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No. 63006-7

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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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APPELLANTS' REPLY BRIEF

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## ARGUMENT

### I. THE SUPERIOR COURT ERRONEOUSLY PLACED THE BURDEN ON THE APPELLANTS TO DEMONSTRATE THAT THE 2(f) EXEMPTION DID NOT APPLY.

Under Washington State's Minimum Wage Act ("MWA"), RCW 49.46.130, workers are entitled to overtime after working forty hours in a week. Safeway claims it does not have to pay such overtime because it is entitled to an exemption set forth in RCW 49.46.130(2)(f).

"Employer exemptions from... the MWA will be 'narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.'" *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 881, 64 P.3d 10 (2003) (citations omitted). "An employer bears the burden of establishing its exempt status." *Id.* See also *Clawson v. Grays Harbor College*, 148 Wn.2d 528, 540, 61 P.3d 1130 (2003).

The lower court ruled that Appellants had failed to satisfy their burden to prove that the drivers were **not** exempt from the MWA traditional overtime requirements. The lower court held:

Most of all I have to say that on this record it seems to me that **the burden is on the plaintiffs to bring forward evidence to show the Court that there is an ongoing issue not only with the application of the ABC system to the drivers as a group...but also to show that there is some particular problem with regard to individual drivers or a sub-set of the drivers. And I do not think**

**that the plaintiffs have come close to meeting that burden.**

RP 23 (emphasis added).

Thus, the lower court erred in imposing on the Appellants the burden of showing both that the FMCA exemption did not apply, and that Respondent's compensation scheme was not "reasonably equivalent" to traditional overtime. Had the burden of proof in this case been placed on Respondent, where it belonged, summary judgment could not properly have issued.

First, Safeway failed to put forth any facts to support the FMCA element of its claimed exemption. Because Safeway failed to introduce any facts relevant to the analysis under *Watkins v. Ameripride Services*, 375 F.3d 821 (9<sup>th</sup> Cir. 2004), *Klitzke v. Steiner Corp.*, 110 F.3d 1469 (9<sup>th</sup> Cir. 1997), or even under the ICC Policy Statement it relies upon, to show that its in-state drivers were covered by the FMCA, Safeway failed to establish this element of its claimed exemption to the MWA, and summary judgment was therefore not appropriate.

Additionally, Safeway failed to establish that its compensation system in fact provided the "reasonable equivalent" of overtime to all of its driver-employees, in light of the evidence presented by Appellants, i.e., that 17.1 percent of the Safeway drivers during the one 26-week period

covered by the data provided by Safeway earned less than they would have earned under traditional overtime. CP 1424; CP 1427-1429.

Summary judgment should be granted “after considering the evidence in the light most favorable to the nonmoving party, only if reasonable persons could reach but one conclusion.” *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 790, 16 P.3d 574 (2001) (citing *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998)). Viewing the facts in the light most favorable to Appellants, reasonable persons could **at a minimum** find that the ABC system is not “reasonably equivalent” to overtime.<sup>1</sup> This is a separate and independent reason that summary judgment should not have been granted to Safeway.

**II. THE SUPERIOR COURT ERRONEOUSLY RULED THAT THE TRUCK DRIVERS WERE SUBJECT TO THE FEDERAL MOTOR CARRIER ACT AND THEREFORE POTENTIALLY COVERED BY THE OVERTIME EXEMPTION CONTAINED IN RCW 49.48.130(2)(f).**

**A. The Plaintiff-Drivers Are Not Subject To The FMCA Because They Do Not Normally Cross State Lines and Safeway Presented No Evidence Supporting the Conclusion That The Drivers’ Intrastate Routes Are Merely Part of the Final Phase of Interstate Delivery.**

Safeway concedes that for the exemption from the “traditional” overtime requirement by the RCW 49.48.130(2)(f) to apply, an individual

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<sup>1</sup> In fact, Appellants contend, as they did below, that this is the **only** inference that can be drawn from the evidence presented to the trial court, and that summary judgment should therefore have been entered in Appellants’ favor on this basis.

driver must be subject to the Federal Motor Carrier Act (“FMCA”). As noted in Brief of Appellants, p. 16, “[w]hen a [state] statute borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts.” *State v. Williams*, 17 Wn. App. 368, 371, 563 P.2d 1270 (1977). Thus, the meaning and application of the FMCA language in the MWA is informed by federal courts’ interpretation of the FMCA.

