37689,* July 13, 1999.]
[PUBLISHER'S NOTE: For Federal Register citations concerning Part 395 Notice of availability of supplemental documents, see: *73 FR 44171,* July 30, 2008; *73 FR 65565,* Nov. 4, 2008.]
[PUBLISHER'S NOTE: Nomenclature changes to part 395 appear at *66 FR 49867, 49874,* Oct. 1, 2001.]

3160 words

1 of 1 DOCUMENT

This document is current through Ordinance 12899, passed November 3, 2008. For more recent provisions, please contact the City.

California
Oakland Code
Title 2 ADMINISTRATION AND PERSONNEL
Chapter 2.28 LIVING WAGE ORDINANCE

Oakland Code § 2.28

§ Chapter 2.28 LIVING WAGE ORDINANCE

EXHIBIT S

This chapter shall be known as the "Oakland living wage ordinance." The purpose of this chapter is to require that nothing less than a prescribed minimum level of compensation (a living wage) be paid to employees of service contractors of the city and employees of CFARs. (Ord. 12050 § 1, 1998) 2.28.020 Definitions.

The following definitions shall apply throughout this chapter:

"Agency" means that subordinate or component entity or person of the city (such as a department, office, or agency) that is responsible for solicitation of proposals or bids and responsible for the administration of service contracts or financial assistance agreements.

"City" means the city of Oakland and all city agencies, departments and offices.

"City financial assistance recipient" (CFAR) means any person who receives from the city financial assistance as contrasted with generalized financial assistance such as through tax legislation, in an amount of one hundred thousand dollars ($100,000.00) or more in a twelve (12) month period.

1. Categories of such assistance include, but are not limited to, grants, rent subsidies, bond financing, financial planning, tax increment financing, land writedowns, and tax credits. City staff assistance shall not be regarded as financial assistance for purposes of this article. The forgiveness of a loan shall be regarded as financial assistance, and a loan provided at below market interest rate shall be regarded as financial assistance to the extent of any differential between the amount of the loan and the present value of the payments thereunder, discounted over the life of the loan by the applicable federal rate as used in *26 U.S.C. Sections 1274*(d), 7872(f).

2. A tenant or leaseholder of a CFAR who occupies property or uses equipment or property that is improved or developed as a result of the assistance awarded to the CFAR and who will employ at least twenty (20) employees for each working day in each of twenty (20) or more calendar weeks in the twelve (12) months after occupying or using such property, shall be considered a "city financial assistance recipient" for the purposes of this chapter and shall be covered for the same period as the CFAR of which they are a tenant or leaseholder.

"Contractor" means any person that enters into a service contract with the city in an amount equal to or greater than twenty-five thousand dollars ($25,000.00).

"Employee" means any person who is employed (1) as a service employee of a contractor or subcontractor under the authority of one or more service contracts and who expends any of his or her time thereon, including but not limited to: hotel employees, restaurant, food service or banquet employees; janitorial employees; security guards; parking attendants; health care employees; gardeners; waste management employees; and clerical employees; or (2) by a CFAR and who expends at least half of his or her time on the funded project/program or property which is the subject of city financial assistance, or (3) by a service contractor of a CFAR and who expends at least half of his or her time on the premises of the CFAR and is directly involved with the funded project/program or property which is the subject of city financial assistance. Any person who is a managerial, supervisory or confidential employee is not an employee for purposes of this definition.

"Employer" means any person who is a city financial assistance recipient, contractor, or subcontractor.

"Person" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts.

"Service contract" means (1) a contract let to a contractor by the city for the furnishing of services, to or for the city, except contracts where services are incidental to the delivery of products, equipment or commodities, and that involves an expenditure equal to or greater than twenty-five thousand dollars ($25,000.00), or (2) a lease or license under which services contracts are let by the lessee or licensee. A contract for the purchase or lease of goods, products, equipment, supplies or other property is not a "service contract" for the purposes of this definition.

