

NO. 63006-7

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I

GENERAL TEAMSTERS LOCAL NO. 174,
on behalf of certain of the employees it represents, and Carl Gasca, Dane
Radke, and James Holcomb, individually and on behalf of others
similarly situated,

Appellants,

v.

SAFEWAY INC.,

Respondent.

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STATE OF WASHINGTON
COURT OF APPEALS

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal involves the question whether drivers, loaders, and driver-loaders (“drivers”) who work for defendant/respondent Safeway Inc. (“Safeway”) are properly paid under RCW 49.46.130(2)(f) (“Section 2(f)”), which provides an exception to normal overtime requirements for:

An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

Plaintiff/appellant General Teamsters Local No. 174 (“Local 174”) is the bargaining agent for the drivers. CP 701. Prior to 2003, a collective bargaining agreement (“CBA”) between Local 174 and Safeway provided that drivers were paid an hourly rate with overtime for all hours worked in excess of 40 hours per week in compliance with RCW 49.46.130(1) (“Regular Overtime”). CP 702. In 2003, Local 174 and Safeway negotiated an alternative compensation system under Section 2(f). CP 702, 740-743, 751-55. This activity-based compensation system (the “ABC System”) paid the drivers based on a combination of activities, mileage, and time worked, and paid part of that amount as overtime under the CBA (“Contract Overtime”). CP 702-03, 742. In 2005,

Local 174 and Safeway entered into a second CBA that continued the ABC System. CP 703, 789-96. There is no dispute that drivers as a whole make far more money under the ABC System than they would under the prior hourly system. CP 430-31, 630-700. The benefit was at least \$267,000 over a six-month test period. CP 431.

Despite the extra money Safeway has paid, Local 174 brought this lawsuit in 2007 challenging the very compensation system it negotiated. CP 1566-69. At the end of discovery and just before trial, the parties stipulated to and the Superior Court entered an order setting a briefing schedule for the parties' cross-motions for summary judgment and requiring the parties to "meet and confer in good faith" regarding a stipulation of facts. CP 1671-72. Despite its agreement at the time, Local 174 is now challenging that process, arguing that it should not be bound by its stipulation that drivers are subject to the Federal Motor Carrier Act ("FMCA"), 49 U.S.C. § 3101, *et seq.*¹ CP 702.

It is with this backdrop that the Court is presented with the key

¹ After the lawsuit was filed, Local 174 made a series of other commitments to the Superior Court and Safeway that it now seeks to escape. For example, Local 174 stated that it would not challenge individual time allocations in the ABC System in order to avoid arbitration of its claim. CP 704, 1568, 1601; Court's Feb. 8, 2008 Oral Ruling ("Feb. RP") at 6. It also stated that it would not present individual driver testimony in order to avoid a standing issue. CP 56, 296, 1606; Report of Proceedings of June 13, 2008 ("June RP") at 7. Moreover, counsel committed that the Court could rule on the Section 2(f) issue as a matter of law. Dec. 12, 2008 Report of Proceedings ("Dec. RP") at 7.

legal question resolved by the Superior Court: whether the ABC System falls within the Section 2(f) exemption to the Regular Overtime requirements in RCW 49.46.130(1)? The arguments presented in the Brief of Appellants (“App. Br.”) bear little resemblance to the arguments advanced before the Superior Court. On summary judgment, Local 174 argued that Section 2(f) only applied to FMCA drivers who actually drove across state lines and could only be used if approval and recordkeeping requirements were satisfied. In contrast, the vast majority of the Brief is dedicated to arguing that drivers are not subject to the FMCA, App. Br. at 15-32, which is a new argument that was never presented to the Superior Court (Plaintiffs stipulated that they *were* subject to the FMCA) and should not be considered under RAP 9.12. Regardless, the uncontroverted evidence establishes that Safeway’s drivers are covered by the FMCA and properly compensated under Section 2(f). Thus, the Court should affirm the Superior Court’s rulings in favor of Safeway.

II. RESPONSE TO ASSIGNMENT OF ERROR

The Superior Court properly granted summary judgment in favor of Safeway in its December 12, 2008 Order. CP 1408-1411. Plaintiffs / Appellants Local 174, Carl Gasca (“Gasca”), Dane Radke (“Radke”) and James Holcomb (“Holcomb”) (collectively the “Plaintiffs”) claim for overtime compensation under RCW 49.46.130(1) fails as a matter of law

because Safeway's drivers are fully paid under the ABC System in compliance with RCW 49.46.130(2)(f). The Superior Court also properly awarded costs and denied Plaintiffs' Motion for Reconsideration.

III. COUNTER STATEMENT OF THE ISSUES

- A. Did the Superior Court properly conclude that Plaintiffs' overtime claims failed as a matter of law because Safeway's drivers are paid under the ABC System in compliance with RCW 49.46.130(2)(f) when Plaintiffs are covered by the FMCA, the ABC System includes Contract Overtime, and the ABC System pays amounts at least reasonably equivalent to what would have been paid under an hourly pay system?
- B. Did the Superior Court properly deny Plaintiffs' Motion for Reconsideration when they did not meet the requirements of CR 59?
- C. Did the Superior Court properly award Safeway its costs?

IV. COUNTER STATEMENT OF THE FACTS

A. Safeway and Its Drivers

Safeway operates retail grocery stores and related distribution facilities, including a distribution facility in Auburn, Washington where it employs drivers, including Radke, Holcomb and Gasca. CP 176, 701-02. The Auburn facility receives goods from both inside and outside the State, and the drivers deliver those goods to retail stores. CP 702, 1374.

Safeway and Plaintiffs agreed that Safeway and its drivers are

subject to the FMCA. CP 141, 176, 427, 702, 950. Safeway is licensed with the U.S. Department of Transportation (“DOT”), holds required authorizations from the Federal Motor Carrier Administration to be an interstate motor carrier, and has been issued a DOT number. CP 956 (2003 bargaining notes stating that Safeway’s “Transportation Department will operate in accordance with the [DOT] regulations as an interstate carrier”).² Under the FMCA, drivers are subject to mandatory drug testing and track and report hours spent driving. CP 805, 939, 942, 946, 1089.

B. Safeway’s Negotiation and Operation of the ABC System

Safeway pays its drivers in accordance with CBAs negotiated with Local 174. CP 702-03. Up until May 2003, the CBAs between Safeway and Local 174 provided that drivers were paid on an hourly basis with Regular Overtime. CP 702. In 2003, Safeway and Local 174 negotiated the ABC System, which pays for specified amounts of time based on established standards for delivery routes and activities (“Standard Time”), and provides for the payment of overtime if an employee’s Standard Time exceeds 40 hours per week and under other circumstances specified in the

²The Court should take judicial notice of publicly available documents such as those available on DOT websites that demonstrate that Safeway and its drivers are subject to the FMCA. These documents, which are cited and attached hereto in the Appendix, are not part of the record because Plaintiffs stipulated to the Superior Court on summary judgment that they are covered by the FMCA, so this issue was not argued or briefed on summary judgment. Instead, the issue was raised for the first time on appeal. If the Court entertains Plaintiffs’ FMCA argument despite RAP 9.12, Safeway requests that these publicly available government materials be considered.

CBA. CP 702-03, 740-43, 751-55. In 2005, Safeway and Local 174 negotiated a subsequent CBA that continued the ABC System. CP 703, 789-96.

Under the ABC System, tasks and activities performed by drivers are assigned time values. CP 703, 740-43, 750-55, 789-96. How the Standard Time is calculated depends on the type of task, such as yard activities, driving, activities at a store, and other miscellaneous activities. CP 703, 740-41, 789-90. If drivers are delayed by breakdowns, road conditions, or inspections, they may be paid for actual delay time (“Delay Time”) in addition to Standard Time. CP 703, 741, 790. The time values and mileage charts used in the ABC System were negotiated by Local 174 and Safeway. CP 704, 740-43, 751-55, 789-796. They are also subject to review and arbitration if Local 174 questions their reasonableness. CP 704, 742-43, 791.

The ABC System pays drivers regular and overtime wages based on total Standard Time added to Delay Time or other non-driver hourly time. CP 704, 742, 791. Wages are calculated using the hourly rate specified in the CBA, which is sometimes called the employee’s “base rate.” CP 704. Depending on the driver, Contract Overtime is paid after 8 or 10 hours of Standard Time in a day, after 40 hours in a workweek, and for work on a sixth or seventh day. CP 704, 716-19, 742, 764-67, 791.

Contract Overtime is typically paid at time and a half of the hourly rate in the CBA; and, at times, double time is paid. *Id.*

Each day, drivers select the route they will drive based on seniority. CP 704. A dispatcher then prints a detailed "Trip Sheet." *Id.* During the day, drivers are expected to complete the tasks on the Trip Sheet and note any corrections or additional work they do. CP 704-05. Safeway's computer system tracks this information and uses assigned time values to calculate the Standard Time accrued by drivers. CP 705.

Safeway also keeps track of when drivers start and finish work each day. CP 177-78, 427, 705. The difference between the start and end times is called "Actual Time," which is the maximum amount of time that the drivers could possibly work. CP 178, 427-28, 705. The Actual Time may, at times, reflect the total hours worked by a driver; however, at other times, it may exceed the total hours worked because Safeway does not ask drivers to record nor attempt to track personal activities, meal periods, or other uncompensated breaks or activities during the work day. CP 178, 428. For example, Radke often spends time during the day in his role as a shop steward for Local 174 talking to employees and addressing union issues rather than performing his work as a driver. CP 428.

Safeway runs weekly comparisons of Standard Time and Actual Time to determine driver performance. CP 178, 428, 705. Each driver is

given an efficiency rating (Standard Time divided by Actual Time) for the week. *Id.* Similarly, Safeway calculates the efficiency rating for the drivers as a group. *Id.* These efficiency calculations do not include Delay Time or other non-driving hourly work. CP 705.

As discussed in detail in the argument section, the drivers as a group always have more Standard Time than Actual Time, and are always paid for more hours than they actually work. CP 178, 428-29. In fact, during a six-month test period, the drivers made at least \$267,196.30 more than they would have made under the prior hourly compensation system. CP 430-31, 630-700. Moreover, Gasca, Holcomb, and Radke all made more than what they would have made under the prior hourly system. *Id.*

C. Holcomb's Complaint and DLI's Review of the ABC System

In early 2007, Holcomb complained to DLI, apparently asserting that he was not being paid for all overtime hours that he worked. CP 919. DLI opened a case and sent a letter dated February 14, 2007, asking Safeway to perform an in-house audit of its compensation practices for drivers. CP 917-18. Safeway's counsel sent a response to DLI on March 21, 2007, that outlined the ABC System and explained how it falls within Section 2(f). CP 920-25. DLI had no further communications with Safeway and never indicated any doubt that the ABC System was appropriate under Section 2(f). CP 808.

D. The Superior Court Proceedings

Local 174 filed its Complaint in King County Superior Court on August 7, 2007. CP 1566. Local 174 brought an overtime claim “on behalf of Local 174’s members at Safeway.” CP 1567-68.

On November 26, 2007, Safeway filed a Motion to Compel Arbitration under the CBAs Local 174 negotiated with Safeway. CP 1582-92. In order to avoid the language in the CBAs that provided for arbitration of disputes about the reasonableness of time values in the ABC System, Local 174 committed that it was only arguing that the structure of the ABC System was illegal and not that specific times used to determine individual pay under in the System were unreasonable. CP 704, 1601 Based on this limitation, the Superior Court denied Safeway’s Motion, but cautioned that “to proceed in this litigation...the plaintiff is precluded from questioning the reasonableness of the time values used by the employer in this litigation.” Feb. RP at 6. The Superior Court went on to say that “[w]e must assume for purposes of this lawsuit that the employer’s time values are right.” Feb. RP at 7.

On May 16, 2008, Safeway filed a Motion for Summary Judgment, arguing that Local 174’s claim should be dismissed because, among other things, the union lacked standing and its claim was preempted. CP 102-277. The standing issue focused on whether Local 174’s overtime claim

required the participation of its individual members, which would defeat standing under the third prong of *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212, 45 P.3d 186 (2002). CP 163-66; June RP at 5-9. To avoid this standing issue, Local 174 represented that it would not put on testimony from drivers to prove its claim. CP 296, 1606; Dec. RP at 2-5; June RP at 7-8. Based on that representation, the trial court denied Safeway's motion; however, the court stated that the union would lose its standing under *Spokane Airports* if it put on individual driver testimony. CP 420-22, 1606; June RP at 7-9.

Safeway also argued that Local 174's overtime claim was preempted by Section 301 of the Labor Management Relations Act because it required interpretation and analysis of the 2003 and 2005 CBAs. CP 168-170. Again, Local 174 stated that it was not challenging the application of the ABC System, but the legality of the System itself. CP 299, 704. Based on this representation, the Superior Court denied Safeway's motion, but expressed concern over the procedural posture of Local 174's case. CP 420-22; June RP at 11-12; Dec. RP at 2-3, 5-6.

On July 8, 2008, the Superior Court granted Local 174's motion to amend its complaint to add individual plaintiffs Gasca, Radke and Holcomb, and assert a class claim on their behalf. CP 1579.

After further discovery, the parties agreed to litigate the issue of

whether the ABC System falls within Section 2(f) before addressing other issues in the case. CP 1670-71. On October 23, 2008, the Superior Court entered a stipulated scheduling order that required the parties to “meet and confer in good faith in an attempt to agree upon a stipulated set of facts” before filing cross motions for summary judgment on this central issue. CP 1670-74. Counsel met and conferred and negotiated a written Statement of Stipulated Facts. CP 701-805. Among other things, Plaintiffs and Safeway stipulated that Gasca, Radke and Holcomb were covered by the FMCA.³ CP 702.

On December 12, 2008, the Superior Court heard the parties’ cross motions for summary judgment on the Section 2(f) issue. Dec. RP at 1-28. The parties agreed that the Superior Court could rule on this issue as a matter of law, and stipulated to a core set of relevant facts. CP 701-805, 1456; Dec. RP at 7. In a detailed ruling, the Superior Court granted Safeway’s motion and dismissed Plaintiffs’ overtime claim, holding that:

My assessment of all of the information provided to me by the parties, and again, there is a considerable amount of data and information the parties have provided, is that in all respects the ABC system appears to this Court, as a matter of law, to meet the requirements of 2(f), and to be reasonably equivalent to what the drivers would earn under the Washington Minimum Wage Act. And indeed it is my strong suspicion on this record that the drivers are probably doing better than they would under the Washington

³ Plaintiffs have repeatedly stated that Gasca, Radke and Holcomb are representative of Safeway’s other drivers. CP 939, 942, 946, 1573.

Minimum Wage Act. And I think that is probably why this contract got negotiated, not once, but twice, on the terms that it did. For the reasons I have stated I am granting the defendant's request for summary judgment in its favor and I am dismissing the lawsuit on the merits.

Dec. RP at 24-25. Plaintiffs moved for reconsideration, submitting a new analysis of the facts, but providing no justification for reconsideration under CR 59. CP 1422-26. The motion was denied. CP 1548-49. The Court granted Safeway's request for statutory costs and fees. CP 1412-13, 1539-40.

In their brief, Plaintiffs now claim that when they filed their motion for partial summary judgment on November 14, 2008, "they did not have complete information for all of the weeks in question in the lawsuit." App. Br. at 9. This is demonstrably false. Well before Plaintiffs filed their motion, Safeway produced all of the payroll and other records that Plaintiffs requested and that formed the basis of Safeway's Section 2(f) analysis to Plaintiffs – over 12,000 pages. CP 1605. The fact that Plaintiffs may have failed to do a complete analysis of the data produced in a timely manner does not mean that they did not have "complete information." As the Superior Court concluded in its ruling:

The plaintiffs suggested in oral argument that perhaps the Court should delay ruling here for the plaintiff *to do more analysis*. But this case has been around for quite a while... the parties have done considerable discovery. This particular motion has been on my calendar for a long time, and it was not until the day of argument

that there was a suggestion that we might continue this case.

Dec. RP at 24 (emphasis added).

V. ARGUMENT

CR 56(c) provides that summary judgment is proper if the pleadings, depositions, and affidavits on file “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Safeway presented substantial evidence, providing detailed information about the ABC System and wages earned by the Plaintiffs under the ABC System, including payroll data, affidavits, and Plaintiffs’ deposition testimony. CP 427-700, 806-936, 950-81, 1150-73, 1373-84, 1393-99.

CR 56(e) then provides that an adverse party “may not rest on mere allegations in the pleadings,” but “must set forth specific facts showing that there is a genuine issue for trial.”⁴ *E.g., LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Plaintiffs failed to present evidence that the ABC System did not comply with Section 2(f). The Court thus properly granted summary judgment to Safeway.

A. **Drivers Paid in Compliance with Section 2(f) Have No Claim for Overtime Under RCW 49.46.130(1)**

RCW 49.46.130(1) states (emphasis added):

⁴ In their Brief (at 37-38), Plaintiffs assert that the Court improperly assigned the burden of proof when, in fact, the Court was merely citing this summary judgment standard.

(1) **Except as otherwise provided in this section**, no employer shall employ any of his employees for a work week 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

Later in that section, RCW 49.46.130(2) states that “[t]his section does not apply to” an individual covered by Section 2(f). Thus, if Section 2(f) applies, Plaintiffs’ claim for Regular Overtime fails as a matter of law. *E.g., Schneider v. Snyder’s Foods, Inc.*, 116 Wn. App. 706, 713-18, 66 P.3d 640 (2003) (affirming holding that employer’s compensation plan with route sales drivers complied with Section 2(f)); CP 807, 868-73 (affirming summary judgment that plan satisfied Section 2(f)).

As evidenced by the plain language of the statute, RCW 49.46.130(2)(f) requires proof of three distinct components: (1) an individual must be employed as a truck or bus driver who is subject to the FMCA (the “FMCA Requirement”); (2) the employer must pay the individual using an alternative compensation system that includes amounts designated as overtime pay (the “Overtime Requirement”); and (3) the overtime pay under that system must be reasonably equivalent to Regular Overtime (*i.e.* compensation that would be earned if overtime was paid at one and one-half times the usual hourly rate for working longer than forty hours per week) (the “Reasonably Equivalent Requirement”).

B. The Superior Court Properly Held That Plaintiffs Are Paid in Compliance with Section 2(f) and Have No Overtime Claim

Considering the statute and the history of its interpretation, which were fully detailed before the Superior Court (CP 806-936, 1176-85), the Court properly held that the three Section 2(f) elements are satisfied.

1. Safeway and Its Drivers Satisfy The FMCA Requirement

Plaintiffs argue for the first time on appeal that drivers are not covered by the FMCA. This argument fails because: (1) Plaintiffs stipulated that they are subject to the FMCA; (2) they did not properly preserve the issue for appellate review; (3) there is no evidence in the record that Plaintiffs are not subject to the FMCA; and (4) federal law clearly demonstrates that the FMCA applies to in-state drivers for multi-state retailers like Safeway.

a. Plaintiffs Stipulated They Are Subject to the FMCA

As the Superior Court recognized, Plaintiffs stipulated that they are truck drivers for Safeway who are “subject to the provisions of the Federal Motor Carrier Act and ... responsible for delivering goods to Safeway’s retail stores.” CP 702; Dec. RP at 19. This stipulation should not be surprising. As discussed herein, Plaintiffs and Safeway both know, as a matter of fact, that DOT has exercised jurisdiction over the drivers,

requiring drug testing and limiting hours spent driving. CP 805, 939, 942, 946, 956, 1370. By stipulating on this issue, Plaintiffs narrowed the disputed issues before the Court on summary judgment, and limited Safeway's ability to conduct discovery. CP 1670-71, 1673.

Under these circumstances, the actions of Plaintiffs' counsel should estop them from now raising this issue. *E.g.*, *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005) (applying judicial estoppel "to avoid inconsistency [and] duplicity" and to "preserve respect for judicial proceedings"); *Russell v. Sunburst Refining Co.*, 83 Mont. 452, 272 P. 998, 1004 (1928) (party was estopped from challenging the timeliness of a hearing when the party stipulated to continuation of the hearing).⁵ The wheels of justice would grind to a halt if courts could not rely on the representations of counsel.

Moreover, the invited error doctrine also prohibits Plaintiffs from challenging their FMCA stipulation on appeal. This doctrine prohibits a party from challenging on appeal an error that he or she caused in the trial court. *E.g.*, *Casper v. Esteb Enter., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004). Washington courts prohibit parties from challenging stipulations on appeal under the invited error doctrine. *E.g.*, *State v. Korum*, 157

⁵ The cases that Plaintiffs cite for the proposition that waiver and estoppel arguments do not apply (App. Br. 30, n. 9) address pre-litigation actions and representations rather than the representations of counsel to a tribunal during litigation, and are thus inapposite.

Wn.2d 614, 649, 141 P.3d 13 (2006); *State v. Hickman*, 116 Wn. App. 902, 905, 68 P.3d 1156 (2003).

Finally, contrary to Plaintiffs' argument that only Gasca, Radke and Holcomb are bound, Local 174 also entered and is bound by the FMCA stipulation. Plaintiffs repeatedly testified and represented that these three were representative of all the drivers, and there is no evidence to the contrary. CP 939, 942, 946, 1573.

b. Plaintiffs Did Not Preserve the FMCA Argument Before the Superior Court

Even if the Court does not find Plaintiffs to be bound by their FMCA stipulation, it should decline to consider their FMCA argument because Plaintiffs did not raise this issue before the Superior Court. Despite what is cited in their Brief, in opposition to Safeway's summary judgment motion, Plaintiffs made a different argument - that Section 2(f) only applies to FMCA drivers who regularly travel outside of Washington. CP 1204-05. Safeway responded that there was no statutory basis for drawing a distinction between in-state and out-of-state drivers covered by the FMCA. CP 1394-95. Plaintiffs did not argue to the Superior Court that the FMCA did not apply to them, or present any evidence in support of such an argument. An argument that is not pleaded or argued to the trial court cannot be raised for the first time on appeal. *E.g.*, RAP 9.12;

Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 510, 182 P.3d 985 (2008).

**c. Undisputed Testimony From Both Parties
Demonstrates That the FMCA Applies**

It is undisputed that Safeway receives goods at its Auburn facility from manufacturers, suppliers and producers from both inside and outside of Washington. CP 3174. Drivers then deliver those goods to Safeway's retail stores in the State. CP 702, 1374. Occasionally, drivers travel through Oregon to supply Safeway's stores in Eastern Washington when mountain passes are closed during the winter months. CP 1329-30.

DOT has undisputedly exercised its jurisdiction over Safeway and its drivers under the FMCA based on Safeway's transport of out-of-state goods into its Auburn, Washington warehouse and on to its retail stores in Washington. Safeway is licensed with DOT and authorized as an interstate motor carrier, and has been issued a DOT number. *E.g.*, Appendix A (DOT websites); CP 956. The fact that a company holds these kinds of authorizations indicates that the DOT has exercised jurisdiction over it. *E.g.*, *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir. 1991). Safeway's drivers are also required to meet DOT safety standards, including mandatory drug testing and limits on driving hours. CP 805, 939, 942, 946, 1089. Safeway representatives testified: "Safeway employs drivers ... who are subject to the provisions of the Federal Motor

Carrier Act.” CP 950; *see also* CP 427 (drivers “are subject to the Federal Motor Carrier Act”). Similarly, Gasca, Holcomb and Radke testified that they are “required to be certified” by DOT and are “subject to limitation on my hours.” CP 939, 942, 946.

d. As a Matter of Law, the FMCA Applies Here

Plaintiffs’ argument that the FMCA does not apply as a matter of law fails under well-established FMCA interstate commerce jurisprudence. The FMCA exemption applies to motor carriers and employees for whom the DOT may prescribe requirements for qualifications and maximum hours of service under the FMCA. *See* 49 U.S.C. §§ 31502, 13501. Plaintiffs do not contest that Safeway is a motor carrier under the FMCA. Under the pertinent U.S. Department of Labor (“DOL”) regulation, the FMCA exemption applies to those employees:

... 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.

29 C.F.R. § 782.2(b)(2). Plaintiffs do not contest that they are drivers or that their work affects the safe operation of motor vehicles on the public highways.

Instead, Plaintiffs argue that the FMCA exemption does not apply

to them because they only drive in Washington when they deliver interstate goods from Safeway's Auburn facility to Safeway's retail stores. *See* App. Br. at 16-26. In making this argument, Plaintiffs simply ignore the controlling legal test set forth in 1992 by the Interstate Commerce Commission ("ICC") for determining when transportation of out-of-state retail goods through warehouses to retail stores is considered part of interstate commerce. Plaintiffs instead base their strained argument on outdated and factually inapposite cases.

In 1992, the ICC articulated the test for determining when transportation, like Safeway's, that "mov[es] from warehouses or similar facilities to points in the same State after a for-hire movement from another State" is part of the "practical continuity" of interstate commerce.⁶ Policy Statement - Motor Carrier Interstate Transportation—From Out-Of-State Through Warehouses to Points in Same State, 8 I.C.C.2d 470, 1992 WL 122949 (May 8, 1992) at **1,2 (the "1992 Policy Statement"). Numerous federal courts, in addition to the DOL and the ICC, have acknowledged that the 1992 Policy Statement and the body of modern law upon which the 1992 Policy Statement is based set forth the proper inter-

⁶ The 1992 Policy Statement "was derived from cases decided by the ICC, federal courts, and the Supreme Court, which explained the differences between intrastate and interstate trucking services provided within a single state." *Musarra v. Digital Dish, Inc.*, 454 F.Supp.2d 692, 708 (S.D. Ohio 2006). An earlier interpretation was replaced after criticism by courts that it was outdated in light of modern advances in shipping. *Id.* (citing, *intra alia*, *Cal. Trucking Ass'n v. I.C.C.*, 900 F.2d 208, 213 (9th Cir. 1990)).

state commerce test.⁷ The 1992 Policy Statement provides that:

[t]he essential and controlling element in determining whether the traffic is properly characterized as interstate is whether the shipper has a 'fixed and persisting intent' to have the shipment continue in interstate commerce to its ultimate destination. *If this intent is present, the interstate character of the traffic is not changed simply because the merchandise may move through a warehouse or storage facility on the way to its ultimate destination.*

1992 WL 122949 at **1 (emphasis added).

Under the totality of the circumstances test set forth in the 1992 Policy Statement, many courts have held that transportation of goods from another state through a warehouse or distribution center to retail stores in the same state constitutes interstate commerce under the FMCA.⁸ The DOL has considered these precedents in relation to the FLSA's FMCA exemption and concluded that drivers like Plaintiffs are covered by the FMCA.⁹

⁷ *E.g.*, *Musarra*, 454 F.Supp.2d at 708; *Collins v. Heritage Wine Cellars, Ltd.*, 2008 WL 5423550, *14 (N.D. Ill. 2008); *California Trucking*, 900 F.2d at 213; *Roberts v. Levine*, 921 F.2d 804, 812 (8th Cir. 1990); *Central Freight v. I.C.C.*, 899 F.2d 413, 421 (5th Cir. 1990); DOL Opinion Letter FLSA 2005-10, 2005 WL 330602 (Jan. 11, 2005); *Advantage Tank Lines, Inc.*, 10 I.C.C.2d 64, 1994 WL 71208, *4-5 (March 4, 1994).