Safeway also does not dispute that it “bear[s] the burden of showing that the [F]MCA exemption applies to each Plaintiff... [b]ecause ‘the exemption depends upon the activities of the individual employees.’” *Collins v. Heritage Wine Cellars, Ltd.*, 2008 WL 5423550 , \*10 (N.D. Ill. 2008) (citations and internal punctuation omitted).

The Ninth Circuit has recently and expansively interpreted the breadth of the FMCA in *Watkins v. Ameripride Services*, 375 F.3d 821 (9<sup>th</sup> Cir. 2004) and *Klitzke v. Steiner Corp.*, 110 F.3d 1469 (9<sup>th</sup> Cir. 1997), which are the controlling federal interpretations of this federal statute.

The FMCA itself covers only drivers crossing borders. *See* 49 U.S.C. § 13501, reproduced at Brief of Appellants 17-18. Federal courts have carved out an exception not stated in the statute for drivers who do not cross state lines but handle goods traveling interstate, where “the intrastate route is merely part of the final phase of delivery.” *Watkins*, 375

F.3d at 825. Whether intrastate deliveries constitute a leg of the interstate journey is determined by the “the character of the shipments... and the intent of the shippers as to the ultimate destination of the goods.” *Id.*

Here, the drivers at issue normally only drive in-state.<sup>2</sup> Thus on its face the FMCA did not apply to them. Summary judgment could therefore only properly have been granted to Safeway if there was un rebutted evidence in the record regarding the intent of the shippers, or that the nature of the shipments qualified for the judicially-created *Jacksonville Paper* exception, which requires “considering the entire panoply of ‘facts and circumstances surrounding the transportation.’” *Watkins*, 375 F.3d at 825 (citing *Klitzke* at 1469).

Safeway presented no such evidence below. There being nothing in the record to support the conclusion that these drivers are covered by the FMCA, summary judgment should not have been granted based on that conclusion.

Safeway attempts to explain why the controlling authority just cited should not apply by arguing that these cases are “outdated” or

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<sup>2</sup> To the extent that Respondent’s vague assertion that its drivers do “occasionally” drive out-of-state, Brief of Resp. at 18, based in part on hearsay (“my understanding is that some drivers” have driven out-of-state) and ambiguous as to date (“prior to March 1, 2007), *see* CP 1329-1330, places this threshold question in dispute, there is a dispute of material fact on this issue and summary judgment in favor of Respondent was therefore inappropriate on that basis. *See Moore v. Pacific Northwest Bell*, 34 Wn. App. 448, 456, 662 P.2d 398 (1983), *rev. denied*, 100 Wn.2d 1005 (1983).

“inapposite.” However, *Watkins* addressed nearly the precise issue presented here: whether a driver was entitled to “traditional” overtime or not due to the application of the FMCA. *Watkins*, 375 F.3d at 825-26. *Klitzke* is equally on point because it dealt with whether the FMCA applied to intrastate drivers for purposes of a parallel overtime exemption from the FLSA. 110 F.3d at 1467.

Instead of recognizing the controlling authority of *Watkins* and *Klitzke*, Safeway points to a 1992 Policy Statement from the Interstate Commerce Commission (“ICC”). *Watkins* and *Klitzke* were both decided **after** the ICC memo relied upon by Safeway, and those courts did not recognize the ICC’s policy statement as controlling, as indeed it is not.<sup>3</sup> *Watkins* and *Klitzke* instead focus on the intent of the shipper and the nature of the stop at the warehouse while examining “the entire panoply of ‘facts and circumstances,’” *Watkins*, 375 F.3d at 825, which is distinct from the ICC policy statement’s factor-based approach.

Even if the ICC Policy Statement factors were to be considered, the evidence still does not establish the drivers in this case are subject to

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<sup>3</sup> “Interpretations such as those in opinion 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.” *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000) (emphasis added) (finding an agency opinion letter “unpersuasive” and declining to follow it); *see also*, *California Trucking Ass’n v. I.C.C.*, 900 F.2d 208, 213 (9<sup>th</sup> Cir. 1990) (departing from ICC’s previous 1957 policy statement); *Collins, supra*, 2008 WL 5423550 at \*14 n. 8 (observing the 1992 I.C.C. Policy Statement was not controlling and didn’t warrant *Chevron* deference).

the FMCA. The factors weighed under the ICC Policy Statement to determine if a driver is engaged in interstate commerce are based on whether the original shipper had 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. ICC Policy Statement, 8 I.C.C.2d at 472. The factors<sup>4</sup> to determine this intent are as follows, in italics:

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

This factor is plainly not satisfied here, as the original shipper to the Safeway warehouse is simply shipping products ordered by Safeway, not based on any “projections of customer demand.”<sup>5</sup>

**Safeway** orders goods based on its own needs and projections as to what *its* customers want, but the **shippers** base their shipments to the Auburn warehouse not on “projections of customer demand” but on

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<sup>4</sup> Found at I.C.C. Policy Statement, 8 I.C.C.2d at 473.