"Subcontractor" means any person who enters into a contract with (1) a contractor to assist the contractor in performing a service contract or (2) a CFAR to assist the recipient in performing the work for which the assistance is being given or to perform services on the property which is the subject of city financial assistance. Service contractors of CFARs shall not be regarded as subcontractors except to the extent provided by the definition of "employee" in this section.

"Trainee" means a person enrolled in a job training program which meets the city job training standards. (Ord. 12050 § 2, 1998)

2.28.030 Payment of minimum compensation to employees.

A. Wages. Employers shall pay employees a wage to each employee of no less than the hourly rates set under the authority of this chapter. The initial rate shall be eight dollars ($8.00) per hour worked with health benefits, as described in this chapter, or otherwise nine dollars and twenty-five cents ($9.25) per hour. Such rate shall be upwardly adjusted annually, no later than April 1st in proportion to the increase immediately preceding December 31st over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor, applied to nine dollars and twenty-five cents ($9.25). The city shall publish a bulletin by April 1st of each year announcing the adjusted rates, which shall take effect upon such publication. Such bulletin will be distributed to all city agencies, departments and offices, city contractors and CFARs upon publication. The contractor shall provide written notification of the rate adjustments to each of its employees and to its subcontractors, who shall provide written notices to each of their employees, if any, and make the necessary payroll adjustments by July 1st.

B.1. Compensated Days Off. Employers shall provide at least twelve (12) days off per year for sick leave, vacation, or personal necessity at the employee's request. Employees shall accrue one compensated day off per month of full-time employment. Part-time employees shall accrue compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required twelve (12) compensated days off.

2. Employers shall also permit employees to take at least an additional ten days a year of uncompensated time to be used for sick leave for the illness of the employee or a member of his or her immediate family where the employee has exhausted his or her compensated days off for that year. This chapter does not mandate the accrual from year to year of uncompensated days off.

C. Health Benefits. Health benefits required by this chapter shall consist of the payment of at least one dollar and twenty five-cents ($1.25) per hour towards the provision of health care benefits for employees and their dependents. Proof of the provision of such benefits must be submitted to the agency not later than thirty (30) days after execution of the contract to qualify for the wage rate in subsection (A) of this section for employees with health benefits. (Ord. 12050 § 3, 1998)

2.28.040 Duration of requirements.

A. For CFARs, assistance given in an amount equal to or greater than one hundred thousand dollars ($100,000.00) in any twelve (12) month period shall require compliance with this chapter for the life of the contract in the case of assistance given to fund a program or five years in the case of assistance given to purchase real property, tangible property or construct facilities, including but not limited to materials, equipment, fixtures, merchandise, machinery or the like.

B. A service contractor and subcontractor shall be required to comply with this chapter for the term of the contract. (Ord. 12050 § 4, 1998)

2.28.050 Notifying employees of their potential right to the federal earned income credit.

Employers shall inform employees making less than twelve dollars ($12.00) per hour of their possible right to the federal Earned Income Credit ("EIC") under Section 32 of the Internal Revenue Code of 1954, *26 U.S.C. Section 32,* and shall make available to employees forms informing them about the EIC and forms required to secure advance EIC payments from the employer. These forms shall be provided to the eligible employees in English, Spanish and other languages spoken by a significant number of the employees within thirty (30) days of employment under the terms of this chapter and as required by the Internal Revenue Code. (Ord. 12050 § 5, 1998)

2.28.060 Contract review process and city reporting and record keeping.

A. The City Manager shall promulgate rules and regulations for the preparation of bid specifications, contracts and preparation for contract negotiations.

B. The City Manager shall submit periodic reports to the City Council which shall include the following information at minimum:

1. A listing and the status of all RFPs and RFQs, service contracts and lease agreements executed and financial assistance awarded, to which this chapter applies including the term, dollar amount and the service performed or assistance provided;

2. A description of every instance where an exemption or waiver was granted by action of the City Council.

C. The City Manager shall develop an administrative procedure and appeal process for determining compliance with this chapter.

1. Regarding the appeal process, it shall be available to every bidder/proposer who has been deemed noncompliant with this chapter, or who disputes the determination of applicability of this chapter to its business operation which will be involved in the proposed contract. A contract shall not be executed until there is resolution of the relevant appeal.

