No. _____

In The
Supreme Court of the United States

DONALD P. KENNEDY,

Petitioner,

v.

EQUITY TRANSPORTATION COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

CARLO A.C. DE OLIVEIRA*
PHILLIP G. STECK
COOPER ERVING & SAVAGE LLP
39 North Pearl Street,
Fourth Floor
Albany, New York 12207
(518) 449-3900
cdeoliveira@coopererving.com

*Counsel of Record

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

The Second Circuit affirmed the magistrate's decision in the District Court granting summary judgment to Equity Transportation Company Inc., finding that Donald Kennedy ("Kennedy") was exempt from overtime compensation under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the New York State Labor Law § 650 *et seq.*, by reason of Kennedy being "one leg of a route to an out of state destination," subjecting him to the Motor Carrier Act, 49 U.S.C. § 31501 *et seq.*, exemption to the FLSA.

The Second Circuit affirmed the magistrate's decision in spite of the record undisputedly showing that: (1) Kennedy was a purely intrastate shuttle driver who had never transported products across state lines; (2) Kennedy's primary duties were to transport products to and from the shipper's bottling manufacturing plant in Latham, New York and a tandem lot located several miles away from the plant at Exit 24 of the New York State Thruway; (3) Kennedy would, occasionally, be asked to transport products to Pepsi's warehouses within the State of New York, but driving to the shipper's warehouses was not a substantial part of Mr. Kennedy's work; (4) Kennedy's expected route did not exceed fifty miles beyond the shipper's plant in Latham, New York; (5) the products transported by Kennedy to the tandem lot would be picked up by "over-the-road-drivers" and transported to the shipper's warehouses within and outside the State of New York; (6) when the shipment commenced, the

QUESTION PRESENTED – Continued

shipper had no fixed or persistent intent to have the products transported by Kennedy delivered to customers beyond its warehouse locations either within or outside the State of New York; (7) the products transported by Kennedy were not in response to projections of customer demands outside the State of New York; and (8) the shipper acknowledged that the products transported by Kennedy to its warehouses were for the purpose of maintaining inventory only.

Based on these undisputed facts, in affirming the district court's decision that Kennedy's activities constituted "practical continuity of movement" in the flow of interstate commerce as defined under the Motor Carrier Act, the Second Circuit's decision directly conflicts with the holdings of the United States Supreme Court, the Second Circuit's own prior holding, and the holdings of the Fifth, Sixth, Eighth, and Tenth Circuits, including a Fifth Circuit decision in 2016. Until now, the meaning of interstate commerce under the Motor Carrier Act has never been interpreted to constitute the minimal act of transporting products between warehouses in the absence of the shipper's intent to transport such products to a final destination beyond its warehouses.

The question presented is:

When the Secretary of Transportation has rejected jurisdiction over intrastate activity, does the Motor Carrier Act exemption in the Fair Labor Standards Act apply?

PARTIES TO THE PROCEEDINGS

The parties below are listed in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Donald P. Kennedy, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Kennedy v. Equity Transp. Co.*, 2016 U.S. App. LEXIS 17582, 2016 WL 5414998 (2d Cir. 2016). (App. 1). The Second Circuit denied Kennedy's Petition for Rehearing *En Banc* on November 1, 2016. (App. 27).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The judgment of the Second Circuit was entered on September 28, 2016. Petitioner timely filed his Petition for a Panel Rehearing *En Banc* on October 4, 2016. On November 1, 2016, the Second Circuit denied the Petition for Rehearing *En Banc*. (App. 27).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved may be found at App. 29.

INTRODUCTION

The Courts of Appeals are expected to contribute to the predictability of the law by following the precedent of this Court, though precedent is not always a clear enough guide. Occasionally one Court of Appeals may identify some area not yet filled in by this Court's precedent where the current interpretation of the law prevalent among all the Circuits may not accurately reflect the meaning of existing Supreme Court precedent. In those circumstances, innovation by a Court of Appeals may enhance our understanding of the law. For example, in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), this Court rejected the prevailing view among the Circuits and held that a public employee's speech is not protected when it is part of an employee's job duties. This rule had been suggested in the Court of Appeals, but it was innovative, and therefore left to this Court to decide whether that understanding of the law was appropriate in light of this Court's precedent.

This case presents another effort by a Court of Appeals at innovation in the law. No Court of Appeals, not even the Second Circuit in its own previous decisions, had yet expanded the Motor Carrier Act exemption from the Fair Labor Standards Act ("FLSA") to

embrace all situations where a driver participates in any respect, no matter how minimal, in a transportation process that may lead to products crossing state lines. The Courts, following the lead of the Secretary of Transportation, have always recognized specific circumstances where a purely intrastate driver will be entitled to overtime even if some product he or she transports may eventually cross state lines after that product is passed on to another driver. That may be interstate commerce for purposes of the United States Constitution, but the Motor Carrier Act ("MCA") has never been interpreted as having the broadest possible meaning of interstate commerce. Rather, the Motor Carrier Act only covers those types of transportation over which the Secretary of Transportation has chosen to exercise its jurisdiction, which is less than the maximal meaning of interstate commerce.

The Second Circuit's decision ignores prior precedent of this Court and the Secretary of Transportation's regulations as to his or her own jurisdiction. It creates a new test for "practical continuity of movement" in interstate commerce, *i.e.* any intrastate transportation of products that crosses State lines justifies an employer's denial of overtime benefits to purely intrastate drivers. That approach, however, is in direct conflict with holdings of other Circuit courts that have enforced the Secretary's regulations and narrowly construed the application of the MCA exemption to purely intrastate drivers. Thus, the Second Circuit's decision is not an appropriate innovation consistent with this Court's prior teaching on this issue; rather it is an

outlier departing from the consensus of the Circuits that represents an unprincipled departure from existing law.

The Second Circuit's decision affects the overtime rights of all purely intrastate truck drivers in New York, Vermont, and Connecticut. And, should this decision spread, it has the potential for affecting their overtime rights nationwide. If this is to occur, it should be this Court that makes the determination.