⁸ *E.g.*, *California Trucking*, 900 F.2d at 213 (Quaker Oats shipments between distribution centers and retail chain stores in same state were a continuation of previous interstate shipments and thus part of interstate commerce); *Billings v. Rolling Frito-Lay Sales*, 413 F.Supp.2d 817, 821-23 (S.D. Tex. 2006) (transportation of Frito-Lay snack foods between a Texas warehouse and Texas retail stores where snack foods had originally been shipped from out-of-state manufacturing facilities constituted interstate commerce); *Collins*, 2008 WL 5423550 at *22 (transportation of wine that had entered Illinois from other countries between defendant's Illinois warehouse and various Illinois retail stores was part of interstate commerce).

⁹ *E.g.*, DOL Field Operations Handbook § 24d02(d), included in the Appendix and located at http://www.dol.gov/esa/whd/foh/FOH_Ch24.pdf ("Transportation within a single State from a chain store warehouse to outlets of the chain, of goods brought into

Moreover, under the 1992 Policy Statement test, certain factors are *insufficient* to establish that transportation through a warehouse or distribution center breaks the continuity of interstate commerce. Notably, these factors include: “The shipper’s lack of knowledge of the specific, ultimate destination or consignee at the time the shipment leaves its out-of-State origin.” 1992 Policy Statement, 1992 WL at **2. This directly undercuts Plaintiffs’ principal argument – that Safeway’s warehouse-to-retail store transport of goods is not part of interstate commerce because Safeway did not have a specified final destination for each product when they left the shipper. *E.g.*, App. Br. at 24-25. Plaintiffs do not mention the 1992 Policy Statement on this point, or any other, in their Brief.

Instead, Plaintiffs rely upon a handful of cases in support of their argument that there must be a specific destination for goods in order for their transport to be part of interstate commerce. Some of Plaintiffs’ cases support Safeway’s position; others are factually inapposite. None of them analyze interstate commerce under the current test set forth in the 1992 Policy Statement as applied to integrated retail distribution. For example,

the State for sale at the outlets, is covered on traditional ‘in commerce’ grounds under the FLSA and is also transportation in interstate commerce under the Motor Carrier Act....As the courts have uniformly held, the situation in the chain store cases is one where goods are shipped from one State and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets.”); *see also* DOL Opinion Letter, FLSA 2005-2NA, 2005 WL 5419038 (April 27, 2005) (shipments of perishable and non-perishable out-of-state goods between warehouse and 140 retail stores within same state constituted interstate commerce).

Walling v. Jacksonville Paper Co., 317 U.S. 564, 63 S.Ct. 332 (1943), supports Safeway’s position that drivers’ transportation of out-of-state goods between the Auburn facility and retail stores is part of interstate transport. *Walling* explains:

The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce’ within the meaning of the Act...if the halt in the movement of goods is a convenient intermediate step in the process of getting them to their final destinations, they remain ‘in commerce’ until they reach those points.

Id. at 568. Similarly, *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1470 (9th Cir. 1997), supports Safeway’s position that the final intra-state stage of distribution (here, of uniforms) from a warehouse to in-state customers is covered by the FMCA, “even though the [out-of-state] shippers did not know the goods’ ultimate destinations.”¹⁰

¹⁰ *Watkins v. Ameripride Servs.*, 375 F.3d 821 (9th Cir. 2004), is inapposite. The driver in that case worked for a company that rented uniforms, drove between a warehouse and customer locations in California, and spent almost all his time delivering clean uniforms and picking up soiled uniforms.. *Id.* at 824. The trial court applied the FMCA exemption to grant summary judgment because uniforms and a few other goods were initially ordered from out of state. *Id.* at 823. The Ninth Circuit reversed for a trial because the driver submitted a detailed declaration stating that the goods were fungible, sat in the warehouse for months, and were modified at the warehouse before they were rented to customers. *Id.* at 826-27. In contrast, Plaintiffs presented no such evidence in this case. Moreover, *Watkins* did not consider or apply the ICC’s controlling 1992 Policy Statement test, apparently because the employer was in the business of renting uniforms and was not involved in the integrated delivery of goods to retail stores. Similarly, *Southern Pac. Transp. Co. v. ICC*, 565 F.2d 615 (9th Cir. 1977) did not apply the 1992 Policy Statement because it had not yet been issued. Moreover, like *Watkins*, that case did not involve the integrated delivery of goods through a warehouse to retail stores. Nor do the *Reich*, *Flowers*, or *Sedrick* cases cited by Plaintiffs (App. Br. at 22, 25, 26) involve the integrated delivery of goods through warehouses to retail stores.

The Superior Court properly concluded that the FMCA applies to Safeway drivers, based on the stipulation of the parties, the undisputed facts, and the controlling law on the application of interstate commerce to integrated retail operations. Dec. RP at 19. Drivers like the Plaintiffs, who transport out-of-state goods from a warehouse to retail stores, are engaging in interstate commerce under the FMCA even if they never leave Washington State.

2. The ABC System Satisfies the Overtime Requirement

Before the Superior Court and this Court, Plaintiffs did not argue that the ABC System did not satisfy the Overtime Requirement in the Section 2(f) Test. This issue is thus a verity on appeal. RAP 9.12. Nevertheless, because an understanding of the Overtime Requirement is necessary to understand the Reasonably Equivalent requirement, Safeway will detail why the Overtime Requirement is satisfied.

a. An Alternative Compensation System Must Designate Part of Its Compensation as Overtime

Section 2(f) allows compensation systems based on mileage and/or the performance of specific duties (e.g., loading or unloading) as long as the alternative compensation system includes an amount designated as “overtime pay.” RCW 49.46.130(2)(f) (“compensation system ... includes overtime pay”); WAC 296-128-011 (listing “mileage, perform-

ance of specified duties,” etc.); WAC 296-128-012(1)(a) (listing “miles, loading, unloading, other”); CP 868-73. As WAC 296-128-012(1)(a) provides “to meet this requirement, an employer may . . . establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime,” and then gives an example of a system where a portion of a mileage rate is designated as overtime compensation. Indeed, in *Schneider*, 116 Wn. App. at 715, the Court of Appeals recognized that an employer and union are free to bargain over the characterization of compensation and what portion of compensation will be designated as “overtime pay” for purposes of Section 2(f). It is thus clear that overtime under Section 2(f) is treated differently than Regular Overtime under RCW 49.46.130(1).

b. Undisputed Evidence Establishes That Part of the Compensation Under the ABC System Is Designated as Overtime

When Safeway and Local 174 negotiated the CBAs that include the ABC System, they designated part of the compensation under that system as “overtime” that would be equivalent to Regular Overtime. CP 951. The parties exchanged proposals and then, on May 8, 2003, agreed upon a fully recommended settlement that includes the overtime language that is still used in the CBA. CP 951, 956-981. That provision states:

Employees will receive overtime pay as provided in this agreement. Overtime shall be calculated based upon the hours compensated as per the provisions of this Appendix. Grid drivers working a [fifth (5th) on 4x10] sixth (6th) or seventh (7th) day as a switcher will be compensated pursuant to Article 8 – Hours and Overtime. Switchers working over eight or ten hours per day on a [fifth (5th) on 4x10] sixth (6th) or seventh (7th) day will be paid at the applicable rate. Hourly employees (e.g., spotters, union dispatchers, routers) shall be paid according to this Incentive Pay Appendix for all time when dispatched away from the yard....

CP 742, 791. In response to this language, Plaintiffs provide no evidence that the ABC System does not include overtime.

c. The Contract Overtime Under the ABC System Satisfies the Overtime Requirement

The mileage and task-based calculations in the ABC System are virtually the same as compensation systems that courts and DLI have previously approved, which designate a portion of the compensation employees earn as “overtime pay.” CP 838-911. For example, DLI approved an activity-based system, like Safeway’s, that included “mileage pay for the number of miles driven, multi-stop pay per unit of work, single stops/backhand pay per unit of work, drop and hook/reload pay per unit of work, and tarp pay per unit of work.” CP 878-79.¹¹

¹¹ See also *Schneider*, 116 Wn. App. at 711-15 (approving a plan that paid a 7% commission on sales, with up to 2.5% of the commission “designated as a component that is ‘reasonably equivalent’ to overtime,” even though the Court found “no direct correlation existed between hours worked and commissions earned”); CP 902 (trial court approved a “base plus commission system” that was adopted instead of “an hourly wage plus overtime system because it would result in more pay to the route salespersons”); CP 888-89 (DLI approved a “hybrid/commission-based system” for route sales

Moreover, as recognized in *Schneider*, 116 Wn. App. at 715, Safeway and Local 174 were free to negotiate the structure of the ABC System and what portion of the compensation under that system would be “attributable to overtime” so long as the drivers received at least the reasonable equivalent of Regular Overtime. Thus, the Contract Overtime and the negotiated allocation of compensation that occurred in this case are precisely what Section 2(f) requires.

3. The ABC System Satisfies the Reasonably Equivalent Requirement

Section 2(f) does not define what it means by “reasonably equivalent;” however, the meaning of that term has been developed under federal bankruptcy law. *E.g.*, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 540 n.4, 114 S.Ct. 1757 (1994) (finding that “reasonably equivalent means ‘approximately equivalent,’ or ‘roughly equivalent’” and noting that several courts found a price only 70% of the size of another price was still of “reasonably equivalent” value). The general understanding is that reasonably equivalent “does not require exact equality in value” or “a dollar-for-dollar equivalent.” *Matter of Fairchild Aircraft Corp.*, 6 F.3d 1119, 1125-26 (5th Cir. 1993). Instead, reasonably equivalent involves “a

representatives that allocated “a percentage of the aggregate value” of product sold or rented each week as an overtime equivalent); CP 839-40 (DLI approved a plan that provided premiums for driving beyond a mileage radius, working in excess of 10 hours per day, working on holidays, and performing pre-trip and post-trip tasks).

rule of reasonableness in light of the particular circumstances.” *In re Unglaub*, 332 B.R. 303, 316 (Bankr. N.D. Ill. 2005). In applying Section 2(f), the courts and DLI have taken the same type of flexible approach recognized under federal law.¹² As DLI has recognized, “under a reasonably equivalent analysis, the law provides greater flexibility for the pay structure.” CP 889.

Keeping this flexible approach in mind, the following general rules for evaluating reasonably equivalent systems can be derived from court and DLI determinations:

First, the amount allocated to overtime under the alternative system is accepted, even if those attacking the system challenge the employer’s motives or question whether the agreement was properly adopted. For instance, despite class counsel’s attacks on the motives behind a compensation system and claims that it was “only form over substance,” one trial court concluded that “the issue of reasonable equivalency ultimately must be decided based on the actual terms and provisions of the compensation system in the Agreement itself” and held that a percentage of commissions was reasonably equivalent to Regular Overtime. CP 905; *see also*

¹² Plaintiffs take a reference to the word “commensurate” in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007), and treat it as if it was a holding on the meaning of “reasonably equivalent.” It was not. “Equivalent” and “commensurate” mean “proportional” or “equal.” *E.g.*, www.merriam-webster.com. The addition of “reasonably” suggests that the compensation does not have to be exactly the same.

Schneider, 116 Wn. App. at 715.

Second, the amount of Regular Overtime (to which a comparison is made) is calculated based on the standard hourly rate that would otherwise apply to the drivers.¹³ As one court held, this requires a comparison to “one and one-half times what would be the equivalent of the hourly rate regularly paid an employee.” CP 903. Similarly, DLI has concluded that (for purposes of the reasonably equivalent comparison) the calculation of Regular Overtime is done based on the hourly rate that would otherwise apply to the employees. CP 1111.

Third, the reasonably equivalent determination is focused on the compensation system, not on a particular person or work week. Section 2(f) and WAC 296-128-012(a)(1) state that “the compensation system” must include reasonably equivalent overtime pay, not that each driver must receive such compensation. Thus, DLI has approved pay systems even though documentation established many weeks when individual drivers earned less than Regular Overtime because, “[o]n the whole, drivers will receive greater compensation.” CP 840. Ultimately, although individual results are a factor to consider, DLI has concluded that alternative plans are reasonably equivalent if they provide overtime that is

¹³ This is different than the erroneous comparison Plaintiffs suggest, where they propose calculating Regular Overtime using a regular rate based on all alternative pay (including Contract Overtime).

“at least reasonably equivalent to the averaged overtime wages employees would be paid” with Regular Overtime in an hourly system. CP 879.

Plaintiffs appear to make two arguments in relation to the Reasonably Equivalent Requirement. The first deals with what comparison must occur. The comparison that Plaintiffs propose has been rejected by DLI and the courts and would render Section 2(f) a nullity. The second deals with the question whether every driver must earn more money in order for the system to be reasonably equivalent – again, this approach has been rejected by DLI and the courts and also involves the very individual assessments about the reasonableness of time allocations that Local 174 committed not to present.

a. Any Comparison Is To Hourly Pay

Plaintiffs latch onto a series of legal arguments that have nothing to do with Section 2(f) and the reasonably equivalent analysis, and use them to argue that Section 2(f) requires a comparison of (1) Contract Overtime, and (2) Regular Overtime using a regular rate of pay that includes all alternative compensation (including Contract Overtime). App. Br. at 33-37. This interpretation of Section 2(f) ignores the plain language of Section 2(f) and its implementing regulations, and extensive guidance from DLI and the courts. Moreover, this interpretation would render Section 2(f) meaningless.

Plaintiffs declare that the ABC System pays employees on a task basis and that the regular rate used to calculate Regular Overtime must include such piece rate earnings. Plaintiffs then leap to the conclusion that the methods for calculating the regular rate and Regular Overtime for a piece rate system must be superimposed on the reasonably equivalent comparison under Section 2(f). It is worth noting that the “adding up all the earnings and dividing by total hours” approach described by Plaintiffs is not unique to piece rate systems, but is used to calculate the regular rate and Regular Overtime for almost all non-hourly compensation systems.¹⁴ CP 930-32. However, this approach for calculating the regular rate and Regular Overtime is not appropriate when doing comparisons under Section 2(f). When adopting the statute, the Legislature expressly noted that income under a Section 2(f) system should be “comparable to a local driver who is paid on an hourly basis.” CP 813. Moreover, WAC 296-128-011(1) defines the “overtime rate of pay” used for comparison purposes as “one and one-half times the base rate of pay,” not the regular rate

¹⁴ Nevertheless, even when calculating Regular Overtime unrelated to the Section 2(f) analysis, employers are not required to pay overtime on top of Contract Overtime that they have already paid. *E.g., Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 464-65, 68 S.Ct. 1186, 92 L.Ed. 1502 (1948) (“To permit overtime premiums to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended”). The federal regulation cited by Plaintiffs, 29 CFR § 778.312, is taken out of context and must be read with 29 U.S.C. § 207(e)(7) and 29 CFR §§ 778.308 and .314. Sections 207(e)(7), 778.308, and 778.314 all provide that contract overtime (including Contract Overtime on a task basis) may be excluded from the regular rate in circumstances like those presented here.

of pay. *Cf.* WAC 296-128-012(2) (addressing the appropriate overtime rate when different base rates are used).

Thus, when evaluating plans, DLI has consistently had employers submit a comparison of alternative compensation with compensation that would be earned at the drivers' hourly rate plus Regular Overtime. CP 839-62, 878-87, 888-89. This approach is confirmed in DLI Admin. Policy ES.A.8.1. (reasonably equivalent to time and one half "the driver's usual hourly rate") and DLI Admin. Policy ES.A.8.3 ("the company should compare for each workweek what each line driver's gross pay was relative to what the gross pay would have been if each line haul driver was paid hourly"). CP 934, 1355. Indeed, in 2004, DLI rejected the same "regular rate" argument Plaintiffs are making here in relation to its evaluation of an employer compensation system.¹⁵ CP 888-89.

Even without this contrary authority, Plaintiffs' interpretation of how the reasonably equivalent comparison should be done would render the exemption meaningless and must be rejected. Plaintiffs' interpretation requires a comparison of (1) the total compensation under an alternative system and (2) the compensation if Regular Overtime is calculated on top

¹⁵ In August 2003, two law firms representing a class of employees wrote to DLI and objected to a system that allocated a percentage of the value of product sold as an overtime equivalent, in part, because it did not include the commissions in the calculation of the regular rate for Regular Overtime comparison purposes. CP 891-95. DLI rejected this argument, finding that the reasonably equivalent analysis is flexible and that Regular Overtime should be calculated using the base hourly rate for employees. CP 888-89.

of the total compensation under an alternative system. Since Plaintiffs' interpretation calls for Regular Overtime to be calculated on top of Contract Overtime, the resulting amount due to each employee under a Regular Overtime system would always be more than what was paid under the alternative system. This would make it impossible for an employer to implement a system that qualified as "reasonably equivalent" under Section 2(f). Such an absurd interpretation would defeat the intent of the unanimous Legislature and must be rejected. CP 813; *Berrocal v. Fernandez*, 155 Wn.2d 585, 594, 121 P.3d 82 (2005); *Stone v. Chelan Co. Sheriff's Dept.*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988).

b. The ABC System Pays Contract Overtime That Is Reasonably Equivalent To Regular Overtime

Safeway has detailed information about driver compensation and performance, both for drivers as a group and for individual drivers. CP 704-05. Drivers edit, complete, and turn in a Trip Sheet for every trip they complete. CP 704-05. The information from each Trip Sheet is entered into a computer system that calculates the Standard Time for that trip (based on the mileage and activity-based measurements negotiated between the parties). CP 704-05. Safeway also tracks the Actual Time between the shift start time and when drivers complete their routes for the day (which is the maximum time that the drivers could possibly work

during the day). CP 427-28, 705. This information provides clear evidence that the Contract Overtime paid under the ABC System is at least reasonably equivalent to Regular Overtime. CP 428-30, 630-700.

Initially, on the simplest level, Safeway runs a weekly comparison of Standard Time and Actual Time to determine weekly driver performance. CP 428, 705. Efficiency ratings (Standard Time divided by Actual Time) are determined for each driver and for the drivers as a group. CP 428, 705. These efficiency calculations understate driver performance because they do not include Delay Time or other non-driving hourly work. CP 178, 429, 705. Nevertheless, as a group, the drivers have always had more Standard Time than Actual Time and have never had an efficiency rating below 100%. CP 428. Safeway submitted an analysis of this information to the Superior Court that revealed that drivers collectively accrued and were paid for approximately 110.3% more Standard Time than Actual Time in 2004; 109.3% more in 2005; 109.5% more in 2006; 109.1% in 2007, and 111.1% more in 2008. CP 428-29, 432-37. Because drivers were paid for more Standard Time hours each week, they were obviously paid for more hours and Contract Overtime than under a Regular Overtime system. Moreover, these percentages do not even factor in the additional pay drivers receive for Delay Time. CP 429, 705.

Safeway also compared the Standard Time and Actual Time and

calculated the efficiency rating for Gasca, Holcomb and Radke.¹⁶ CP 429-30, 438-629. Put simply, under the ABC System, Gasca and Holcomb were paid for far more hours (and, thus, received far more compensation) than they would have received under an hourly compensation system with Regular Overtime. Moreover, Radke was paid for slightly more hours than he would have been paid for under an hourly system.

Beyond these basic efficiency ratings, a detailed comparison of the amount paid each work week and the amount that would have been paid under a Regular Overtime system demonstrates that the ABC System always pays Contract Overtime that is at least reasonably equivalent to Regular Overtime. CP 430-31, 630-700. As provided in WAC 296-128-012(3) (a new subsection effective in November 2008), Safeway analyzed and submitted to the Superior Court a 26-week period and compared the actual compensation the ABC System paid to drivers with the amount that would have been earned under an hourly system with Regular Overtime (at the hourly rates that were negotiated by Local 174 and that are used for Local 174 members when they are not paid under the ABC System).

¹⁶ Gasca had 3,858 hours and 35 minutes of Standard Time, 3,059 hours and 47 minutes of Actual Time, and an efficiency rating of 126%. CP 429, 438-68. Holcomb had 9,790 hours and 29 minutes of Standard Time, 9,118 hours and 48 minutes of Actual Time, and an efficiency rating of 107%. CP 429, 469-549. Radke had 10,248 hours and 15 minutes of Standard Time, 10,465 hours and 13 minutes of Actual Time, and an efficiency rating of 98%. CP 429, 550-629. He also had 251 hours and 38 minutes of Delay Time. *Id.* Although Radke's rating is below 100%, his Delay Time is about 34 hours greater than the shortfall (216 hours and 58 minutes) between Standard Time and Actual Time. *Id.*

CP 430-32, 630-700. The results of that comparison are revealing. During each of the 26 weeks, the ABC System paid far more than would have been paid under an hourly system with Regular Overtime. *Id.* The weekly benefit to the drivers ranged from \$7,241.03 to \$13,073.63. CP 431, 630-700. Over the entire 26-week period, the ABC System paid an extra \$267,196.30 (or \$10,276.78 per week) to Safeway's drivers. *Id.* For this period, the personal benefit to Gasca was \$2,978.19, Holcomb was \$4,378.81, and Radke was \$511.09. *Id.*

In response to this overwhelming evidence presented by Safeway, Plaintiffs presented no evidence to contest that (1) drivers collectively benefited from the ABC System every work week, and (2) Gasca, Holcomb and Radke all personally benefited from the system. Instead, at the summary judgment stage, Plaintiffs argued that a few drivers might make less money in some weeks. CP 1146-48.¹⁷

When Plaintiffs presented evidence of two drivers, Messrs. Blue and Cullum, who allegedly were paid less in one particular week, CP 1146-48, Safeway provided detailed evidence to demonstrate that they were actually making far more money under the ABC System. CP 1192-

¹⁷ This resort to an analysis of individual performance violated two commitments Plaintiffs made in this case – that they would not challenge the reasonableness of individual time allocations, and would not attempt to present individual evidence from drivers. CP 704, 1601, 1606; Feb. RP at 6. Plaintiffs' analysis and argument should be rejected on that basis alone. *E.g., Cunningham*, 126 Wn.App. at 224-25 (applying judicial estoppel). Regardless, Plaintiffs' arguments are meritless.

95, 1331-32, 1333-40. Thus, at the time of summary judgment, Plaintiffs had presented no evidence that specific drivers were receiving less compensation over time, and did not move under CR 56(f) for more time to develop such evidence. Dec. RP at 23-24.

In their Motion for Reconsideration, Plaintiffs presented a new analysis of Safeway's 26-week data, claiming that 18 of the drivers were getting paid less during that period. CP 1424, 1428-29. In addition to noting that it was too late to provide this new analysis, Safeway provided the Superior Court with a detailed response in relation to these 18 drivers demonstrating that the Plaintiffs' analysis was ill-founded and virtually all of those drivers were ultimately making more money under the ABC System.¹⁸ CP 1436-1446, 1496-1518. Under RAP 9.12, the Court should not consider the new argument and analysis Plaintiffs made on reconsideration because it was not presented to the Superior Court before summary judgment was granted. Moreover, the Court properly exercised its discretion to deny reconsideration.

Ultimately, none of the arguments advanced by Plaintiffs has any impact on key undisputed facts: (1) Gasca, Holcomb and Radke made

¹⁸ If a meal period was considered in the calculations, 12 of the 18 drivers made money and the total difference was only \$2,075.05 for six months. CP 1442, 1497. Moreover, most of the 18 were new drivers on break-in rates who, under the CBA, got last choice of routes. CP 1443, 1497. Review of their performance over 26 weeks in 2008 revealed that 15 of the 18 had Standard plus Delay Time exceeding Actual Time. CP 1444, 1498, 1518.

more money under the ABC System, (2) as a group, drivers made more money every week under the ABC System, and (3) for a six-month test period, the benefit of the ABC System to drivers was approximately \$267,000. Moreover, even if accepted, Plaintiffs' arguments about some drivers who get paid less money are tacit admissions that the vast majority of drivers make more money. For example, even if the improper and belated evidence submitted by Plaintiffs on reconsideration about 18 drivers is considered, that evidence demonstrates that at least 83% of employees are paid more under the ABC System. CP 1427-29.

These economic results can only lead to one conclusion: the ABC System provides overtime that is at least reasonably equivalent to Regular Overtime and satisfies the Reasonably Equivalent Requirement.¹⁹

4. Section 2(f) Does Not Require DLI To Approve Compensation Systems

Plaintiffs argue that reasonably equivalent compensation systems must be "approved" by DLI, spinning this approval requirement from whole cloth based on an off-handed reference to "an approved reasonably

¹⁹ Cf. *Schneider*, 116 Wn. App. at 714-16 (noting that the commission system "provided better pay than an hourly system"); CP 901-02 (court approved the commission system because it provided "more pay" and "better compensation than an hourly rate system"); CP 840 (DLI approved a mileage and task-based pay system because, "[o]n the whole, drivers will receive greater compensation"); CP 879 (DLI approved a mileage and task-based pay system because "the drivers' payment for hours worked during the review period is at least reasonably equivalent to the averaged overtime wages employees would be paid for overtime hours worked under RCW 49.46.130").

equivalent plan” in a DLI letter dated July 19, 2004 (the “2004 Letter”). Of course, Plaintiffs fail to authenticate that letter, explain its context, or explain how a private letter between a DLI manager and an attorney can create a legal requirement. Plaintiffs also ignore the language and history of the statute and regulations, DLI’s formal administrative interpretation, the relevant case law, and the fact that, in March 2007, Safeway provided DLI with information on the ABC System in response to an investigation letter and DLI did not ask for additional information, indicate any dissatisfaction, or find any violation. The Court should thus reject this argument as the Superior Court did. Dec. RP at 17.

a. The Statute Does Not Include An Approval Requirement

Any analysis of the requirements of Section 2(f) must start with the plain language in that statute. “Plain words do not require statutory construction.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999). Courts should “assume the Legislature meant exactly what it said and apply the statute as written.” *In re Custody of Smith*, 137 Wn.2d 1, 8, 969 P.2d 21 (1998). RCW 49.46.130(2)(f) provides an exemption for drivers if they receive “overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.” The statute does not include an approval requirement.

As a general matter, courts may not graft onto a statute additional requirements not contained in the statute's plain language. *E.g.*, *State v. McNichols*, 128 Wn.2d 242, 249, 906 P.2d 329 (1995). Thus, any attempt to impose an approval requirement under Section 2(f) is improper and would limit the application of this provision in a manner inconsistent with the statute.²⁰ CP 871 (court finding that validity of a Section 2(f) system is not conditioned on "further Department review and approval").

Beyond the language of Section 2(f), the legislative history makes clear that there was no intent to create an approval requirement. There is not one mention of such a requirement in the legislative materials, CP 810-20, and the House Bill Report explains: "Under the department's administration of the bill, employers will be required to have a written compensation policy available for department evaluation." CP 819. There is a stark difference between having a system "available for department evaluation" and being required to submit it for approval. Moreover, the Fiscal Note states that DLI would have "a moderate decrease in investigatory responsibilities" because DLI had 41 open investigations that it would not have to continue. CP 816-17. There is no mention of costs to

²⁰ *Cf. Cerrillo v. Esparza*, 158 Wn.2d 194, 200-06, 142 P.3d 155 (2006) (applying exemption in RCW 49.46.130(2)(g) as written despite DLI interpretation establishing an additional "working for farmers" requirement); *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 879, 64 P.3d 10 (2003) (applying exemption in RCW 49.46.130(3) as written despite Court of Appeals' finding of additional "sales duty" requirement).

review and approve every company's system because the statute did not require this. CP 816-17.

Plaintiffs' attempt to create an approval requirement is counter to the plain language of Section 2(f), as well as the intent underlying that provision, and thus is not permitted. *E.g.*, *Cerrillo*, 158 Wn.2d at 201 (“Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.”).

b. The Relevant Regulations Do Not Require DLI Approval

In 1989, DLI adopted two regulations to help implement Section 2(f). Plaintiffs ignore the first regulation and then cite an out-of-context sentence in the second regulation in an effort to support their approval requirement. Their efforts should be rejected.

