Transportation Practice Group + Labor & Employment Practice Group

JOINT MEETING - CASE LAW UPDATE

January 30, 2020

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WHITFIELD & EDDY LAW

News & Events

U. S. Supreme Court Affirms Decision That Federal Arbitration Act Prohibits Arbitration with Independent Contractors

03.13.2019

Readers will recall that we previously reported on a case issued by the United States Court of Appeals for the First Circuit. (United States Court of Appeals for First Circuit Holds Prohibition on Arbitration Extends to Independent Contractors 6/20/18). The First Circuit concluded that arbitration agreements were unenforceable against independent contractors engaged in interstate commerce under the Federal Arbitration Act.

On January 15, 2019, Justice Gorsuch, writing for an 8-0 majority, affirmed the decision of the First Circuit. *See* New Prime, Inc. v. Oliveria, No. 17-340 (Jan 15, 2019). The majority was 8-0 because Justice Kavanaugh did not participate in the decision. Further, Justice Ginsburg filed a concurring opinion. The result of the decision is that contracts which require arbitration of claims between parties wherein one party purports to be an "independent contractor" engaged in interstate commerce may no longer be enforced. The net result is that the independent contractor may, instead, sue or be sued in federal or state court.

Section 1 of the Federal Arbitration Act ("FAA") provides some parties, subject to a "contract of employment," are not required to arbitrate their case but may proceed in court. The text of the statute is set out in the margin[1]. There is a perception in the legal community that

employers prefer arbitration because the claim is not reviewed by a jury.

PROCEDURAL HISTORY AND ARGUMENTS

In this case, Oliveria sued and claimed New Prime's drivers were not paid lawful wages. New Prime sought relief in federal court and attempted to compel arbitration pursuant to the parties' agreement. Oliveria resisted on the basis that the agreement qualified "as a 'contract[] of employment of…[a] worker[] engaged in interstate commerce.'" In his position, the district court was without authority to compel arbitration. New Prime's position was that the term "'contracts of employment'" was intended to extend only to an employer-employee relationship. Thus, Section 1's prohibition did not extend to Mr. Oliveria because he was an independent contractor. As previously reported, both the district court and the First Circuit agreed with Mr. Oliveria.

THE QUESTION OF ARBITRABILITY

The opinion observes, at the outset, that the district court's authority to compel arbitration is considerable but it is not unconditional. While a district court has the authority to stay litigation and compel arbitration, the authority does not extend to all private contracts. Section 2 of the FAA provides the arbitration provision must be in a written agreement; Section 1 limits those contracts to which the FAA applies.

Consequently, the district court must decide for itself whether a Section 1 exclusion applies before the court orders arbitration. As Justice Gorsuch explained "the parties' private agreement may be crystal clear and require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum."

In explaining the Court's position, the Court drew upon the statute's sequencing. Sections 1 and 2 of the FAA define the field in which Congress was legislating while Sections 3 and 4 apply only to contracts which fall within those provisions. In short, enforcement under the FAA turns on whether the contract is based upon a "contract of employment." Thus, even a broad agreement to delegate all decisions to the arbitrator cannot overcome the text of the statute which prohibits compulsory arbitration of contracts of employment.

WHEN IS A WORKER SUBJECT TO A CONTRACT OF EMPLOYMENT

The second issue the Court examined was the exact scope of the phrase "contracts of employment." The Court began with an examination of a maxim of statutory construction. That is, statutes are interpreted by taking their ordinary meaning at the time Congress enacted the statute. Thus, the modern notion of employment, meaning a master-servant relationship, does not square with the use of the term in 1925 at the time of the FAA's adoption. At that time, all work was treated as employment. The Court's review of contemporaneous state and federal statutes compels the same conclusion. Consequently, the Court held that a "contract of employment" does not necessarily require an employer-employee relationship.

Furthermore, the Court observes that Congress did not use the term employee or servant in the statute. Thus, in the broad sense "contracts of employment" was intended to reach the performance of any "work by workers."

Finally, a federal policy of favoring arbitration agreements did not aid New Prime's argument. In short, New Prime argued that since the FAA was adopted to combat judicial hostility towards arbitration, the Court should order arbitration in accordance with the parties' agreement. The Court categorized such an approach as "pav[ing] over bumpy statutory text in the name of …advancing a policy goal." Instead, in the Court's view, by respecting the qualifications to the Act, the Court respected the limits which Congress saw fit to impose when it adopted the FAA.

CONCLUSION

In conclusion, the term "contracts of employment" means only an agreement to perform work. In the Court's view, Mr. Oliveria was entitled to the same understanding. Thus, arbitration of his claim could not be compelled and the judgment of the lower courts was affirmed.

Contact John F. Fatino for more information about this or other transportation matters at 515-288-6041.

[1]Section 1 of the FAA, states: "Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but *nothing herein contained shall apply to contracts of employment* of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (emphasis added).

ATTORNEYS

John Fatino

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News & Events

U.S. Department of Labor Issues New Wage and Hour Opinion Letter Regarding Sleeper Berths

07.24.2019

The U.S. Department of Labor announced on Tuesday, July 22 that it has issued a new opinion letter that addresses compliance issues related to the Fair Labor Standards Act (FLSA).

The letter addresses the compensability of time a driver spends in a truck's sleeper berth while otherwise relieved from duty.

Contact John Fatino at 515-288-6041 for more information.