<sup>5</sup> The “shippers” here are manufacturers, suppliers, and producers who ship goods to Safeway’s Auburn warehouse, not Safeway stores. See Declaration of Joel Leisy, Transportation Manager at the Auburn Distribution Center for Safeway, dated December 8, 2008, Paragraph 3., CP: 1373-1384.

Safeway's orders for delivery to the warehouse. Moreover, there is simply no evidence of what the shippers' basis for determining the total volume of shipments is.

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.*

Safeway has not submitted any evidence demonstrating whether processing or modification occurs in its warehouse to support its entitlement to the exemption.

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

Once the merchandise is at the distribution center, it is no longer in the shipper's control, and Safeway determines when and where the product will be shipped to its own stores. There is no evidence that the manufacturers, suppliers and producers control where the goods go once they deliver them to Safeway's Auburn Distribution Center.

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.*

Safeway has not submitted any evidence regarding this factor.

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.*

Safeway has not submitted any evidence regarding transportation costs to support this factor, but it is unlikely that any shipper bears the costs of any transportation at all. It is unlikely that the manufacturers, suppliers, and producers bear costs beyond the shipment to Safeway's Auburn Distribution Center.

6. *The warehouse utilized is owned by the shipper.*

It is undisputed that the Distribution Center is owned by Safeway, not the many shippers.

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

Safeway has not submitted any evidence to support this factor.

If Safeway intends to argue that the drivers are covered by the FMCA due to the 1992 ICC Policy Statement, it will need to present evidence regarding the specific factors set out in the statement. When Plaintiffs argued that the drivers were not covered by the FMCA in opposition to Safeway's summary judgment motion, Safeway did not raise or address the ICC Policy Statement. At a minimum, summary judgment was inappropriate because the factual record overall was insufficient for Safeway to be entitled to judgment as a matter of law on this issue, and the

case should be remanded for additional factual findings.<sup>6</sup>

Safeway's reliance on a few non-Ninth Circuit cases applying the ICC guidelines is also unpersuasive. Safeway cites these out-of-circuit cases for the oversimplified proposition 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." Brief of Resp. at 21, nn. 7 and 8. Those cases do not so hold, and instead reaffirm that "[c]rucial to this [FMCA] 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.*" *Musarra v. Digital Dish, Inc.*, 454 F. Supp. 2d 692, 708 (S.D. Ohio, 2006) (quoting *Armstrong World, Inc. v. I.C.C.*, 2 I.C.C.2d 63, 69, 1986 WL 68605 (1986) (emphasis in *Musarra*).<sup>7</sup>

Safeway's reliance on 29 C.F.R. § 782.2(b)(2) is also unavailing. Appellants do not dispute that they were employed as drivers and loaders

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<sup>6</sup> Summary judgment "should not be used... where a real doubt exists as to decisive factual issues." *Bartlett v. Northern Pac. Ry. Co.*, 74 Wn.2d 881, 883, 447 P.2d 735 (1969). The granting of a summary judgment motion "is proper only where the moving party is entitled to judgment as a matter of law, **where it is quite clear what the truth is**, and no genuine issue remains for trial. It is not the purpose of the rule to cut litigants off from their right of trial by jury if they really have issues to try." *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960) (emphasis added).

<sup>7</sup> See also *Collins*, *supra*, 2008 WL 5423550 at \*11 (same); *Roberts v. Levine*, 921 F.2d 804, 814 (8<sup>th</sup> Cir. 1990) (same); *Central Freight Lines v. I.C.C.*, 899 F.2d 413, 419-20 (5<sup>th</sup> Cir. 1990) (same); *Advantage Tank Lines, Inc.*, 10 I.C.C.2d 64, 67, 1994 WL 71208 (1994); *Cal. Trucking Ass'n v. I.C.C.*, 900 F.2d 208, 212 (9<sup>th</sup> Cir. 1990) (same); *Billings v. Rolling Frito-Lay Sales, LP*, 413 F. Supp. 2d 817, 820-21 (S.D. Tex. 2006) (same)

and that, as such, they affected the safety of operation of motor vehicles on the public highways. The issue here is whether, as such, they participated “**in interstate or foreign commerce within the meaning of the Motor Carrier Act.**” 29 C.F.R. § 782.2(b)(2) (emphasis added). See *Collins, supra*, 2008 WL 5423550 at \*10.