Furthermore, this case illustrates a problem with the Second Circuit's ever-increasing practice of issuing summary orders. Whether a Court of Appeals believes it is filling in a gap in existing law, or recommending an innovation in the law, it must provide a clear explication of the law, so that practitioners and the lower Courts understand clearly the direction in which the Court intends to take them. This is particularly true when the Court is rejecting the applicability of prior precedent. A summary order, in and of itself, may mask the underlying debate by only presenting as certitude something that is anything but.

STATEMENT OF THE CASE

This case involves the distinction in the meaning and application of the term "interstate commerce" for purposes of the jurisdiction of the Department of Labor to enforce the Fair Labor Standards Act of 1938 and "interstate commerce" within the meaning of the Motor Carrier Act of 1935 for purposes of

exempting employees falling within the jurisdiction of the Secretary of Transportation from overtime compensation under the FLSA. While "interstate commerce" under the FLSA has an expansive reach based on the remedial nature of the Act, the meaning of "interstate commerce" under the MCA is limited in scope and more narrowly construed by the Courts. An employer claiming the MCA exemption under the Fair Labor Standards Act carries the burden of proof. *Corning Glass Works v. Brennan*, 417 U.S. 188, 193, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (1974).

The gravamen of Kennedy's claim is that his conduct did not constitute "interstate commerce" within the meaning of the MCA and, thus he was not exempt from overtime compensation under the FLSA.

The facts of this case are undisputed. The Respondent is a trucking company that entered into a contract with the shipper (Pepsico) to transport products from the shipper's manufacturing plant in Latham, New York, to the shipper's warehouse facilities within and outside New York. The Respondent hired two classes of drivers to transport the shipper's products under the contract: One Shuttle Driver (Petitioner) and several over-the-road drivers. Petitioner's primary responsibility as a Shuttle Driver was to shuttle products from the shipper's plant in Latham, in the Town of Colonie, to the Exit 24 compound on the New York State Thruway, also located several miles away in the very same Town. Petitioner's work route was not expected to exceed fifty (50) miles beyond the shipper's plant in Latham. He was not expected to drive and he did

not drive outside New York State, nor was he expected to deliver and he did not deliver products to the shipper's customers either inside or outside New York State.

Unlike Petitioner, over-the-road drivers did transport products across state lines. Over-the-road drivers picked up trailers with the shipper's products either from the shipper's plant in Latham or trailers dropped off by Kennedy at the Exit 24 compound on the NYS Thruway and transported them to the shipper's warehouses within and outside New York. Unlike the Petitioner, who was compensated on an hourly basis, over-the-road drivers were compensated on a mileage basis.

The record below undisputedly shows that, at the time the products left the shipper's manufacturing plant in Latham, the shipper had no fixed and persistent intent to have the products transported beyond its warehouse facilities within and outside New York. Instead, the shipper admitted that its products were moved from its manufacturing plant to its warehouse facilities for inventory purposes only and to fill customer orders when such orders were received. The products were not transported in response to a specific customer order, neither were they being shipped to fulfill factual projections of customers' demand.

Kennedy filed his complaint on July 16, 2014 alleging violations of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216 *et seq.*, and the New York State Labor Law ("NYLL") § 650 *et seq.*, to recover overtime

pay owed, but never paid, to him by the Respondent. On June 23, 2015, Kennedy moved for summary judgment. Respondent cross-moved for summary judgment on July 21, 2015. The parties consented to have the matter heard by the Magistrate, who entered his Order on October 22, 2015, denying Kennedy's motion for summary judgment and granting Respondent Company's cross-motion finding that Respondent had met its burden to show that Kennedy was exempt from overtime compensation pursuant to the Motor Carrier Act of 1935, 49 U.S.C. § 31502. The District Court reasoned that, because Petitioner's intrastate transportation of trailers constituted the first leg of the transportation of goods where the final destinations included locations outside New York, he was exempt from overtime compensation under the MCA.

Kennedy filed a Notice of Appeal on October 27, 2015. On September 20, 2016, Kennedy filed a Citation of Supplemental Authority attaching a Fifth Circuit decision addressing the employer's burden of proof when asserting an intrastate theory for MCA exemption. The Second Circuit's Summary Order was entered on September 28, 2016. Petitioner timely filed his Petition for Panel Rehearing *En Banc* on October 4, 2016. On November 1, 2016, the Second Circuit denied the Petition for Rehearing *En Banc*.

REASONS FOR GRANTING THE PETITION

By summarily affirming the district court's decision, the Second Circuit exceeded its judicial role and unilaterally expanded the jurisdiction of the Secretary of Transportation over intrastate activities of drivers when the Secretary himself has rejected that expansion. The Second Circuit decision conflicts with decisions of the United States Supreme Court in *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943); and *Texas N.O.RR. v. Sabine Tram Co.*, 227 U.S. 111, 122 (1913), as well as decisions of other Circuit courts, including a more recent decision issued by the United States Court of Appeals for the Fifth Circuit in *Nicole Olibas et al. v. Native Oilfield Services, L.L.C.*, No. 15-10919 (5th Cir. Sept. 20, 2016). (App. 54). The decision also conflicts with the Second Circuit's own prior decision in *Bilyou v. Dutchess Beer Distributors*, 300 F.3d 217 (2d Cir. 2002).[1]

The Second Circuit's decision represents a radical departure from prior precedent and a dramatic expansion of the Motor Carrier Act exemption to the Fair Labor Standards Act. Neither any Court nor the Secretary of Transportation has ever construed the Motor Carrier Act to exempt from coverage under the Fair Labor Standards Act the activities of a purely

[1] One of the Judges at oral argument, recognizing the conflict with *Bilyou*, referred to it as a "silly" decision because it did not follow the more simplistic reasoning ultimately adopted by the Second Circuit in this case.

intrastate driver that were only causally or incidentally related to the transportation of products across state lines for inventory purposes only. That might well establish interstate commerce jurisdiction for constitutional purposes, but does not fall within the jurisdiction of the Secretary of Transportation where, "commerce" under the Motor Carrier Act excludes transportation of goods from one warehouse to another, without the intent to deliver it to a recipient beyond the warehouses, even if the warehouses are in different states. The Second Circuit's summary order provides no legal support of its decision, *sua sponte*, to expand the jurisdiction of the Secretary over activities that he himself has renounced.