For More Information:

FLSA2019-10

ATTORNEYS

John Fatino

Kay Oskvig

U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2019-10

July 22, 2019

Dear **Name***:

This letter responds to your request for an opinion on whether the time spent in a truck's sleeper berth is compensable hours worked under the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You write on behalf of a small, family-owned motor carrier (Carrier) that operates a fleet of ten trucks, licensed by the Department of Transportation to move property in interstate commerce, and which primarily provides over-the-road, long-haul services. You represent that Carrier regularly employs drivers to undertake multi-day trips in interstate commerce. You further represent that during such trips, Carrier's drivers typically spend much of their time not working in the truck's sleeper berth. You provide an example of one such trip—a workweek wherein a particular driver spent 55.84 hours driving, inspecting, cleaning, fueling, and completing paperwork, and 49.96 hours in the sleeper berth, during which time he was permitted to sleep, did not perform any work, and was not on call to perform work. In this example, the driver's sleeper berth time for that week broke down as follows:

Day 1: 2.82 hours
Day 2: 0 hours
Day 3: 4.75 hours
Day 4: 12.08 hours
Day 5: 11.67 hours
Day 6: 11.17 hours
Day 7: 7.47 hours

You ask whether Carrier satisfies its federal minimum wage obligation under the FLSA to this driver by paying the driver at least $404.84 (55.84 hours worked × the federal minimum wage of $7.25) for the workweek described above.[1]

GENERAL LEGAL PRINCIPLES

An employee is working, and must therefore be compensated, when suffered or permitted to work. *See* 29 U.S.C. § 203(e)(1), (g); 29 C.F.R. § 785.11 ("Work … [that is] suffered or permitted is work time"). WHD regulations address when certain kinds of activities—such as

[1] Based on your assertion in your letter, we assume that the drivers are exempt from the FLSA's overtime requirements under 29 U.S.C. § 213(b)(1).

waiting, sleeping, and traveling—are considered hours worked and thus compensable. *See* 29 C.F.R. §§ 785.14-.23; 29 C.F.R. §§ 785.33-.41. First, waiting time is on-duty (compensable) if the employee is "engaged to wait," but off-duty (non-compensable) if the employee is "waiting to be engaged" to work. 29 C.F.R. §§ 785.14–.16; *see Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944).[2] An employee is "engaged to wait," or on-duty, when "waiting is an integral part of the job," which may often be during "unpredictable" periods or periods "usually of short duration" in which the employee's time "belongs to and is controlled by the employer." 29 C.F.R. § 785.15. For example, a truck driver is "engaged to wait" if required to wait at a job site for goods to be loaded into the truck. 29 C.F.R. § 785.16(b). Conversely, an employee is "waiting to be engaged" during periods when the facts show he is "completely relieved from duty" and the periods are "long enough to enable him to use the time effectively for his own purposes." *See* 29 C.F.R. § 785.16(a). For example, 29 C.F.R. § 785.16(b) provides that "if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged." 29 C.F.R. § 785.16(b).

Second, under certain conditions, sleeping time may be considered compensable time if the employer permits the employee to sleep during an on-duty period when the employee is not busy. *See* 29 C.F.R. §§ 785.20–.21. However, if an employer requires an employee to be on duty for a continuous period of 24 hours or more, the parties may agree—under certain conditions—to set aside 5 to 8 on-duty hours as a non-compensable sleeping period. *See* 29 C.F.R. § 785.22.[3] Factors that may suggest an employee is continuously on duty for 24 hours or more, thus invoking 29 C.F.R. § 785.22, include: (1) the employee lacks a regular schedule and is "required to perform work on a helter-skelter basis at any time during the day or night"; or (2) even with a regular schedule, unscheduled periods "are so cut through with frequent work calls that this time is not his or her own." *See* WHD Field Operations Handbook (FOH) 31b02.

Third, travel time is compensable working time when the employer requires the employee to "perform [work] while traveling[.]" 29 C.F.R. § 785.41. "An employee who drives a truck … or an employee who is required to ride therein as an assistant or helper, is working while riding," and therefore this time constitutes compensable hours worked. *Id.* However, 29 C.F.R. § 785.41 provides that employees who drive vehicles or are required to ride therein as an assistant or helper are not "working while riding" when they are "permitted to sleep in adequate facilities

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[2] While off-duty employees typically have the ability to leave the physical workplace, there are certain circumstances—for example, working on hard-to-reach construction locations, isolated dredging barges, and offshore drilling sites—where practical considerations make it necessary for employees to remain temporarily on the employer's premises and to eat and sleep there during their stay. *See* Field Operations Handbook 31b02(a). Such employees are not continually on duty while they are on the employer's premises if they have a regular schedule of hours and thereafter are relieved of duties—except for extra work required by the exigencies of the job. *Id.* Instead, "[o]nly the actual working time need be counted as hours worked." *Id.* WHD considers long-haul truck drivers to be similarly situated. Despite inherent restrictions on their ability to leave the truck due to the nature of the job, drivers generally experience periods of time when they are completely relieved of their duties.

[3] The employer and employee may also agree to treat an on-duty meal period as non-compensable if it is a "bona fide" meal period. 29 C.F.R. § 785.22.

furnished by the employer[,]" such as a sleeper berth. 29 C.F.R. § 785.41; WHD FOH 31b09(a). This type of travel—traveling while sleeping in a sleeper berth—is not "[work] while riding," if drivers and assistants are "completely relieved" from their duties. 29 C.F.R. § 785.16(a); *see* 29 C.F.R. § 785.41; *Petrone v. Werner Enters., Inc.*, No. 8:11-cv-401, 2017 WL 510884, at *7 (D. Neb. 2017) ("[U]nder the plain language of § 785.41, drivers and assistants are off duty when permitted to sleep in adequate facilities, such as a sleeper berth."). Therefore, it is not the "kind of travel" that constitutes working time. 29 C.F.R. § 785.33; 29 C.F.R. § 785.41.