As was previously explained, the coverage of the FMCA is set forth in 49 U.S.C. § 13501, with the *Jacksonville Paper* exception determined by reference to “the character of the shipments... and the intent of the shippers as to the ultimate destination of the goods.” *Watkins* at 825. Intrastate drivers will be considered covered by the FMCA if they handle goods traveling interstate, and “the intrastate route is merely part of the final phase of delivery.” *Id.* There is no evidence as to the intent of the shippers as to which Safeway stores their goods ultimately are destined to, but it is obvious that once a manufacturer ships their goods to Auburn, the journey is over as far as they are concerned.

Appellants vigorously argued in Superior Court that the Safeway drivers that are the subject of this lawsuit do **not** normally drive out of state, (and thus are not covered by the FMCA under 49 U.S.C. § 13501), producing 84 affidavits from the drivers declaring that they had never done so. CP 1227-1310. Respondents provided no evidence to rebut that fact, nor evidence to support their assertion that the *Jacksonville Paper*

exception, discussed above, applied. The new arguments about the FMCA that Safeway puts forth now on appeal are unavailing and, at a minimum, require further factual findings in order for a conclusion to be made. Reversal of the lower court's grant of summary judgment to Safeway is therefore appropriate on this basis.

**B. Safeway Cannot Escape Liability Due To An Erroneous Stipulation Of Law That Plaintiffs' Corrected In The Superior Court.**

Safeway makes much of the fact that three of the drivers represented by the Plaintiff Local 174 in this matter erroneously stipulated, solely for the purposes of the summary judgment motion then pending, that they were covered by the FMCA. However, Defendant makes no effort to address the important distinction between factual stipulations and legal stipulations, the latter of which are *not* binding on the courts. See Brief of Appellant, at 28-30; *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995) (“No authority or rationale is cited for [the legal] conclusion and it is contrary to settled law. A stipulation as to an issue of law is not binding on this court; it is the province of this court to decide the issues of law”).

Instead, Respondent draws an unjustified conclusion from a single Washington case, *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 229, 108 P.3d 147, 151 (2005) for the proposition that the

Plaintiffs here are estopped from arguing the inapplicability of the 2(f) exemption here. The case cited by the Appellant suggests no such sweeping conclusion. Instead, that case involves bankruptcy law, and holds: “We conclude that under the facts of this case, the failure to list the claim in the bankruptcy schedules fulfills the first criterion of judicial estoppel.” *Id.* at 229. The only other case cited by Defendant is a 1928 case from Montana, involving a stipulation to continue a hearing date, not a legal question. *Russell v. Sunburst Refining Co.*, 83 Mont. 452, 272 P. 998, 1004 (1928).

From these two inapposite cases, Respondent suggests that the “wheels of justice would grind to a halt” if this Court did not rely on an erroneous legal stipulation by the Plaintiffs. In fact, the “wheels of justice” are dependent upon the Court being the final arbiter of legal determinations. Indeed, our own Supreme Court has long recognized the inherent power of the courts to vacate void judgments. “A judgment unreversed, though void upon its face, may seriously embarrass the person against whom it is in form rendered, though it can of course, be of no benefit to the person who has secured it. This being so, such judgment should not be allowed to stand.” *Stewart v. Lohr*, 1 Wn. 341, 344, 25 P. 457 (1890). If this Court determines that the dismissal of Appellants’ overtime claims (with its attendant *res judicata* effects) was in error, it has

the power and responsibility to correct the judgment.

Safeway argues that Appellants invited an error about the FMCA due to their stipulations, but the invited error doctrine is inapplicable here. Under the invited error doctrine, a party may not *request* a ruling which is erroneous and later claim error from that ruling on appeal. *See, e.g., Sandler v. U.S. Development Co.*, 44 Wn. App. 98, 103, 721 P.2d 532 (1986) (“Invited error arises when a party requests a ruling which is erroneous and then seeks to claim error from that ruling on appeal”). Appellants did not invite the superior court’s erroneous legal ruling on the applicability of the FMCA. Appellants vigorously argued in the opposition to Safeway’s motion for summary judgment that the FMCA did **not** apply. The lower court rejected the Appellants’ argument, and made a legal error that Appellants now dispute.