If one assumes that the Secretary's interpretation of the MCA is correct, an issue which the Second Circuit summary decision does not address, the record is devoid of any evidence that could support a finding that the Petitioner's purely intrastate activity constituted part of the movement of interstate commerce within the meaning of the MCA. Specifically, unlike in prior precedent, the Respondent failed to produce any documentary evidence of any customers' orders or projections of customer demand to support a theory that the shipper had any intent at the time of shipment to move product beyond its own warehouses, so that the products can enter "interstate commerce." *See*, *e.g.*, *Nicole Olibas et al. v. Native Oilfield Services, L.L.C.*, No. 15-10919 (5th Cir. Sept. 20, 2016).

The Second Circuit's decision rejected long-standing Supreme Court precedent holding that the

shipper's intent at the commencement of the transportation fixes the character of the transportation for purposes of the MCA. *Texas N.O.RR. v. Sabine Tram Co.*, 227 U.S. 111, 122 (1913). Under the MCA, unless the driver transports products or passengers across state lines, his purely intrastate driving cannot be considered part of commerce if he is simply an intrastate leg of a movement of product among the warehouses of the shipper without any intended delivery of product to a recipient beyond the warehouse locations in another state. It also conflicts with Supreme Court precedent holding that casual and incidental relationship to interstate transit is not interstate movement "in the absence of some special arrangement" that the activity is part of the interstate movement. *United States v. Yellow Cab Co.*, 332 U.S. 218, 231-232 (1947). The decision fails to discuss how, in the absence of a contract or special arrangement for the delivery of the shipper's products to a final destination beyond its warehouses, the purely intrastate activity of the Petitioner constituted "a leg of interstate commerce," even before the shipper intended the product to enter the stream of commerce as defined under the MCA. The MCA is an old law with very specific meaning. Any reinterpretation or attempt to "modernize" the statute needs to be clearly squared with the prior decisions of this Court.

It is not possible to reconcile the Second Circuit's decision with the explicit definition of "interstate commerce" in the MCA, which provides that, to constitute part of a shipment in interstate commerce, the shipper

must have intended the products to be transported to a final destination *beyond its storage locations* at the time the transportation commenced. *See* 29 C.F.R. § 782.7(b)(2) and 57 Fed. Reg. 19812, May 8, 1992. The decision creates uncertainty in the application of the MCA exemption to purely intrastate drivers because it conflicts directly with the Regulations of the Secretary of Transportation issued pursuant to authority granted by Congress under the Motor Carrier Act ("MCA"), 49 U.S.C. § 31501 *et seq*. The Second Circuit failed to recognize that the regulations have the force of law, unless the Court finds they are inconsistent with the Act. Based on the Second Circuit's reasoning, which ignored the regulations, all intrastate drivers would be exempt from overtime even if the product never entered commerce but was simply transported across state lines. Such an expansive view of the MCA exemption to intrastate drivers is contrary to holdings of the Supreme Court and all other Circuit Courts including the Second Circuit.

Thus, the Second Circuit has injected confusion into the law, so that allowance of the Writ is appropriate both to prevent each case from arising *sui generis* and to allow both practitioners and citizens to readily understand what the law is concerning overtime exemptions as it applies to purely intrastate drivers.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE "INTRASTATE THEORY" OF MCA EXEMPTION TO PURELY INSTRASTATE DRIVERS.

A. Application Of The MCA Exemption To Certain Activities, When The Secretary Of Transportation Has Renounced Jurisdiction Over Those Activities, Conflicts With Supreme Court Precedent Prohibiting Judicial Expansion Of Statutory Requirements.

The Second Circuit stated, without explanation, that the Appellant's argument is based on "a misunderstanding of *Baird v. Wagoner Transportation Co*., 425 F.2d 407 (6th Cir. 1970), and related authority, *e.g.*, Motor Carrier Interstate Transportation, 57 Fed. Reg. 19,812 (May 8, 1992), and 29 C.F.R. § 782.7(b)(2)." (App. 3). However, the Second Circuit failed to explain in what respect that is true. Indeed, the Second Circuit simply utilized a conclusory unsupported comment to dramatically expand the meaning of "interstate commerce" as defined under the MCA and, in doing so, it exceeded the proper limits of the judicial role in statutory construction. *See*, *e.g.*, *Jones v. Bock*, 549 U.S. 199, 203 (2007) (in 42 U.S.C. § 1983 actions against prison officials, holding that Sixth Circuit exceeded the proper limits on the judicial role by heightening the inmates pleading rule for exhaustion in contravention of the Federal Rules of Civil Procedure and the Prison Litigation Reform Act of 1995 (PLRA), 28 U.S.C.

§ 1915A, 42 U.S.C. § 1997e(a)); *see also Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016) (reminding courts of their role in interpreting and applying statutes and courts' obligations to honor Congress' choice).

Likewise, the MCA exemption is not a judge-made doctrine, but a statutory exception to the FLSA overtime compensation requirement. Congress expressly delegated the power to regulate the qualifications and maximum hours of service of employees of motor carriers to the Secretary of Transportation. 29 U.S.C. § 207(a)(1); 49 U.S.C. § 31502; 29 C.F.R. § 782.1(a). Pursuant to Congress' mandate, the Secretary ruled he does not have jurisdiction over employees engaged in the intrastate transporting products between storage facilities "*if the shipper has no fixed and persisting transportation intent beyond the terminal storage point at the time of shipment*." 29 C.F.R. § 782.7(b)(2) (emphasis added). The Secretary subsequently ruled that a shipper need not have a specific recipient identified at the time of the shipment while the property is temporarily stored in the warehouse or distribution center before moving to its final destination in order to make an intrastate journey a leg of the interstate commerce. 57 Fed. Reg. 19812, May 8, 1992. Although the identification of a specific recipient at the time the transportation commences is no longer required, the shipper must show a fixed and persistent intent to transport the products to a recipient beyond its warehouse through factually based projections of customer demand, rather than a mere generalized plan to solicit future sales within the State. *Id*. This interpretation of

the term "interstate commerce" by the DOL and the Secretary of Transportation is entitled to great weight. *Boutell v. Walling*, 327 U.S. 463, 471 (1946). Without such "fixed and persistent intent" and factual based evidence of such intent, the Secretary clearly has no jurisdiction and the intrastate driver is not exempt from the FLSA.