WHD's earliest guidance on time spent sleeping in a sleeper berth generally considered this time noncompensable. *See* WHD Opinion Letter FLSA-289 (Jul. 18, 1951) ("[H]ours of work are not considered to include ... sleeping in a sleeping berth ... where such periods are of sufficient length to be used effectively by the employee for the intended purpose, and the employee is actually relieved of all duties and responsibilities ...."); WHD Release R-1933 (Feb. 15, 1943) ("Truck drivers riding in the trucks' sleeping berths ... need not be compensated ... for time so spent ....").[4]

In subsequent guidance, WHD interpreted 29 C.F.R. § 785.41 in conjunction with §§ 785.15-.16 and §§ 785.21-.22 to mean that while sleeping time may be excluded from hours worked where "adequate facilities" were furnished, only up to 8 hours of sleeping time may be excluded in a trip 24 hours or longer, and no sleeping time may be excluded for trips under 24 hours. *See, e.g.*, WHD Opinion Letter SCA-118 (June 22, 1979); WHD Opinion Letter SCA-117 (Apr. 26, 1978); WHD Opinion Letter FLSA-213 (Jan. 6, 1964).

WHD has concluded that this interpretation is unnecessarily burdensome for employers and instead adopts a straightforward reading of the plain language of § 785.41, under which the time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable. WHD regulations draw a clear distinction between on-duty sleeping time, *see* 29 C.F.R. §§ 785.20–.22, and non-working time when the employer permits the employee to sleep in adequate facilities. *See* 29 C.F.R. § 785.41. The first (on-duty sleeping time) is compensable because it is on-duty—except under certain circumstances during on-duty periods of 24 hours or more—while the second is non-compensable because it is presumptively off-duty. *See Petrone*, 2017 WL 510884, at *7. This presumption—that non-working time in which the employee is relieved of all duties is not compensable—holds true regardless of whether the truck is moving or stationary. *See Nance v. May Trucking* Co., 685 F.

[4] That said, there may be some cases where a driver or assistant who retires to a sleeper berth is unable to "use the time effectively for his own purposes." 29 C.F.R. § 785.16(a); *see* WHD Opinion Letter FLSA-289. For example, a driver or assistant who is required to remain on call, study job-related materials, or do paperwork in the sleeper berth may be unable to effectively sleep, nap, or engage in other personal activities, like reading or gaming. *See* 29 C.F.R. §§ 785.16–.17; WHD Opinion Letter FLSA-289. However, as a general matter, a driver or assistant who retires to a sleeper berth has typically ceased his or her duties. "Accordingly, sleeping berth time is compensable, if ever, only where a plaintiff can demonstrate that he or she was on duty while in the sleeper berth." *Petrone*, 2017 WL 510884, at *7; *see Nance v. May Trucking Co.*, No. 3:12-cv-01655-HZ, 2014 WL 199136, at *8 (D. Or. Jan. 15, 2014) (finding that an employee in a sleeper berth who is not on call is off-duty "as a matter of law"), *aff'd in relevant part*, 685 F. App'x 602, 605 (9th Cir. 2017) (unpublished).

App'x 602, 605 (9th Cir. 2017) (unpublished) ("[D]rivers are not entitled to compensation for time they are permitted to sleep in the berths of moving trucks."). Because WHD regulations classify sleeper berth time as non-working travel time, rather than on-duty sleeping time, such time is presumptively off-duty and not compensable.[5]

Further, this position is consistent with the decisions of several courts, which WHD understands to reflect the prevailing practice in the trucking industry. *See Nance*, 2014 WL 199136; *Petrone*, 2017 WL 510884, at *7.[6] Thus, WHD is withdrawing the opinion letters referenced above and others to the extent that they conflict with this letter.[7]

OPINION

Based on the facts you provided—a representative example of a truck driver who spent 55.84 hours in a workweek driving, inspecting, cleaning, fueling, and completing paperwork, and 49.96 hours off-duty in the sleeper berth—Carrier would indeed satisfy its FLSA minimum wage obligation to this driver by paying the driver at least $404.84 (55.84 hours worked × the federal minimum wage of $7.25). The driver's time spent in the berth was time when the driver was relieved of all duties and was "permitted to sleep in adequate facilities furnished by the employer," and presumptively non-working, off-duty time.[8] You have represented that, when the driver was in the berth, he did not perform any work and was not on call to perform work. Accordingly, the driver's time in the berth was not compensable.

We trust that this letter is responsive to your inquiry.

Sincerely,

Cheryl M Stanton

Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(6).**

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[5] To the extent specific factual circumstances support that a driver is on-duty or on-call this presumption may be rebutted. *See, e.g., supra* n.4.

[6] WHD disagrees with recent judicial decisions that have regarded sleeper berth time as on-duty sleeping time, rather than off-duty travel time. *See, e.g., Julian v. Swift Transp. Co. Inc.*, 360 F. Supp. 3d 932 (D. Ariz. 2018); *Browne v. P.A.M. Transp., Inc.*, No. 5:16-cv-5366, 2018 WL 5118449 (W.D. Ark. 2018).

[7] *See, e.g.*, WHD Opinion Letter SCA-118 (June 22, 1979); WHD Opinion Letter SCA-117 (Apr. 26, 1978); WHD Opinion Letter FLSA-235 (Nov. 18, 1966); WHD Opinion Letter FLSA-214 (Feb. 17, 1964); WHD Opinion Letter FLSA-213 (Jan. 6, 1964).