**C. The Issue Of The FMCA Exemption Was A Central Issue Below, And Thus Preserved For Appeal.**

Safeway argues that the “Plaintiff did not raise this issue before the Superior Court,” see Brief of Respondent, p. 17. This is incorrect, which can readily be demonstrated by reviewing Plaintiff’s Opposition to Safeway’s Motion for Summary Judgment. The entire first half of the brief is dedicated to this very subject. CP 1198-1222. Indeed, this very issue was a central issue during the parties’ oral argument on Safeway’s

Summary Judgment.

In *Sourakli v. Kyriakos, Inc.*, 144 Wn.App. 501, 510, 182 P.3d 985 (2008), cited by the Defendant, the plaintiff never presented the “rescue doctrine” to the Court that he then attempted to rely on in the Court of Appeals. The Court “reviewed Sourakli’s complaint, his response to the defendants’ motions for summary judgment, and his answer to Titan’s motion for discretionary review,” and found no references to any cases involving the doctrine and “[u]pon reading the motion, neither the trial court nor the defendants could reasonably be expected to perceive that Sourakli intended to pursue the rescue doctrine as a separate theory of liability.” *Id.* In this case, the Plaintiffs vigorously contested Defendant’s legal argument that the FMCA applied to these drivers, and presented 84 affidavits to the Court from individual drivers who did not drive out of state. It cannot therefore be fairly said that the Plaintiffs did not preserve this issue for appeal.

**III. THE SUPERIOR COURT ALSO ERRONEOUSLY FOUND THAT THE ABC SYSTEM WAS REASONABLY EQUIVALENT TO OVERTIME UNDER THE MWA.**

**A. A System Is Not “Reasonably Equivalent” If It Does Not Provide Each Plaintiff-Driver With Compensation “Commensurate” With What He/She Would Have Received Under Traditional Overtime.**

Safeway, citing legal authority that has no relationship with

worker-protective minimum wage and hour statutes, contends that its compensation scheme may be upheld as lawful even if it is providing the group of covered employees, collectively, with pay for overtime work that is as little as 70% as great as what would have been required under a traditional system. Safeway provides no legal authority indicating that the phrase “reasonably equivalent” was ever intended to mean anything but “closely approximating,” or (in the words used by the Supreme Court in *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 715, 153 P.3d 846 (2007), *cert. denied*, 128 S. Ct. 661 (2007)) “commensurate” with traditional overtime.

Moreover, permitting employers to pay employees under a compensation scheme that provides them more than negligibly less than traditional overtime would fundamentally undercut the purposes of overtime statutes, which include, among other things, “to spread employment by placing financial pressure on the employer through the overtime pay requirement.” *Walling v. Helmerich & Payne*, 323 U.S. 37, 40, 65 S.Ct. 11 (1944).<sup>8</sup>

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<sup>8</sup> See also *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78, 62 S.Ct. 1216 (1942):

By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the

Allowing an employer to pay employees under a scheme that compensates some, even a large majority, of employees at a higher rate, while depriving others of the compensation to which they would be entitled under traditional overtime, also runs afoul of two of the other purposes of overtime statutes, which are (1) “to compensate employees for the burden of a workweek in excess of the hours fixed” by law, *Walling*, 323 U.S. at 40, and (2) “to protect the overtime workers from themselves: long hours of work might impair their health or lead to more accidents (which might endanger other workers as well).” *Mechmet v. Four Seasons Hotels, Ltd.* 825 F.2d 1173, 1176 (7<sup>th</sup> Cir. 1987).

Allowing such a scheme also runs afoul of the fundamental principle of Washington law that the rights guaranteed to workers by the Minimum Wage Act are basic individual rights, not rights shared collectively by a group of employees. *See, e.g., Schneider v. Snyder’s Foods, Inc.*, 95 Wn. App. 399, 402, 976 P.2d 134 (1999) (because the right to obtain overtime wages was a nonnegotiable right, these individual rights could not be “waived, alienated, or altered” by the collective bargaining agreement).<sup>9</sup>

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distribution of available work. Reduction of hours was a part of the plan from the beginning.