2. Appeals shall be filed with the City Manager within seven calendar days of the date of the notice of the city's written determination of noncompliance and reasons therefor, or written determination of the applicability of this chapter.

3. The City Manager shall maintain records pertaining to all complaints, hearings, determinations and findings, and shall submit a regular report on compliance with this chapter no less than annually to the City Council. Special reports and recommendations on significant issues of interest to the Council will be submitted as deemed appropriate. (Ord. 12050 § 6, 1998)

2.28.070 Noncompliance review and appeal.

Contractors, subcontractors and CFARs who fail to submit documents, declarations or information required to demonstrate compliance with this chapter shall be deemed nonresponsive and subject to disqualification. (Ord. 12050 § 7, 1998)

2.28.080 Waivers.

A. A CFAR who contends it is unable to pay all or part of the living wage must provide a detailed explanation in writing to the City Manager who may recommend a waiver to the City Council. The explanation must set forth the reasons for its inability to comply with the provisions of this chapter, including a complete cost accounting for the proposed work to be performed with the financial assistance sought, including wages and benefits to be paid all employees, as well as an itemization of the wage and benefits paid to the five highest paid individuals employed by the CFAR. The CFAR must also demonstrate that the waiver will further the interests of the city in creating training positions which will enable employees to advance into permanent living wage jobs or better and will not be used to replace or displace existing positions or employees or to lower the wages of current employees.

B. The City Council will grant a waiver only upon a finding and determination that the CFAR has demonstrated economic hardship and that waiver will further the interests of the city in providing training positions which will enable employees to advance into permanent living wage jobs or better. However, no waiver will be granted if the effect of the waiver is to replace or displace existing positions or employees or to lower the wages of current employees.

C. Waivers from the chapter are disfavored, and will be granted only where the balance of competing interests weighs clearly in favor of granting the waiver. If waivers are to be granted, partial waivers are favored over blanket waivers. Moreover, any waiver shall be granted for no more than one year. At the end of the year the CFAR may reapply for a new waiver which may be granted subject to the same criteria for granting the initial waiver.

D. The City Council reserves the right to waive the requirements of this chapter upon a finding and determination of the City Council that waiver is in the best interests of the city, e.g. when the city has declared an emergency due to natural disasters and needs immediate services. (Ord. 12050 § 8, 1998)

2.28.090 Exemptions.

A. A recipient shall be exempted from application of this article if (1) it employs fewer than five employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, or (2) it obtains a waiver as provided herein.

B. An employee who is a trainee in a job training program which meets the city job training standards shall be exempt for the period of training as specified under the city-approved training standards.

C. An employee who is under twenty-one (21) years of age, employed by a nonprofit corporation for after school or summer employment or as a trainee for a period not longer than ninety (90) days, shall be exempt. (Ord. 12050 § 9, 1998)

2.28.100 RFP, contract and financial assistance agreement language.

All RFPs, city contracts and financial assistance agreements subject to this chapter shall contain the following two paragraphs or substantially equivalent language:

A. This contract is subject to the Living Wage Ordinance, of the Oakland Municipal Code. The Ordinance requires that, unless specific exemptions apply or a waiver is granted, all employers (as defined) under service contracts and recipients of City financial assistance, (as defined) shall provide payment of a minimum wage to employees (as defined) of $8.00 per hour with health benefits of at least $1.25 per hour or otherwise $9.25 per hour. Such rate shall be adjusted annually pursuant to the terms of the Oakland Living Wage Ordinance, of the Oakland Municipal Code.

B. Under the provisions of the Living Wage Ordinance, the City shall have the authority, under appropriate circumstances, to terminate this contract and to seek other remedies as set forth therein, for violations of the Ordinance.

(Ord. 12050 § 10, 1998)

2.28.110 Obligations of contractors and financial assistance recipients.

A. All proposed contractors and CFARs subject to the provisions of this chapter shall submit a completed declaration of compliance form, signed by an authorized representative, along with each proposal. The completed declaration of compliance form shall be made a part of the executed contract.