The requirement that the shipment be destined to a recipient beyond the shipper's warehouse is what makes the activity of the intrastate driver a "leg of the interstate commerce." Without a shipper's fixed and persistent intent to transport its product to a customer or to a final destination beyond its temporary storage at a shipper's warehouse, there is no commerce within the meaning of the MCA because the intent of the shipper at the time the transportation commences is what fixes the character of the transportation. *Texas N.O.RR. v. Sabine Tram Co.*, *supra*, at 122. The Second Circuit ignored this Court's precedent and created its own rule: if the intrastate driver knew that he was transporting products that were intended to be stored in the shipper's warehouse location outside the State, such intrastate activity becomes a leg of interstate commerce. However, there can be no practical continuity of movement of goods in interstate commerce until "they reach the customers for whom they are intended." *See*, *e.g.*, *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 568 (1943).

The Second Circuit also disregarded this Court's holding that a casual and incidental relationship to interstate transit is not interstate movement "in the absence of some special arrangement" that the activity is part of the interstate movement. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 231-232 (1947) (finding that an intrastate taxi ride between railroad stations in Chicago was an integral step in the interstate movement because the passenger had contracted in advance as a part of interstate travel arrangements). Ironically, that is exactly the basis on which the Second Circuit found the MCA exemption to apply in *Bilyou v. Dutchess Beer Distributors*, 300 F.3d 217 (2d Cir. 2002). In *Bilyou*, a purely intrastate driver was a leg of interstate commerce and subject to the MCA exemption because, when transportation of the products began, the shipper had a fixed and persistent intent to return the products to a specific recipient outside New York pursuant to a contract between the shipper and the out-of-state recipient of those products. *Bilyou v. Dutchess Beer Distributors*, 300 F.3d at 225. In the present case, the Second Circuit failed to discuss how, in the absence of a contract or special arrangement for the delivery of the shipper's products to a final destination beyond its warehouses, the purely intrastate activity of the Petitioner constituted "a leg of interstate commerce."

The Second Circuit's summary order affirming the district court's freewheeling approach to the MCA exemption cannot be reconciled with this Court's decisions, or as discussed *infra*, the Second Circuit's own decision in *Bilyou*, decisions of the other Circuit courts,

or the regulations of the Secretary issued pursuant to the authority granted to him by Congress.

By negating the regulatory requirement that a shipper show a fixed and persistent intent to transport its products to a *recipient* (customer) *beyond* its warehouse locations, the Second Circuit has broadly construed the MCA exemption against the employee, which is conflict with decisions from the United States Supreme Court. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (holding that 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.").

B. The Second Circuit Conflicts With Other Circuits In Holding That The MCA Exemption Applies To An Interstate Driver Transporting Products Destined To A Warehouse Outside The State.

The Second Circuit decision conflicts with the holdings of other Circuit courts recognizing that the MCA exemption does not apply to the intrastate transportation of products that have not entered commerce as specifically defined in the MCA. *Nicole Olibas et al. v. Native Oilfield Services, L.L.C.*, No. 15-10919 (5th Cir. Sept. 20, 2016); *Watkins v. Ameripride Servs.*, 375 F.3d 821, 826 (9th Cir. 2003); *Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 673 (10th Cir. 1993); *Middlewest Motor Freight Bureau v. Interstate Commerce*

Comm'n, 867 F.2d 458, 460 (8th Cir. 1989); *Baird v. Wagoner Transportation Co.*, 425 F.2d 407, 410 (6th Cir. 1970); *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941, 945-946 (5th Cir. 1969); *Shew v. Southland Corp. (Cabell's Dairy Div.)*, 370 F.2d 376, 380 (5th Cir. 1966).

The Second Circuit confused the application of the MCA exemption to drivers who, in the process of transporting products to warehouses, actually drive across state lines with the standard applicable to purely intrastate drivers who transport products entirely within a state that are ultimately destined for inventory purposes in warehouses located in other states. While the activities of the former constitute interstate commerce under the FLSA and the MCA, the activities of the latter do not fall under the definition of interstate commerce under the MCA. 29 C.F.R. § 782.7(b). The transportation within a single State is interstate commerce within the meaning of the FLSA if and only if "it forms a part of a 'practical continuity of movement' across State lines from the point of origin to the point of destination." *Id*. *citing Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943). However, in order for intrastate transportation of products to fall under the jurisdiction of the Secretary of Transportation for the purpose of MCA exemption, the final destination or resting place of the product transported must be a location beyond the shipper's warehouse which was determined at the time of shipment. 29 C.F.R. § 782.7(b)(2).

The Second Circuit, citing to its prior decision in *Bilyou*, *supra*, found that Petitioner's purely intrastate

transportation of products, which were eventually delivered to the shipper's warehouses outside the State for inventory purposes, to constitute "one leg of a route to an out of state destination." (App. 5). However, the Second Circuit failed to distinguish the very specific "final destination" in *Bilyou* (out-of-state breweries that have contracted with the employer for the return of empty containers from New York) from the general "final destination" in the present case (the shipper's own warehouses for storage and inventory purposes). Contrary to the Second Circuit's holding in this case, merely being one leg of a journey that travels out of state is not in and of itself sufficient to exempt an intrastate driver from coverage under the FLSA.

In addition to conflicting with its own prior decision in *Bilyou*, the Second Circuit's decision is in conflict with the Tenth Circuit decision in *Watkins v. Ameripride Servs.*, 375 F.3d 821, 826 (9th Cir. 2004), where the Tenth Circuit held that "drivers who drove between the intrastate canning plants and the intrastate warehouse were not engaged in interstate commerce, because the intrastate warehouse was the only designated destination at the time of the transport.").[2] Likewise in *Nicole Olibas et al. v. Native Oilfield*

[2] The result would not have been different if the warehouse were located out of state unless there was a specific intent at the time of transport to deliver to customers located out of state. Conversely, the fact that the warehouse was located intrastate would serve to exempt the driver from the FLSA if the products, when they arrived at the warehouse, were destined for delivery to customers located out of state.