Initially, WAC 296-128-011 (which Plaintiffs ignore) outlines recordkeeping practices for employers that use reasonably equivalent systems and provides that these records must be “available” to DLI. If DLI wanted to create an approval requirement, it undoubtedly would have required “submission” of records instead of mere “availability.” Moreover, the plain language of WAC 296-128-012 does not create an approval requirement. Section (1)(a) of that provision states:

The compensation system under which a truck or bus driver subject to the [FMCA] is paid shall include overtime pay at least rea-

sonably equivalent to that required by RCW 49.46.130 for working [] in excess of forty hours a week. **To meet this requirement, an employer may, with notice to a truck or bus driver subject to the [FMCA], establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime.** *An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula* (emphasis added).

Plaintiffs ignore the second (bolded) sentence of the regulation, which states that an employer may “establish” an alternative compensation system “with notice” to drivers. By using the term “may,” the regulation gives employers permission to create such systems. The only prerequisite stated is that employers must give “notice” to their employees. The regulation could have said “with approval by the department and notice to drivers,” but does not. Instead of addressing the second sentence, Plaintiffs focus on the third (italicized) sentence, which provides that an employer shall substantiate any deviations from hourly pay “to the satisfaction of the department.” That sentence does not say that employers must submit their compensation plans to DLI nor does it say that the plans must be “approved.” Instead, WAC 296-128-012(1)(c) provides that DLI “may evaluate” alternative systems. The “substantiate” language in subsection (1)(a), when read in conjunction with the “may evaluate” language in subsection (1)(c) and the “available ... at the request of the department” language in WAC 296-128-011, merely requires an employer to

substantiate its plan if DLI decides to evaluate an employer's compensation system and asks for substantiation.

Such an interpretation of the regulations is supported by the regulatory history of the provisions. In an explanation of changes made between the interim and permanent versions of the 1989 regulations, the Director of DLI Joseph Dear stated:

The permanent rule clarifies that the department **may require** an employer to substantiate its use of a compensation scheme other than payment on an hourly basis. (emphasis added)

CP 827. Similarly, in its small business impact statement, DLI explained that "the alternative compensation system authorized by the 1989 amendments is an option an employer may choose." CP 823. Thus, DLI understood that the regulations gave DLI authority to investigate the validity of compensation systems; however, DLI did not view the regulations as creating an approval requirement. *Id.*

To the extent there was any doubt as to whether the regulations require employers to obtain approval of their alternative compensation plans, that doubt was eliminated when DLI amended the regulations in October 2008. A new subsection (3) was added to the regulation that states an employer "may, within ninety days of the adoption of this subsection, submit a proposal consistent with subsection (1) of this section to the department for approval of a reasonably equivalent compensation system."

Use of the word “may” (rather than “must” or “shall”) is telling. It means that employers have the option, but are not required to do so. *E.g., State v. Pineda-Guzman*, 103 Wn. App. 759, 763, 14 P.3d 190 (2000) (“may” implies “permissive, optional, or discretionary, and not mandatory action or conduct,” but “shall” is “generally imperative or mandatory”).

The commentary surrounding the 2008 amendment supports the conclusion that an approval requirement does not exist. The Preproposal Statement issued by DLI in May 2008 explains: “Language will also be added that allows employers to submit their compensation systems to the department for review and approval.” CP 830. A DLI statement that accompanied the Proposed Rule issued in July 2008 further explains:

. . . . Employers who paid workers on a basis other than an hourly basis with time and a half for overtime hours will have the opportunity to get formal review of their compensation systems.

. . . .

Employers are already able to submit their compensation systems to the department. However, the added language will expressly require the department to review compensation systems for time periods before March 1, 2007

CP 833. DLI’s use of “allows employers to submit,” “are already able to submit,” and “will have the opportunity to get formal review” would make no sense if employers were already “required” to submit alternative compensation systems to DLI for approval.

Thus, Plaintiffs’ attempt to create an approval requirement from

whole cloth is counter to the language and intent of the regulations and should be rejected. *Cf. Cerrillo*, 158 Wn.2d at 201.

c. The 2004 Letter that Plaintiffs Cite Does Not State That DLI Must Approve Reasonably Equivalent Compensation Plans

Plaintiffs take the word “approved” in the 2004 Letter and attempt to turn that word into a legal requirement that all reasonably equivalent plans must be approved by DLI. The letter simply does not say that.

Initially, the context of the 2004 Letter makes clear that DLI was not attempting to establish an approval requirement. There is nothing – other than Plaintiffs’ unsupported assertions – to suggest that the letter was interpreting whether Section 2(f) includes an approval requirement. In fact, the 2004 Letter was written in response to a letter in which an attorney asked DLI to confirm his interpretation of how to properly calculate Regular Overtime under WAC 296-128-012(2) when a driver is paid at multiple piece rates. CP 1344-46. The letter did not ask about reasonably equivalent compensation systems, let alone whether they must be approved. *Id.* The 2004 Letter identifies the subject as “WAC 296-128-012(2)” and notes that it is responding to a request “for an interpretation of WAC 296-128-012(2),” which does not address equivalent compensation plans. The 2004 Letter focuses on how to calculate Regular Overtime under subsection (2). Although the 2004 Letter references subsection

(1) and uses the word “approved,” there is nothing to suggest that DLI was attempting to create a new requirement for that subsection.

Even if “approved” is plucked out of context from the 2004 Letter and transformed into an approval requirement, there is nothing to suggest that it is referencing approval by DLI. It could well be referencing approval by employees, or a union, or a court. In fact, by the time of the 2004 Letter, courts had already issued decisions independently approving Section 2(f) systems. CP 898-906; *Schneider*, 116 Wn. App. at 718.

Finally, even if DLI was attempting to create an approval requirement, any such requirement would be invalid. DLI can interpret the law, not change it. *E.g.*, *Cerrillo*, 158 Wn.2d at 205-06. Absent an explanation from DLI as to how Section 2(f) creates an approval requirement, DLI’s mere use of the word “approved” is entitled to no deference. *See Senate Republican Campaign Comm. v. Public Disclosure Comm’n of Wash.*, 133 Wn.2d 229, 241, 943 P.2d 1358 (1997) (“[a]n administrative determination will not be accorded deference if the agency’s interpretation conflicts with the relevant statute”).

**d. DLI’s Formal Interpretation of Section 2(f)
Makes Clear There Is No Approval Requirement**

In October 2008, DLI issued DLI Admin. Policy ES.A.8.3, which is entitled “Process Protocols for Reasonably Equivalent Overtime Com-

pensation Plans for Truck & Bus Drivers.” That starts by stating:

Companies **may voluntarily submit** to L&I for its review under RCW 49.46.130(2)(f) and WAC 296-128-011 and -012 a compensation system for truck and bus drivers subject to the [FMCA] that includes overtime pay for hours over forty per workweek and is reasonably equivalent to traditional overtime.

CP 1352-58 (emphasis added). This seven-page interpretation does not include a single statement from DLI suggesting that approval is mandatory.²¹ When such DLI interpretations are consistent with the statute, they are entitled to deference. *E.g., Stahl*, 148 Wn.2d at 886-87.

e. Courts Have Rejected an Approval Requirement

In light of this statutory and regulatory language and history, it is no surprise that the courts have found that prior approval is not required under Section 2(f). For instance, in 2001, a trial court made an independent determination that a compensation system complied with Section 2(f) even though the company had already submitted its system to DLI and obtained approval. CP 898-906. On appeal, the employees challenged DLI’s approval because the agency allegedly did not consider all the evidence. *Schneider*, 116 Wn. App. at 717. The Court of Appeals found that this challenge “is of little or no importance to the determination of this

²¹ The Court should note that in the 19 years between adoption of Section 2(f) and this DLI policy, DLI only reviewed 9 Section 2(f) plans. CP 807, 838-911. This is in stark contrast to the 41 companies being investigated when Section 2(f) was adopted. CP 816-17.

case” because “the trial court specifically stated it made an independent review of the decision.” *Id.* at 718. If DLI approval was mandated, then the validity of DLI’s process would have been paramount rather than “of little or no importance.” The only conclusion that can be drawn here is that the trial court could make a reasonably equivalent determination with or without DLI approval.

This conclusion was confirmed by a subsequent decision. CP 868-73. In that case, plaintiffs argued that DLI’s provisional approval of a compensation plan had expired and the employer had failed to provide DLI with required follow-up information. CP 871. The court rejected this argument, holding that the facts alleged did “not invalidate the compensation scheme” and that “whether the Department’s approval was provisional or whether United States Bakery sent in current data is irrelevant to the validity of the compensation plan.” *Id.* As the Court of Appeals has twice intimated, there is no requirement that DLI approve a compensation system under Section 2(f). *See Schneider*, 116 Wn. App. at 718, CP 868-73.

f. Safeway Submitted the ABC System To DLI and Provided Information To Its Satisfaction

As part of their approval argument, Plaintiffs also assert that Safeway has “neither sought, nor obtained, the approval of DLI” for the ABC

System. This is false. On February 14, 2007, DLI sent Safeway an investigation letter asking Safeway to perform an in-house audit of its compensation practices for drivers in Washington State. CP 917-18. Safeway sent a response to DLI on March 21, 2007, outlining the ABC System, explaining how it falls within Section 2(f), and asking DLI to issue a determination that the ABC System is in compliance with State law. CP 920-25. The agency had no further communications with Safeway, never asked for additional information, and never indicated any doubt that the ABC System was appropriate under Section 2(f). CP 808. Safeway thus submitted its compensation system to DLI and satisfied any obligation it had to “substantiate” the ABC System “to the satisfaction of the department” as provided in WAC 296-128-012(1). The end result was that DLI closed its investigation without finding a violation.

C. The Superior Court Properly Denied Reconsideration

Denial of a motion for reconsideration is reviewed under an abuse of discretion standard. *E.g., Wilcox v. Lexington Eye Instit.*, 130 Wn. App. 234, 241-42, 122 P.3d 729 (2005). Plaintiffs moved for reconsideration of the Court’s summary judgment ruling, arguing that the ABC System does not provide reasonably equivalent compensation based on a different analysis of the same payroll data that had been in their possession for months. CP 1422-26. Plaintiffs provided no justification under CR 59 as to

why the Court should have reconsidered its detailed summary judgment ruling. *Id.* The Brief of Appellant is silent on this issue and provides no evidence of abuse of discretion. Thus, the Court should affirm the Court's order denying reconsideration and should also refuse to consider the belated arguments made and evidence submitted on reconsideration.

D. The Superior Court Properly Awarded Costs

Plaintiffs do not contest the award of \$701.41 if summary judgment is affirmed. CP 1539-40.

VI. CONCLUSION

Based on the foregoing, Safeway respectfully requests the Court to affirm the Superior Court's summary judgment order and other rulings.

DATED this 4th day of September, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2009, I served a true and correct copy of the foregoing Brief of Respondent by First Class U.S. Mail to Appellants' counsel at his last-known addresses:

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***Collins v. Heritage Wine Cellars, Ltd.*, 2008 WL 5423550 (N.D. Ill. 2008)**

United States District Court,
N.D. Illinois,
Eastern Division.

Anthony COLLINS, Antoine Lacy, James Neal, Nathaniel Thompson,
Jimmy Washington, Javier Murcio, Wayne Evans, Thomas Bennett, and
Wayne Evans, Jr., Plaintiffs,

v.

HERITAGE WINE CELLARS, LTD., and Steven Hirsch, Defendants.

No. 07-CV-1246.
Dec. 29, 2008.

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MEMORANDUM OPINION AND ORDER

ROBERT M. DOW, JR., District Judge.

**I* Currently pending before the Court are cross-motions for summary judgment by the collective Plaintiffs and Defendants. For the reasons set forth below, Plaintiffs' motion for summary judgment [31] is denied and Defendants' cross-motion for summary judgment [46] is granted in part and denied in part as moot.

I. Background

Plaintiffs filed a one-count complaint [1] initiating this action against Defendants on March 5, 2007. In their complaint, Plaintiffs allege that Defendants are “employers” engaged in interstate “commerce” and/or the production of “goods” for “commerce” within the meaning of the Fair Labor Standards Act (the “FLSA”), 29 U.S.C. § 203. Compl. ¶ 14.

Plaintiffs allege that Defendants, in contravention of the FLSA, “had a policy and practice of failing and refusing to pay Plaintiffs overtime compensation for hours worked in excess of forty (40) hours per week.” Compl. ¶¶ 17, 18. Plaintiffs seek recovery for overtime compensation and attorneys fees under the FLSA. Compl. ¶¶ 20, 21. Defendants' primary defense to Plaintiffs' allegations rests on the motor carrier exemption (“MCA exemption”), 29 U.S.C. § 213(b)(1).

II. Facts

A. Local summary judgment standards

The Court takes the relevant facts from the parties' respective Local Rule (“L.R.”) 56.1 statements.¹ The Court takes no position on whose version of disputed factual matters is correct. Local Rule (“L.R.”) 56.1 requires that statements of facts contain allegations of material fact, and that the factual allegations be supported by admissible record evidence. See L.R. 56.1; *Malec v. Sanford*, 191 F.R.D. 581, 583-85 (N.D.Ill.2000). The Seventh Circuit teaches that a district court has broad discretion to require strict compliance with L.R. 56.1. See, e.g., *Koszola v. Bd. of Educ. of the City of Chicago*, 385 F.3d 1104, 1109 (7th Cir.2004); *Curran v. Kwon*, 153 F.3d 481, 486 (7th Cir.1998) (citing *Midwest Imports, Ltd. v. Coval*, 71 F.3d 1311, 1317 (7th Cir.1995) (collecting cases)).

FN1. See [31] Plaintiffs' Local Rule 56.1(a)(3) Statement of Facts (“Pls.SOF”); [50] Defendants' Response to Plaintiffs' Local Rule 56.1 Statement of Facts (“Defs.Resp.”); [48], Defendants' Combined Local Rule 56.1(a)(3) Statement of Facts and 56.1(b)(3) (C) Statement of Additional Facts (“Defs.SOF”); and [58] Plaintiffs' Response to Defendants' Combined Local Rule 56.1(a)(3) Statement of Facts and 56.1(b)(3)(C) Statement of Additional Facts (“Pls.Resp.”).

Where a party has offered a legal conclusion or a statement of fact without offering proper evidentiary support, the Court will not consider that statement. See, e.g., *Malec*, 191 F.R.D. at 583. Additionally, where a party improperly denies a statement of fact by failing to provide adequate or proper record support for the denial, the Court deems admitted that statement of fact. See L.R. 56.1(a), (b)(3)(B); see also *Malec*, 191 F.R.D. at 584. The requirements for a response under Local Rule 56.1 are “not satisfied by evasive denials that do not fairly meet the substance of the material facts asserted.” *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233

F.3d 524, 528 (7th Cir.2000). In addition, the Court disregards any additional statements of fact contained in a party's response rather than in its statement of additional facts. See, *e.g.*, *Malec*, 191 F.R.D. at 584 (citing *Midwest Imports*, 71 F.3d at 1317).

B. Pertinent facts for purposes of cross-motions for summary judgment²

FN2. The Court notes that many of the statements of fact set forth in both parties' submissions are not relevant to the Court's disposition of the pending motions.

1. Plaintiffs and Defendants

*2 All of the Plaintiffs are residents of Illinois. Defs. SOF ¶ 1. Defendant Hirsch also is a resident of Illinois. *Id.* ¶ 3. Defendant Heritage does business within the Northern District of Illinois and maintains its corporate headquarters in Niles, Illinois. *Id.* ¶ 2. Since at least March 1, 2004, Heritage has operated a warehouse in Niles, Illinois. *Id.*

Hirsch is Heritage's President and Chief Executive Officer. Pls. SOF ¶ 34, Ex. 2, Gonzalez Dep. at 89:19-20. He is responsible for overseeing the day-to-day operations of Heritage, including, among other things, reviewing the finances of the company, exercising authority to set employees' rates of pay, reprimanding employees, and participating in the employee hiring and firing process. Pls. SOF ¶ 35. Hirsch also is responsible for Heritage's marketing, purchasing, sales, and operational activities. Defs. SOF, Ex. L, Hirsch Aff. ¶ 1.

Heritage is, among other things, a wholesale wine importer and distributor in the Chicago area, servicing Illinois since 1981. Pls. SOF ¶ 1, Exs. 1-2; Defs. Resp. ¶ 1. During the relevant period, Heritage grossed more than \$500,000.00 per year and engaged in interstate commerce activities. Pls. SOF ¶ 2.

Plaintiff Wayne Evans, Sr. has worked as a driver and has made deliveries for Heritage from approximately November, 2001 through the present. Pls. SOF ¶ 7, Ex. 10 Evans Dep. at 5:8-11; Defs. SOF ¶ 15. Evans, Sr. also spent between one and two hours a day loading trucks. Defs. SOF ¶ 15; Pls. Resp. ¶ 15. Since March 2004, Evans, Sr.'s regular route has been the far southwest suburbs of Chicago, including Downers Grove, Wheaton, Glen Ellyn, Naperville, Batavia, Schaumburg, and Des

Plaines. Defs. SOF ¶ 17. Evans, Sr. made deliveries at least once a week in these locations to customers such as Binny's, Trader Joe's (through early 2005), Whole Foods, Costco and Sam's Club. *Id.*

Plaintiff Antoine Lacy worked for Heritage as a driver delivering products from July, 1997 until April 14, 2007. Pls. SOF ¶ 8, Ex. 12, Lacy Dep. at 4:13-14, 4:18-19; Defs. Resp. ¶ 8; Defs. SOF ¶ 9. Lacy's job responsibilities included the delivery of product, occasional oversight of other drivers, and passing out routes to other drivers. Defs. SOF ¶ 9. At times, Lacy also loaded trucks. *Id.* Lacy drove a twenty-four foot truck that weighed more than 10,000 pounds. Defs. SOF ¶ 9. Lacy had a permanent route from March, 2004 through April, 2007 in the Chicago Gold Coast area, which included deliveries to Trader Joe's, Whole Foods, Sam's Club, and Costco. *Id.* ¶ 11. Lacy made deliveries to Trader Joe's two to four times a week. *Id.*

Plaintiff Jimmy Washington worked as a driver and made deliveries for Heritage from September 26, 1994 until July, 2007. Pls. SOF ¶ 9, Ex. 16, Washington Dep. at 4:16-22; Defs. SOF ¶ 26. Washington drove a fourteen-foot truck that weighed approximately 26,000 pounds. Defs. SOF ¶ 26. Washington was assigned to a route in the Northeast suburbs, and made deliveries to Binny's in Skokie, Highland Park, and Glencoe, Wine Discount in Highland Park, and Trader Joe's (through early 2005) in Highland Park and Night Bridge. *Id.* ¶ 28.

*3 Plaintiff Nathaniel Thompson has worked as a driver and has made deliveries for Heritage since approximately January, 2001 through the present. Pls. SOF ¶ 10, Ex. 9, Thompson Dep. at 5:22-6:1. Thompson spends approximately an hour each day loading his truck. *Id.* Thompson is regularly assigned the same fourteen-to-sixteen foot truck that weighs approximately 14,500 pounds. Defs. SOF ¶ 18. Between March, 2004 and March, 2007, Thompson drove an assigned route in the Northwest suburbs, including customer locations in Buffalo Grove, Niles, Des Plaines, Schaumburg, Deerfield, Glenview, Northbrook, and Park Ridge. *Id.* ¶ 19. Thompson made deliveries at least once a week to those locations, including to large customers such as Binny's, Whole Foods, and Trader Joe's (until 2005). *Id.* Approximately three to four years ago, Plaintiff Thompson made one pick-up and two deliveries of wine to a location in New Berlin, Wisconsin. Pls. SOF ¶ 10. Plaintiff Thompson did not travel outside of Illinois for any other deliveries or pick-ups. *Id.*

Plaintiff Anthony Collins worked as a driver delivering product for Heritage from April, 2003 until March, 2007. Pls. SOF ¶ 11, Ex. 13, Collins Dep. at 7-8; Defs. SOF ¶ 6. Collins also spent at least thirty minutes each day loading trucks. Defs. SOF ¶ 6. Collins drove a van and a fifteen-foot truck that weighed more than 10,000 pounds. Defs. SOF ¶ 6. Collins generally had the same downtown route every day and delivered product to the same customers weekly. *Id.* ¶ 8. Those customers included Whole Foods and Trader Joe's. *Id.* Collins also made deliveries to Costco once or twice a week. *Id.*

Plaintiff Javier Murcio has worked as a driver and has made deliveries for Heritage from June, 2001 to the present. Pls. SOF ¶ 12, Ex. 14, Murcio Dep. at 5:22-6:1; Defs. SOF ¶ 20. Murcio drives an eighteen-foot truck that weighs over 10,000 pounds. Defs. SOF ¶ 20. Murcio spends approximately an hour and a half each day loading his truck. Defs. SOF ¶ 20. Since March, 2004, Murcio has driven a Northwest route which includes deliveries at least once a week to large customers, including three different Costco stores, Whole Foods, four different Trader Joe's stores (through early 2005), and three different Binny's locations. *Id.* ¶ 22.

Plaintiff Thomas Bennett has worked as a driver and has made deliveries for Heritage since approximately August, 1998 through the present. Pls. SOF ¶ 13, Ex. 11, Bennett Dep. at 5:23-6:3; Defs. SOF ¶ 12. Bennett spends approximately one and one half to two hours a day loading trucks. Defs. SOF ¶ 12. Since March, 2004, Bennett has driven a twenty-four-foot truck that weighs approximately 33,000 pounds. Defs. SOF ¶ 12. Bennett had an assigned route for the last few years which included Lombard, Downers Grove, Oak Brook, and Oak Park, and made deliveries on that route to customers such as Binny's, Trader Joe's (at least through 2005), Costco, and Whole Foods. *Id.* ¶ 14. Pls. Resp. ¶ 14. In 2006, Bennett made occasional pick-ups from New Berlin, Wisconsin, and Indianapolis, Indiana in a van that weighed less than 10,001 pounds. Pls. SOF ¶ 13, Ex. 11, Bennett Dep. at 45:22-49:7; Defs. Resp. ¶ 13.

*4 Plaintiff James Neal worked as a truck driver and delivered product for Heritage from February, 2002 until February 21, 2005. Pls. SOF ¶ 14, Ex. 8, Neal Dep. at 5:10-14; Defs. Resp. ¶ 14; Defs. SOF ¶ 23. Neal drove an eighteen-foot truck that weighed less than 26,000 pounds. Defs. SOF ¶ 23. Neal also was responsible for loading his truck each morning. *Id.* Between March, 2004 and February 21, 2005, Neal was assigned to the

downtown Chicago Loop route, and made deliveries to a Sam's Club, Trader Joe's, and Binny's in that area. Defs. SOF ¶ 25.

Heritage pays (or paid) all Plaintiffs on an hourly basis. *Id.* ¶¶ 7-14; Defs. Resp. ¶¶ 7-14. None of the Plaintiffs has knowledge of Heritage's volume of shipments, sales projections, volume of customer purchases, customer demand, sales plans, supplier goods, projections of customer demand, historical sales figures, actual present orders, or relevant market surveys. Defs. SOF ¶¶ 7, 11, 13, 16, 21, 24, 27. Based upon a review of route sheets covering their deliveries, however, each Plaintiff is aware of the quantities and types of wines that he delivered for particular customers on a day-to-day basis. Pls. Resp. ¶¶ 7, 11, 13, 16, 21, 24, 27, Evans, Sr. Decl. ¶¶ 6-7, Lacy Decl. ¶¶ 6-7, Washington Decl. ¶¶ 6-7, Thompson Decl. ¶¶ 6-7, Collins Decl. ¶¶ 6-7, Murcio Decl. ¶¶ 6-7, Bennett Decl. ¶¶ 6-7, Neal Decl. ¶¶ 6-7.

As explained above, on limited occasions, Plaintiffs Thompson and Bennett made interstate deliveries and/or pick-ups outside of Illinois, and drove vans on those trips. Pls. SOF ¶ 6; Defs. Resp. ¶ 6. Heritage acknowledges that Plaintiffs Evans, Sr., Lacy, Washington, Collins, Murcio, and Neal never made or were asked to make pick-ups or deliveries outside of Illinois. Pls. SOF ¶¶ 7-9, 11-12, 14; Defs. Resp. ¶¶ 7-9, 11-12, 14. Consistent with that acknowledgement, Heritage's Chief Financial Officer ("CFO") J.R. Gonzalez has no recollection of any Plaintiff other than Thompson and Bennett driving outside of Illinois, nor does he believe that an expectation was established that Plaintiffs would be required to make such out-of-state trips. Pls. SOF Ex. 2, Gonzalez Dep. at 44:12-19.

The parties' relationship during the relevant period was governed by a collective bargain agreement. On August 20, 2004, Heritage entered into a "Labor Contract and Working Agreement" (the "Agreement") with its employees which governed, among other things, the payment of overtime wages. Pls. SOF ¶ 15. Pursuant to the express terms of the Agreement, Heritage agreed that "[t]ime and one-half rate shall be paid after eight (8) hours in one day and after forty any hours in any one week." *Id.* ¶ 16; Defs. SOF ¶ 79. Heritage's CFO J.R. Gonzalez indicated that even though the Agreement stated that Heritage's union employees would be paid overtime, Heritage never intended to honor the contract. Pls. SOF ¶ 17, Ex. 2, Gonzalez Dep. at 21:8-11, 22:2-6. Consistent with that position and notwithstanding the Agreement, prior to January, 2007 Heritage did not

pay overtime to Plaintiffs for hours worked over forty (40) hours per week. Pls. SOF ¶ 17. At least one Plaintiff, Thompson, for example, has no recollection of Heritage posting any information about minimum wage rights or overtime rights. *Id.* ¶ 19, Ex. 9, Thompson Dep. at 45:19-46:2.

*5 Additionally, although Heritage was required to maintain a time clock to track employees' hours worked pursuant to the terms of the Agreement, Heritage failed to do so. Pls. SOF ¶ 18. Heritage maintained no accurate records identifying the actual hours worked by Plaintiffs during the relevant period. *Id.*

2. Heritage's Operations

Heritage imports wines from all over the world, including from Italy, Germany, Spain, and France. Pls. SOF ¶ 20; Defs. Resp. ¶ 20. Since at least March 1, 2004,³ 100% of Heritage's revenues have resulted from out-of-state shipments of wine merchandise into Heritage's warehouse located in Niles, Illinois. Defs. SOF ¶ 29. Heritage's customers have included restaurants, hotels, chain stores, and independent retail merchants such as Trader Joe's (through early 2005), Binny's, Cost Plus World Market, Whole Foods, Schafer's, Costco, Wine Discount Centers, and Sam's Wine and Spirits. *Id.* ¶ 30; Pls. Resp. ¶ 30. These customers accounted for 69.4% of the cases of wine delivered in 2004, 35.0% of the cases of wine delivered in 2005, and 36.6% of the cases of wine delivered in 2006. Defs. SOF ¶ 31. For example, in 2004, these eight customers accounted for 49.1 % of the dollar sales of wine to Heritage's customers. *Id.* In 2004, Heritage made approximately \$45,700,000 in total sales, \$23,000,000 (or approximately 51%) of which were derived from sales to Heritage's largest customers and represented 70% of the total cases shipped by Heritage. *Id.* ¶ 32. In 2005, Heritage did approximately \$32,500,000 in total sales, \$11,500,000 (or approximately 35%) of which were derived from sales to Heritage's largest customers, representing 38% of all cases shipped by Heritage. *Id.* ¶ 33. In 2006, Heritage did approximately \$38,000,000 in total sales, \$13,500,000 (or approximately 35%) of which were derived from sales to Heritage's largest customers, representing 38% of all cases shipped by Heritage. *Id.* ¶ 34.