B. Contractors and CFARs shall require their subcontractors and tenants/leaseholders to comply with the provisions of this chapter. Language indicating the subcontractor's or tenants/leaseholders agreement to comply shall be included in the contract between the contractor and subcontractor or any agreement between a CFAR and tenants/leaseholders. A copy of such subcontracts or other such agreements shall be submitted to the city.

C. Contractors, subcontractors and CFARs shall maintain a listing of the name, address, date of hire, occupation classification, rate of pay and benefits paid for each of its employees, if any, and submit a copy of the list to the city by March 31st, June 30th, September 30th, and December 31st of each year the contract is in effect. Failure to provide this list within five days of the due date will result in a penalty of five hundred dollars ($500.00) per day. Contractors, subcontractors and CFARs shall maintain payrolls for all employees and basic records relating thereto and shall preserve them for a period of three years after termination of their contracts.

D. Contractors, subcontractors and CFARs shall give written notification to each current and new employee, at time of hire, of his or her rights to receive the benefits under the provisions of this chapter. The notification shall be provided in English, Spanish and other languages spoken by a significant number of the employees, and shall be posted prominently in communal areas at the work site. A copy of such notification shall be forwarded to the city which must include the following:

1. Minimum Compensation. The initial rates of eight dollars ($8.00) with health benefits or nine dollars and twenty-five cents ($9.25) without health benefits will be adjusted annually to correspond to adjustments, if any. The living wage shall be upwardly adjusted each year no later than April 1st in proportion to the increase at the immediately preceding December 31st over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor, applied to nine dollars and twenty-five cents ($9.25).

2. Health Benefits. Proof of the provision of such benefits shall be submitted to the city not later than thirty (30) days after execution of the contract to qualify for the wage rate in Section 2.28.030. Health benefits shall be provided to part-time employees as well as full-time employees.

3. Twelve compensated days off per year for sick leave, vacation or personal necessity at the employee's request, and ten uncompensated days off per year for sick leave which shall be made available to all covered employees as provided in this chapter. Employees shall accrue one compensated day off per month of full time employment. Part-time employees shall accrue compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required twelve (12) compensated days off. Ten uncompensated days off shall be made available, as needed, for personal or immediate family illness after the employee has exhausted his or her accrued compensated days off for that year. This chapter does not mandate the accrual from year to year of uncompensated days off.

4. Federal Earned Income Credit (EIC). Forms to inform employees earning less than twelve dollars ($12.00) per hour of their possible right to EIC and forms to secure advance EIC payments from the employer shall be provided to

the eligible employees in English, Spanish and other languages spoken by a significant number of the employees within thirty (30) days of employment under the subject agreement.

5. Notice that the employers are required to file a declaration of compliance form as part of the contract with the city and that the city will make such declarations available for public inspection and copying during its regular business hours.

E. Contractors, CFARs and subcontractors shall permit access to work sites and relevant payroll records for authorized city representatives for the purpose of monitoring compliance with this chapter, investigating employee complaints of noncompliance and evaluating the operation and effects of this chapter, including the production for inspection and copying of its payroll records for any or all of its employees for the term of the contract or for five years whichever period of compliance is applicable. (Ord. 12050 § 11, 1998)

2.28.120 Retaliation and discrimination barred.

Contractors, subcontractors and CFARs shall not discharge, reduce the compensation of or otherwise discriminate against any employee for making a complaint to the city, participating in any of its proceedings, using any civil remedies to enforce his or her rights, or otherwise asserting his or her rights under this chapter. Contractors, subcontractors and CFARs shall also be in compliance with federal law proscribing retaliation for union organizing. (Ord. 12050 § 12, 1998)

2.28.130 Monitoring, investigation and compliance.

The provisions of this chapter will augment the city's normal and customary procedure for administering its contracts. The city shall administer the requirements of this chapter as follows:

A. The City Manager shall develop rules and regulations to review contract documents to insure that relevant language and information are included in city RFP's, agreements and other relevant documents.