[8] We assume from the facts provided that the drivers in question are neither "required to perform work on a helter-skelter basis," nor are the periods in the sleeper berth "so cut through with frequent work calls" that the time in the sleeper berth is not the driver's own. *See* WHD FOH 31b02.

WHITFIELD & EDDY LAW

News & Events

Federal Motor Carrier Safety Administration Announces Proposed Rulemaking

08.16.2019

Earlier this week the United States Department of Transportation's Federal Motor Carrier Safety Administration announced proposed rulemaking regarding commercial motor vehicle driver's hours of service requirements. The Notice and proposed rule are posted below. There are several changes addressed by the proposed rules. First, the rule addresses changes to short-haul operations (including extending the distance to 150 miles air miles). Second, the proposed rule will extend the time of operation during adverse weather conditions. Third, the proposed rule imposes a 30 minute break rule. Fourth, the proposed rule allows drivers to split time off while in a sleeper berth. The public will have 45 days to comment on the proposed rules.

Link to proposed rule.

ATTORNEYS

John Fatino

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Procedures and Policy for Considering Environmental Impacts, March 1, 2004, and DOT Order 5610.1C, *Procedures for Considering Environmental Impacts*, as amended on July 13, 1982 and July 30, 1985. The EA is in the docket pertaining to this rulemaking. As discussed in the EA, FMCSA also analyzed this proposed rule under the Clean Air Act, as amended, section 176(c), (42 U.S.C. 7401 et seq.) and implementing regulations promulgated by the Environmental Protection Agency. FMCSA concludes that the issuance of the proposed rule would not significantly affect the quality of the human environment. Therefore, an environmental impact statement process is unnecessary. FMCSA requests comments on this analysis.

List of Subjects in 49 CFR Part 395

Highway safety, Motor carriers, Reporting and recordkeeping requirements.

In consideration of the foregoing, FMCSA proposes to amend 49 CFR part 395.

PART 395—HOURS OF SERVICE OF DRIVERS

1. The authority citation for part 395 continues to read as follows:

AUTHORITY: 49 U.S.C. 504, 31133, 31136, 31137, 31502; sec. 113, Pub. L. 103-311, 108 Stat. 1673, 1676; sec. 229, Pub. L. 106-159 (as added and transferred by sec. 4115 and amended by secs. 4130-4132, Pub. L. 109-59, 119 Stat. 1144, 1726, 1743, 1744); sec. 4133, Pub. L. 109-59, 119 Stat. 1144, 1744; sec. 108, Pub. L. 110-432, 122 Stat. 4860-4866; sec. 32934, Pub. L. 112-141, 126 Stat. 405, 830; sec. 5206(b), Pub. L. 114-94, 129 Stat. 1312, 1537; and 49 CFR 1.87.

2. Amend § 395.1 by revising paragraphs (b)(1), (e)(1), (g)(1) and (h) to read as follows:

§ 395.1 Scope of rules in this part.

* * * * *

(b) *Driving conditions*—(1) *Adverse driving conditions*. Except as provided in paragraph (h)(3) 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 or duty time during which driving is permitted under §§ 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 beyond the maximum allowable hours 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.

* * * * *

(e) *Short-haul operations*—(1) *150 air-mile radius.* A driver is exempt from the requirements of §§ 395.8 and 395.11 if:

(i) The driver operates within a 150 air-mile radius (172.6 miles) 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 14 consecutive hours;

(iii)(A) A property-carrying commercial motor vehicle driver has at least 10 consecutive hours off duty separating each 14 hours on duty;

(B) A passenger-carrying commercial motor vehicle driver has at least 8 consecutive hours off duty separating each 14 hours on duty; and

(iv) 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.

* * * * *

(g) *Sleeper berths*—(1) *Property-carrying commercial motor vehicle*—(i) *General.* A driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in § 395.2, and uses the sleeper berth to obtain the required off duty time must accumulate:

(A) At least 10 consecutive hours off duty;

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

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

(D) A combination of sleeper-berth time of at least 7 consecutive hours and up to 3 hours riding in the passenger seat of the vehicle while the vehicle is moving on the highway, either immediately before or after the sleeper berth time, amounting to at least 10 consecutive hours; or

(E) The equivalent of at least 10 consecutive hours off duty calculated under paragraph (g)(1)(ii) and (iii) of this section.

(ii) *Sleeper berth.* A driver may accumulate the equivalent of at least 10 consecutive hours off duty by taking not more than two periods of either sleeper-berth time or a combination of off-duty time and sleeper-berth time if:

(A) Neither rest period is shorter than 2 consecutive hours;

(B) One rest period is at least 7, but less than 10, consecutive hours in the sleeper berth;

(C) The total of the two periods is at least 10 hours; and

(D) Driving time in the period immediately before and after each rest period, when added together:

(1) Does not exceed 11 hours under § 395.3(a)(3); and

(2) Does not violate the 14-hour duty-period limit under § 395.3(a)(2).

(iii) *Calculation.* The 14-hour driving window for purposes of § 395.3(a)(2) does not include qualifying rest periods under paragraph (g)(1)(ii) of this section.

* * * * *

(h) *State of Alaska*—(1) *Property-carrying commercial motor vehicle.* (i) *In general.* 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:

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

(B) After being on duty for 20 hours or more following 10 consecutive hours off duty;

(C) 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

(D) 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.