Services, *supra*, the employer raised an intrastate theory defense arguing that its intrastate drivers were transporting goods in the flow of interstate commerce. The Fifth Circuit affirmed the judgment of the district court and rejected the defendants' intrastate theory argument because the defendants "could not produce documentary evidence of any customer orders to support its intrastate theory." *Id.* at p. 3. Consistent with Supreme Court precedent, the Fifth Circuit placed the burden of production on the employer to show that the products were destined to a final destination (any customer orders) beyond the shipper's warehouse *Corning Glass Works v. Brennan*, 417 U.S. 188, 193 (1974).

The Tenth and Fifth Circuits' decisions above are also congruent with the Secretary of Transportation's definition of "interstate commerce" within the meaning of the MCA, which requires the shipper to have a "fixed and persisting transportation intent beyond the terminal storage point at the time of shipment." 29 C.F.R. § 782.7(b)(2). Or, at minimum the shipper must show a fixed and persistent intent to transport the products to a recipient beyond its warehouse through factually based projections of customer demand, rather than a mere generalized plan to solicit future sales within the State. 57 Fed. Reg. 19812, May 8, 1992.

Moving products from warehouse to warehouse is not sufficient to subject a purely intrastate driver to the MCA exemption. Since the essential character of a shipment is determined by the intent of the shipper at the time the transportation commences, *Texas*

N.O.RR. v. Sabine Tram Co., *supra*, at 122, courts have consistently held that the MCA exemption only applies to intrastate transportation of products destined to a final destination beyond the shipper's warehouse locations. *See Foxworthy v. Hiland Dairy Co.*, 997 F.2d 670, 673 (10th Cir. 1993) (finding MCA exemption because shipments were made pursuant to preexisting orders by specific customers who had agreed to stock a specific amount of a particular product); *Middlewest Motor Freight Bureau v. Interstate Commerce Comm'n*, 867 F.2d 458, 460 (8th Cir. 1989) (when most shipments involved supply contracts or other arrangements entered into prior to shipment, chemical company intended for its products to continue on in interstate commerce), *cert. denied*, 493 U.S. 890 (1989); *Baird v. Wagoner Transp. Co.*, 425 F.2d 407, 412 (6th Cir.) (when shipper had not entered into requirements contracts or specific quantity arrangements before shipping to terminal, no fixed and persisting transportation intent existed), *cert. denied*, 400 U.S. 829, 27 L. Ed. 2d 59, 91 S. Ct. 58 (1970); *Galbreath v. Gulf Oil Corp.*, 413 F.2d 941, 945-946 (5th Cir. 1969) (when ninety-seven percent of oil was shipped pursuant to contract, either for specific gallonage or to meet customers' requirements, oil passed through the terminal storage in a "practical continuity of movement"); *Shew v. Southland Corp. (Cabell's Dairy Div.)*, 370 F.2d 376, 380 (5th Cir. 1966) (when dairy products originated out of state and were distributed within a day, pursuant to preexisting orders, delivery was part of a continuous movement in interstate commerce).

The Second Circuit's criticism of the Sixth Circuit's decision in *Baird v. Wagoner Transportation Co.*, 425 F.2d 407 (6th Cir. 1970) is also misplaced. The Court in *Baird* correctly applied the Secretary's regulation, which at the time required the shipper to show a "specific order being filled for a specific quantity of a given product to be moved through to a specific destination beyond the terminal storage." *Baird v. Wagoner Transportation Co.*, 425 F.2d at 410 (citing 29 C.F.R. § 782.7(b)(2)). After *Baird* was decided, the Secretary issued a policy statement (57 Fed. Reg. 19812) permitting the shipper to show fixed and persistent intent through factually-based projections of customer demand without the need to show a specific order at the time of shipment. Therefore, for the MCA exemption to apply, the shipper must still have the intent to transport its products *beyond* its warehouse facilities for the product to enter interstate commerce as defined under the MCA.

The Second Circuit incorrectly analogized the present case with cases involving the application of the MCA exemption to the transportation of products temporarily stored in warehouses or moved by various carriers. (App. 4). The two cases relied on by the Second Circuit in support of its holding are unlike the case at hand in which there was no final destination envisioned beyond the shipper's warehouses. For example, in *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147 (10th Cir. 2016) the final destination for empty kegs, pallets, hops, and other materials were breweries outside the state. *Deherrera v. Decker Truck Line, Inc.*,

820 F.3d at 1158. In *Roberts v. Levine*, 921 F.2d 804 (8th Cir. 1990), the products were transported based on supply contracts or predictions of customer need. *Roberts v. Levine*, 921 F.2d at 813. Both *Deherrera* and *Devine* involved the transportation of products being temporarily stored in warehouses but with a final destination envisioned at the time that the transportation commenced. Here, the final destination envisioned by the shipper at the commencement of the transportation was the warehouse itself for purposes of inventory only.

Thus, certiorari is warranted to resolve a split between the Second Circuit and the other Circuits as to the meaning of interstate commerce under the Motor Carrier Act, particularly as it applies to purely intrastate transportation of products destined to the shipper's warehouse locations outside the State, when such products are being transported for inventory purposes only without any specific intent to deliver them to customers or demonstrable prediction of a need to meet specific customer demand.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant this petition for review of this matter.

Dated:

Respectfully submitted,

COOPER ERVING & SAVAGE LLP
Attorneys for Petitioner

CARLO A. C. DE OLIVEIRA, ESQ.
PHILLIP G. STECK, ESQ.
39 North Pearl Street, Fourth Floor
Albany, New York 12207
Telephone: (518) 449-3900
Facsimile: (518) 432-3111
E-mail: Cdeoliveira@coopererving.com

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of September, two thousand sixteen.

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
RICHARD C. WESLEY,
PETER W. HALL,
Circuit Judges.

DONALD P. KENNEDY,

Plaintiff-Appellant,

v.

EQUITY TRANSPORTATION COMPANY, INC.,

Defendant-Appellee.

No. 15-3459

For Plaintiff-Appellant: CARLO A. C. DE OLIVEIRA, Cooper Erving & Savage LLP, Albany, NY.