B. The City Manager shall develop rules and regulations for the monitoring of the operations of the contractors, subcontractors and financial assistance recipients to insure compliance including the review, investigation and resolution of specific concerns or complaints about the employment practices of a contractor, subcontractor or CFAR relative to this chapter. In such cases, the city will attempt to resolve the problem within thirty (30) days.

C. Where a violation of any provision of this chapter has been determined, the contractor will be given a written notice by the city per the rules and regulations promulgated by the City Manager. Should the violation continue and/or no resolution is imminent, the city shall pursue all available legal remedies, including but not limited to any or all of the following penalties and relief:

1. Suspension and/or termination of the contract, subcontract or financial assistance agreement for cause;

2. Payback of any or all of the contract or financial assistance awarded by the city;

3. Deem the contractor or CFAR ineligible for future city contracts and/or financial assistance until all penalties and restitution have been paid in full;

4. A fine payable to the city in the sum of five hundred dollars ($500.00) for each week for each employee found not to have been paid in accordance with this chapter;

5. Wage restitution for each affected employee.

E. The City Attorney shall promulgate procedures for legal enforcement of the requirements of this chapter. (Ord. 12050 § 13, 1998)

2.28.140 Employee complaint process.

An employee who alleges violation of any provision of this chapter may report such acts to the city and, at the employee's discretion, exhaust available employer internal remedies. The complaint to the city shall be handled as follows:

A. The employee shall submit to the city a completed complaint form and copies of all documents supporting the allegation. The city shall provide the complaint forms in English and Spanish.

B. The city shall notify the agency and the employer of the complaint and seek resolution within five days from receipt of the complaint form. If resolution is not accomplished, the city shall initiate an investigation and seek legal remedies, if appropriate.

C. An employee claiming retaliation (such as, termination, reduction in wages or benefits or adverse changes in working conditions) for alleging noncompliance with this chapter may report the alleged retaliation in the same manner as the initial complaint.

D. The complainant's or witness' identity will not be divulged to the employer without the individual employee's written consent. (Ord. 12050 § 14, 1998)

2.28.150 Private right of action.

A. An employee claiming violation of this article may bring an action in the Municipal Court or Superior Court of the State of California, as appropriate, against an employer and may be awarded:

1. For failure to pay the living wage, back pay for each day during which the violation continued;

2. For any violation of this chapter, including retaliation for exercising rights provided hereunder, the Court may award any appropriate remedy at law or equity, including but not limited to reinstatement, compensatory damages and punitive damages.

B. The Court shall award reasonable attorney's fees and costs to an employee who prevails in any such enforcement action.

C. Notwithstanding any provision of this code or any other ordinance to the contrary, no criminal penalties shall attach for any violation of this article.

D. No remedy set forth in this chapter is intended to be exclusive or a prerequisite for asserting a claim for relief to enforce any rights hereunder in a court of law. This chapter shall not be construed to limit an employee's right to bring a common law cause of action for wrongful termination. (Ord. 12050 § 15, 1998)

2.28.160 Collective bargaining agreement supersession.

All of the provisions of this chapter, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. (Ord. 12050 § 16, 1998)

2.28.170 Expenditures covered by this article.

This chapter shall apply to the expenditure whether through aid to financial assistance recipients, service contracts let by its financial assistance recipients of funds entirely within the city's control and to other funds, such as federal or state grant funds, where the application of this chapter is consonant with the laws authorizing the city to expend such other funds. (Ord. 12050 § 17, 1998)

2.28.180 Ordinance applicable to new contracts and city financial assistance.

The provisions of this chapter shall apply to (a) a contract entered into and financial assistance provided after the effective date of the ordinance codified in this chapter; (b) a contract amendment consummated after the effective date of the ordinance codified in this chapter which itself meets the financial threshold requirement of this chapter and (c) supplemental financial assistance provided for after the effective date of this chapter which itself meets the requirements of this chapter. (Ord. 12050 § 18, 1998)

2.28.190 Implementing regulations.

All implementing rules, regulations, and procedures promulgated by the City Manager or his designee shall be presented to the City Council for approval within sixty (60) days of adoption of the ordinance codified in this chapter. (Ord. 12050 § 19, 1998)