(ii) *Off-duty periods.* Before driving, a driver who operates a property-carrying commercial motor vehicle equipped with a sleeper berth, as defined in § 395.2, and uses

the sleeper berth to obtain the required off-duty time in the State of Alaska must accumulate:

(A) At least 10 consecutive hours off duty;

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

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

(D) A combination of consecutive sleeper-berth time and up to 3 hours riding in the passenger seat of the vehicle while the vehicle is moving on a highway, either immediately before or after a period of at least 7, but less than 10, consecutive hours in the sleeper berth; or

(E) The equivalent of at least 10 consecutive hours off duty calculated under paragraph (h)(1)(iii) of this section.

(iii) *Sleeper berth.* A driver who uses a sleeper berth to comply with the Hours of Service regulations may accumulate the equivalent of at least 10 consecutive hours off duty by taking not more than two periods of either sleeper-berth time or a combination of off-duty time and sleeper-berth time if:

(A) Neither rest period is shorter than 2 consecutive hours;

(B) One rest period is at least 7 consecutive hours in the sleeper berth;

(C) The total of the two periods is at least 10 hours; and

(D) Driving time in the period immediately before and after each rest period, when added together:

(1) Does not exceed 15 hours; and

(2) Does not violate the 20-hour duty period under paragraph (h)(1)(i)(B) of this section.

(iv) *Calculation.* The 20-hour duty period under paragraph (h)(1)(i)(B) does not include off-duty or sleeper-berth time.

(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) *Adverse driving conditions.* (i) 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.

(ii) 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

(iii) 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.

* * * * *

3. Amend § 395.3 by revising paragraphs (a)(2) and (3) to read as follows:

§ 395.3 Maximum driving time for property-carrying vehicles.

(a) * * *

(2) *14-hour period.* Except as provided in paragraph (a)(3)(iii) of this section, a driver may not drive after a period of 14 consecutive hours after coming on duty following 10 consecutive hours off duty.

(3) *Driving time and interruptions of driving periods.* (i) *Driving time.* A driver may drive a total of 11 hours during the period specified in paragraph (a)(2) of this section.

(ii) *Interruption of driving time.* Except for drivers who qualify for either of the short-haul exceptions in § 395.1(e)(1) or (2), driving is not permitted if more than 8 hours of driving time have passed without at least a 30-minute consecutive interruption in driving status, either off duty or on duty.

(iii) *Split duty period.* (A) A driver may take one off-duty break of at least 30 minutes, but not more than 3 hours, during the driver's 14-hour period specified in paragraph (a)(2) of this section and extend the 14-hour period for the length of the driver's off-duty break.

(B) An off-duty break under paragraph (a)(3)(iii)(A) of this section does not affect the requirement that a driver take 10 consecutive hours off duty under paragraph (a)(1) of this section.

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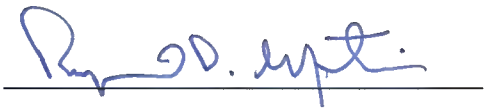
Issued under authority delegated in 49 CFR 1.87 on:



Raymond P. Martinez

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News & Events

Court Holds Time Spent in Sleeper May Constitute Time Worked

02.12.2019

CASE SUMMARY

There is a recent case from a United States District Court which is important to the trucking industry. The United States District Court for the Western District of Arkansas recently held that when a truck driver is required to work a 24-hour shift, the employer must compensate for time spent in their sleeper berth, unless they enter into an agreement with the employee, express or implied, that the employer will exclude up to 8 hours of compensation during the 24-hour shift. *Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2018 WL 5118449, at *1 (W.D. Ark. Oct. 19, 2018). While this is not an appellate decision, it could be a sign of this to come before the United States Court of Appeals for the Eighth Circuit.

BACKGROUND

Plaintiffs in this case, employee truck drivers, brought a class action lawsuit against their employer, P.A.M. Transport, Inc. ("PAM") asserting violations of the federal Fair Labor Standards Act ("FLSA"), among other claims. Plaintiff's asserted that Department of Labor (DOL) regulations prohibit PAM from excluding more than eight (8) hours of pay, during a 24-hour shift, for time the truck driver spends in their sleeper berth.

PAM sought dismissal of the "sleeper berth" claims. PAM contended that excluding all time a trucker driver spends in their sleeper berth is permissible, even if the excluded time exceeds an 8-hour period during a 24-hour shift.

ANALYSIS

Under the FLSA, employers are required to pay their employees at least minimum wage for every hour the employee works. 29 U.S.C. § 206(a). However, the Court noted that the FLSA does not expressly define the terms "on duty" nor "hours worked."

Accordingly, PAM offered the Department of Transportation (DOT) regulation defining "on duty" as the definition to be adopted by the Court in this matter. Under this DOT definition, on duty time is "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work"—and explicitly excludes a driver's time spent resting in a sleeper berth.

The Court concluded that the DOT definition was immaterial as it is part of a different set of regulations than the DOL regulations that were readily applicable to the issue, and is concerned with different policy goals, such as aiming to make roads safer. Further, the Court reasoned that different laws may assign different technical meanings to the same word or phrase. The Court noted that in this case, however, the DOL acknowledged the difference between their definition for "on duty" and the DOT definition, as a DOL handbook states that "on duty" time under the DOT is governed by different principles and not the FLSA. In response to PAM's reliance on the *in pari materia* canon of construction, that statutes addressing the same subject matter should be read as if they are one law, the Court decided not to apply this canon as the DOT and DOL regulations have inconsistent definitions and address concepts which are not "of the same order."