For Defendant-Appellee: ROBERT EVERETT SCOTT and Rochelle Kathleen Lawless, Gibson, McAskill & Crosby, LLP, Buffalo, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Peebles, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-Appellant Donald P. Kennedy appeals from an order of the United States District Court for the Northern District of New York (Peebles, *M.J.*), entered on October 22, 2015, denying his motion for summary judgment and granting Defendant-Appellee Equity Transportation Company, Inc.'s cross-motion for summary judgment. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

"We review the district court's grant and denial of summary judgment *de novo*." *Zaretsky v. William Goldberg Diamond Corp.*, 820 F.3d 513, 519 (2d Cir. 2016). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

Having reviewed the record and the parties' arguments, we AFFIRM for substantially the same reasons provided by the district court. But we briefly address Kennedy's main argument that the motor-carrier exemption to the overtime requirements of the Fair Labor Standards Act (FLSA), *see* 29 U.S.C. § 213(b)(1), does not apply to "drivers, such as Kennedy, even if he is part of a chain of drivers one of whom ultimately crosses state lines, when the products being transported are destined to the shipper's warehouses for inventory purposes only." Appellant's Br. at 5. Kennedy's argument is based on a misunderstanding of *Baird v. Wagoner Transportation Co.*, 425 F.2d 407 (6th Cir. 1970), and related authority, *e.g.*, Motor Carrier Interstate Transportation, 57 Fed. Reg. 19,812 (May 8, 1992), and 29 C.F.R. § 782.7(b)(2). Kennedy misreads this legal authority as stating that any shipment to a warehouse, regardless of whether that shipment crosses state lines, is not interstate within the meaning of the motor-carrier exemption if the shipper intends to store the products at the warehouse for inventory purposes.

"For certain types of shipments, the interstate nature of the transportation [for the purposes of the motor-carrier exemption] can become blurred as products are temporarily warehoused or moved by various carriers – some of whom may only complete intrastate portions of the journey." *Deherrera v. Decker Truck Line, Inc.*, 820 F.3d 1147, 1155 (10th Cir. 2016). In *Baird*, for example, petroleum products were transported across state lines from Indiana to a storage facility in Michigan and then from that storage facility to other locations in Michigan; the issue was whether the intrastate transportation *from* the storage facility was the last leg of a continuous interstate journey or a new intrastate journey. *See* 425 F.2d at 408-12. To answer that question, the Sixth Circuit had to determine whether the products had "come to rest" at the storage facility. *Id.* at 412. And to make that determination, it had to decide whether the shipper had a "fixed and persisting transportation intent" to move the products beyond the storage facility at the time of shipment. *Id.* at 410 (quoting 29 C.F.R. § 782.7(b)(2)). If the shipper had such a fixed and persisting intent, the goods would not have come to rest at the facility; otherwise they would have come to rest. The Sixth Circuit concluded, based on a now outdated test, *see, e.g.*, *Roberts v. Levine*, 921 F.2d 804, 811-12 (8th Cir. 1990), that the products had come to rest at the storage facility. *See Baird*, 425 F.2d at 410-12. And because the drivers at issue in *Baird* transported products only from that storage facility to other points in the same state, the Sixth Circuit concluded that the drivers were engaged in purely intrastate transportation. *See id.* at 412. In sum, *Baird*

addressed how courts must determine when the warehousing of products terminates their journey; it did not address what makes a product's journey interstate in the first place.

Here, Kennedy shuttled trailers of products from a Pepsi bottling plant in Latham, New York, to a parking lot at Exit 24 of the New York State Thruway. After arriving at the Exit 24 lot, Kennedy would unhitch his trailer, and a different driver would take that trailer in tandem with another trailer to Pepsi warehouses in New York and surrounding states. The district court noted that "[e]ven if a carrier's transportation does not cross state lines, the interstate commerce requirement is satisfied if the goods being transported within the borders of one State are involved in a 'practical continuity of movement' in the flow of interstate commerce." *Kennedy v. Equity Transp. Co.*, No. 1:14-CV-0864 (DEP), 2015 WL 6392755, at *6 (N.D.N.Y. Oct. 22, 2015) (quoting *Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 223 (2d Cir. 2002)). It further noted correctly that "[t]hough [Kennedy] may never have personally transported a trailer across state lines, when he relayed filled trailers to the Exit 24 compound, he was essentially 'one leg of a route to an out of state destination.'" *Id.* at *7 (quoting *Bilyou*, 300 F.3d at 224). Thus, the motor-carrier exemption to the FLSA applies. *See Bilyou*, 300 F.3d at 224.

Kennedy also argues that the district court erred in dismissing his state-law claim because the motor-carrier exemption does not preempt state law. This may be true, *see Overnite Transp. Co. v. Tianti*, 926 F.2d

220, 221-22 (2d Cir. 1991), but it is irrelevant, because the district court did not hold that Kennedy's state-law claim was preempted. Rather, the district court pointed to this Court's holding that the New York Labor Law itself "applies the same exemptions as the FLSA." *Kennedy*, 2015 WL 6392755, at *8 n.8 (quoting *Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 105 (2d Cir. 2010)).

We have considered all of Kennedy's contentions on appeal and have found in them no basis for reversal. For the reasons stated herein, the district court's judgment is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

DONALD P. KENNEDY,

Plaintiff,

v.

EQUITY TRANSPORTATION CO., INC.,

Defendant.

Civil Action No.
1:14-CV-0864 (DEP)

APPEARANCES:

FOR PLAINTIFF:

COOPER ERVING & SAVAGE LLP
39 North Pearl Street,
Fourth Floor
Albany, NY 12207

OF COUNSEL:

CARLO A.C. de OLIVEIRA, ESQ.