FN3. The unconverted facts regarding Heritage's operations all date to a starting point of March 1, 2004. Unless otherwise noted, the Court's references to Heritage's operations fall within the timeframe of March 1, 2004 forward.

Heritage buys wines from vineyards or wineries, all of which are located outside Illinois. *Id.* ¶ 35. All product that comes into Heritage's warehouse is purchased by Heritage. *Id.* ¶ 29. Bills of lading for wine purchased by Heritage designate Heritage as the purchaser and list Heritage as the customer to whom the wine is delivered. Pls. SOF, Ex. 3, Hirsh Dep. at 16:19-22. Heritage's Warehouse Manager, David O'Connell, confirmed that at the time that wine comes into Heritage's Chicago warehouse, Heritage generally is identified as the customer or the purchaser of the wine. Pls. SOF ¶ 20, Ex.6, O'Connell Dep. at 11:21-12:1. David O'Connell testified that 99% of the orders for Heritage's customers are picked and pulled in the warehouse in Chicago rather than being sent directly to a customer. Pls. SOF ¶ 20; O'Connell Dep. at 11:16-20. The paperwork associated with most, if not all, of Heritage's transactions with the out-of-state wineries or vineyards, identifies only Heritage (and no other entity) as the shipper. Pls. Resp. ¶ 42; Gonzalez Dep. at 52:24-53:14, O'Connell Dep. at 11:21-12:1.

*6 Heritage has arranged for the transportation of the wine from those vineyards or wineries to its warehouse in Illinois by paying for all of the transportation charges, both out-of-state (by engaging drivers to bring the wine to Illinois) and locally (by employing Plaintiffs to make deliveries within Illinois). Defs. SOF ¶ 35; Pls. SOF ¶ 35. Specifically, Heritage covers transportation costs by (i) paying for the taxes, (ii) paying for the freight, (iii) paying for the insurance, (iv) paying for all custom fees, (v) transporting the wine freight on board (F.O.B.), (vi) hiring and paying the freight forwarder that arranged for the transportation, (vii) determining the type of shipping container, including whether temperature is controlled or refrigerated or insulated, and (viii) acting as its own custom broker. Defs. SOF ¶ 36. In 2004, Heritage spent a total of \$2,247,207.83 on these latter shipping costs; in 2005, \$1,790,162.02; and in 2006, \$2,162,274.62. *Id.* ¶ 37.

Once the wine left the winery or vineyard, Heritage was responsible for it. *Id.* Upon tender to the over-the-road trucker for domestic shipments coming from the East or West Coast, Heritage took title to and control of the wine, which then was transported to Heritage's warehouse in Niles, Illinois. Defs. SOF ¶ 38. With overseas shipments, Heritage took possession of the shipping container at the point of origin. *Id.* ¶ 39. With domestic shipments transported by over-the-road trucks, Heritage took possession of the wine at the winery or vineyard, or the location where the winery or vineyard stored its wines for transportation purposes. *Id.* For

overseas shipments, Heritage has used a freight forwarder that has acted as Heritage's agent in arranging the transportation for which Heritage has paid. *Id.* ¶ 40. In short, the product that Heritage arranges to transport is Heritage's responsibility from the time that it leaves its point of origin or the location where the wine was stored (for example, a winery). *Id.*

Hirsch attests that pre-orders or pre-arrival orders, which involved standing orders, pre-arrival offering, clearing of merchandise, and wine sold as futures, have accounted for approximately 25% of the cases of wine Heritage ships. Defs. Resp. ¶ 20; Defs. SOF ¶ 41, Hirsch Aff. ¶ 6.⁴ In those instances, Heritage arranged the transportation of that wine from out-of-state and overseas wineries to Heritage's warehouse in Niles, Illinois, and then Heritage's drivers delivered that wine from Heritage's warehouse to the customers from whom it received pre-orders within a few days of the wine's arrival to its warehouse. *Id.* For example Binny's, whose purchases accounted for approximately 10% of Heritage's total business, used standing orders to order wine. Defs. Resp. ¶ 20, Ex. M, Hirsch Aff. ¶ 6; Defs. SOF ¶ 42, Hirsch Aff. ¶ 8. Binny's would detail what wine it wanted to purchase and ship, a certain quantity, and the date on which it should be delivered. Defs. SOF ¶ 42, Hirsch Aff. ¶ 8. Approximately 20% of the business that Binny's did with Heritage came from standing orders. *Id.* Other customers with similar arrangements with Heritage included Sam's, the Wine Discount Center Stores, and Costco. *Id.* These types of orders accounted for approximately 5% of Heritage's gross sales, and 5% of the deliveries made by Heritage locally (by Plaintiffs). *Id.*

FN4. Plaintiffs respond to a number of Defendants' statements of fact by stating that "Defendants have not submitted a single document to this Court or Plaintiffs that would either confirm or deny [the] statement or that would establish that the shippers * * * had any knowledge that anyone other than Heritage was the intended ultimate purchaser of the wine at the time it was shipped." Pls. Resp. ¶ 41; see also Pls. Resp. ¶¶ 42-49. Plaintiffs do not, however, offer any evidence that contradicts the specific evidence by which Hirsch has attested in these statements. Rule 56 makes clear that a moving party may support its summary judgment motion by affidavit. Fed.R.Civ.P. 56(c), 56(e)(1). The adverse party "by affidavits or [other evidence], must set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2). Because Plaintiffs fail to provide contrary evidentiary proof sufficient to call into question the facts attested to by Hirsch that are within his personal knowledge, those facts are deemed admitted

pursuant to L.R. 56.1(b)(3)(B). See *Raymond v. Ameritech Corp.*, 2005 WL 525421, at *3 (N.D.Ill. March 4, 2005) (citing L.R. 56.1(b)(3)(B)) (“The opposing party's failure to controvert the moving party's statement of fact results in the moving party's version of the fact being admitted”).

*7 Of the more than \$13 million in sales that Heritage did with Trader Joe's in 2004, approximately \$12 million, or 92.3% sales volume, involved sales where Trader Joe's selected and ordered wine in advance of Heritage placing the order with the winery or vineyard. Defs. SOF ¶ 43, Hirsch Aff. ¶ 16. Hirsch attests that approximately 90% of the deliveries that Heritage's drivers made to Trader's Joes locations in 2004 involved wine that Trader Joe's had ordered in advance. *Id.*

In the years 2004-2007, Heritage also arranged certain “private label wine” orders where the Heritage's customer requested that particular wine be “expressly designated” for that customer. Defs. SOF ¶ 44, Hirsch Aff. ¶ 9. For example, the wine brands Painted Horse and Riven Rock from California and Vida Organica from Argentina, respectively, were transported by Heritage exclusively for, and sold to, Whole Foods. *Id.* Heritage agreed to purchase, transport and deliver the wine to Whole Foods from the wineries or vineyards in California and Argentina. *Id.* Approximately 5% of Heritage's total wines sales and approximately 5% of its deliveries made by its drivers involved private label wines or similar arrangements with Heritage's customers. *Id.*

Heritage also used pre-buy sheets for certain limited-offering wines, allowing for pre-arrival ordering. Defs. SOF ¶ 45, Hirsch Dep. at 36-17-23, 37-18; Hirsch Aff. ¶ 11. For pre-arrival offerings, Heritage required customers to take immediate delivery of the wine upon arrival at Heritage's warehouse. Defs. SOF ¶ 45, Hirsch Aff. ¶ 11. For example, in the years 2004-2007, Heritage ordered a selection of expensive wines from the Burgundy region in France. *Id.* Heritage took orders from customers by a required date, placed an order with the winery, and transported the wine to Heritage's warehouse. *Id.* Heritage's drivers then delivered the wine to the customers. *Id.* Heritage delivered approximately 1,000 cases of wine from the Burgundy region through this pre-arrival offer each year. Heritage's pre-arrival offering business represented approximately 15% of the deliveries transported by Plaintiffs as Heritage's drivers. *Id.*

Hirsch made customer demand projections when determining how much wine to order and transport from out-of-state or overseas wineries and vineyards and then sell to Heritage's Illinois customers based on a review of the following: (i) historic need and usage of Heritage's customers; (ii) anticipated sales conditions; (iii) specific or standing orders by Heritage's customers; (iv) historical sales figures to and past order history of Heritage's customers; (v) projections of likely need by Heritage's customers. Defs. SOF ¶ 47, Hirsch Aff. ¶ 13. As an example, to gauge the volume of Painted Horse wine to be transported through Heritage's warehouse and delivered to Whole Foods, Hirsch reviewed several factors, including Whole Food's buying habits, Whole Food's historical need for Painted Horse wine, anticipated sales conditions, and market trends. Defs. SOF ¶ 49, Hirsch Aff. ¶ 15.

*8 A majority of the wine delivered to Heritage has been placed in the warehouse for a limited period of time. Defs. SOF ¶ 50. Heritage brought over-the-road trucks in every two weeks to ensure a constant rotation of the wine merchandise in the warehouse. *Id.* Thus, the wine that Heritage purchased rotated through the warehouse on a regular, constant basis throughout the year. *Id.* For example, most of the domestic wines purchased by Heritage completely turn over approximately every month. *Id.*

Heritage has kept detailed records of each log of the trip and/or transportation of the wine from origin to destination at Heritage's warehouse. Defs. SOF ¶ 53. A computer system was used to track and document the wine cases coming in and going out, including, for example, the name of the winery where the wine was produced, and the destination of the wine. *Id.* Heritage tracked the transportation of the wine from the time that the winery gave Heritage a release date for the wine to be transported by the over-the-road drivers to when it was received in Heritage. *Id.* Once at the warehouse, the wine is still subject to control and direction as to its subsequent transportation or delivery by Heritage's drivers (such as the Plaintiffs) to Heritage's customers. *Id.* ¶ 54.

When Heritage purchases and receives wine from outside of Illinois, the wine is delivered by truck on shrink-wrapped pallets to its Niles warehouse in Illinois. Pls. SOF ¶ 21; Defs. SOF ¶ 55. The pallets are then unwrapped and broken down, and the wine is placed inventory in the warehouse. Defs. SOF ¶ 57; Pls. Resp. ¶ 57. In most instances, upon receipt of a local order from an Illinois customer, the wine is then picked

from inventory by Heritage warehouse workers, placed on a pallet different from the one on which the wine initially arrived, and sorted for local delivery by Plaintiffs. Pls. SOF ¶ 23; Defs. Resp. ¶ 23.

Heritage is not licensed with the Department of Transportation or the Federal Motor Carrier Safety Administration as a motor carrier. Pls. SOF ¶ 5; Defs. Resp. ¶ 5. Trucks owned by Heritage are only licensed to be driven in Illinois. *Id.* Prior to January of 2007, Defendants never consulted with the Department of Labor to determine whether their pay practices were in compliance with the FLSA. Pls. SOF ¶ 37. Nor had Defendants, prior to January, 2007, consulted with an accountant or an attorney to determine whether their pay practices were in compliance with the FLSA. *Id.* ¶¶ 38-39. Up until January, 2007, Heritage had not used a time clock or paid employees for hours worked over forty hours in a work week. *Id.* ¶ 40.

III. Analysis

A. Standard of Review

Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). In determining whether there is a genuine issue of fact, the Court “must construe the facts and draw all reasonable inferences in the light most favorable to the nonmoving party.” *Foley v. City of Lafayette*, 359 F.3d 925, 928 (7th Cir.2004).

*9 To avoid summary judgment, the opposing party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (internal quotation marks and citation omitted). A genuine issue of material fact exists if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* at 248. The party seeking summary judgment has the burden of establishing the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is proper against “a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. The non-moving party “must do more than simply show that there is

some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). “The mere existence of a scintilla of evidence in support of the [non-movant’s] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson*, 477 U.S. at 252.

B. The FLSA and the MCA Exemption

On the facts before the Court, it is undisputed that Defendants did not pay Plaintiffs for time worked in excess of forty hours a week. See Pls. SOF ¶¶ 17, 40. The FLSA requires employers to pay employees one and one-half times their normal hourly wage for each hour they work in excess of forty hours per week. 29 U.S.C. § 207(a)(1). The question raised by both parties in their respective cross-motions for summary judgment is whether Heritage’s drivers are covered by the overtime mandate of the FLSA (as Plaintiffs contend) or whether Heritage can avail itself of an exemption to that mandate (as Defendants contend). Under the specific exemption that Heritage attempts to invoke, the FLSA’s overtime provisions do not apply to employees over whom “the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of [49 U.S.C. § 13502]” of the Motor Carrier Act. 29 U.S.C. § 213(b)(1). The Secretary of Transportation need not actually have exercised its power for the exemption to apply⁵-“it is the existence of that power [to establish qualifications and maximum hours of service] (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not § 7 of the Fair Labor Standards Act is applicable to these employees.” *Morris v. McComb*, 332 U.S. 422, 434, 68 S.Ct. 131, 92 L.Ed. 44 (1947); see also *Jones v. Centurion Invest. Assocs.*, 268 F.Supp.2d 1004, 1008 (N.D.Ill.2003). Although motor carriers may engage in both intrastate and interstate commerce, “a motor carrier cannot be subject to the jurisdiction of both the Secretary of Labor and the Secretary of Transportation.” *Ruiz v. Affinity Logistics Corp.*, 2006 WL 3712942, at *4 (S.D.Cal. Nov.9, 2006).

FN5. The Court finds unpersuasive Plaintiffs’ contention that Defendants’ failure to register with the Department of Transportation is subjective evidence that the Defendants themselves did not believe the exemption at issue was applicable. The question is not whether Heritage intended to be governed by the Department of Transportation or is in fact in compliance with Department of Transportation

regulations, but rather whether Heritage's activities fall within the motor carrier practices over which the Department of Transportation has power and authority. See *Jones v. Centurion Invest. Assoc., Inc.*, 268 F.Supp.2d 1004, 1008-1009 (N.D.Ill.2003) (“[T]he DOT retains its jurisdiction over employees within the scope of its authority regardless of whether or not it has chosen to exercise its regulatory authority, and the overtime exemption applies to such employees despite the lack of DOT regulation”).

***10** Pursuant to 49 U.S.C. § 31502, the MCA exemption applies to transportation as set forth in 49 U.S.C. §§ 13501 and 13502, which provide that the Secretary of Transportation may prescribe requirements for qualifications and maximum hours of service for “motor carriers” and “private motor carriers” “when needed to promote the safety of operations.” See 49 U.S.C. § 13502(b). Under the applicable Department of Labor regulation, the MCA exemption applies:

to those employees * * * 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 * * *, and (ii) as directly affecting the safety of operation of motor vehicles on the public highways in transportation in interstate or foreign commerce with the meaning of the Motor Carrier Act.

29 C.F.R. § 782.2(b)(2). “Exemptions [to the FLSA] are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.” *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) (citing *Mitchell v. Lubin, McGaughy, & Assoc.*, 358 U.S. 201, 211 (1959)); *Klein v. Rush-Presbyterian St. Luke's Med. Ctr.*, 990 F.2d 279, 282 (7th Cir.1993); see also *Nichols v. City of Chicago*, 1992 WL 92117, at *8 (N.D.Ill. Apr.30, 1992) (“An exemption to the FLSA may only be applied in circumstances which plainly and unmistakably come within the terms and spirit of the exemption.”). The employer bears the burden of demonstrating an employee's exempt status. *Piscione v. Ernst and Young, LLP*, 171 F.3d 527, 533 (7th Cir.1999); *Shaw v. Prentice Computer Publ'g, Inc.*, 151 F.3d 640, 642 (7th Cir.1997).

Here, Defendants bear the burden of showing that the MCA exemption applies to each Plaintiff. Because “[t]he exemption * * * depends upon the

activities of the individual employees,” Defendants must come forward with evidence as to “the character of the activities involved in the performance” of each Plaintiff’s job to enable the Court to determine whether Heritage owes each of the Plaintiffs overtime compensation. *McGee v. Corporate Express Delivery Systems*, 2003 WL 22757757, at *3 (N.D.Ill. Nov.20, 2003) (citing *Goldberg v. Faber Indus., Inc.*, 291 F.2d 232, 235 (7th Cir.1961)). The activities of one Plaintiff cannot justify a blanket exemption for other Plaintiffs. *Id.*

1. *The Practical Continuity of Interstate Commerce*

The parties do not dispute that Plaintiffs are or were employed as drivers for Heritage. As such, Plaintiffs’ actions affected the safety of operation of motor vehicles on the public highways. 29 C.F.R. § 782.2(b)(2); 29 C.F.R. § 782.3(a); see also *McGee*, 2006 WL 22757757 at *4. The parties’ dispute over the applicability of the motor carrier exemption centers on whether Plaintiffs were engaged in interstate commerce when making local deliveries for Heritage. There also is no dispute that only two of the Plaintiffs-Thompson and Bennett-ever made any interstate deliveries and the routes routinely driven by all of the Plaintiffs were entirely within Illinois (and in the Chicago area).

**II* Although the transportation provided by Plaintiffs in most instances did not cross state lines, the interstate commerce requirement still may be satisfied if the wine is transported within the borders of Illinois as part of a “practical continuity of movement” in the flow of interstate commerce. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568, 63 S.Ct. 332, 87 L.Ed. 460 (1943). When considering whether the goods are part of a practical continuity in the flow of interstate commerce, a crucial factor is the “original and persisting intention of the shippers.” *Baltimore & O.S. W.R.R. v. Settle*, 260 U.S. 166, 174, 43 S.Ct. 28, 67 L.Ed. 189 (1922); *Alice v. GCS, Inc.*, 2006 WL 2644958, at *1 (N.D.Ill. Sept.14, 2006) (“Crucial to a determination of the essential character of a shipment is the shipper’s fixed and persisting intent at the time of shipment”).

The parties appear to disagree on the appropriate test for determining “practical continuity” in the flow of interstate commerce. Defendants assert that the analysis set forth in a policy statement issued by the Interstate Commerce Commission in 1992 applies (see *Motor Carrier Interstate Transportation-From Out-of-State Through Warehouses to Points in Same State*, 8 I.C.C.2d 470, 1992 WL 122949, (May 8, 1992)

(hereinafter referred to as the “1992 policy statement”); Plaintiffs focus their analysis on an older ICC test, codified at 29 C.F.R. § 782.7(b), which was first developed in 1957. As explained below, the disagreement is important, for it bears on the Court's analysis for purposes of the parties' cross-motions for summary judgment on the MCA exemption issue.

In 1957, the ICC formulated a three-part test to assist in the determination of a shipper's intent at the time of shipment “where the transportation was confined to point in a single State from a storage terminal of commodities which have had prior movement by rail, pipeline, motor, or water from an origin in a different state.” Ex Parte No. MC-48, codified at 29 C.F.R. § 782.7. The 1957 test made clear that:

there is *not* fixed and persisting intent where: (i) at the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and (ii) the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and (iii) transportation in furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.

29 C.F.R. § 782.7(b)(2) (noting that the Sixth Circuit specifically adopted this test in *Baird v. Wagoner*, 425 F.2d 407 (6th Cir.1970)) (emphasis added). Most of Plaintiffs' arguments concerning the MCA exception presume that the 1957 ICC test applies. See, e.g., Pls. SJ Mem. at 6-7 (citing 29 C.F.R. § 782.7); Pls. Opp. at 11.

Since 1957, a number of courts have determined that other factors are relevant to determining the presence of a fixed and persisting intent to ship products in interstate commerce, including: (1) whether and for how long the length of time for the movement of product is interrupted by storage; (2) whether the product distribution has a low through-put compared to its storage capacity; (3) whether the carrier is in continuous possession of the product through to delivery; (4) whether the products are shipped on a “predetermined” ordering cycle; (5) whether the product is processed or commingled at the storage location; (6) whether the goods were intended for certain customers; and (7) whether the storage simply was a convenient and temporary way to convert the means of delivery from one form of transportation to another. *Musarra v. Digital Dish, Inc.*, 454 F.Supp.2d 692, 708 (S.D. Ohio 2006) (citing *Foxworthy v. Hiland Dairy*

Co., 997 F.2d 670, 672-673 (10th Cir.1993) (citing *Midwest Moto Freight Bureau v. I.C.C.*, 867 F.2d 458 (8th Cir.1989)); *Texas v. United States*, 866 F.3d 1546, 1556-1557 (5th Cir.1989); *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941, 947 (5th Cir.1969)). In 1990, foreshadowing the new position adopted by the ICC in 1992, the Fifth and Ninth Circuits observed that the three-part test for determining whether the shipper had a “fixed and persisting” intent had been phased out, and the Eighth Circuit went a step further, deeming the old test “outmoded” and specifically declining to adopt it. *Musarra*, 454 F.Supp.2d at 708 (citing *Roberts v. Levine*, 921 F.2d 804, 812 (8th Cir.1990)) (finding the *Baird* test codified at 29 U.S.C. § 782.7(b)(2) outmoded and declining to adopt it); *California Trucking Ass'n v. I.C.C.*, 900 F.2d 208, 213 (9th Cir.1990) (“Even though the ICC has never explicitly stated that it was abandoning the more structured [1957] test, it appears that its use of that standard has been refined, if not phased out”); *Central Freight v. I.C.C.*, 899 F.2d 413, 421 (5th Cir.1990) (stating that the ICC “appears to have implicitly recharacterized the applicable test”). The Fifth, Eighth, and Ninth Circuits all cited with approval a 1986 decision by the ICC, *Armstrong World, Inc. v. I.C.C.*, 2 I.C.C.2d 63, 69 (1986), in support of their decisions to move away from the prior test. *Musarra*, 454 F.Supp.2d at 708. In *Armstrong*, the ICC broadened the relevant inquiry, explaining that “[t]he determination of whether transportation between two points in [a] State in interstate (or foreign) or intrastate in nature depends on the ‘essential character’ of the shipment. * * * Crucial to this determination is the shipper's fixed and persisting intent at the time of shipment * * * [which] is ascertained from all the facts and circumstances surrounding the transportation.” *Armstrong*, 2 I.C.C.2d at 69.

***12** In its 1992 policy statement, the ICC promulgated an alternative test that has been applied in subsequent administrative proceedings involving disputes over whether transportation within a state constitutes intrastate or interstate commerce. See 1992 policy statement, Ex Parte MC No. 207, 8 I.C.C.2d 470, 1992 WL 122949 (May 8, 1992); see also *Advantage Tank Lines, Inc.*, No. MC-C-30198, 10 I.C.C.2d 64 (1994). In that policy statement, which Defendants contend controls here, the ICC offered more detail on the relevant inquiry for the determination of a shipper's intent when considering whether certain movement within a state constituted intrastate or interstate commerce. The ICC stated that “[t]he essential and controlling element in determining whether the traffic is properly characterized as interstate is whether the shipper has a ‘fixed and persisting intent’ to have the shipment continue in interstate commerce to

its ultimate destination.” 1992 Policy Statement, 1992 WL 122949, at *1. It went on to find that “[w]here the shipper has a ‘fixed and persisting intent’ that the merchandise continue in interstate or foreign commerce from or to an out-of-State origin or destination, via a warehouse or distribution center, is ascertained from *all the facts and circumstances surrounding the transportation.*” *Id.* at *2 (emphasis added).

The ICC noted that the following factors have been considered in establishing that the in-State component *is* part of a continuing movement in commerce, and hence subject to its regulation:

- (1) Although the shipper does not know in advance the ultimate destination of specific shipments, it bases its determination of the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. The factual basis for projecting customer demand may include, but is not limited to, historical sales in the State, actual present orders and relevant market surveys of need.
- (2) No processing or substantial product modification of substance occurs at the warehouse or distribution center. However, repackaging or reconfiguring (secondary packaging) may be performed.
- (3) While in the warehouse, the merchandise is subject to the shipper's control and direction as to the subsequent transportation.
- (4) Modern systems allow tracking and documentation of most, if not all, of the shipments coming in and going out of the warehouse or distribution center.
- (5) The shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier.
- (6) The warehouse utilized is owned by the shipper.
- (7) The shipments move through the warehouse pursuant to a storage-in-transit tariff provision.

Id. at *2. The ICC further noted that certain factors alone are insufficient to establish that the continuity of interstate commerce is broken at the

warehouse or distribution center. *Id.* In particular, the ICC observed “that the absence of time limitations on storage and the absence of storage-in-transit receipts by the warehouse or distribution center are not sufficient to establish that the continuity of interstate commerce is broken.”

Conversely, ICC has determined that the following factors are insufficient to establish a break in continuity:

- *13 (1) The shipper's lack of knowledge of the specific, ultimate destination [] at the time the shipment leaves its out-of-state destination;
- (2) Separate bills of lading for the inbound and outbound movements instead of through bills of lading;
- (3) Storage-in-transit tariff provisions;
- (4) Storage receipts issued by the warehouse or distribution center;
- (5) Time limitations on storage;
- (6) Payment of transportation charges by the warehouse or distribution center, when the shipper [] is ultimately billed for such charges;
- (7) Routing of the outbound shipment by the warehouse or distribution center;
- (8) A change in carrier or transportation modes at a distribution facility;
- (9) Use of brokers retained by the shipper; and
- (10) Use of a warehouse not owned by the shipper.

Id. at *2-3.

The ICC subsequently has applied its revised guidelines in administrative proceedings. See, e.g., *Advantage Tank Lines, Inc.*, No. MC-C-30198, 10 I.C.C.2d 64 (March 2, 1994); see also *Atlantic Indep. Union v. Sunoco, Inc.*, 2004 WL 1368808, at *6 (E.D.Pa. June 16, 2004); *Musarra*, 454 F.Supp.2d at 710. In an opinion letter dated January 11, 2005, the Department of Labor addressed the relationship between the two tests, acknowledging that the 1992 policy statement followed by the

Department of Transportation⁶ set forth seven factors for determining a shipper's fixed and persisting intent based upon the incorporation of case law developed subsequent to the cases upon which 29 C.F.R. § 782.7(b)(2) rested and had been applied by the DOT and others. See January 11, 2005 Opinion Letter, "*Intra/interstate Transportation of Gasoline and Section 13(b)(1)*", FLSA2005-10 (citing 1992 Policy Statement)⁷.

FN6. In 1996, Congress abolished the ICC and transferred many of its functions to the Surface Transportation Board, an agency with the Department of Transportation ("DOT"). See ICC Termination Act of 1995, Pub.L. No. 104-88, § 101, 109 Stat. 803, 804 (1995).

FN7. A copy of the January 11, 2005 DOL opinion letter can be found on the Department of Labor website at https://www.dol.gov/esa/whd/opinion/FLSA/2005/2005_01_11_10_FLSA_IntraInterstate.htm (last viewed on December 19, 2008).

Defendants urge the Court to apply the more flexible factors set forth in the 1992 Policy Statement and the DOL opinion letter. See Defs. Mem. at 4. As previously noted, Plaintiff's analysis implicitly rests on the more rigid test promulgated by the ICC in 1957 and subsequently adopted as 29 C.F.R. § 782.7. See *e.g.*, Pls. SJ Mem. at 5-6; Pls. Opp. at 11-12. Neither the parties' briefs nor the Court's independent review of the case law has uncovered any decision by the Seventh Circuit discussing whether a district court should apply the 1957 test or the 1992 Policy Statement when determining the shipper's intent for purposes of interstate commerce analysis. Several judges in this district have considered whether the MCA exemption applies, but none has directly addressed which standard should be applied. See, *e.g.*, *Jones v. Centurion Invest. Assocs.*, 268 F.Supp.2d 1004 (N.D.Ill.2003) (no mention of either test determining the shipper's intent); *McGee v. Corporate Express Delivery Sys.*, 2003 WL 22757757 (N.D.Ill. Nov.20, 2003) (same), *Alice v. GCS, Inc.*, 2006 WL 2644958, at *4-5 (N.D.Ill. Sept.14, 2006) (applying the 1957 test codified at 29 C.F.R. § 782.7(b)(2) without mention or consideration of the 1992 policy statement).