In search of a definition for hours worked, the Court pointed to 29 C.F.R. 785.22(a), a DOL regulation stating that when an employee is required to work a shift lasting 24 hours or more, the employer and employee can agree to exclude bona fide meal periods and sleep time. Such time excluded from compensation is not to exceed 8 hours, regardless of whether the truck driver actually spends more than 8 hours in their sleeper berth. Thus, an employer must compensate at least 16 hours during a 24-hour shift, even if some of this time is spent sleeping or eating. However, where the employer has not entered into an express or implied agreement with the employee to the contrary, an 8-hour sleep period as well as meal periods are deemed hours worked.

The Court reasoned that, based on their interpretations of the DOL's regulations, the question of whether a truck driver's time spent eating or sleeping should be counted as hours worked is irrelevant to whether that time consists of actual work. Rather, the determining factors as to whether the employer must compensate time spent eating and sleeping are whether the shift is at least 24 hours long, whether there is an agreement between the employer and employee to the contrary, and whether the sleep time lasts more than 8 hours. Furthermore, the Court notes that the DOL does affirmatively define excludable sleep time for shifts longer than 24 hours, but less than 48.

PAM also contended that the DOL regulation 29 C.F.R. § 785.41, stating that a *truck driver is working while riding, except during* bona fide meal periods or when in their sleeper berth, creates an exception to the rule that employers must compensate at least 16 hours during a 24-hour shift. PAM also relied on the regulation's language that any work the employee is required to perform while traveling counts as hours worked.

In response, Plaintiff's pointed to the DOL's interpretation of their regulation, 29 C.F.R. § 785.41, stating that if the trip is "performed within one working day (less than 24 hours), *all time on duty on the truck is time worked, even though some of that time is spent in the sleeping berth*." However, bona fide meal periods are expressly excluded by this regulation.

The Court held that, within the DOL regulations, the language was not ambiguous in stating that when a truck driver is sleeping, they are not working. However, the Court found that there was ambiguity as to whether an employer must nevertheless count time spent sleeping as hours worked. Nonetheless, the Court concluded that this ambiguity was resolved by 29 C.F.R. 785.22(a), which states exactly how employers should determine whether sleep time is compensable: not by considering whether the employee is driving, but whether there is an agreement between the employer and employee excluding 8 hours of pay during a 24-hour shift. Readers should continue to follow the case, as an appeal could follow which could change the disposition of the case.

REGULATORY WATCH

In a related matter, industry sources report the Federal Motor Carrier Safety Administration ("FMSCA") will no longer conduct a year-long program that would test different sleeper berth schedules. The FMCSA requested public comment on sleeper berth regulations in August 2018 and received over 5,200 comments. Recent research emphasizes that the total amount of sleep may be more important than a single period of accumulated sleep. The FMSCA is expected to incorporate this research into proposed regulatory changes this year and allow drivers to split their sleeper berth time.

Contact John F. Fatino for more information about trucking and transportation matters at 515-288-6041. Jennifer Chavez-Rivera, J.D. candidate, Drake University Law School assisted in the preparation of these materials.

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Supreme Court Allows Ninth Circuit Decision to Stand Regarding Independent Contractors

04.17.2019

California Trucking Ass'n v. Su, 903 F.3d 953 (9th Cir. 2018)

On September 10, 2018, the United States Court of Appeals for the Ninth Circuit ruled on a case involving whether the Federal Aviation Administration Authorization Act ("FAAAA") preempts the California Labor Commissioner's use of a common law test "to determine whether a motor carrier has properly classified its drivers as independent contractors." The common law test, "often referred to as the *Borello* standard," uses classifications that "impact what benefits workers are entitled to under the State's labor laws and the corresponding burdens placed on the entities that hire them." In this case, the Ninth Circuit affirmed the district court, holding that the *Borello* standard is not related to prices, routes, or services, and, as such, is not preempted by the FAAAA. The United States Supreme court decided on March 18, 2019 not to review the case so the decision will stand.

The plaintiff-appellant in this case, California Trucking Association ("CTA"), "is an association devoted to advancing the interests of its motor carrier members." CTA makes a distinction between "company drivers" and "owner-operators." When CTA members utilize owner-operators, the parties enter into a contract with terms regarding the truck, who is responsible for operating expenses, who has control, and an agreed-upon rate of payment. Thus, CTA views owner-operators as independent contractors. CTA's main claim in this case

against the California Labor Commissioner is that "the Commissioner's application of the *Borello* standard disrupts the contractual arrangements between owner-operators and motor carriers, which introduces inefficiencies into the transportation services market" and is inconsistent with the goals of the FAAAA; as such, CTA alleges that the FAAAA preempts application of the *Borello* standard. The *Borello* standard is a "common law test for determining whether a worker is an employee or an independent contractor." The question that the *Borello* standard contemplates is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."

The *Borello* standard is flexible and should not be applied mechanically. The reason this standard comes into play in this case is because if the Commissioner "were to determine that, under *Borello*, certain owner-operators are employees of a motor carrier, this could result in obligations under the California Labor Code that are inconsistent with the parties' contractual arrangements (e.g., who is responsible for truck maintenance expenses)."

The FAAAA "expressly preempts certain state regulation of intrastate motor carriage." When deciding whether a statute is preemptive, "congressional intent is the ultimate touchstone." Here, the relevant provision is 49 U.S.C. 14501(c)(1): " . . . a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." The Ninth Circuit notes that "related to" preemption is often broad, but that the FAAAA "does not preempt state laws that affect a carrier's prices, routes or services in only a 'tenuous, remote, or peripheral . . . manner' with no significant impact on Congress's deregulatory objectives."