<sup>9</sup> *Accord: Ervin v. Columbia Distributing, Inc.*, 84 Wn. App. 882, 891, 930 P.2d 947 (1997); *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 925 P.2d 212 (1996).

As was noted by above, employer exemptions from the MWA should be “narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation.” *Stahl*, 148 Wn.2d at 881 (citations omitted). Interpreting the requirements of a “reasonably equivalent” system as permitting payment of materially less compensation for overtime work than that prescribed by traditional overtime, or as payment of such lesser compensation to some employees, would not be consistent with this standard.

In light of the foregoing, it is not surprising that Safeway’s assertion that DLI has ruled that the legitimacy of a “reasonably equivalent” compensation system is based on the impact of that system on employees “as a whole,” as opposed to individually, is not supported by the evidence. In fact, reviewing the prior DLI adjudications that are in the record, it appears that DLI has **never** approved such a system after finding that even **one** covered employee in **one workweek** will receive less than the “reasonable equivalent” of overtime as a result thereof.<sup>10</sup>

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<sup>10</sup> In the instant case, of course, the question of whether such an arguably minute or insubstantial deficiency would render a compensation scheme invalid need not be reached, because Safeway in essence has admitted that approximately 17% of its workers at a given point in time did not receive as much as they would have received under a traditional overtime system (*see* Brf. of Resp. at 38). *See also* Brf. of Resp. at 37 n. 18, conceding that out of a sample of 18 mostly new drivers whose productivity and compensation it analyzed over a 26-week period in 2008, fully 1 in 6 worked “Actual Time” (i.e., actual hours worked) in excess of the “Standard plus Delay Time” calculation upon which their compensation was based. These drivers, too, received (by Safeway’s

**B. Safeway's ABC System Does Not Meet This Standard.**

The merits of Appellants' contention that the ABC system does not provide compensation "reasonably equivalent" to traditional overtime, even when analyzed through the prism of Safeway's methodology,<sup>11</sup> can be demonstrated through a simple mathematical equation.

Safeway's ABC compensation system pays by the task (e.g., a certain amount per load, mile, etc.), but calls these task units "Standard Time." Referring to these units as "time" complicates the equation immensely, as overtime compensation under the ABC system has **nothing** to do with real-world time. It is much easier to understand the ABC system's deficiencies when the units of work Safeway calls "hours" of "Standard Time" are instead properly recognized simply as "Task Units."

Thus, the fact that Safeway pays "contract overtime" for "Standard Time" actually means only that a premium rate of pay is paid if the number of Task Units exceeds 40 in a week or 8 or 10 in a day.

Suppose, however, that we are dealing with one of Safeway's "low

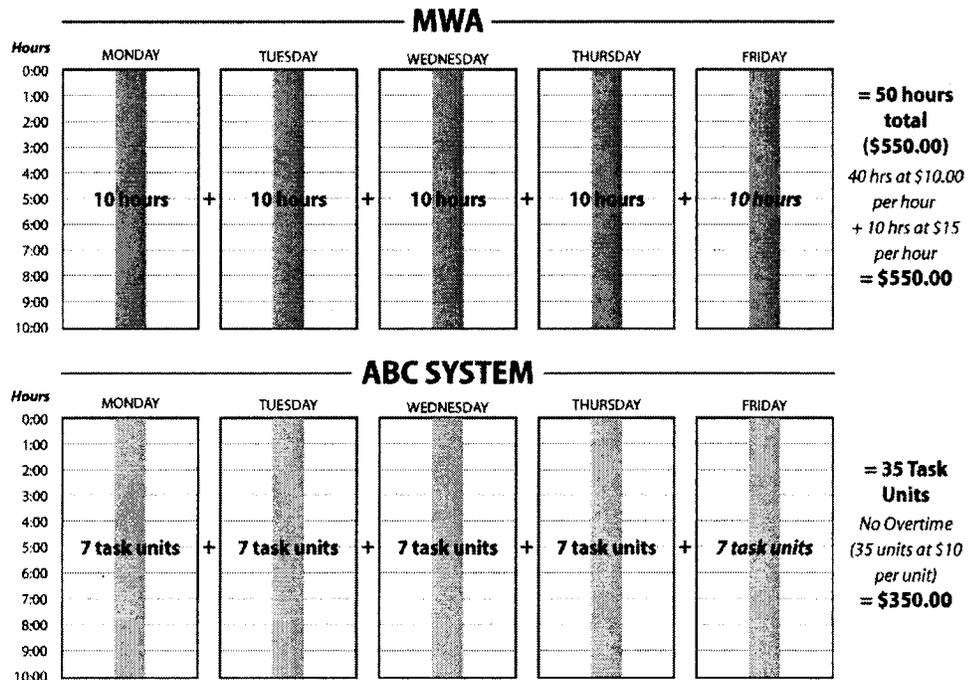
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own admission) less compensation than they would have received under a traditional overtime system.