***14** In resolving the issue, the Court finds the reasoning of two district courts in other jurisdictions both relevant and persuasive. See *Atlantic Indep. Union v. Sunoco, Inc.*, 2004 WL 1368808, at *7 (E.D.Pa. June 16,

2004) (finding that application of the more recent test delineated by the ICC was warranted). *Musarra*, 454 F.Supp.2d at 711. As the *Atlantic* court aptly explained:

Many reasons compel the application of the more recent test delineated by the ICC. First and foremost, the determination regarding whether the commerce at issue is interstate or intrastate has always been determined by a totality of circumstances. *Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 268, 48 S.Ct. 107, 72 L.Ed. 270 (1927) (holding that in order to determine whether commerce in inter- or intrastate, courts must analysis “the essential character of the commerce” by examining the facts). Moreover, since its inception, many courts, including the *Baird* court that first adopted the 1957 test, have treated the test merely as a starting point from which to look at the totality of circumstances and have looked to factors outside the three-part test in order to determine a shipper's intent. (citations omitted). Additionally, before the ICC revised its older test, three circuit courts noted that the 1957 test was outmoded. *Roberts*, 921 F.2d at 804; *California Trucking*, 900 F.2d at 208; *Central Freight*, 899 F.2d at 413. Finally the ICC is now using the flexible multi-factor test in its own decisions. See, e.g. *Advantage Tank Lines, Inc.*, No. MC-C 30198, 10 I.C.C.2d 64 (March 2, 1994).

Atlantic, 2004 WL 1368808, at *7. The *Mussara* court similarly found the 1992 policy statement to be the more appropriate analysis, stating that “in the face of modern advancements and new shipping techniques, [the 1957 test] is no long sufficient to determine a shipper's intent accurately.” *Musarra*, 454 F.Supp.2d at 710-11. The *Musarra* court concluded that the defendant's “shipping system is more similar to those modern systems at issue in the recent cases adopting [the 1992 policy statement] than the 1957 petroleum shipping system at issue in *Baird*.” *Id.* The court then distinguished the Sixth Circuit's prior (and controlling) decision in *Baird* as factually, inapposite and concluded that it would “apply [the 1992 policy statement] to determine whether [the defendant] ships goods in interstate commerce.” *Id.*

Like the courts in *Atlantic* and *Musarra*, this Court is persuaded that the 1992 policy statement set forth the appropriate criteria for analyzing whether Heritage's local operations constitute interstate commerce. In reaching that conclusion, the Court takes into account the ICC's expertise in evaluating the reach of its own jurisdiction, the ICC's own use of the

newer test, and the overarching mandate to consider the “totality of the circumstances” when determining a shipper's intent. The Court also believes that the Seventh Circuit likely would follow the views of the Fifth, Eighth, and Ninth Circuits, all of which have come to the same conclusion within the past two decades. Indeed, the absence of significant argument from Plaintiffs as to the continuing validity of the 1957 test in light of the 1992 policy statement at least tacitly acknowledges the emerging consensus in the agency and the courts that the policy statement reflects the better mode of analysis of a shipper's intent.⁸

FN8. The Court declines to give *Chevron* deference to the 1992 policy statement and the subsequent January 11, 2005 DOL opinion letter. See Defs. SJ Mem. at 4 n. 2. Neither policy statements nor agency opinion letters warrant *Chevron* judicial deference. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (“[i]nterpretations such as those in opinions letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law-do not warrant *Chevron*-style deference”). Instead, the policy statement will be given due “respect” as a “reasonable agency interpretation” having some “persuasive force.” See *United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (“*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency”); see also *Alaska Dept. of Environ. Conservation v. E.P.A.*, 540 U.S. 461, 488, 124 S.Ct. 983, 157 L.Ed.2d 967 (2004) (citing *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 123 S.Ct. 1017, 154 L.Ed.2d 972. 385 (2003) (“[c]ogent ‘administrative interpretations * * * not [the] products of formal rulemaking * * * nevertheless warrant respect.’ ”)); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136, 117 S.Ct. 1953, 138 L.Ed.2d 327 (1997) (reasonable agency interpretations carry “at least some added persuasive force.”).

2. *The Shipper's Intent and Heritage's Operations*

*15 With the 1992 policy statement in mind, the Court turns to the parties' arguments regarding “shipper's intent.” The parties devote considerable attention to whether Heritage (as Defendants contend) or the wineries and vineyards (as Plaintiffs insist) should be considered to be the “shipper” (or “shippers”). Specifically, Plaintiffs argue that “Defendants

make the illogical contention that, not only are they the purchaser of the wine that is delivered from out of state, but they also are the shipper of wine for their local Illinois customers” and that “Defendants do not cite to a single authority in support of the proposition that they, not the vineyards/wineries, are the shipper.” Pls. Opp. at 8; see also Pls. SJ Mem. at 7 (arguing the vineyards and wineries are the shippers). Defendants counter that the facts make clear that Heritage is in fact the shipper. Defs. SJ Mem. at 4-5; Defs. SJ Reply at 3-4; Defs. Opp. at 4.

The Court agrees with Heritage that, on the undisputed facts before the Court at the summary judgment stage, Heritage-and not the wineries or vineyards-is the shipper for purposes of determining the “shipper's intent” as the wine moves in interstate commerce. As Plaintiffs point out, it is undisputed that during the relevant period (1) Heritage purchased the wine it delivers to its Illinois customers from vineyards and wineries outside of Illinois and (2) Heritage was designated the purchaser and the customer to whom the wine is delivered on the bills of lading. Pls. SOF ¶¶ 2,20; Defs. SOF ¶ 35 Gonzalez Dep. at 52;2-5, 52:13-14; Hirsh Dep. at 16:19-22). However, it also is undisputed that Heritage arranged for the transportation of the wine from those vineyards and wineries to Heritage's Niles, Illinois warehouse by paying for all of the transportation charges, both for the out-of-state services from the wineries and vineyards to its warehouse, and then by employing Plaintiffs to transport the wine to its local customers. Defs. SOF ¶ 35; Pls. Resp. ¶ 35.

In particular, it is undisputed that Heritage handles all aspects of the transportation (i.e. the shipping), including: (i) paying for taxes associated with transportation; (ii) paying for the freight; (iii) paying for all custom fees for foreign wines; (iv) paying for insurance; (v) transporting the wine freight on board (F.O.B.); (vi) hiring and paying the freight forwarder who handled the transportation of the wine; (vii) determining the type of shipping container, including the temperature was controlled or refrigerated or insulated; and (viii) acting as its own custom broker. Defs. SOF ¶ 36. During the period from 2004 to 2006, Heritage spent approximately \$2 million annually in shipping costs. Defs. SOF ¶ 37. And not only was Heritage responsible for the wine once it left the winery or vineyard, but Heritage also took title to the wine for its domestic purchases upon the wine being tendered to the over-the-road truckers whom it hired to transport the wine to Illinois.⁹ Defs. SOF ¶ 38. There simply is nothing in the record to suggest that the wineries and the vineyards, rather than Heritage, were the “shippers” in the transportation

of the wine at issue at all, or that the wineries and vineyards handled any part of the transportation and distribution of the wine once it was placed into Heritage's control. For purposes of considering the shipper's intent, the Court finds that there is no dispute that Heritage, and not the original wineries or vineyards, is the shipper, and thus Heritage's intent with respect to the wine controls.

FN9. Plaintiffs cite Defs. SOF ¶¶ 29 and 38 in support of their contention that Heritage did not take title to the wine until it arrived at the Niles, Illinois warehouse. However, statements 29 and 38, both of which Plaintiffs admitted, actually support the opposite conclusion: Heritage took title to the wine when the wineries and vineyards tendered the wine to over-the-road truckers that Heritage arranged to transport the wine to Illinois.

**16* Given the Court's determination that, on the undisputed facts, Heritage is the shipper, the Court next must determine whether any genuine issue of material fact exists as to Heritage's "fixed and persisting intent" under the standard set by the 1992 policy statement. To reiterate, "[t]he essential and controlling element in determining whether the traffic is properly characterized as interstate is whether the shipper has a 'fixed and persisting intent' to have the shipment continue in interstate commerce to its ultimate destination." 1992 Policy Statement, 1992 WL 122949, at *1. "[W]hether the shipper has a 'fixed and persisting intent' that the merchandise continue in interstate or foreign commerce from or to an out-of-State origin or destination, via a warehouse or distribution center, is ascertained from all the facts and circumstances surrounding the transportation." *Id.* at *2. Here, the question is whether the undisputed facts show that Heritage had a fixed and persisting intent that the wine continue on to its Illinois customers without a break in the practical continuity of the product's interstate movement.

Under the pertinent ICC policy statement, the Court must consider seven factors in ascertaining whether the product at issue remained in practical continuity of interstate commerce. The Court notes at the outset that, under the undisputed evidence, several of the factors outlined in the 1992 policy statement are satisfied with respect to the in-state portion of Heritage's delivery practices. To begin with, it is undisputed that Heritage did not process or modify the product-the wine-at its warehouse, thereby satisfying the second factor.¹⁰ Defs. SOF ¶ 52; Pls. Reply at 10, n. 2 (Plaintiffs do not dispute that the "lack of 'substantial modification' to the

wine [Heritage] purchases * * * [does not] break [] the chain of interstate movement”). In addition, Plaintiffs do not contest that within Heritage's warehouse, the wine was subject to Heritage's control and direction as to its subsequent transportation or delivery by Heritage's drivers. Defs. SOF ¶ 54. Thus, Defendants have established that Heritage has met the third factor. Furthermore, Plaintiffs admit that Heritage kept detailed record of the transportation of its wine products, including the use of a computer system to track and documenting the wine cases coming and going out of its warehouse. *Id.* ¶ 53. Defendants therefore have established without dispute that Heritage has a modern system that tracks product into and out of the warehouse, which is sufficient to satisfy the fourth of the seven factors. Finally, as noted above, it is undisputed that Heritage handles all of the transportation costs, establishing that Heritage bore the ultimate payment of such costs under the fifth factor. *Id.* ¶ 36. All of these undisputed facts weigh in favor of a finding that no break occurred in the practical continuity of the wine's interstate movement and that Heritage's fixed and persisting intent has been that the product continue in interstate commerce beyond Heritage's warehouse.

FN10. In this respect, Plaintiffs' emphasis on any repackaging of the wine (i.e. transferring of pallets, unwrapping of shrink wrap, etc.) is misplaced. The 1992 policy statement clearly contemplates that product may be repackaged at the warehouse or distribution center without breaking the chain of continuity of interstate commerce. See 1992 Policy Statement, 1992 WL 122949, at *2 (“repackaging or reconfiguring (secondary packaging) may be performed”).

*17 The parties dispute the first factor-namely, Heritage's fixed and persisting intent as to the ultimate destination of the wine when it started its interstate journey at the winery or vineyard. As previously noted, much of Plaintiffs' argument in the briefing assumed that Heritage was not the shipper, an argument that must be rejected on the facts in the record. Plaintiffs also argue that their local deliveries of Heritage's product were intrastate in nature because Heritage did not know in advance the ultimate destination of specific shipments when it was picked up at the vineyards and wineries. See Pls. SJ Mem. at 7; Pls. Opp. at 11-12. Heritage counters that the record evidence demonstrates that it had a fixed and persisting intent that the wine was to be shipped to someone other than itself (at its warehouse), based on two primary approaches-pre-orders and order

projections based on prior customer demand. Defs. Opp. at 5; Defs. SJ Mem. at 5-6.

Under the 1957 test's more rigid requirements, in order to find a “fixed and persisting” intent regarding interstate commerce, the shipper was required to know the ultimate destination of the product *at the time the product began* its interstate journey. The 1992 policy statement, however, explicitly discredited that notion in its list of factors which are “insufficient to break the practicality continuity of interstate commerce”- the first of which is “[t]he shipper's lack of knowledge of the specific, ultimate destination [] at the time the shipment leaves its out-of-State destination.” 1992 Policy Statement, 1992 WL 122949, at *2. Under the policy statement, intent that the product remain in interstate commerce may be found where the shipper moves product based on calculations of customer demand: “Although the shipper does not know in advance the ultimate destination of specific shipments, it bases its determination of the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. The factual basis for projecting customer demand may include, but is not limited to, historical sales in the State, actual present orders and relevant market surveys of need.” *Id.* at *2.

Heritage has submitted detailed and uncontroverted evidence of its ordering practices through the affidavit of its President, Defendant Hirsch, based on Hirsch's personal knowledge of Heritage's operations. See Defs. SOF Ex. L, Hirsch Aff. at ¶ 1 (attesting that he “ha[s] been responsible for Heritage's marketing, purchasing, sales, and operational activities” in his capacity as Heritage's President). Notwithstanding Plaintiffs' contrary views, affidavits are an appropriate evidentiary tool for Defendants to use in meeting their burden to prove that they qualify under the MCA exemption for summary judgment purposes. *Hardnick v. City of Bolingbrook*, 522 F.3d 758, 761 (7th Cir.2008) (quoting *Stinnett v. Iron Works Gym/Executive Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir.2002)) (evidence submitted on summary judgment “ ‘need not be admissible in form (for example, affidavits are not normally admissible at trial), but it must be admissible in content’ ”). While it is well-settled in this circuit that parties opposing summary judgment may not create an issue of fact by providing conclusory and self-serving affidavits “whose conclusions contradict prior deposition or other sworn testimony in the absence of newly-discovered evidence or the unmistakable need to clarify prior

ambiguous statements,” a party clearly may submit “self-serving” affidavits as evidence on summary judgment. *Gates v. Caterpillar, Inc.*, 513 F.3d 680, 688 n. 5 (2008). In fact, the Seventh Circuit “repeatedly” has stated that “the record may include a so-called ‘self-serving’ affidavit provided that it is based on personalized knowledge.” *Dalton v. Battaglia*, 402 F.3d 729, 735 (7th Cir.2005); see also *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir.2003) (“Provided that the evidence meets the usual requirements for evidence on summary judgment-including the requirements that it be based on personal knowledge and that it set forth specific facts”-a self-serving affidavit is acceptable evidence for summary judgment purposes).

***18** In fact, if Plaintiffs had so desired, upon receiving Hirsch's affidavit in Defendants' summary judgment materials, Plaintiffs could have filed a motion for additional discovery as to the topics upon which he provided testimony in his affidavit. “A district court may defer a ruling on a summary judgment motion if a party submits an affidavit explaining why the party has been unable to obtain the evidence necessary to oppose the motion.” *Microsoft Corp. v. Rechanik*, 249 Fed. Appx. 476, 479 (7th Cir.2007) (citing Fed.R.Civ.P. 56(f)); *Woods v. City of Chicago*, 234 F.3d 979, 990 (7th Cir.2000)). Such a motion and supporting affidavit may even be “sufficient grounds to deny the [summary judgment] motion.” *Id.* (citing *First Nat'l Bank & Trust Corp. v. Am. Eurocopter Corp.*, 378 F.3d 682, 693-94 (7th Cir.2004)). Plaintiffs, however, brought no such motion, nor have they provided any evidence to controvert the attestations made by Hirsch. Thus pursuant to this district's local rules, the Court deems the statements of fact in Hirsch's affidavit admitted when considering the summary judgment motions before it. See *supra* Section II.B at n. 4.

Defendants thus have established the following uncontroverted facts: (1) approximately 5% of Heritage's total gross sales (and 25% of its shipments) of product delivered by Plaintiffs were the result of pre-orders or pre-arrival orders, in various arrangements with its customers prior to local delivery (See Defs. SOF ¶¶ 41-44, 45); and (2) Heritage used customer demand projections to determine the amount of wine it would need to purchase and ship in order to fulfill its customer needs in Illinois (Defs. SOF ¶¶ 47, 49). It also is undisputed that when Hirsch formulated customer projections for Heritage, he considered historical data of both Heritage's sales and Heritage's customer needs, as expressly contemplated by the 1992 policy statement. See, e.g., Defs. SOF ¶ 47; see *Atlantic*, 2004 WL 1368808, at *7 (finding shipments to be interstate in nature when

there were made in response to customer demand projections based on historic need). Plaintiffs offer no response to these facts, and thus the Court concludes that Defendants have satisfied the first factor, in addition to the four factors already established.

Finally, the Court must consider two additional arguments in regard to the practical continuity of interstate commerce issue: (1) the length of time that the wine may sit within Heritage's warehouse (see, *e.g.*, Pls. SJ Mem. at 8-9) and (2) the fact that the bills of lading only designate Heritage and do not provide any further destinations for the product beyond Heritage's warehouse. Pls. SOF, Ex. 3, Hirsh Dep. at 16:19-22; Pls. SOF ¶ 20. Plaintiffs contend that both of these factors undermine Defendants' argument that they intended the product to continue on to a further destination.

As Plaintiffs aptly point out, “[i]ndefinite storage in a warehouse may transform goods shipped from out-of-state into intrastate deliveries.” *Watkins v. Ameripride Servs.*, 375 F.3d 821, 825 (9th Cir.2004). But, here, the time period was not “indefinite.” It is undisputed that Heritage's wine could sit in the warehouse for up to a month at a time, even with constant rotation and with certain pre-orders or pre-arrival business leaving the warehouse within a few days. See Defs. SOF ¶¶ 41-46, 50. Storage for that period of time is insufficient to break continuity. As the Supreme Court explained, “[t]he entry of goods into a warehouse interrupts but does not necessarily terminate their journey. A temporary pause in their transit does not mean that they are no longer ‘in commerce’ * * *. [I]f the halt of movement of the goods is a convenient step in the process of getting them to their final destinations, they remain ‘in commerce’ until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended.” *Walling v. Jacksonville Paper Co.*, 317 U.S. 568 (1947). Courts subsequently have found that longer periods of rest at a warehouse than those in evidence here do not break the continuity of the interstate nature of the product. See, *e.g.*, *Roberts v. Leonard W. Levine*, 921 F.2d 804, 814 (8th Cir.1990) (six-month storage period in the company's warehouse did not disrupt the company's fixed and persisting intent that the product continue in interstate commerce to its customers). Moreover, the 1992 policy explicitly states that the presence of certain factors are insufficient to establish a break in continuity of interstate commerce, and specifically includes among those factors that are insufficient “time limitations on the length of storage” and the existence of separate bills of lading for the

inbound and outbound movements instead of through bills of lading. 1992 Policy Statement, 1992 WL 122949, at *2-3. Thus, neither of Plaintiffs' arguments changes the result of the Court's analysis.

3. *The Weight of the Vehicles Driven by Plaintiffs*

*19 Plaintiffs next argue that even if the Court finds that the MCA exemption applies before August 10, 2005, Defendants are unable to sustain their burden of proof on the MCA exemption after August 10, 2005, at least as to those Plaintiffs who drove vans weighing less than 10,001 pounds. See, e.g., Pls. Opp. at 16. There is evidence that some of the Plaintiffs occasionally drove such vans. See, e.g., Pls. SOF ¶ 6 (Plaintiffs Thompson and Bennett drove vans on the few occasions they made deliveries or picked up product out-of-state). And on August 10, 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), which amended certain key definitions relating to the MCA exemption. See Pub.L. No. 109-59, 199 Stat. 1144 (2005). "Motor carrier" was redefined, for relevant purposes, as a "person who provides commercial motor vehicle transportation for compensation. 49 U.S.C. § 13102(14). "Commercial motor vehicle," in turn, was defined, in relevant part, as "a self-propelled or towed vehicle used on the highways in interstate commerce to transport passengers or property, if the vehicle-(A) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds whichever is greater." 49 U.S.C. § 31132(1). The amendments plainly were directed at defining the motor carrier-in this instance, the employer, Heritage-and not the individual employees driving the motor vehicles.

In support of their argument, Plaintiffs cite to 29 C.F.R. § 782.2(4), which explains how the MCA exemption applies to employees whose duties may shift "from one job to another periodically or on occasion" in any workweek in which the employee engages or intended to engage in exempt activities. 29 C.F.R. § 782.2(4). The regulations explain that "as a general rule, if the *bona fide* duties of the job performed by the employee are in fact such that he is * * * 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." 29 C.F.R. § 782.2(3). The regulations go on to explain that "where this is the case, the rule applies regardless of the proportion of the

employee's time or of his activities which are actually devoted to such safety-affecting work in the particular workweek." *Id.*

Drawing on Section 782.2(4), Plaintiffs suggest that any time that an employee drives a vehicle that weighs less than 10,001 pounds—even sporadically or on a one-time only basis—the employee's activities are not “interstate” in nature. That argument fails for several reasons. To begin with, Plaintiffs cite no authority in support of their theory that just because an employee occasionally operates a vehicle weighing less than 10,001 pounds, the activity at issue—delivering wine—is no longer interstate in nature, and thus the MCA exemption does not apply and the “workweek” rationale should be applied instead. In addition, the facts here are far afield from the situation that the regulations were meant to address. Those regulations apply to employees whose job duties generally fall *outside* the MCA exemption and instead are regulated by the FLSA. The regulations provide that when an employee does engage in safety-affected activities—here driving in interstate commerce in any given workweek—the MCA exemption should be applied during that workweek, regardless of the exact portion of the employee's time spent on the exempt activity. The regulations thus make clear that where “mixed” activities occur (expressly contemplated as interstate versus intrastate activities), application of the MCA exemption is favored. Here, the facts align on the opposite end of the spectrum. Plaintiffs' activities normally are exempt because they engage primarily (and, in some cases, exclusively) in conduct that carries out Heritage's interstate commerce activities through the use of vehicles which weighing more than 10,000 pounds. Given the thrust of the regulation to exempt employees when they *occasionally* perform interstate duties, it would be anomalous to disallow the exemption for employees who *almost exclusively* perform interstate duties.

*20 Plaintiffs' argument also implies that the nature of the *employer's* status as a “motor carrier” varies with the weight of the vehicles that its employees drive. The district court's reasoning in *Tidd v. Adecco USA, Inc.*, 2008 WL 4286512, at *2 (D.Mass. Sept.18, 2008), is instructive on this point. In *Tidd*, the plaintiffs argued that a company “is a ‘motor carrier’ subject to hours regulation by the Secretary of Transportation *only to the extent* that it operates trucks weighing more than five tons, because those heavier trucks are ‘commercial motor vehicles’ for purposes of the ‘motor carrier’ definition * * * and, conversely, that a company is not a ‘motor carrier’ to the extent it operates trucks weighing five tons or less.” *Tidd*, 2008 WL 4286512 at *3. As the district court in *Tidd* noted, “in

theory,” it would be possible to deem a company to be a “motor carrier” to the extent it operated larger trucks and not a “motor carrier” to the extent it operated smaller trucks. *Id.* However, the court concluded that “without some specific indication that Congress intended such a bifurcation in responsibilities-that is, an affirmative indication beyond the simple fact of the statute's ambiguity-the theory does not recommend itself.” *Id.*

Notably, the defendant in *Tidd* pointed out exactly the situation that presents itself here: drivers might drive both categories of trucks at different times. *Id.* The *Tidd* Court aptly noted the problem with that scenario-namely, that the drivers would be subject to two different regulatory regimes. *Id.*; see also see also *Ruiz v. Affinity Logistics Corp.*, 2006 WL 3712942, at *4 (S.D.Cal. Nov.9, 2006) (noting that motor carriers cannot be subject to both regulatory regimes, and that even a minor involvement in interstate commerce as a regular part of an employee's duties subjects them to the Secretary of Transportation's jurisdiction). Rather than construing the statute to mandate such a result, the *Tidd* Court reasoned that “a more sensible approach is the ‘either-or’ interpretation. *Id.* This approach would deem an employer to be a ‘motor carrier’ if it meets the definition * * * because it uses 10,001 pound-plus trucks in interstate commerce, even if it also conducts other operations that do not meet that definition.” *Id.* at *4.

This Court agrees with the “more sensible” approach adopted by the court in *Tidd*. The question always has been whether Heritage is a “motor carrier” to whom the exemption applies. It is undisputed that Heritage's delivery operations (as executed by Plaintiffs as the drivers) are undertaken primarily (and *almost* exclusively) with “commercial motor vehicles” weighing more than 10,000 pounds. See, *e.g.*, Defs. SOF ¶¶ 6, 9, 12, 18, 20, 23, 26. Thus, under 49 U.S.C. § 13102(14), Heritage is a “motor carrier,” the hours of its employees are subject to regulation by the Secretary of Transportation (49 U.S.C. 31502(1)), and the MCA exemption applies *in toto*, including on the rare occasions when an employee drives a vehicle less than 10,001 pounds.¹¹

FN11. The sole case cited by Plaintiffs in support of their position, *Dell'Orfano v. Ikon Office Solutions, Inc.*, 2006 WL 2523113, at *2 (M.D.Ga. Aug.29, 2006), is inapposite. In that case, it was undisputed that at all times “Plaintiff drove a vehicle that weighed substantially less than 10,000 pounds.” On the record here, almost exactly the

opposite is true: Plaintiffs almost exclusively drove vehicles weighing more than 10,000 pounds and only sporadically drove the lighter vans.

4. *The Illinois Liquor Control Act*

*21 Finally, the Court addresses the parties' dispute over the significance and the applicability of the Illinois Liquor Control Act (the "ILCA") when considering whether Heritage's local deliveries made by Plaintiffs were part of a practical continuity of interstate commerce. The parties agree that the Illinois Liquor Control Act (the "ILCA") applies to Heritage's operations as an importer and distributor of wine. However, the parties offer vastly different views of the ILCA's significance when considering whether the motor carrier exemption applies. Defendants contend that although the ILCA prohibits the entry of alcohol, including wine, into the Illinois marketplace without first going through a distributor, courts in states with similar laws have recognized that such as a system creates a two-legged journey for the importation of wine. Defs. Mem. at 6-7; Defs. Reply at 2, 5-6. Plaintiffs contend that Heritage's compliance with the ILCA eviscerates any argument by Defendants that the motor carrier exemption applies because "the wine must come to rest once it arrives at Defendants' facilities in Illinois" and that it is "well settled under MCA jurisprudence that where goods come to rest at a warehouse and are inventoried and processed, the chain of interstate commerce is broken for MCA purposes." Pls. Opp. at 8-9.

The Court finds that neither party's argument is dispositive when considering the implications of the ILCA as it relates to the application of the MCA exemption on the facts of this case. The ILCA, in relevant part, requires that:

Each importing distributor * * * shall effect possession and physical control thereof by storing such alcoholic liquors in the premises wherein such importing distributor * * * is licensed to engage in such business as an importing distributor * * * and to make such alcoholic liquors which accompanying invoices, bills of lading, and receiving tickets available for inspection by an agent or representative of the Department of Revenue and of the State Commission.

All alcoholic liquor imported must be of-loaded from the common carrier, vehicle, or mode of transportation by which the alcoholic liquor was delivered into this State. The alcoholic liquor shall be stored at the

licenses premises of the importing distributor before sale and delivery to licensees in this State.