The Ninth Circuit discussed various United States Supreme Court decisions regarding preemption of state laws in the context of interference with customer contracts at the point of sale and impacting workforce arrangements, the *Borello* standard's impact on workforce arrangements, and the historical context and preemption in the present. Ultimately, the Ninth Circuit held that the FAAAA does not preempt the California Labor Commissioner from applying the *Borello* standard "because this generally applicable, common law test is not 'related to' motor carriers' prices, routes or services."

Contact John F. Fatino for more information about trucking and transportation matters at (515) 288-6041. Bryn E. Hedlund, J.D. Candidate, University of Iowa College of Law, assisted in the preparation of these materials.

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Federal Court Finds California *Dynamex* Decision Not Preempted by FAAAA

07.01.2019

WESTERN STATES TRUCKING ASSOC. v. SCHOORL, 2019 WL 1426304

CASE SUMMARY

Western States, a trade group, brought suit against the California Department of Industrial Relations ("Department") and the California Attorney General in the United States District Court for the Eastern District of California. The Department was charged with enforcement of the *Dynamex* decision recently decided by the California Supreme Court. This case is of high importance to the trucking industry because it expands the definition of "employed" for purposes of California wage and hour laws. As a result of the scope of the *Dynamex* decision, independent contractors could be considered employees.

By way of background, in *Dynamex*, the California Supreme Court adopted the "ABC" test to determine whether a worker is an employee or independent contractor for purposes of California's wage orders. As a preliminary matter, while *Dynamex* has spurred much litigation in regard to the way independent contractors are characterized, the federal court allowed Western States to bring suit as all of Western States' members use independent contractors to provide transportation services and "have a concrete interest in knowing whether their employee classification must be fundamentally changed."

Western States claimed the new test precluded independent contractors from being engaged in the same work as the hiring entity and limits Western States' members' ability to hire small independent carriers to provide transportation services as independent contractors on a short-term basis—a reality that is common in the industry due to fluctuations in demand. Western States claimed the *Dynamex* test discards settled, previous precedent for determining whether an individual is an employee or independent contractor. Western States contended that because the trucking industry developed according to that now discarded precedent, the new test "throws into question the legality of the entire trucking industry in California." The federal court decided it would not disturb the ABC test and found it does not preclude the hiring of independent contractors by a motor carrier.

DISCUSSION

The government moved to dismiss the complaint. In response to the motion to dismiss, Western States first claimed the Federal Aviation Administration Act of 1994 ("FAAAA") preempted the *Dynamex* "ABC" test by prohibiting a state, or a political division thereof, from enacting or enforcing a law or regulation "related to a price, route or service of any motor carrier…with regard to the transportation of property." The federal court stated that although this provision should be "interpreted quite broadly," the key question is congressional intent behind the FAAAA. The federal court noted "the FAAAA was intended to prevent state regulatory practices . . . and "preempts state laws that . . . have a 'significant impact' on carrier rates, routes or services, while at the same time not disturbing laws with only a "tenuous, remote or peripheral" connection to rates, routes, or services." The federal court agreed with the Defendants' argument that wage orders are only "remote[ly], tenuous[ly], or peripheral[ly]" related to rates, services or routes. The federal court noted that while the wage orders provide

how an employee of the transportation industry shall be paid, the *Dynamex* test applies to all California wage orders and does not specifically relate to the transportation industry.

The federal court found that *Dynamex* is generally applicable to labor regulations and cannot be avoided by arguing it specifically targets the transportation industry. The federal court compared this case to another case where it was argued that compliance with a prevailing wage law was preempted by the FAAAA because such compliance would lead to an increase in labor costs and, thus, prices, to compensate for lost revenue. Following the reasoning in that case, the court here, held that any such effects of costs "did not rise to the level of triggering preemption given their only indirect impact on prices, routes and services." The court also relied on another decision which concluded that prevailing wage laws are several steps removed from prices, routes or services, "even if employers must factor [such] provisions into their decisions about the prices that they set, the routes that they use, or the services that they provide; and even if state laws

> increase or change a motor carriers' operating costs, broad laws applying to hundreds of different industries with no other forbidden connection with prices, routes, and services -- that is, those that do not directly or indirectly mandate, prohibit, or otherwise regulate certain prices, routes, or services—are not preempted by the FAAAA.

The court also rejected the argument that *Dynamex* was preempted by the Federal Motor Carrier Safety Regulations ("FMCSRs"). Western States contended that because "[a]n agency regulation with the force of law can pre-empt conflicting state requirements," the FMCSRs, which, they argued, completely and thoroughly address in detail every aspect of the trucking industry, preempts *Dynamex*. The court stated the fact that an agency's regulations are "comprehensive" does not infer they are preemptive. Holding that the wage orders did not conflict with the FMCSRs, the court found that preemption under the FMCSRs was not comprehensive, but limited to conflicting state regulations on commercial vehicle safety.

Finally, Western States argued the ABC test "on its face discriminates against out of state and interstate trucking companies," violating the Dormant Commerce Clause. The court noted such clause is concerned about "economic protectionism that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." The court stated that under the Dormant Clause, a law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." However, the court ultimately concluded no plausible Dormant Clause argument existed here as neither the wage orders nor *Dynamex* differentiates between in-state and out-of-state employers, the wage orders apply only to work performed in California, and secure benefits for California employees without impeding interstate commerce.

Western States has filed an appeal to the U.S. Court of Appeals for the Ninth Circuit. However, the parties have been ordered by the court to participate in the Mediation Program of the Ninth Circuit Court of Appeals and attempt to mediate the case while the appeal is pending. In short, continue to monitor this website for further developments before the Ninth Circuit.