<sup>11</sup> Appellants continue to contest Safeway's methodology, as outlined in the Brief of Appellant at pp. 33-35. We contend that because Safeway's drivers receive no extra compensation based on the number of hours they work in a week, the premiums they receive for performing a certain number of "task units" must be considered part of their "base pay," for purposes of calculating the amount of overtime they are owed. *See, e.g.*, CP 1094 (L&I Employment Standards Administrative Policy ES.A.8.1), numbered paragraph 4, second bullet point: "**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." (Emphasis in original.)

efficiency drivers” who complete fewer Task Units (which Safeway calls “Standard Time”) than actual hours worked (less than 1 Task Unit per real-world hour). For simplicity’s sake, we can suppose that he or she works for Safeway five days a week and works fifty hours a week, and that the base rate for a Task Unit is ten dollars.

During the first week, this driver completes only seven Task Units each day. His compensation under the ABC system compared to overtime under a traditional Minimum Wage Act overtime system would look like this:



With this rather dramatic example the deficiency is made painfully obvious. Because the driver did not work in excess of forty “Task Units,”

he received no premium pay whatsoever, even though he worked ten hours more than a forty hour workweek.

The point to be taken is this: Even under Safeway's methodology, the ABC system only pays the reasonable equivalent of MWA overtime if the average Task Unit upon which the pay is based takes the driver one hour or less. In any week where the employee nets less "Standard Hours" than the number of real world hours he or she actually spent at work, that employee makes less than he or she would have under a traditional overtime system. Perhaps this employee should be given more training, or be disciplined, for his/her poor performance, but under the MWA an employee who works 50 hours in a week is entitled to traditional overtime, or the "reasonable equivalent" thereof, for the ten hours worked beyond the regular forty-hour workweek, even if he or she is having performance trouble.

Nor is this hypothetical in any way inconsistent with the actual facts of the situation. As was noted in the Brief of Appellants, p. 36, fully 17.1 percent of the Safeway drivers during the one 26-week period covered by the data provided by Safeway earned less than they would have earned under traditional overtime. CP 1424; CP 1427-1429. As a group they earned \$37,500 less, for an average underpayment of approximately \$2,000 each. *Id.* This is because for each of those drivers,

during the period under examination, they worked fewer “Task Units” than the number of hours it took to accomplish those tasks, and therefore were paid less overtime than the amount they would have been entitled to under a traditional overtime system.<sup>12</sup>

Safeway’s system therefore does not provide the reasonable equivalent of overtime pay under the MWA, which requires time-and-a-half compensation after 40 hours for every individual regardless of productivity. It is a piece rate, speed-up system that ultimately operates as an incentive for unsafe trucking and only is reasonably equivalent to hourly overtime when the driver has a net positive “efficiency.”

Nor, finally, does Appellants’ interpretation of the requirements of a “reasonably equivalent” overtime system render Section 2(f) meaningless, as claimed by Safeway. The many examples of systems that have been approved by DLI show that to be “reasonably equivalent,” an overtime compensation simply needs to ensure that each employee is paid either **as much** under the employer’s system as he or she would have been

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<sup>12</sup> Safeway’s unproven claim that some of these drivers might have actually “come out ahead” over a longer period of time is besides the point. Statutory overtime guarantees workers a premium rate of pay for hours worked over 40 in a **given workweek**. No caselaw suggests that a compensation scheme that fails to pay either overtime or the “reasonable equivalent” of overtime in a given workweek may be construed as lawful because a worker might conceivably come out ahead, under that scheme, over time. *See also* DLI Administrative Policy ES.A.8.1, CP 1093-1084, at CP 1098 (numbered paragraph 7), noting that “[a] workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods.... For purposes of overtime payment, each workweek stands alone; there can be no averaging of two or more workweeks.”

paid under a traditional system, or a very close approximation of that sum.