235 ILCS 5/6-8. Simply put, the ILCA requires that out-of-state shippers use a distributor, with all the attendant requirements, in order for their product to reach Illinois residents. It does not, by its terms, destroy the chain of interstate commerce, as Plaintiffs contend, nor does it validate, by its terms, interstate commerce as Defendants would have the Court believe. As noted above, intrastate transportation may qualify as interstate commerce “if what is being transported is actually moving in interstate commerce within the meaning of [the FLSA and the Motor Carrier Safety Act (MCA)]; the fact that other carriers transport it out of or into the State is not material.” 29 C.F.R. § 782.7(b)(1); *Alice v. GCS, Inc.*, 2006 WL 2644958, at *3 (N.D.Ill. Sept.14, 2006). The mere fact that Heritage has a warehouse where the product must be unloaded prior to being transported locally by Plaintiffs, rather than being transported directly to the ultimate end point by the over-the-road carriers hired by Heritage to transport the product from distant out-of-state vineyards and wineries, does not alter the Court's analysis of the shipper's intent outlined above.

*22 Considering the totality of circumstances and the unrefuted facts set forth by Defendants, the Court concludes that Defendant clearly has met its burden of showing that Plaintiffs' deliveries of Heritage's wine on the intrastate leg of its delivery within Illinois fall “plainly within the terms” of the MCA exemption. Under the factors set forth in the applicable policy statement, Defendants have established their fixed and persisting intent that the wine that Defendants bring to Illinois from out-of-state and foreign wineries and vineyards continue in interstate commerce to Defendants' own Illinois customers. See, e.g., January 11, 2005 Opinion Letter, “*Intra/interstate Transportation of Gasoline and Section 13(b)(1)*,” FLSA2005-10 (citing 1992 Policy Statement and finding interstate activity where four of the seven factors were satisfied). Finally, the Court finds that a Plaintiff's occasional driving of a vehicle weighing less than 10,000 pounds does not alter Heritage's status as a motor carrier, and thus does not defeat application of the MCA exemption to Plaintiffs' activities. In sum, the MCA exception applies to Defendants' activities, Plaintiffs' request for overtime relief under the FLSA must be denied, and Heritage is entitled to summary judgment.

C. Defendant Hirsch's Individual Liability for Plaintiffs' Overtime Claims

Because this Court finds that the MCA exemption applies and that summary judgment is proper in favor of Heritage, no claims remain against Defendant Hirsch in his individual capacity, even assuming *arguendo* that as Heritage's President Defendant Hirsch could have been held liable based on upon his decision-making authority with respect to Plaintiff's work terms and hours. Plaintiff's motion for summary judgment as to their overtime claims against Defendant Hirsch in his individual capacity is therefore denied.

D. Failure to Exhaust Grievance Procedures under the Collective Bargaining Agreement

Defendants also contend that Plaintiffs' claims are barred in their entirety here in federal court for failure to exhaust their administrative remedies, namely the grievance procedures under the collective bargaining agreement related to their overtime claims. Defs. Mem. at 14. Plaintiffs respond that their FLSA claims are independent of and do not require interpretation of the collective bargaining agreement, and therefore are not preempted. Pls. Opp. at 3-4. Because the Court already has found that Plaintiffs' overtime claims are barred by the MCA exemption because they do not fall under the regulatory framework of the FLSA, the Court need not consider whether the collective bargaining agreement bars Plaintiffs' claims from independent review in federal court under the FLSA. Defendants' motion for summary judgment on that ground therefore is denied as moot.

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion for summary judgment [31] is denied and Defendants' cross-motion for summary judgment [46] is granted in part and denied as moot in part.

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RCW 49.46.130

Minimum rate of compensation for employment in excess of forty hour work week — Exceptions.

(1) Except as otherwise provided in this section, no employer shall employ any of his employees for a work week 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.

(2) This section does not apply to:

(a) Any person exempted pursuant to RCW 49.46.010(5). The payment of compensation or provision of compensatory time off in addition to a salary shall not be a factor in determining whether a person is exempted under RCW 49.46.010(5)(c);

(b) Employees who request compensating time off in lieu of overtime pay;

(c) Any individual employed as a seaman whether or not the seaman is employed on a vessel other than an American vessel;

(d) Seasonal employees who are employed at concessions and recreational establishments at agricultural fairs, including those seasonal employees employed by agricultural fairs, within the state provided that the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days a year;

(e) Any individual employed as a motion picture projectionist if that employee is covered by a contract or collective bargaining agreement which regulates hours of work and overtime pay;

(f) An individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week;

(g) Any individual employed (i) on a farm, in the employ of any person, in

connection with the cultivation of the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife, or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; or (ii) in packing, packaging, grading, storing or delivering to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption;

(h) Any industry in which federal law provides for an overtime payment based on a work week other than forty hours. However, the provisions of the federal law regarding overtime payment based on a work week other than forty hours shall nevertheless apply to employees covered by this section without regard to the existence of actual federal jurisdiction over the industrial activity of the particular employer within this state. For the purposes of this subsection, "industry" means a trade, business, industry, or other activity, or branch, or group thereof, in which individuals are gainfully employed (section 3(h) of the Fair Labor Standards Act of 1938, as amended (Public Law 93-259));

(i) Any hours worked by an employee of a carrier by air subject to the provisions of subchapter II of the Railway Labor Act (45 U.S.C. Sec. 181 et seq.), when such hours are voluntarily worked by the employee pursuant to a shift-trading practice under which the employee has the opportunity in the same or in other work weeks to reduce hours worked by voluntarily offering a shift for trade or reassignment.

(3) No employer shall be deemed to have violated subsection (1) of this section by employing any employee of a retail or service establishment for a work week in excess of the applicable work week specified in subsection (1) of this section if:

(a) The regular rate of pay of the employee is in excess of one and one-half times the minimum hourly rate required under RCW 49.46.020; and

(b) More than half of the employee's compensation for a representative period, of not less than one month, represents commissions on goods or services.

In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate is to be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(4) No employer of commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing, or farm implements to ultimate purchasers shall violate subsection (1) of this section with respect to such commissioned salespeople if the commissioned salespeople are paid the greater of:

(a) Compensation at the hourly rate, which may not be less than the rate required under RCW 49.46.020, for each hour worked up to forty hours per week, and compensation of one and one-half times that hourly rate for all hours worked over forty hours in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

(5) No public agency shall be deemed to have violated subsection (1) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if: (a) In a work period of twenty-eight consecutive days the employee receives for tours of duty which in the aggregate exceed two hundred forty hours; or (b) in the case of such an employee to whom a work period of at least seven but less than twenty-eight days applies, in his or her work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his or her work period as two hundred forty hours bears to twenty-eight days; compensation at a rate not less than one and one-half times the regular rate at which he or she is employed.

WAC 296-128-011

Special recordkeeping requirements.

(1) In addition to the records required by WAC 296-128-010, employers who employ individuals as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act shall maintain records indicating the base rate of pay, the overtime rate of pay, the hours worked by each employee for each type of work, and the formulas and projected work hours used to substantiate any deviation from payment on an hourly basis pursuant to WAC 296-128-012. The records shall indicate the period of time for which the base rate of pay and the overtime rate of pay are in effect.

For the purposes of this section and WAC 296-128-012, "base rate of pay" means the amount of compensation paid per hour or per unit of work in a workweek of forty hours or less. A base rate of pay shall be established in advance of the work performed and may be based on hours or work units such as mileage, performance of specified duties, or a specified percentage of the gross proceeds charged for specified work. A base rate of pay shall not be established that will result in compensation at less than the minimum wage prescribed in RCW 49.46.020. "Overtime rate of pay" means the amount of compensation paid for hours worked in excess of forty hours per week and shall be at least one and one-half times the base rate of pay.

(2) The records required by this section shall be made available by the employer at the request of the department. Any current or past employee may obtain copies of the formula, the base rate of pay, the overtime rate of pay, and that employee's records. Job applicants seeking employment by the employer as truck or bus drivers subject to the provisions of the Federal Motor Carrier Act, may obtain copies of the formula, the base rate of pay, and the overtime rate of pay.

WAC 296-128-012

Overtime for truck and bus drivers.

(1)(a) The compensation system under which a truck or bus driver subject to the provisions of the Federal Motor Carrier Act is paid shall include overtime pay at least reasonably equivalent to that required by RCW 49.46.130 for working in excess of forty hours a week. To meet this requirement, an employer may, with notice to a truck or bus driver subject to the provisions of the Federal Motor Carrier Act, establish a rate of pay that is not on an hourly basis and that includes in the rate of pay compensation for overtime. An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department by using the following formula or an alternative formula that, at a minimum, compensates hours worked in excess of forty hours per week at an overtime rate of pay and distributes the projected overtime pay over the average number of hours projected to be worked. The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other.
2.
$$\frac{\text{Average number of work units}}{\text{per hour}} = \frac{\text{Average number of work units accomplished per week}}{\text{Average number of hours projected to be worked per week}}$$
3.
$$\text{Weekly Base Rate} = \text{Number of units per hour} \times 40 \text{ hours} \times \text{base rate of pay}$$
4.
$$\text{Weekly Overtime rate} = \text{Number of units per hour} \times \text{number of hours over 40} \times \text{overtime rate of pay}$$
5.
$$\text{Total weekly pay} = \text{Weekly base rate plus}$$

$$6. \quad \begin{array}{l} \text{Uniform rate of} \\ \text{pay} \end{array} = \frac{\begin{array}{l} \text{weekly overtime rate} \\ \text{Total weekly pay} \end{array}}{\text{Total work units}}$$

Example: A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1. $\frac{2300 \text{ mi.}}{\text{divided by per week}} = \frac{45 \text{ hours per week}}{51.1 \text{ miles per hour}}$
2. (a) $51.1 \text{ miles/hour times } 40 \text{ hours times } .20/\text{mile} = \408.80
 (b) $51.1 \text{ miles/hour times } 5 \text{ hours} = 255.5 \text{ miles}$
 (c) $255.5 \text{ miles times } .30/\text{mile} = \76.65
 (d) $\$408.80 \text{ plus } \$76.65 = \$485.45 \text{ divided by } 2300 \text{ miles} = 21.1 \text{ cents mile}$

(b) In using a formula to determine a rate of pay, the average number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

(c) The department may evaluate alternative rates of pay and formulas used by employers in order to determine whether the rates of pay established under this section result in the driver receiving compensation reasonably equivalent to one and one-half times the base rate of pay for actual hours worked in excess of forty hours per week.

(2) Where an employee receives a different base rate of pay depending on

the type of work performed, the rate that is paid or used for hours worked in excess of forty hours per week shall be at least the overtime rate of pay for the type of work in which most hours were worked.

(3) Compensation plans before March 1, 2007. An employer who employed drivers who worked over forty hours a week consisting of both in-state and out-of-state hours anytime before March 1, 2007, may, within ninety days of the adoption of this subsection, submit a proposal consistent with subsection (1) of this section to the department for approval of a reasonably equivalent compensation system. The employer shall submit information to substantiate its proposal consisting of at least twenty-six consecutive weeks over a representative time period between July 1, 2005, and March 1, 2007. The department shall then determine if the compensation system includes overtime that was at least reasonably equivalent to that required by RCW 49.46.130.

Note On March 1, 2007, the Washington state supreme court ruled that
1: overtime rate of pay includes hours worked within and outside the
state of Washington for Washington-based employees. *Bostain v.*
Food Express, Inc., 159 Wn.2d 700, 153 P.3d 846 (2007).

Note 2: The adoption date of this subsection is October 21, 2008.

29 USC 207

Maximum hours.

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) 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.

(2) 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, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, 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.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that

specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if--

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title, and if such employee receives

compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c), (d) Repealed. Pub.L. 93-259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined

As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include--

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums¹ paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) of this section or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a) of this section,² where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if--

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate

ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are--

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates

No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection

if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection--

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) of this section are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Extra compensation creditable toward overtime compensation

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) of this section by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) of this section if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if--

- (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant

to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a) of this section.

(m) Employment in tobacco industry

For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if such employee--

(1) is employed by such employer--

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of

type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for--

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) of this section applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only--

(A) pursuant to--

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be

paid for the unused compensatory time at a rate of compensation not less than--

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee,

whichever is higher³

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency--

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) of this section if--

(A) such employee is paid at a per-page rate which is not less than--

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency

requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection--

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency--

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education

Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) of this section without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is--

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

49 USC 13501

General jurisdiction.

The Secretary and the Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier--

(1) between a place in--

(A) a State and a place in another State;

(B) a State and another place in the same State through another State;

(C) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) in a reservation under the exclusive jurisdiction of the United States or on a public highway.

49 USC 31502

Requirements for qualifications, hours of service, safety, and equipment standards.

(a) Application.--This section applies to transportation--

(1) described in sections 13501 and 13502 of this title; and

(2) to the extent the transportation is in the United States and is between places in a foreign country, or between a place in a foreign country and a place in another foreign country.

(b) Motor carrier and private motor carrier requirements.--The Secretary of Transportation may prescribe requirements for--

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation.

(c) Migrant worker motor carrier requirements.--The Secretary may prescribe requirements for the comfort of passengers, qualifications and maximum hours of service of operators, and safety of operation and equipment of a motor carrier of migrant workers. The requirements only apply to a carrier transporting a migrant worker--

(1) at least 75 miles; and

(2) across the boundary of a State, territory, or possession of the United States.

(d) Considerations.--Before prescribing or revising any requirement under this section, the Secretary shall consider the costs and benefits of the requirement.

(e) Exception.--

(1) In general.--Notwithstanding any other provision of law, regulations issued under this section or section 31136 regarding--

(A) maximum driving and on-duty times applicable to operators of commercial motor vehicles,

(B) physical testing, reporting, or recordkeeping, and

(C) the installation of automatic recording devices associated with establishing the maximum driving and on-duty times referred to in subparagraph (A), shall not apply to any driver of a utility service vehicle during an emergency period of not more than 30 days declared by an elected State or local government official under paragraph (2) in the area covered by the declaration.

(2) Declaration of emergency.--An elected State or local government official or elected officials of more than one State or local government jointly may issue an emergency declaration for purposes of paragraph (1) after notice to the Field Administrator of the Federal Motor Carrier Safety Administration with jurisdiction over the area covered by the declaration.

(3) Incident report.--Within 30 days after the end of the declared emergency period the official who issued the emergency declaration shall file with the Field Administrator a report of each safety-related incident or accident that occurred during the emergency period involving--

(A) a utility service vehicle driver to which the declaration applied; or

(B) a utility service vehicle of the driver to which the declaration applied.

(4) Definitions.--In this subsection, the following definitions apply:

(A) Driver of a utility service vehicle.--The term “driver of a utility service vehicle” means any driver who is considered to be a driver of a utility service vehicle for purposes of section 345(a)(4) of the National Highway System Designation Act of 1995 (49 U.S.C. 31136 note; 109 Stat. 613).

(B) Utility service vehicle.--The term “utility service vehicle” has the meaning that term has under section 345(e)(6) of the National Highway

System Designation Act of 1995 (49 U.S.C. 31136 note; 109 Stat [FN1] 614-615).

29 CFR 778.308

The overtime rate is an hourly rate.

(a) Section 7(a) of the Act requires the payment of overtime compensation for hours worked in excess of the applicable maximum hours standard at a rate not less than one and one-half times the regular rate. The overtime rate, like the regular rate, is a rate per hour. Where employees are paid on some basis other than an hourly rate, the regular hourly rate is derived, as previously explained, by dividing the total compensation (except statutory exclusions) by the total hours of work for which the payment is made. To qualify as an overtime premium under section 7(e)(5), (6), or (7), the extra compensation for overtime hours must be paid pursuant to a premium rate which is likewise a rate per hour (subject to certain statutory exceptions discussed in §§ 778.400 through 778.421).

(b) To qualify under section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half or two times that rate. To qualify under section 7(e)(6) or (7), the overtime rate may not be less than one and one-half times the bona fide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one-half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate for example, if the nonovertime rate is \$5 per hour, the overtime rate may not be less than \$7.50 but may be set at a higher arbitrary figure such as \$8 per hour.

29 CFR 778.312

Pay for task without regard to actual hours.

(a) Under some employment agreements employees are paid according to a job or task rate without regard to the number of hours consumed in completing the task. Such agreements take various forms but the two most usual forms are the following:

(1) It is determined (sometimes on the basis of a time study) that an employee (or group) should complete a particular task in 8 hours. Upon the completion of the task the employee is credited with 8 "hours" of work though in fact he may have worked more or less than 8 hours to complete the task. At the end of the week an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the "hours" so credited and at one and one-half times such rate for the "hours" so credited in excess of 40. The number of "hours" credited to the employee bears no necessary relationship to the number of hours actually worked. It may be greater or less. "Overtime" may be payable in some cases after 20 hours of work; in others only after 50 hours or any other number of hours.

(2) A similar task is set up and 8 hours' pay at the established rate is credited for the completion of the task in 8 hours or less. If the employee fails to complete the task in 8 hours he is paid at the established rate for each of the first 8 hours he actually worked. For work in excess of 8 hours or after the task is completed (whichever occurs first) he is paid one and one-half times the established rate for each such hour worked. He is owed overtime compensation under the Act for hours worked in the workweek in excess of 40 but is paid his weekly overtime compensation at the premium rate for the hours in excess of 40 actual or "task" hours (or combination thereof) for which he received pay at the established rate. "Overtime" pay under this plan may be due after 20 hours of work, 25 or any other number up to 40.

(b) These employees are in actual fact compensated on a daily rate of pay basis. In plans of the first type, the established hourly rate never controls the compensation which any employee actually receives. Therefore, the established rate cannot be his regular rate. In plans of the second type the rate is operative only for the slower employees who exceed the time allotted to complete the task; for them it operates in a manner similar to a

minimum hourly guarantee for piece workers, as discussed in § 778.111. On such days as it is operative it is a genuine rate; at other times it is not.

(c) Since the premium rates (at one and one-half times the established hourly rate) are payable under both plans for hours worked within the basic or normal workday (if one is established) and without regard to whether the hours are or are not in excess of 8 per day or 40 per week, they cannot qualify as overtime premiums under section 7(e)(5), (6), or (7) of the Act. They must therefore be included in the regular rate and no part of them may be credited against statutory overtime compensation due. Under plans of the second type, however, where the pay of an employee on a given day is actually controlled by the established hourly rate (because he fails to complete the task in the 8-hour period) and he is paid at one and one-half times the established rate for hours in excess of 8 hours actually worked, the premium rate paid on that day will qualify as an overtime premium under section 7(e)(5).

29 CFR 778.314
Special situations.

There may be special situations in which the facts demonstrate that the hours for which contract overtime compensation is paid to employees working on a “task” or “stint” basis actually qualify as overtime hours under section 7(e)(5), (6), or (7). Where this is true, payment of one and one-half times an agreed hourly rate for “task” or “stint” work may be equivalent to payment pursuant to agreement of one and one-half time a piece rate. The alternative methods of overtime pay computation permitted by section 7(g)(1) or (2), as explained in §§ 778.415 through 778.421 may be applicable in such a case.

29 CFR 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.

(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 transportation 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 or 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), certiorari 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.).)

**Policy Statement—Motor Carrier Interstate Transportation—From
Out-of-State Through Warehouses to Points in Same State**

SURFACE TRANSPORTATION BOARD (S.T.B.)

**POLICY STATEMENT—MOTOR CARRIER INTERSTATE
TRANSPORTATION—FROM OUT-OF-STATE THROUGH
WAREHOUSES TO POINTS IN SAME STATE**

EX PARTE NO. MC-207

Decided April 27, 1992
Effective on May 8, 1992

This policy statement reviews established guidelines for motor carriers and shippers to determine the interstate or intrastate nature of for-hire motor traffic moving from warehouses or similar facilities to points in the same State after a for-hire movement from another State.

BY THE COMMISSION:

This policy statement enumerates the criteria that determine whether certain traffic is interstate or intrastate and considers various factors that affect that determination. It is designed to assist carriers and shippers facing challenges from State regulatory authorities. These challenges persist despite an unbroken string of Commission, Federal Court and Supreme Court decisions explaining the difference between interstate and intrastate trucking services provided within a single State.¹ This statement is derived from those decisions.

Carriers and shippers may use this statement to determine if property, temporarily stored in a warehouse or distribution center before moving to its final destination, moves in interstate commerce rather than intrastate commerce. Interstate traffic must move by Commission-regulated motor carriers under applicable interstate rates and charges unless it is unregulated or exempt from regulation.² Intrastate traffic moves under applicable State statutes.

The traffic usually called into question by State regulatory authorities falls within the following pattern. Various types of property (“merchandise”) is moved in interstate (or foreign) commerce from points outside a State to

in-State warehouses or distribution centers. The shipper may or may not know the specific, ultimate consignee at the time the shipment leaves its out-of-State origin, but the shipper intends that the merchandise move beyond the warehouse. After storage at the warehouse or distribution center, the merchandise is tendered to a for-hire motor carrier for transportation within the State to the ultimate consignee. If the transportation continues in interstate commerce, only those carriers holding interstate authority may provide it.

If the merchandise comes to rest in a manner sufficient to break the continuity of the original interstate commerce, then subsequent transportation within the State by for-hire carriers may constitute transportation in intrastate commerce subject to applicable State regulation. The essential and controlling element in determining whether the traffic is properly characterized as interstate is whether the shipper has a “fixed and persisting intent” to have the shipment continue in interstate commerce to its ultimate destination. If this intent is present, the interstate character of the traffic is not changed simply because the merchandise may move through a warehouse or terminal facility on the way to its ultimate destination. Where a distribution center or warehouse serves only as temporary storage to permit orderly and convenient transfer of goods in the course of what the shipper intends to be a continuous movement to destination, the continuity of the movement is not broken at the warehouse.

Whether the shipper has a “fixed and persisting intent” that the merchandise continue in interstate or foreign commerce from or to an out-of-State origin or destination, via a warehouse or distribution center, is ascertained from all the facts and circumstances surrounding the transportation. In this regard, the following factors have been considered in establishing that the in-State for-hire motor transportation component is part of a continuing movement in interstate commerce, and hence subject to this Commission's regulation.

Although the shipper does not know in advance the ultimate destination of specific shipments, it bases its determination of the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. The factual basis for projecting customer demand may include, but is not limited to,

historic sales in the State, actual present orders, relevant market surveys of need.

No processing or substantial product modification of substance occurs at the warehouse or distribution center. However, repackaging or reconfiguring (secondary packaging) may be performed. This Commission and the U.S. Court of Appeals for the Fifth Circuit have found, for example, that cutting carpeting from large rolls for further distribution constitutes repackaging or reconfiguring rather than product modification.³

While in the warehouse, the merchandise is subject to the shipper's control and direction as to the subsequent transportation.

Modern systems allow tracking and documentation of most, if not all, of the shipments coming in and going out of the warehouse or distribution center.

The shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier.

The warehouse utilized is owned by the shipper.

The shipments move through the warehouse pursuant to a storage in transit tariff provision.

The case law establishes that the absence of time limitations on storage and the absence of storage-in-transit receipts issued by the warehouse or distribution center are not sufficient to establish that the continuity of interstate commerce is broken at the warehouse. Conversely, the presence of one or more of the following factors is not sufficient to establish a break in that continuity that would change the interstate character of the subsequent transportation.

The shipper's lack of knowledge of the specific, ultimate destination or consignee at the time the shipment leaves its out-of-State origin;

Separate bills of lading for the inbound and outbound movements instead of through bills of lading;

Storage-in-transit tariff provisions;

Storage receipts issued by the warehouse distribution center;

Time limitations on storage;

Payment of transportation charges by warehouse or distribution center, when the shipper or consignee is ultimately billed for these charges;

Routing of the outbound shipment by the warehouse or distribution center;

A change in carriers or transportation modes at a distribution facility;

Use of brokers retained by the shipper;

Use of a warehouse not owned by the shipper.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Under the terms of the Regulatory Flexibility Act, this restatement of the legal basis for our jurisdiction over certain transportation movements is not an action that will have a significant impact on a substantial number of small entities.

Authority: 5 U.S.C. § 554(d); 49 U.S.C. §§ 10521, 10922, and 10923.

COMMISSIONER SIMMONS, dissenting:

I seriously question the wisdom or need for issuing a policy statement that enunciates no new policy. Moreover, I also disagree with the statement's apparent premise, i.e., that complex factual situations involved in determining a shipper's intent or the continuity of interstate commerce can be reduced to a simple series of discrete factors.

My refusal to join in the majority's action today is also grounded in an even more basic objection. I will not associate myself with the implied accusation of the policy statement that state regulatory bodies are

systematically misinterpreting or ignoring this line of cases to the detriment of legitimate interstate movements. First, the correct application of the law to the facts of each case is often far from apparent. Certainly reasonable persons can and do differ as to whether the facts in a given situation support a claim of “fixed and persisting intent” to have a shipment continue in interstate commerce to its final destination. Second, I question why it is so urgently necessary to “assist carriers and shippers facing challenges from state regulatory authorities.” State regulatory agencies have a legitimate interest in their oversight of intrastate commerce, and their challenges in any given case may or may not be meritorious. As the supposedly impartial expert arbiter of these disputes, why should the Commission be assisting either party?

It is ordered:

1. This policy statement is effective on publication in the Federal Register and ICC Register on May 8, 1992.
2. This proceeding is discontinued.

By the Commission, Chairman Philbin, Vice Chairman McDonald, Commissioners Simmons, Phillips, and Emmett. Commissioner Simmons dissented with a separate expression.

FN1. See, e.g., *Texas & N.O.R.R. v. Sabine Tram Co.*, 277 U.S. 111, 122 (1913). Whether transportation between two points in a State is interstate or intrastate in nature depends on the “essential character” of the shipment. *Baltimore & O.S.W.R.R. v. Settle*, 260 U.S. 166, 170 (1922). Crucial to the determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment. *Armstrong, Inc.—Transportation within Texas*, 2 I.C.C.2d 63 (1986) (*Armstrong*) [petition to reopen denied by decision (not printed), served August 31, 1987], *aff'd sub nom. Texas v. ICC*, 866 F.2d 1546 (5th Cir.1989) (*Texas*). The court upheld the Commission's finding that the shipper's intent was sufficient for the shipment to be regarded as interstate. *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458 (8th Cir.1989), affirming our decisions in No. MC-C-10999, *Matlack, Inc.—Transportation within Missouri—Petition for Declaratory Order* (not printed), served June 17, 1987 and December 31, 1987 (*Matlack*), which found that certain single-State movements had not come to rest at the storage point prior to the time of

reshipment, and, thus, that the temporary storage “did not interrupt the continuity of the original movement in interstate commerce.” Quaker Oats Company-Transportation within TX and CA, 4 I.C.C.2d 1033 (1987), petition to reopen denied, 4 I.C.C.2d 1052 (1988), *aff'd sub nom. California Trucking Ass'n, et al. v. ICC*, 900 F.2d 208 (9th Cir.1989) (Quaker Oats) the outbound single-State movement of goods from warehouses both owned by Quaker and public warehouse space leased by Quaker is part of interstate transportation based on the shipper's fixed and persisting intent. The court also affirmed the Commission's determination that the use of brokers retained by the shipper; a switch in carriers or transportation modes at a distribution facility; and the single-State leg of the movement by private or exempt carrier does not alter the continuing interstate nature of the movement. No. MC-C-30002, Victoria Terminal Enterprises, Inc.—Transportation of Fertilizer within Texas—Petition for Declaratory Order (not printed), served December 15, 1987 (Victoria Terminal I); administrative appeal (not printed) served April 29, 1988 (Victoria II); reopened (not printed) served February 3, 1989 (Victoria III), *aff'd sub nom. Central Freight Lines v. ICC*, 899 F.2d 413 (5th Cir.1990). Single-State movements after transportation by a for-hire exempt carrier is subject to ICC licensing jurisdiction. The court stated, “If the essential character of the transportation, as determined by the shipper's intent, is interstate, we do not see how that interstate character changes when one leg of the journey is performed by a carrier that happens to be exempt from ICC regulation.” No. MC-C-30044, James River Corporation of Virginia—Transportation Through Woodland, CA—Petition for Declaratory Order (not printed), served July 15, 1988 (James River) *aff'd sub nom. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. ICC*, 921 F.2d 904 (9th Cir.1990). The essential character of the transportation does not change when one leg of the journey is performed by an exempt carrier, and the Commission's ability to interpret statutory language conflicts is not limited by the Supreme Court's decision in *Maislin Industries U.S., Inc. et al. v. Primary Steel, Inc.*, 493 U.S. 1041 (1990), except when such interpretations conflict with well-established Supreme Court precedents. No. MC-C-30152, *Willbanks Steel Corporation v. The Squaw Transit Company and Motor Carrier Audit & Collection Co., A Division of Delta Traffic Services, Inc.* (not printed), served October 27, 1989 (Willbanks).