FOR DEFENDANT:

GIBSON, McASKILL & CROSBY LLP
69 Delaware Street,
Suite 900
Buffalo, NY 14202

OF COUNSEL:

ROBERT E. SCOTT, ESQ.
ROCHELLE K. LAWLESS, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

DECISION AND ORDER

(Filed Oct. 22, 2015)

Plaintiff Donald P. Kennedy, a truck driver formerly employed by defendant Equity Transportation Company, Inc. ("Equity"), has commenced this action alleging that Equity failed to properly compensate him as required under both the Fair Labor Standards Act ("FLSA") of 1938, 29 U.S.C. § 201 *et seq.*, and New York Labor Law ("NYLL") § 650 *et seq.*, by violating the overtime requirements of those provisions. In response to plaintiff's claims, Equity contends that it is exempt from those overtime requirements based on the authority vested in the Secretary of Transportation to establish qualifications and maximum hours of service for truck drivers pursuant to the Motor Carrier Act of 1935 ("MCA"), 49 U.S.C. § 31502, legislation that predated the enactment of the FLSA by three years.

Now that discovery in the action is complete, the parties have filed cross-motions for summary judgment, each arguing that there are no genuine disputes of material fact requiring a trial and that they are entitled to judgment as a matter of law. For the reasons set forth below, defendant's motion will be granted and plaintiff's denied.[1]

[1] This matter is before me based upon consent of the parties, pursuant to 28 U.S.C. § 363(c). Dkt. No. 20.

I. BACKGROUND

Equity is a national trucking company operating as an interstate contract carrier throughout the United States. Dkt. No. 22-15 at 2. On January 16, 2009, New Bern Transportation Corporation ("New Bern"), the principal contracting entity for the transportation of Pepsi Beverages Company ("Pepsi") goods throughout the United States, entered into a Transportation of Goods Agreement ("Agreement") with Equity. Dkt. No. 21-6 at 85, 128-142. The Agreement provides, *inter alia*, that Equity will transport Pepsi commodities from Pepsi's facility in Latham, New York ("Latham facility"), to company-owned or operated satellite warehouses both within and outside of New York State. *Id.* at 85. None of the Pepsi goods transported under the Agreement are specifically designated to fill orders for particular customers. *Id.* at 86. Instead, the purpose of the shipments is to allow Pepsi to maintain approximately ten-to-twelve days worth of inventory in its satellite warehouses to fill customer orders when they are received. *Id.*

The goods transported under the Agreement can include (1) empty can bodies and ends manufactured in New York and transported to the Latham facility for the production of filled goods intended for retail sale; (2) full goods, including, but not limited to, Starbuck's Frappuccino, O.N.E. Coconut Water, Muscle Milk, Ocean Spray, Rockstar, Gatorade, SoBe, Fruit Shoots, and Lipton Pure Leaf beverages manufactured at various third-party co-packaging locations throughout the United States and delivered by third-party carriers to

the Latham facility for transport to warehouses located within and outside of New York State; and (3) other full goods, including, though not limited to, Pepsi-brand products manufactured at the Latham facility, to be transported to warehouses owned or operated by Pepsi located both within and outside of New York. Dkt. No. 21-6 at 85-86. Under the Agreement, Equity drivers deliver those goods to Pepsi satellite locations located throughout New York State, as well as in New Jersey, Pennsylvania, and Connecticut. Dkt. No. 22-5 at 83-84; Dkt. No. 22-6 at 20, 30-32.

To fulfill its obligations under the Agreement, Equity utilizes one "shuttle driver" and nine "over-the-road drivers." Dkt. No. 21-2 at 33; Dkt. No. 21-6 at 34. The shuttle driver's primary responsibility is to transport single trailers filled with products from the Latham facility to a compound at Exit 24 on the New York State Thruway (the "Exit 24 compound"), located approximately nine miles away, and to return empty trailers from the compound to the facility. Dkt. No. 1 at 3; Dkt. No. 8 at 1; Dkt. No. 21-6 at 59-60. The shuttle driver is also occasionally required to transport single trailers containing products to satellite warehouses in New York, and to transport empty cans manufactured in New York to the Latham facility. Dkt. No. 21-5 at 77, 107-08; Dkt. No. 21-6 at 19. The primary job of over-the-road drivers is to deliver trailers filled with products from the Exit 24 compound to satellite Pepsi warehouses located in New York, New Jersey, Pennsylvania, and New England. Dkt. No. 21-6 at 33. The shuttle driver is paid an hourly rate for his primary job of

shuttling, while over-the-road drivers are compensated based upon mileage rates that differ depending on the number of trailers they are transporting. Dkt. No. 21-5 at 75-76; Dkt. No. 21-6 at 34-35.

The daily schedules and routes for Equity drivers are assigned by Linda Wilbur, who is the company's Northeast Dedicated Account Manager and the immediate supervisor of all truck drivers hired by Equity to transport commodities under the Agreement. Dkt. No. 22-6 at 18-19, 29. According to Wilbur, the dispatch of trucks is based on production, and "[n]one of the day drivers ha[ve] the same trip every single day." Dkt. No. 21-6 at 29. At her deposition, she testified that every driver is expected and required to make trips outside of New York State, and a majority of the drivers make trips to New Jersey or Pennsylvania. *Id.* at 32-33.

The typical protocol for transporting goods by Equity involves two drivers, an over-the-road driver and a shuttle driver, separately leaving the Latham facility, each with a single trailer filled with Pepsi goods.[2] Dkt. No. 21-6 at 35-37. The shuttle driver is provided with a bill of lading for each trailer scheduled to be transported from the Latham facility to the Exit 24 compound. Dkt. No. 22-5 at 54-56, 81-82. After arriving at the Exit 24 compound, the shuttle driver disconnects his trailer and places the bill of lading for that load in a small mailbox located in the front of the trailer. *Id.* at 82. An over-the-road driver, with one trailer already

[2] While double trailers are permitted on the New York State Thruway, they are prohibited on local roads. Dkt. No. 21-6 at 35.

attached, then arrives at the Exit 24 compound, engages a second trailer to his vehicle, and drives the two in tandem to the satellite warehouse located at the destination set forth on the bill of lading. Dkt. No. 21-5 at 73-75; Dkt. No. 22-6 at 35. In addition to transporting trailers filled with product from the Latham facility to the Exit 24 compound, the shuttle driver is also tasked with returning empty trailers from the compound to the facility. Dkt. No. 21-5 at 74; Dkt. No. 22-6 at 36-37.