Typical of such a system is the “hybrid system” adopted by Aramark and approved by DLI, where workers are paid either their hourly rate plus time-and-one-half for all work in excess of forty hours in one week, or a commission based on performance, whichever is greater. *See* CP 887. *See also* DLI’s approval of Praxair’s compensation system, on the grounds that “**each truck driver** earned more in compensation over the six month period under the compensation system in place than they would have earned by being paid time and one-half the base rate for hours worked in excess of 40 per week,” CP 839 (emphasis added).<sup>13</sup>

**IV. SAFEWAY’S CONTENTIONS (1) THAT IT DID NOT NEED DLI TO APPROVE ITS COMPENSATION SCHEME, AND (2) THAT DLI WAS “SATISFIED” WITH ITS COMPENSATION SCHEME, BOTH LACK MERIT.**

WAC 296-128-012(1)(a) provides, *inter alia*, that “An employer shall substantiate any deviation from payment on an hourly basis to the satisfaction of the department....” CP 1118-1119. Clearly, this means that approval from the Washington State Department of Labor and Industries (“DLI”) is a prerequisite to implementing a valid “reasonably

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<sup>13</sup> Similarly acceptable compensation systems include the one that was upheld in *Schneider v. Snyder’s Foods*, 116 Wn. App. 706, 714, 66 P.3d 640 (2003), which relied on the trial court’s conclusion that “a reasonably equivalent compensation [was] paid **each route salesperson** for all hours worked in excess of forty per week,” *see* CP 897-905 at 902, and the systems implemented by Interstate Brands West Corporation, *see* CP 913-914 and J. B. Hunt Transport, Inc., *see* CP 877-878, both of which companies sought and received approval from DLI.

equivalent” compensation system. Administrative Policy ES.A.8.3, CP 1352-58, outlining the process which employers may invoke to get an alternative compensation system approved by DLI, plainly means only that employers are permitted to pursue this process should they seek to have such a system, not that they may implement such a scheme unilaterally. For this reason alone, Appellants continue to believe that Safeway’s failure to obtain either advance or retroactive DLI approval for its system is an appropriate basis for reversal.<sup>14</sup>

Safeway also provides no legal authority to support its assertion that it “substantiated” its ABC system to the “satisfaction of the department.” DLI’s alleged failure to respond to one of Safeway’s letters cannot be understood as approval of the scheme, especially given the uncontroverted evidence that DLI does, in fact, consider compensation schemes and approve, conditionally approve, and disapprove of such schemes.<sup>15</sup>

It is clear, to the contrary, that the reason Safeway has to this day not sought approval from DLI of its putatively “reasonably equivalent”

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<sup>14</sup> It is also self-evidently better public policy for the agency with expertise to approve or disapprove these types of alternative compensation schemes prior to their being implemented, versus having the court system need to wrestle with these questions “after-the-fact.”

<sup>15</sup> See examples of such DLI approvals at note 12, above, and accompanying text; *see also* CP 875 (DLI “provisionally approv[ing]” proposed plan but requiring the employer, US Bakery, to submit additional data one year following implementation); CP 906-907, at 907 (DLI refusing to approve proposal compensation plan as “reasonably equivalent”).

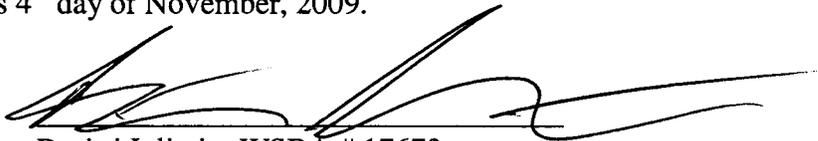
pay scheme is the near-certainty that DLI would deny that request. Not only would DLI find that Safeway's system results in paying a substantial number of drivers substantially less than they would receive under traditional overtime laws (see pages 18-21, above), DLI would deny Safeway's request on the more technical basis that DLI insists on being presented with, and considering, the **actual** hours a driver is either projected to work or actually works.

DLI requires maintenance of records showing 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." WAC 296-128-011(1). Because Safeway contends that it has no knowledge of the actual hours worked by its employees, CP 160, it would not receive DLI approval of its compensation scheme even if it requested such approval.

#### CONCLUSION

For the foregoing reasons, the trial court erred in dismissing Appellants' overtime claim on Safeway's Motion for Summary Judgment.

DATED this 4<sup>th</sup> day of November, 2009.



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CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of November, 2009, I caused the original and one copy of the foregoing Appellant's Reply Brief to be delivered via legal messenger to:

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