The method by which the shipper's product moves from dockside to the port warehouse by non-regulated motor carrier does not affect the continuous movement in foreign commerce. No. MC-C-30129, Pittsburgh-Johnstown-Altoona Express, Inc.—Petition for Declaratory Order (not printed), served February 12, 1990 (PJAX); petition to reopen filed May 31, 1990 (decision pending). The nature of the subsequent motor movement is not affected by whether the initial movement across State lines is in regulated, private, or other carriage.

FN2. PJAX at 12.

FN3. Texas, 866 F.2d at 1560-61.

DOL Opinion Letter FLSA 2005-10

January 11, 2005

Dear *Name**,

This is in response to your letter requesting an opinion as to the application of the FLSA's section 13(b)(1) motor carrier exemption to drivers working for an associated group of common carriers of petroleum products. The employers in question have approximately 3,000 drivers and operate in 30 states.

The business of the *Name** employers involves the transportation by truck of shipments of gasoline, kerosene, home heating oil, diesel fuel, and ethanol that have previously moved across state lines by pipeline, rail, or ship. These petroleum products have been produced by the major petroleum refining companies and shipped by various means to their retail customers and commercial users. The *Name** drivers pick up the products at various terminals or storage facilities after their previous movement and transport them over the last leg of the delivery of the products. The question is whether these drivers are subject to the FLSA's section 13(b)(1) overtime exemption during this intrastate movement.¹

*Name** states that in some of the trips the out-of-state producer/shipper has designated the shipment to fill the order of a specifically named customer. Other shipments are the result of standing orders or the historic demands of the producers' customers and, when shipped, do not name a final destination beyond the end of the pipeline or storage facility at that location.

Section 13(b)(1) applies 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 31502 of Title 49" (the "Motor Carrier Act" or "MCA"). The Department of Transportation ("DOT") has jurisdiction over the safety-affecting employees of motor carriers when the employees operate in interstate commerce, as defined in the MCA. There is no question that the *Name** employers are motor carriers and that the drivers are safety-affecting employees. The only issue is whether the drivers are operating in interstate commerce under the MCA, as interpreted by DOT, when they transport

products over the last leg of their journey and do not drive across a state line.

The Wage and Hour Division's enforcement position for section 13(b)(1) provides that an intrastate leg of an interstate trip is in interstate commerce if it "forms a part of a 'practical continuity of movement' across State lines from the point of origin to the point of destination." 29 C.F.R. 782.7(b)(1).² There is no question that this requirement is satisfied under the MCA and section 13(b)(1) for the intrastate leg of the trip when the out-of-state shipper designates a final destination of the goods at the time of shipment. See *Bilyou v. Dutchess Beer Distributors, Inc.*, 300 F.3d 217, 223 (2nd Cir. 2002) (interstate commerce present when "'the property is carried to a selected destination . . .") (citation omitted). Thus, under the relevant interpretations of interstate commerce, the *Name** drivers would be in interstate commerce and exempt under section 13(b)(1) when they transport the shipments to a specifically named final destination.

The determination of interstate commerce for the final leg of shipments not sent to a named recipient, but held in storage between legs of the trip, has traditionally been governed by a more specific provision at 29 C.F.R. 782.7(b)(2). This regulation is based on rulings of the Interstate Commerce Commission as to its jurisdiction in this particular situation, and is one of the exceptions from the application of the general FLSA definition of interstate commerce described in section 782.7(b)(1).³ That specific regulation provides that interstate commerce, and thus the application of section 13(b)(1), stops at the terminal storage facility if the shipper has no fixed and persisting transportation intent past the terminal storage point at the time of shipment. A shipper has no such intent if three conditions are satisfied:

1. At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage, and
2. the terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated, and
3. transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.⁴

29 C.F.R. 782.7(b)(2). Where these facts are established, interstate commerce is deemed to end at the terminal storage facility. See *Watkins v. Ameripride Services*, 2004 WL 1487393 *4 (9th Cir. 2004) (where uniforms were purchased from out of state and held in a warehouse until later sold, trip from warehouse to customer was intrastate and the drivers were not subject to section 13(b)(1)).

However, the specific criteria in section 782.7(b)(2) for determining whether goods are moving in interstate commerce from terminal points or terminal storage after they have crossed a state line have been supplemented for specific situations by a more recent interpretation from DOT. DOT issued guidance as to its jurisdiction under the MCA for “motor traffic moving from warehouses or similar facilities to points in the same State after or preceding a movement from another State” at 57 Fed. Reg. 19812, May 8, 1992.⁵ These newer DOT guidelines incorporate case law that developed subsequent to the cases upon which section 782.7(b)(2) was based. Thus, the DOT now provides the following factors for determining the “fixed and persisting intent” of a shipper that merchandise continue in interstate commerce when moving goods intrastate from storage facilities:

1. Even if a shipper does not know the ultimate destination of specific shipments, it bases its determination on the total volume to be shipped through the warehouse on projections of customer demand that have some factual basis, rather than a mere plan to solicit future sales within the State. This may include, but is not limited to, historical sales in the State, actual present orders, and relevant market surveys of need.
2. No processing or substantial product modification of substance occurs at the warehouse or distribution center. However, repackaging or reconfiguring (secondary packaging) may be performed.
3. While in the warehouse, the merchandise is subject to the shipper’s control and direction to the subsequent transportation.
4. Modern tracking systems allow tracking and documentation of most, if not all, of the shipments coming in and going out of the warehouse or distribution center.
5. The shipper or consignee must bear the ultimate payment for transportation charges even if the warehouse or distribution center directly pays the transportation charges to the carrier.
6. The warehouse utilized is owned by the shipper.

7. The shipments move through the warehouse pursuant to a storage in transit provision.

57 Fed. Reg. at 19813. *Advantage Tank Lines, Inc.*, No. MC-C-30198, 10 ICC 2d 64 (1994). See also *Atlantic Independent Union v. Sunoco*, 2004 WL 1368808 at *7 (E.D. Pa. 2004).

Additionally, the DOT declared that the presence of one or more of the following factors is not sufficient to establish a break in the continuity that would change the interstate character of the subsequent transportation:

1. The shipper's lack of knowledge of the specific, ultimate destination or consignee at the time the shipment leaves its out-of-State origin;
2. Separate bills of lading for the inbound and outbound movements instead of through bills of lading;
3. Storage-in-transit tariff provisions;
4. Storage receipts issued by the warehouse distribution center;
5. Time limitations on storage;
6. Payment of transportation charges by the warehouse or distribution center, when the shipper or consignee is ultimately billed for these charges;
7. Routing of the outbound shipments by the warehouse or distribution center;
8. A change in carriers or transportation modes at a distribution facility;
9. Use of brokers retained by the shipper;
10. Use of a warehouse not owned by the shipper.

See 57 Fed. Reg. at 19813.

*Name** services can be divided into two categories, A and B. Category A movements involve deliveries to customers for the shipper (typically a major petroleum refiner that retains control over the product until it reaches the destination intended by the shipper, such as a specific retail gas station or commercial end user) of predetermined quantities on a routine basis either to fill standing or specific orders or based on their historic demands for the products. Category B movements follow the sale of the product to marketers, and are based on pre-existing contracts with the volume based on specific or standing orders from the marketers or on their historical usage, and the marketers arrange with *Name** for the final

transportation of the product. Based on the information provided, the above factors 1, 2, 3 and 5 from the first list are clearly met for Category A deliveries. Even when the shipper does not know the ultimate destination of the petroleum when it leaves the shipper's plant, the volume of the shipment is based on historical sales figures. Additionally, no further processing of the petroleum occurs at the storage facility. The whole process is overseen by the shipper, meeting the requirements of the third factor. The fifth factor is met because the shipper bears the ultimate payment for transportation.

As for Category B deliveries, factors 1, 2, and 3 from the first list are also met as they were for Category A deliveries. Absent information as to the remaining factors sufficient to compel a contrary result, the intrastate movements of petroleum in both categories A and B appear to qualify as interstate activity under the MCA, and thus the drivers are exempt from overtime under section 13(b)(1) during this time.

We are as of this date withdrawing opinion letters dated March 19, 1974, April 1, 1981, August 23, 1982, and January 24, 1985 to the extent that these letters conflict with the position described above. These withdrawn letters were all written before the most recent (1992) DOT interpretation that is the basis of the position taken in this letter. Thus, they do not contain a complete description of the facts that should be considered in evaluating the applicability of the MCA and section 13(b)(1).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division of the Department of Labor.

Sincerely,

Alfred B. Robinson, Jr
Acting Administrator

*Note: * The actual name(s) was removed to preserve privacy.*

¹*Name** states that in approximately 26% of their deliveries the drivers move across state lines. Interstate commerce is clear for such movements.

²This is a traditional test of interstate commerce under the FLSA. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). The enforcement position recognizes that interstate commerce under the FLSA and the Motor Carrier Act are not identical, but adopts the slightly broader FLSA interpretation of interstate commerce for purposes of applying the section 13(b)(1) exemption, “except in those situations where the [Interstate Commerce] Commission has held or the Secretary of Transportation or the courts hold otherwise.” Section 782.7(b)(1). As discussed below, the specific situation described in the opinion request does involve a situation subject to decisions of the courts and the Secretary of Transportation.

³The Interstate Commerce Commission regulated motor carrier safety prior to the Secretary of Transportation. Congress abolished the ICC on January 1, 1996 and transferred many of its functions to the newly created Surface Transportation Board, an agency within the Department of Transportation. *See* ICC Termination Act of 1995, Pub.L. No. 104-88, § 101, 109 Stat. 803, 804 (1995).

⁴Under comparable circumstances, the last leg of the trip could be interstate commerce under the FLSA. *See Jacksonville Paper*, 317 U.S. at 568-9 (interstate commerce continues after storage at a warehouse when goods are ordered with a “pre-existing contract or understanding with the customer . . .,” the goods are treated as “stock in trade . . .,” and title passes at the warehouse).

⁵Because DOT is the final administrative authority for the MCA, its interpretation of its jurisdiction is controlling. *See Martin v. Coyne International Enterprises, Inc.*, 966 F.2d 61 (2nd Cir. 1992).

DOL Opinion Letter, FLSA 2005-2NA

April 27, 2005

Dear *Name**,

This is in response to your request for an opinion concerning the application of the Fair Labor Standards Act (FLSA) to certain truck drivers who transport goods only intrastate.

Your client employs approximately 100 truck drivers to transport perishable and non-perishable merchandise from its warehouse in State X to approximately 140 of its retail stores in State X. Approximately 90 percent of the goods shipped to the company's warehouse are produced outside of State X. Employees at the company's headquarters outside of State X order the goods. The out-of-state manufacturers typically ship the goods directly to the company's warehouse, although in some instances (approximately 30 to 40 percent of the time), the company hires a common carrier to pick up the goods from out of state and bring them to the warehouse.

At the time of shipment the goods are not earmarked for a particular retail store. However, it is understood at the time of shipment that the goods will ultimately continue from the warehouse to a retail store within State X. The company orders the out-of-state goods based on various factors, such as past ordering records and projections regarding the quantity of goods that stores will likely need. Once the goods arrive at the warehouse, they are sorted onto pallets and stored on racks as inventory. Individual stores place orders for the goods with the warehouse. The warehouse then fills the orders from the warehouse's existing inventory. When filling orders, the goods are sometimes re-sorted, but they are not repackaged or further processed. The goods typically remain in the warehouse awaiting shipment to the stores from one week to three months. No goods are sold wholesale directly from the warehouse.

Section 13(b)(1) of the FLSA exempts from its overtime pay requirements "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 [the Motor Carrier Act (MCA).]" The Department of Transportation (DOT) has authority to regulate the safety-affecting employees of motor carriers when the employees operate in interstate

commerce, as defined in the MCA.¹ Whether the final intrastate leg of interstate shipments not sent to named recipients, but held in storage between legs of the trip, constitutes interstate commerce turns on whether the shipper has a fixed and persisting transportation intent beyond the terminal storage point at the time of shipments.

We have previously concluded that transportation within a single State from a chain store warehouse to outlets of the chain, of goods brought into the State for sale at the outlets, is covered on traditional "in commerce" grounds under the FLSA and is also transportation in interstate commerce under the MCA. The situation in the chain store cases is "one where goods are shipped from one State and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets. All goods ordered from other States for delivery to the warehouse are ordered to supply the needs of the retail stores, and the shipper will know or can be presumed to know that these stores are the ultimate destination of the goods shipped." Field Operations Handbook §24d02(d); *see also* Opinion Letter dated August 23, 1982, copies enclosed.

Based on the information provided, the overtime pay exemption contained in section 13(b)(1) of the FLSA would apply to the drivers, drivers' helpers, loaders and mechanics whose duties affect the safety of operation of a motor vehicle who are involved in the transportation you described. See Regulations, 29 CFR Part 782.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the questions presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that the above information is responsive to your inquiry.

Sincerely,

Barbara R. Relerford
Fair Labor Standards Team
Office of Enforcement Policy

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*

¹ Your letter states that it is your understanding that DOT “has deemed the company’s delivery drivers who delivery goods from the company’s warehouse to its stores to be wholly intrastate and outside of DOT’s jurisdiction,” but that DOT has issued no formal or written opinion to your client on the matter. You advised us orally that your understanding was based upon a telephone conversation by your client with someone from DOT. Based on the facts you have presented, your client’s understanding is contrary to our understanding of DOT’s interpretation of its jurisdiction , based upon our own communications with DOT and the ruling in Ex Parte No. MC-207, 57 Fed. Reg. 19812 (Interstate Commerce Commission, May 8, 1992). If there is an authoritative decision by DOT that transportation of a particular character is not interstate commerce under the MCA, section 13(b)(1) would not apply. See 29 C.F.R. 782.7(b)(2).

Department of Labor, Wage and Hour Division, Field Operations Handbook, sections 24d-24d02

Rev. 475 Field Operations Handbook – 6/25/81 24d-24d02

24d02 Transportation of commodities from terminal storage

- (a) IB 782.7(6)(1) contains an enforcement policy with respect to motor carrier transportation of property or passengers within a single State which provides that any such movement which is in interstate commerce under the FLSA will be considered a movement in interstate commerce under the Motor Carrier Act (Part II of the Interstate Commerce Act) except where the DOT or the courts hold otherwise. However, as stated in IB 782.7(b)(2), the DOT has held that transportation confined to points in a single State from a storage terminal of commodities which have had a prior movement by rail, pipeline, motor, or water from an origin in a different State is not in interstate commerce within the meaning of the Motor Carrier Act if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of the shipment. It has been specifically found that there is no fixed and persisting intent where the following three conditions are present:
- (1) At the time of shipment there is no specific order being filled for a specific quantity of a given product to be moved through to a specific destination;
 - (2) The terminal storage is a distribution point or local marketing facility from which specific amounts of the product are sold or allocated; and
 - (3) Transportation in the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage.

The term “fixed and persisting transportation intent” as used by the DOT refers to the intent of the shipper of the commodities into the State, who may or may not also be the importer. If in applying the tests set out in (1) through (3) above it is determined that there was no such intent on the part of the shipper, the interstate movement of the commodities under the Motor Carrier Act ends with delivery to a terminal storage facility even where a “practical continuity of movement” through the terminal (Jacksonville Paper rule) makes the subsequent movement of all or part of the commodities from terminal storage to a destination in the same State a part of their movement in interstate commerce under the FLSA. Thus, in situations where the three tests are in fact met, as has been found to be true with respect to movement of petroleum products through pipeline and water terminals, such a subsequent movement would be considered a separate intrastate movement under the Motor Carrier Act even though the importer ordered the out-of-State goods in anticipation of the needs of a stable group of specified customers, or to meet the needs of particular customers pursuant to an understanding with them, or to fill previously received orders of his customers. However, these facts which demonstrate a “practical continuity of movement” under FLSA may, in particular cases, also demonstrate that one or more of the three DOT conditions are not met, and must be carefully examined with this in mind in any situation in which the application of the tests to the facts present in such situation has not specifically been determined by the DOT.

- (b) In some situations the shipper is also the importer, as would be the case where a manufacturer, such as a bakery, produces goods in one State and moves them through his distribution point in another State to his customers in that State. The employer, as the shipper, knows at the time of the shipment what he intends to do with the goods after they reach his out-of-State distribution point. If, as would normally be the case, there is a “practical continuity of movement” of the out-of-State goods through the firm’s distribution point to its customers, this is sufficient to establish a “fixed and persisting transportation intent” beyond the distribution point for purposes of applying Sec 13(b)(1).

- (c) Transportation within a single State of petroleum products from pipeline or water terminals, as ordinarily performed, has specifically been held by the DOT to be in intrastate rather than interstate commerce within the meaning of the Motor Carrier Act. Employees engaged in such transportation, if covered on traditional or enterprise grounds under FLSA, are not within the Sec 13(b)(1) exemption.
- (d) Transportation within a single State from a chain store warehouse to outlets of the chain, of goods brought into the State for sale at the outlets, is covered on traditional “in commerce” grounds under the FLSA and is also transportation in interstate commerce under the Motor Carrier Act. The Sec 13(b)(1) exemption applies to the drivers, drivers’ helpers, loaders and mechanics concerned with such transportation. This has been established in the courts and the DOT determination in paragraph (a) above has no application. The situation of the chain store warehouse differs in essential respects from that of the terminals considered by the DOT in its decision. As the courts have uniformly held, the situation in the chain store cases is one where goods are shipped from one State and briefly warehoused in another for the convenience of the owner in making an efficient distribution of those goods to its local retail outlets. All goods ordered from other States for delivery to the warehouse are ordered to supply the needs of the retail stores, and the shipper will know or can be presumed to know that these stores are the ultimate destination of the goods shipped. Transportation of goods from the warehouse to the retail outlets is typically scheduled for the most part on a continuing basis, rather than only after specific items have been sold or allocated from storage.
- (e) Transportation within a single State from the warehouse of an independent wholesaler or supplier of goods ordered from other States to meet the needs of an associated or allied group of retail stores may be assumed to be in interstate commerce within the meaning of the Motor Carrier Act for purposes of Sec 13(b)(1) pending further clarification by DOT or the courts, if the warehouse serves

such stores exclusively and the situation is in other respects comparable to the chain store situation discussed in paragraph (c) above.

- (f) In situations other than those in (b), (c), (d), and (e) above, the CO shall make every effort to determine the “fixed and persisting transportation intent” of the shipper by ascertaining from the information available at the establishment under investigation whether the three DOT tests are met. In the case of the typical wholesaler or supplier this will generally present no problem because the facts will be available to show whether tests (2) and (3) in (a) above are met and the presence or absence of any transportation intent beyond the importer’s establishment on the part of the shipper can ordinarily be demonstrated from the importer’s purchase orders, invoices, and other similar records. In the event the CO is unable to resolve the question from information available at the establishment under investigation, he shall make no attempt to contact the shipper. In such situations the matter shall be referred promptly to the AD and the ARA shall be contacted as necessary for additional guidance or to consult the RS as appropriate.

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND
INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	OVERTIME	NUMBER:	ES.A.8.1
CHAPTER:	RCW 49.46.130 WAC 296-126 and WAC 296-128 PARAGRAPH 8(g)	REPLACES:	ES-013
		ISSUED:	1/2/2002
		REVISED:	11/6/2002

ADMINISTRATIVE POLICY DISCLAIMER

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Employment Standards should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

1. Employees are generally entitled to overtime compensation for hours worked in excess of forty per week. Unless an employee is exempt from the Minimum Wage Act or from overtime requirements (see page 6 of this policy), he or she must be compensated at an overtime rate of at least at one and one-half times his or her regular rate of pay for all hours in excess of forty in a seven-day workweek. See RCW 49.46.130(1). Overtime pay is required regardless of whether the employee is paid hourly or in some other manner, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate) or whether payment is made on a daily, weekly bi-weekly, semi-monthly, monthly or other basis.

There is no limitation on the number of hours an employee may work in a workweek. An employer can require mandatory overtime but must compensate the employee accordingly. Overtime compensation is due when an employee works more than 40 hours in a workweek, regardless of whether the hours are worked on a Saturday, Sunday or holiday.

The overtime requirement may not be waived by agreement between an employee and employer. A declaration by an employer that no overtime work will be permitted, or that overtime work will not be paid unless authorized in advance, is not a defense to an employee's right to compensation for any overtime hours actually worked. The right to overtime compensation cannot be waived by individual employee agreement or by collective bargaining agreement.

2. If an employee must be paid overtime, how is the amount due calculated?

If an employee is due overtime compensation for hours over 40 in a workweek, it must be paid at a rate “not less than one and one-half times the regular rate at which he [or she] is employed.” See RCW 49.46.130 (1).

- **Employees paid a single hourly rate.** Employees who are paid a single, hourly rate must be paid at least one and one-half their regular hourly rate of pay for each hour worked in excess of 40 in a seven-day workweek.
- **Employees paid other than at a single hourly rate.** For example, non-exempt salaried employees, piece rate, commission, non-discretionary bonus, and combinations of the above, including one or more of the above combined with an hourly rate, are also entitled to overtime pay at a rate of at least one and one-half the “regular rate” at which they are employed. See RCW 49.46.130(1) and WAC 296-128-550.

3. How is “regular rate” determined?

Prior to computing overtime pay, it is necessary to determine the employee's regular rate. The regular rate may exceed the minimum wage pursuant to RCW 49.46.020, but may not be less. Regular rate of pay for other than strictly hourly pay plans or practices is determined by dividing the total weekly compensation received by the total number of hours the employee worked during the workweek, including the hours over forty. See WAC 296-128-550. See **ES.A.8.2**, “How to Compute Overtime.”

4. Payments Included When Determining Regular Rate. Certain payments other than hourly, commission, piece rate, or salary nonexempt payments must be included in the regular rate.

- **Bonuses:** Non-discretionary bonuses must be totaled in with other earnings to determine the regular rate on which overtime must be paid.
- **Non-Overtime Premium:** Lump sum payments that are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.
- **“On Call” Pay:** If employees who are on call and are not confined to their homes or to any particular place, but are required only to leave word where they may be reached or required to wear a beeper, the hours spent on-call are not considered “hours worked.” However, any payment for such on-call time, while not attributable to any particular hours of work, is paid for performing a duty connected with the job, and must be included in calculating the employee’s regular rate.

5. Certain payments may be excluded when determining regular rate. The regular rate includes total compensation earned in the pay period, except certain payments. The following payments are not considered in determining regular rate provided all the conditions in each are met:

- **Overtime pay for hours in excess of a daily or weekly standard:** Extra compensation provided by a premium rate of at least one and one-half the usual hourly rate, which is paid for certain hours worked by the employee in any day or workweek because the hours are hours

worked in excess of eight in a day or in excess of 40 in a workweek. Such extra compensation may be credited toward statutory overtime payments.

- **Premium pay for work on Saturdays, Sundays and other special days.** Extra compensation provided by a premium rate of at least one and one-half which is paid for work on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek as such, may be treated as overtime pay. However, if the premium rate is less than one and one-half, the extra compensation paid must be included in determining the regular rate of pay and cannot be credited toward statutory overtime requirements.
- **Discretionary bonuses.** A discretionary bonus or gift or payment in the nature of gifts given on special occasions need not be included in the regular rate if the employer retains discretion both that a bonus will be paid and that the amount will not be determined until the end, or near the end, of the bonus period, i.e., when an employer pays a bonus without prior contract, promise, or agreement and the decision as to the fact and amount of payment lay in the employer's sole discretion and the bonus is not geared to hours worked or production, the bonus would be properly excluded from the regular rate. If the employer announces a bonus in advance, discretion regarding the fact of payment has been abandoned and the bonus would not be excluded from the regular rate.
- **Gifts, Christmas and special occasion bonuses.** If a bonus paid at Christmas or on other special occasions is a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it. If the bonus is geared to hours worked or production, it is not considered as a gift and must be included in the regular rate.
- **Reimbursement for expenses.** When an employee incurs expenses on the employer's behalf, or where the employee is required to spend sums solely for the convenience of the employer, payments to cover such expenses are not included in the employee's regular rate of pay.
- **Payment for non-working hours.** Payments that are made for periods when the employee is not at work due to vacation, holiday, illness or similar situations, may be excluded from the regular rate of pay. Such payments may not be credited toward statutory overtime requirements.
- **Show-up and call-back pay.** An employment agreement may provide for a stated number of hours pay if the employee is not provided with the expected amount of work. If the employee works only part of the hours but is paid for the entire number of hours in the agreement, the pay for the hours not worked is not regarded as compensation and may be excluded from the regular rate. Such pay cannot be credited toward overtime pay due.

Because the regular rate is determined by actual hours of work performed by an employee, employers are required to record all actual hours of work regardless of whether an employee is paid on hourly, salary, piece rate, commission or other basis. **See ES.D.1, Recordkeeping.**

6. Examples of Regular Rate In Various Situations:

- **Hourly rate.** When an employee is paid solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours, the employee must be paid one and one-half times the hourly rate for each hour over 40 in the workweek.
- **Piece rate.** When an employee is paid on a piece rate basis, the regular rate of pay is computed by adding together the total earnings for the workweek from piece rate and all other earnings (such as bonuses), and any sums that may be paid for other hours worked. This sum is divided by the total number of hours worked in that week to yield the pieceworker's "regular rate" for that week. For the overtime work, the employee is owed, in addition to the total straight-time weekly earnings, one-half the regular rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only additional half-time pay is required.
- **Day rates/job rates.** An employee may be paid a flat sum for a day's work, or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case, the employee's "regular rate" is found by totaling all the sums received at such day rates or job rates in the work week and divided by the total hours actually worked. The employee must be paid an additional one-half pay at this rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only the additional half-time pay is required.
- **Payment of salary.** Salary payment arrangements must include a mutually understood agreement between employer and employee specifying the number of hours per week for which the salary is intended to cover. In the absence of a clear understanding of the number of hours to be included in the weekly salary, the department will consider the salary agreement to be based on 40 hours.
- **Salary—weekly.** When an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate.
- **Salary—other than weekly.** When the salary covers a period longer than a workweek, such as a month, it must be reduced to its equivalent weekly wage by multiplying by 12 (months), and dividing by 52 (weeks). A semi-monthly salary is converted to its weekly equivalent by multiplying by 24 and dividing by 52. Overtime payment for salary paid other than weekly is determined the same as for weekly payment of salary.
- **Salary—workweek exceeding 40 hours:** A fixed salary for a regular workweek longer than 40 hours does not discharge the statutory obligation for nonexempt employees. For example, an employee may be hired to work a 44-hour workweek for a weekly salary of \$350. In this case, the regular rate is obtained by dividing the \$350 straight-time salary by 44 hours, which results in a regular rate of pay of \$7.95. The employee is due additional overtime computed by multiplying the four overtime hours by one-half the regular rate of pay at \$3.98 per hour, and the employee is due an additional \$15.92 above the \$350 salary for each week, for a total of \$365.92. If the employee worked more than 44 hours, the employee would be due additional pay

for the hours worked over 44 computed by multiplying these additional overtime hours by *one and one-half* the regular rate of pay (\$7.95), or \$11.93 per hour for each hour worked in excess of 44 in any workweek.