Contact John F. Fatino for more information about trucking and transportation matters at 515-288-6041. Jennifer Chavez-Rivera, J.D. candidate, Drake University Law School, assisted in the preparation of these materials.

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FMCSA Preemption Order Stops Plaintiffs' Case

07.03.2019

Ayala v. U.S Xpress Enterprises, Inc., 2019 WL 1986760 (C.D. Cal. May 2, 2019)

On May 2, 2019, the United States District Court of the Central District of California ruled on a supplemental motion for partial summary judgment involving U.S. Xpress, Inc. (collectively, "Defendants"). Plaintiffs asserted Defendants "wrongly failed to pay wages for all compensable work time, failed to provide duty free meal and rest periods or to pay added wages in the absence of such break periods, failed to maintain proper time and pay records, and failed to pay all accrued wages upon termination of its truck drivers, in violation of California law." The Defendants argued that the Federal Motor Carrier Safety Administration ("FMCSA") "has made a binding determination that California's meal and rest break rules, as applied to property-carrying commercial vehicle drives, are preempted by FMCSA hours and service regulations." Accordingly, Defendants maintain they were entitled to partial summary judgment. The Court agreed with this assessment and ruled in favor of the Defendants.

On December 28, 2018, the FMCSA published an Order which concluded that the California meal and rest break rules, as applied to property-carrying commercial vehicle drivers, were preempted by the FMCSA's hours of service regulations. See 83 Fed. Reg. 67470-01 (Dec. 28, 2018). (The Order is linked at the bottom of the page.) The Administrator of the FMCSA made the determination that the California meal and rest break rules met certain criteria which resulted in their preemption by the federal regulations. Thus, the California rules could not be enforced.

However, in the federal system, judicial review of an agency determination can only be heard by a federal circuit court. Thus, "this Court does not have the authority to review the merits of the Order."

The case does not reflect what challenges to the Order are pending in the Ninth Circuit (or elsewhere for that matter). Consequently, the District Court is bound by the Order. In a footnote, the District Court stated "[w]hen and if the Ninth Circuit issues an opinion as to the validity of the Order, Plaintiff is welcome to file a motion for reconsideration." Until the Ninth Circuit decides to address the validity of the Order, the meal and rest break rules cannot be enforced. In short, you will want to continue to monitor this website for further developments.

Contact John F. Fatino for more information about trucking and transportation matters at (515) 288-6041. Nicholas R. Benson, J.D. candidate, The University of Iowa College of Law, assisted in preparation of this article.

For More Information:

FMCSA Order

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Transportation Law Update: When is a Broker Not a Broker?

07.05.2019

Tryg Ins. v. C.H. Robinson Worldwide, Inc., 2019 WL 1766995 (3rd Cir. 2019)

SHORT ANSWER IS: WHEN IT ACTS AS A MOTOR CARRIER.

On April 19, 2019, the United States Court of Appeals for Third Circuit ruled on a case involving the Carmack Amendment to the Interstate Commerce Act of 1887 and whether the defendant was correctly classified as a motor carrier or a broker. The Carmack Amendment provides that a carrier is liable for damages occurring during a shipment of goods, while a broker, who arranges for transportation only, is not liable. In this case, the Third Circuit affirmed the district court which held that "if a party has accepted responsibility for transporting a shipment, it is a carrier," even if the party holds a broker's license instead of a motor carrier's license, and did not own the equipment necessary to transport cargo.

The plaintiffs in this case, Toms Confectionary Group ("Toms") and its insurer, Tryg Insurance, brought an action against C.H. Robinson Worldwide ("CHRW") and National Refrigerated Trucking, CHRW's independent contractor, for breach of contract of motor carriage. National Refrigerated Trucking failed to appear, so the district court entered a default judgment against it, finding both CHRW and National Refrigerated Trucking jointly and severally liable.

CHRW has a broker license and does not own trucks or equipment needed to transport cargo.

However, the district court determined that CHRW held itself out as a carrier through its transactions with Toms and the supporting shipping documentation. The appellate court said that "if an entity accepts responsibility for ensuring the delivery of goods, then that entity qualifies as a carrier regardless of whether it conducted the physical transportation." As CHRW "took responsibility for the goods and arranged for their transportation," and as there was no agreement to hire a third party to transport the goods, then CHRW could not argue that it was "acting as a broker."

During the course of the negotiations between Toms and CHRW, CHRW was paid to transport and take responsibility for the bottles of chocolate liquor. In the Bill of Lading documents, prepared by a non-party, CHRW was identified as a carrier. Throughout the years that Toms and CHRW had been doing business together, CHRW had no documents showing that they were a broker. Even CHRW's terms and conditions "suggest that CHRW is a non-asset based transportation provider" but it is not clear that CHRW is only a broker. Furthermore, CHRW only began to claim that it was a broker after the start of litigation in this case.

The Third Circuit determined how the term carrier "encompasses entities that perform services other than physical transportation," and that carriers are "person[s] providing motor vehicle transportation for compensation." The appellate court further explains that transportation includes "'services related to' (including 'arranging for') the movement of property." The main question to consider is "whether the party has legally bound itself to transport goods by accepting responsibility for ensuring the delivery of goods," and because CHRW accepted the responsibility of a carrier, through its own course of conduct and communications with Toms, CHRW was thereby liable for damages as if it were a motor carrier.

Contact John F. Fatino for more information about trucking and transportation matters at (515) 288-6041. Elaina J. Steenson, J.D. candidate, Drake University, assisted in the preparation of these materials.