- **Salary—fluctuating hours.** Salary for a fluctuating workweek occurs when an employee is employed on a fixed salary and it is clearly understood and agreed upon by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight-time pay for all hours of work, whether fewer or greater than forty hours per week. The regular rate is then obtained for each week by dividing the weekly salary by the number of hours worked each week. Since it was understood that all hours would constitute straight-time, all hours worked have already been paid at straight-time compensation; however, the employee is still entitled to receive an additional one-half hour's pay for each hour over 40 in the work week.
- **Employees working at two or more rates.** Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. The employee is due the one-half rate for each overtime hour.
- **Commission payments (other than retail sales or service exception).** Commissions are payments for hours worked and must be included in the regular rate, regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a salary or hourly rate. It does not matter whether the commission earnings are computed daily, weekly or monthly.

When a commission is paid on a workweek basis, it is added to the employee's other earnings for that workweek and the total is divided by the number of hours worked in the workweek to obtain the employee's regular rate for the particular work week. The employee must then be paid extra compensation at the one-half rate for each overtime hour worked. See WAC 296-126-021.

Note: See ES.A.10.1, ES.A.10.2 and ES.A.10.3 for commissioned employees in retail sales or service establishments.

Note: In all of the above examples, if the regular rate should fall below the applicable minimum wage, the employee must be compensated for regular hours at the minimum wage and for overtime based on one and one-half the minimum wage rate.

7. What is the definition of “workweek”?

A workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. It may begin on any day of the week and any hour of the day. For purposes of overtime payment, each workweek stands alone; there can be no averaging of two or more workweeks. Once the beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements. In the absence of a workweek established by the employer, the workweek automatically defaults to the calendar week, Sunday through Saturday.

8. Who is exempt from overtime?

RCW 49.46.130 includes the following exemptions from overtime law.

- (a) **Employees exempted from the Minimum Wage Act (MWA).** The entitlement to overtime comes from RCW 49.46.130, which is part of the MWA. Therefore, those who are exempted from the definition of employee under the Minimum Wage Act are not protected by the MWA, nor is it required they be paid overtime wages. See **ES.A.1**, Minimum Wage Act Applicability, for a detailed discussion of the exemptions contained in RCW 49.46.010(5). Also see **ES.A.9.3, ES.A.9.4, ES.A.9.5, ES.A.9.6, ES.A.9.7, and ES.A.9.8**, Exemptions from Minimum Wage and Overtime for Executive, Administrative, Professional, Computer Professional, and Outside Sales. If a person who is exempted from the MWA is, nonetheless, paid overtime or is given compensatory time off by the employer on a voluntary basis, the payment of such additional compensation does not mean that the employee is thereafter entitled to overtime as a matter of law. See RCW 49.46.130 (2)(a).

- (b) **Employees who request compensatory time off in lieu of overtime pay:**

Note: Compensatory time off in lieu of overtime pay is not allowed for industries or enterprises that are subject to the federal Fair Labor Standards Act (FLSA). Employers must contact the U.S. Department of Labor to determine if their business is covered by FLSA.

RCW 49.46.130(2)(b) and WAC 296-128-560 allow employees to request compensating time off in lieu of overtime pay. For compensatory time to substitute for a premium wage rate, however, certain criteria apply:

- The substitution of compensatory time off for premium pay must be at the employee's request and must be agreed to by the employee. Compensatory time is considered a benefit to the employee and the employer may not impose the requirement on any employee who has not made such a request.
 - Compensatory time is valid only if accrued at the rate of one and a half hours off for each overtime hour worked.
 - Upon termination of the employee/employer relationship, the balance of the accrued compensatory time must be paid in wages.
- (c) **Persons employed as "Seamen."** "Seamen," regardless of whether they are employed on an American or other vessel. Seamen who work on American vessels are subject to the payment of minimum wage.
- (d) **Seasonal employees of agricultural fairs.** Seasonal employees of agricultural fairs and seasonal employees who are employed at concessions and recreational establishments at agricultural fairs within the state of Washington as long as "the period of employment for

any seasonal employee at any or all agricultural fairs does not exceed fourteen working days per year.”

The department interprets “agricultural fairs” to mean any area, county, district and community fair and also including youth shows and fairs (generally having some public education component for the purpose of educating rural youth). Examples include the Puyallup Fair, King County Fair, Grant County Fair, etc. **The exception does not apply to amusement fairs such as a shopping mall carnival.**

The fourteen-day requirement is applied to individual employees. Thus, an employer could employ some workers for longer than fourteen days and would owe them overtime, or such workers could work at other fairs and would be entitled to overtime for that work, but an employer would not have to pay overtime to any individual employee who worked fourteen days or less in a year for a fair or fair concessionaire. If an employee does become entitled to overtime by working more than fourteen days in a year, the original employer is not retroactively liable for overtime. In other words, the first fourteen days of employment are not subject to the overtime requirement regardless of whether the employee works longer or at other fairs and is subject to overtime for the subsequent period.

- (e) **Unionized motion picture projectionists.** Motion picture projectionists covered by a contract or collective bargaining agreement that regulates hours of work and overtime pay.
- (f) **Truck or bus drivers subject to federal Motor Carrier Act.** Truck or bus drivers subject to the provisions of the federal Motor Carrier Act as long as the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to time and one half the driver’s usual hourly rate. This provision does not apply to truck or bus drivers who are paid entirely by hourly wage rate or rates. See WAC 296-128-011 for special record keeping requirements applicable to employers of truck and bus drivers subject to the provisions of the Federal Motor Carriers Act, and see WAC 296-128-012 for application to the department for approval of an alternate pay system.
- (g) **Agricultural workers.** Effective November 6, 2006, the previous agricultural policy in this section issued on January 2, 2002 was withdrawn pending revision to update the policy. This is necessary due to the August 31, 2006 Washington Supreme Court decision 77283-5 on Cerrillo v Esparza. The previous policy was in conflict with the decision of the Supreme Court.
- (h) **Industries that are subject to federal law requiring overtime based on a workweek other than 40 hours.** Examples in federal law include:
 - Industries who lease federal land for recreational purposes, which requires payment of overtime after 56 hours per week.

- Hospitals and residential care establishments that pursuant to a prior agreement or understanding with their employees, utilize a fixed workweek period of 14 consecutive days in lieu of the workweek for the purpose of computing overtime, *if* they pay one and one-half times the regular rate for hours worked over eight in any work day, or 80 in the 14-day period, whichever is the greater number of hours.
- (i) **Airline personnel who work more than 40 hours in a week if the hours are accrued as the result of a voluntary shift trade with another airline employee.** When an “employee of a carrier by air” who is subject to the provisions of subchapter II of the Railway Labor Act (45 USC Sec. 181) voluntarily works more than 40 hours in a week as a result of trading shifts with another employee or voluntarily accepting a reassignment and where the trade or reassignment gives the employee the opportunity to reduce hours in the same or in other workweeks, it is not required that the employee be paid overtime wages for the hours over 40.

9. Special exceptions exist for the following types of employees:

A. Commission employees of retail or service establishments. Employees of “retail or service establishments” need not be paid one and one-half the regular rate for hours over 40 in a week *if* the employee’s regular rate of pay is greater than one and one-half times the current statutory minimum wage and more than half of the employee’s compensation for a representative period is due to commissions on goods or services. See RCW 49.46.130(3). For a detailed discussion of application of the retail or service establishment exception to overtime, refer to administrative policies **ES.A.10.1, ES.A.10.2 and ES.A.10.3.**

B. Commissioned salespeople selling cars, trucks, RVs, campers, trailers, manufactured homes or farm implements to consumers. Commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing or farm implements to ultimate purchasers need not be paid additional overtime for hours over forty in a week *as long as they are paid the greater of:*

(a) At least the current minimum wage for each hour worked up to forty hours per week and at least one and one-half times the current minimum hourly rate for all hours worked over forty in one week; or

(b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

Note: This exception, RCW 49.46.130(4), applies only to those workers who sell the types of vehicles listed in the statute. *It is different from the retail sales exception to overtime.* Employees other than salespersons may be subject to the retail sales exception in RCW 49.46.130(3). See **ES.A.10.1, ES.A.10.2 and ES.A.10.3** for interpretation of the retail and service establishment exception.

C. Public sector fire protection and law enforcement employees of agencies of agencies with fewer than five employees. Under RCW 49.46.130(5), employees of a public agency who are engaged in

“fire protection” and “law enforcement” activities (which includes security personnel in correctional institutions) are not required to be paid additional overtime compensation for hours over 40 in a week if (a) in a 28-consecutive day work period the employee earns at least one and one-half his or her regular rate of pay for hours worked in excess of 240 total in that 28-consecutive day work period; or (b) In a work period of not less than seven days but not more than 28 days, the employee earns at least one and one-half his or her regular rate of pay for total hours worked in excess of the number equal to the ratio of 240 hours to 28 days. Note: Agencies with five or more employees in fire protection and law enforcement activities are covered by the federal Fair Labor Standards Act.

ADMINISTRATIVE POLICY



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND
INDUSTRIES
EMPLOYMENT STANDARDS

TITLE:	MINIMUM HOURLY WAGE	NUMBER:	ES.A.3
CHAPTER:	RCW 49.46.020	REPLACES:	ES-008
	WAC 296-126		
	WAC 296-125	ISSUED:	1/2/2002
	WAC 296-131		

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Minimum Wage Adjustments

The Minimum Wage Act provides that on September 30, 2000 and on each following year on September 30th, the Department of Labor and Industries shall calculate an adjusted minimum wage rate to maintain employee purchasing power by increasing the current year’s minimum wage rate by the rate of inflation. The adjusted minimum wage rate will be calculated to the nearest cent using the consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index, for the twelve months prior to each September 1st as calculated by the United States Department of Labor. Each adjusted minimum wage rate takes effect on the following 1st of January.

Each minimum wage adjustment will be published in the Washington State Register.

Minimum Hourly Wage—Adults

Employers must pay each employee who is age 18 or older at least the minimum hourly wage established under RCW 49.46.020. This includes agricultural workers, except as provided in RCW 49.46.010(5)(a).

Minimum Hourly Wage—Minors

The department has the authority to set the minimum wage rate for minors by regulation, and did so in WAC 296-125-043, WAC 296-126-020, and WAC 296-131-117, which state that the minimum wage for minors 16- and 17-years of age is equal to that of adults, and the minimum wage for minors under 16 years of age is 85 percent of the applicable adult minimum wage.

Minimum Hourly Wage—Agricultural Labor

Agricultural workers, including minors, are covered under the state minimum wage provisions, except the minimum wage requirement doesn't apply to hand harvest laborers paid piece rate, and who commute daily from their permanent residence to the farm and who are employed fewer than thirteen weeks in agriculture in the preceding calendar year. See RCW 49.46.010(5)(a).

An example of workers within this group might include berry pickers who reside permanently in the area and work only in the berry crop.

The employer has the burden of proving that workers fall within the above exemption.

Determining whether an employee has been paid the minimum wage

In order to determine whether an employee has been paid the statutory minimum hourly wage when the employee is compensated on other than an hourly basis, the following standards should be used:

- If the pay period is weekly, the employee's total weekly earnings are divided by the total weekly hours worked (including hours over 40). Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- If the regular pay period is not weekly, the employee's total earnings in the pay period are divided by the total number of hours worked in that pay period. The result is the employee's hourly rate of pay. Earnings must equal minimum wage for each hour worked. If such earnings do not equal minimum wage, the employer must pay the difference.
- For employees paid on commission or piecework basis, wholly or in part, other than those employed in bona fide outside sales positions, the commission or piecework earnings earned in each workweek are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See WAC 296-126-021.
- Meal periods are considered hours worked if the employee is required to remain on duty or on the employer's premises at the employer's direction subject to call. In such cases, the meal period counts toward total number of hours worked and must be included in the minimum wage determination.
- "Total earnings" is meant to include all compensation received for hours worked in the pay period, as well as any additional payments, i.e., split-shift bonus or stand-by pay.

- See ES.A.8.1 and ES.A.8.2 for overtime calculations for payment of other than a single hourly rate.

Payments not Included in minimum wage determination:

- Vacation pay or holiday pay is not considered when computing the minimum wage.
- Gratuities, tips, or service fees are not considered when computing the minimum wage and may not be credited as part the minimum wage. See WAC 296-126-022.

Federal Motor Carrier Safety Administration website, Company Snapshot: Safeway, Inc.

Federal Motor Carrier Safety Administration, Safety and Fitness Electronic Records System, available at

http://safer.fmcsa.dot.gov/query.asp?searchtype=ANY&query_type=queryCarrierSnapshot&query_param=USDOT&original_query_param=NAME&query_string=138208&original_query_string=SAFEWAY%20INC (last visited September 3, 2009)

SAFER Web - Company Snapshot SAFEWAY INC - Microsoft Internet Explorer

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Address http://safer.fmcsa.dot.gov/query.asp?searchtype=ANY&query_type=queryCarrierSnapshot&query_param=USDOT&original_query_param=NAME&query_string=138208&original_query_string=SAFEWAY%20INC Go Links

USDOT Number MC/MX Number Name

Enter Value:

Company Snapshot
SAFEWAY INC
USDOT Number: 138208

ID/Operations | Inspections/Crashes | Safety Rating | Insurance

Other Information for this Carrier

- SafeStat Results
- Licensing & Insurance

Carriers: If you would like to update the following ID/Operations information, please complete and submit form [MCS-150](#) which can be obtained [online](#) or from your State FMCSA office. If you would like to challenge the accuracy of your company's safety data, you can do so using FMCSA's [DataQs](#) system.

Carrier and other users: FMCSA provides the Company Safety Profile (CSP) to motor carriers and the general public interested in obtaining greater detail on a particular motor carrier's safety performance than what is captured in the Company Snapshot. To obtain a CSP please visit the [CSP order page](#) or call (800)832-5660 or (703)260-4001 (Fee Required).

For help on the explanation of individual data fields, click on any field name or for help of a general nature go to [SAFER General Help](#).

The information below reflects the content of the FMCSA management information systems as of 09/03/2009.

Entity Type: Carrier & Shipper

Out of Service (Interstate Only): No **Out of Service Date:** None

Legal Name: SAFEWAY INC

DBA Name:

Physical Address: 5918 STONERIDGE MALL ROAD
PLEASANTON, CA 94588

Phone: (925) 226-9555

Mailing Address: 5918 STONERIDGE MALL ROAD
PLEASANTON, CA 94588

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PLEASANTON, CA 94588

Phone: (925) 226-9555

Mailing Address: 5918 STONERIDGE MALL ROAD
PLEASANTON, CA 94588

USDOT Number: 138208

State Carrier ID Number:

MC or MX Number: MC-684448

DUNS Number: 61-473-1677

Power Units: 410

Drivers: 857

MCS-150 Form Date: 06/26/2009

MCS-150 Mileage (Year): 52,348,218 (2008)

Operation Classification:

<input checked="" type="checkbox"/> Auth. For Hire	<input type="checkbox"/> Priv. Pass. (Non-business)	<input type="checkbox"/> State Govt
<input type="checkbox"/> Exempt For Hire	<input type="checkbox"/> Migrant	<input type="checkbox"/> Local Govt
<input checked="" type="checkbox"/> Private(Property)	<input type="checkbox"/> U.S. Mail	<input type="checkbox"/> Indian Nation
<input type="checkbox"/> Priv. Pass. (Business)	<input type="checkbox"/> Fed. Govt	

Carrier Operation:

Interstate Intrastate Only (HM) Intrastate Only (Non-HM)

HM Shipper Operation:

Interstate Intrastate

Cargo Carried:

<input type="checkbox"/> General Freight	<input type="checkbox"/> Liquids/Gases	<input type="checkbox"/> Chemicals
<input type="checkbox"/> Household Goods	<input type="checkbox"/> Intermodal Cont.	<input type="checkbox"/> Commodities Dry Bulk
<input type="checkbox"/> Metal: sheets, coils, rolls	<input type="checkbox"/> Passengers	<input checked="" type="checkbox"/> Refrigerated Food
<input type="checkbox"/> Motor Vehicles	<input type="checkbox"/> Oilfield Equipment	<input checked="" type="checkbox"/> Beverages

General Freight	Liquids/Gases	Chemicals
Household Goods	Intermodal Cont.	Commodities Dry Bulk
Metal: sheets, coils, rolls	Passengers	X Refrigerated Food
Motor Vehicles	Oilfield Equipment	X Beverages
Drive/Tow away	Livestock	X Paper Products
Logs, Poles, Beams, Lumber	Grain, Feed, Hay	Utilities
Building Materials	Coal/Coke	Agricultural/Farm Supplies
Mobile Homes	X Meat	Construction
Machinery, Large Objects	Garbage/Refuse	Water Well
X Fresh Produce	US Mail	X GROCERY ITEMS

ID/Operations | Inspections/Crashes | Safety Rating | Insurance

Inspection results for 24 months prior to: 09-03-2009

Total inspections: 696

Note: Total inspections may be less than the sum of vehicle, driver, and hazmat inspections. Go to [Inspections Help](#) for further information.

<u>Inspections:</u>			
Inspection Type	Vehicle	Driver	Hazmat
Inspections	448	696	0
Out of Service	38	1	0
Out of Service %	8.5%	0.1%	0%
Nat'l Average % (2007 - 2008)	33.33%	9.09%	4.76%

Crashes reported to FMCSA by states for 24 months prior to: 09-03-2009

Narr Average % (2007-2008)	33.33%	9.09%	4.76%
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Crashes reported to FMCSA by states for 24 months prior to: 09:03:2009

Type	Crashes:			
	Fatal	Injury	Tow	Total
Crashes	0	17	34	51

[ID/Operations](#) | [Inspections/Crashes](#) | [Safety Rating](#) | [Insurance](#)

The Federal safety rating does not necessarily reflect the safety of the carrier when operating in intrastate commerce.

Carrier Safety Rating:

The rating below is current as of: 09:03:2009

Review Information:

Rating date:	05/20/1994	Review Date:	04/08/1994
Rating:	Satisfactory	Type:	Compliance Review

[ID/Operations](#) | [Inspections/Crashes](#) | [Safety Rating](#) | [Insurance](#)

For the most current information on the status of operating authority and insurance for this carrier, go to the [FMCSA Licensing & Insurance site](#).

[ID/Operations](#) | [Inspections/Crashes](#) | [Safety Rating](#) | [Insurance](#)

The Federal safety rating does not necessarily reflect the safety of the carrier when operating in intrastate commerce.

Carrier Safety Rating:

The rating below is current as of: 09/03/2009

Review Information:

Rating date:	05/20/1994	Review Date:	04/08/1994
Rating:	Satisfactory	Type:	Compliance Review

[ID/Operations](#) | [Inspections/Crashes](#) | [Safety Rating](#) | [Insurance](#)

For the most current information on the status of operating authority and insurance for this carrier, go to the [FMCSA Licensing & Insurance site](#).

SAFER Links

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Federal Motor Carrier Safety Administration website, FMCSA Motor Carrier: Safeway, Inc.

FMCSA Motor Carrier, available at <http://li-public.fmcsa.dot.gov/reports/rwservlet> (last visited September 4, 2009)

FMCSA Motor Carrier

USDOT Number: **138208**
Docket Number: **MC684448**
Legal Name: **SAFEWAY INC**
DBA (Doing-Business-As) Name



Addresses
Business Address: **5918 STONERIDGE MALL ROAD**
PLEASANTON, CA 94588
Business Phone: **(925) 226-9555** Business Fax: **Fax: (925) 226-9540**
Mail Address:
Mail Phone: Mail Fax: Undeliverable Mail: **NO**

Authorities:
Common Authority: **NONE** Application Pending: **NO**
Contract Authority: **ACTIVE** Application Pending: **NO**
Broker Authority: **NONE** Application Pending: **YES**
Property: **YES** Passenger: **NO** Household Goods: **NO**
Private: **NO** Enterprise: **NO**

Insurance Requirements:

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Insurance Requirements:

BIPD Exempt:	NO	BIPD Waiver:	NO	BIPD Required:	\$5,000,000	BIPD on File:	\$5,000,000
Cargo Exempt:	NO	Cargo Required:	NO	Cargo on File:	NO		
BOC-3:	YES	Bond Required:	YES	Bond on File:	YES		
Blanket Company: UNITED STATES CORPORATION COMPANY							

Comments:

Active/Pending Insurance:

Form:	91X	Type:	BIPD/Primary	Posted Date:	07/02/2009
Policy/Surety Number:	BAP378476803	Coverage From:	\$0	To:	\$5,000,000
Effective Date:	06/01/2009	Cancellation Date:			

Insurance Carrier: ZURICH AMERICAN INSURANCE COMPANY
 Attn: MARIA ADAMSKI
 Address: 1400 AMERICAN LANE
 SCHAUMBURG, IL 60196-1056 US
 Telephone: (800) 821 - 4635 Fax: (410) 261 - 7955

Form:	84	Type:	SURETY	Posted Date:	09/03/2009
Policy/Surety Number:	8964242	Coverage From:	\$0	To:	\$10,000
Effective Date:	07/17/2009	Cancellation Date:			

Insurance Carrier: FIDELITY & DEPOSIT CO. OF MARYLAND
 Attn: MARIA ADAMSKI
 Address: 1400 AMERICAN LANE T1 10

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Attn: MARIA ADAMSKI
 Address: 1400 AMERICAN LANE T1-18
 SCHAUMBURG, IL 60196 US
 Telephone: (800) 821 - 4635 Fax: (410) 261 - 7955

Run Date: September 4, 2009 Page 1 of 2 Data Source: Licensing and Insurance
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FMCSA Motor Carrier

USDOT Number: **138208**
 Docket Number: **MC684448**
 Legal Name: **SAFEWAY INC**
 DBA (Doing-Business-As) Name



Note:
 * If a carrier is in compliance, the amount of coverage will always be shown as the required Federal minimum (\$5,000 per vehicle, \$10,000 per occurrence for cargo insurance and \$10,000 for bond/trust fund).
 The carrier may actually have higher levels of coverage.

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Rejected Reason:					

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Policy/Surety Number:		Effective Date From:	To:	Disposition:	

Authority History:

Sub No.	Authority Type	Original Action	Disposition Action
	MOTOR PROPERTY CONTRACT CARRIER	GRANTED	07/17/2009

Pending Application:

Authority Type	Filed	Status	Insurance	BOC-3

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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

GENERAL TEAMSTERS LOCAL 174,
on behalf of certain of the employees its
represents, et al.,

Appellants,

v.

SAFEWAY INC.,

Respondent.

No. 63006-7

ERRATA TO BRIEF OF
RESPONDENT

TO: THE CLERK OF THE COURT

AND TO: APPELLANT

Respondent Safeway Inc. ("Safeway") respectfully requests that the Court replace the following pages in Safeway's Brief of Respondent, which was filed on September 4, 2009, with the attached replacement pages.

The following errors were discovered and have been corrected on the attached replacement pages:

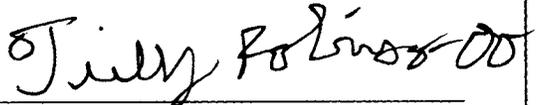
1. Portions of the Table of Contents were bolded that should not have been bolded;
2. There were certain typographical errors and omitted page citation references in the Table of Authorities;
3. Page 18, line 6 should read "CP 1374" rather than "CP 3174."

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4. Page 29, line 12 should read "WAC 296-128-012(1)(a)" rather than "WAC 296-128-012(a)(1)."

DATED this 8th day of September, 2009.

K&L GATES LLP

By 
Patrick M. Madden, WSBA # 21356
Trilby C.E. Robinson-Dorn, WSBA # 27393
Alison M. Bettles, WSBA # 39215
Attorneys for Respondent
Safeway Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2009, I served a true and correct copy of the foregoing document via legal messenger to said party below:

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Schwerin Campbell Barnard & Iglitzin LLP
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Seattle, WA 98119-3971



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Telephone: (206) 623-7580
Fax: (206) 623-7022

NO. 63006-7

COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION I

GENERAL TEAMSTERS LOCAL NO. 174,
on behalf of certain of the employees it represents, and Carl Gasca, Dane
Radke, and James Holcomb, individually and on behalf of others
similarly situated,

Appellants,

v.

SAFEWAY INC.,

Respondent.

BRIEF OF RESPONDENT

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ALISON BETTLES
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Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 510, 182 P.3d 985 (2008).

**c. Undisputed Testimony From Both Parties
Demonstrates That the FMCA Applies**

It is undisputed that Safeway receives goods at its Auburn facility from manufacturers, suppliers and producers from both inside and outside of Washington. CP 1374. Drivers then deliver those goods to Safeway's retail stores in the State. CP 702, 1374. Occasionally, drivers travel through Oregon to supply Safeway's stores in Eastern Washington when mountain passes are closed during the winter months. CP 1329-30.

DOT has undisputedly exercised its jurisdiction over Safeway and its drivers under the FMCA based on Safeway's transport of out-of-state goods into its Auburn, Washington warehouse and on to its retail stores in Washington. Safeway is licensed with DOT and authorized as an interstate motor carrier, and has been issued a DOT number. *E.g.*, Appendix A (DOT websites); CP 956. The fact that a company holds these kinds of authorizations indicates that the DOT has exercised jurisdiction over it. *E.g.*, *Baez v. Wells Fargo Armored Serv. Corp.*, 938 F.2d 180, 181-82 (11th Cir. 1991). Safeway's drivers are also required to meet DOT safety standards, including mandatory drug testing and limits on driving hours. CP 805, 939, 942, 946, 1089. Safeway representatives testified: "Safeway employs drivers ... who are subject to the provisions of the Federal Motor

Schneider, 116 Wn. App. at 715.

Second, the amount of Regular Overtime (to which a comparison is made) is calculated based on the standard hourly rate that would otherwise apply to the drivers.¹³ As one court held, this requires a comparison to “one and one-half times what would be the equivalent of the hourly rate regularly paid an employee.” CP 903. Similarly, DLI has concluded that (for purposes of the reasonably equivalent comparison) the calculation of Regular Overtime is done based on the hourly rate that would otherwise apply to the employees. CP 1111.

Third, the reasonably equivalent determination is focused on the compensation system, not on a particular person or work week. Section 2(f) and WAC 296-128-012(1)(a) state that “the compensation system” must include reasonably equivalent overtime pay, not that each driver must receive such compensation. Thus, DLI has approved pay systems even though documentation established many weeks when individual drivers earned less than Regular Overtime because, “[o]n the whole, drivers will receive greater compensation.” CP 840. Ultimately, although individual results are a factor to consider, DLI has concluded that alternative plans are reasonably equivalent if they provide overtime that is

¹³ This is different than the erroneous comparison Plaintiffs suggest, where they propose calculating Regular Overtime using a regular rate based on all alternative pay (including Contract Overtime).