Plaintiff was hired as a shuttle driver for Equity in February 2011, and worked for the company until June 2014. Dkt. No. 1 at 3; Dkt. No. 8 at 1. During the relevant time period, he was the only shuttle driver employed by Equity. Dkt. No. 21-6 at 34. In his position, each day plaintiff transported trailers between the Latham facility and the Exit 24 compound until all of the full trailers were delivered or he reached a fourteen-hour workday. Dkt. No. 21-5 at 74; Dkt. No. 21-6 at 41. When plaintiff dropped off trailers for over-the-road drivers at the Exit 24 compound, he knew the specific satellite warehouses to which the trailers were destined in New York, Pennsylvania, New Jersey, or New England. Dkt. No. 21-5 at 87-88.

Occasionally, plaintiff was also required to transport single trailers to satellite warehouses located within New York State, including in Saratoga Springs and Feura Bush.[3] Dkt. No. 21-6 at 107-09; Dkt. No.

[3] The parties agree that plaintiff delivered single trailers to satellite warehouses other than the Exit 24 compound but disagree as to the frequency of those trips. Dkt. No. 21-9 at 5; Dkt. No. 22-9 at 3-5. While plaintiff contends that during his three-year

22-8 at 8-9. Although plaintiff was required to obtain his tandem (double trailer) license certification as a condition of his employment with Equity, he drove a tandem trailer only once during his employment. Dkt. No. 22-8 at 9. In addition, while Wilbur testified at her deposition that plaintiff drove to New Jersey twice, plaintiff denies this claim, and the payroll records show no evidence of these trips.[4] Dkt. No. 21-2 at 5; Dkt. No. 21-3; Dkt. No. 21-4; Dkt. No. 21-5 at 88; Dkt. No. 21-6 at 46. Plaintiff's payroll records show that he worked 4,043.50 hours of overtime during his employment. Dkt. No. 21-6 at 90. Plaintiff was not paid time-and-a-half for those overtime hours. Dkt. No. 21-6 at 68, 90; Dkt. No. 21-7 at 3.

II. PROCEDURAL HISTORY

Plaintiff commenced this action on July 17, 2014. Dkt. No. 1. On June 23, 2015, following the completion of discovery, plaintiff filed a motion for summary judgment, arguing that no reasonable factfinder could conclude that Equity did not violate the overtime provisions of the FLSA based upon the facts, which are largely uncontroverted. Dkt. No. 21-8.

---

employment with Equity, he was only asked to transport single trailers to satellite warehouses eight times, defendant disputes the exact number. *Id.*

[4] In response to plaintiff's first set of interrogatories, Equity stated that it could not "truthfully admit or deny" whether plaintiff ever "drove outside New York State in the course of his employment with [Equity]." Dkt. No. 22-9 at 5.

Equity responded by filing papers in opposition to plaintiff's motion and in support of a cross-motion for summary judgment in its favor dismissing plaintiff's complaint, contending that the FLSA's overtime provisions do not apply to plaintiff's position.[5] Dkt. Nos. 22-18. With the filing of a plaintiff's reply on July 27, 2015, Dkt. No. 25, the matter is now ripe for determination. Oral argument in connection with the parties' cross-motions was conducted on August 12, 2015, at which time decision was reserved.

---

[5] In support of his summary judgment motion, plaintiff filed a statement of undisputed material facts pursuant to rule 7.1(a)(3) of the local rules of practice for this court. Dkt. No. 21-9. In opposition to plaintiff's motion and in support of its cross-motion for summary judgment, defendant filed a responsive statement of undisputed material facts and adding additional assertions of undisputed material facts. Dkt. No. 23. Although he filed a reply in further support of his motion for summary judgment, plaintiff did not respond to the additional assertions of fact included in defendant's statement. Dkt. No. 25. Ordinarily, in accordance with rule 7.1(a)(3) the court would "*deem admitted any properly supported facts set forth in the Statement of Material Facts that the [plaintiff] does not specifically controvert.*" N.Y.D.N.Y. L.R. 7.1(a)(3) (emphasis in original). Notwithstanding this rule, however, rule 7.1(c), which governs the filing of cross-motions, is arguably ambiguous as to whether such a response is required. *See* N.D.N.Y. L.R. 7.1(c) (permitting, but not requiring, the original moving party to file a reply "with a reply/opposition brief," but not specifying that the reply should or must include a responsive statement of undisputed material facts). In light of the ambiguity in the local rules, the court has not penalized plaintiff for failing to respond to defendant's additional statement of undisputed material facts, and instead has canvassed the record to determine whether any dispute of material fact exists.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment motions are governed by Rule 56 of the Federal Rules of Civil Procedure. Under that provision, the entry of summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Sec. Ins.* Co. *of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 82-83 (2d Cir. 2004). A fact is "material" for purposes of this inquiry, if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of N.Y.*, 426 F.3d 549, 553 (2d Cir. 2005). A material fact is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

A party moving for summary judgment bears an initial burden of demonstrating that there is no genuine dispute of material fact to be decided with respect to any essential element of the claim in issue, and the failure to meet this burden warrants denial of the motion. *Anderson*, 477 U.S. at 250 n.4; *Sec. Ins.* Co., 391 F.3d at 83. In the event this initial burden is met, the opposing party must show, through affidavits or otherwise, that there is a material dispute of fact for trial. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

When deciding a summary judgment motion, a court must resolve any ambiguities, and draw all inferences, in a light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255; *Jeffreys*, 426 F.3d at 553; *Wright v. Coughlin*, 132 F.3d 133, 137-38 (2d Cir. 1998). The entry of summary judgment is justified only in the event of a finding that no reasonable trier of fact could rule in favor of the non-moving party. *Bldg. Trades Employers' Educ. Ass'n v. McGowan*, 311 F.3d 501, 507-08 (2d Cir. 2002); *see also Anderson*, 477 U.S. at 250 (finding summary judgment appropriate only when "there can be but one reasonable conclusion as to the verdict").

In a case such as this, where parties have interposed cross-motions for summary judgment, each motion must be independently assessed, applying the foregoing standard as a backdrop. *See Light Sources, Inc. v. Cosmedico Light, Inc.*, 360 F. Supp. 2d 432, 434 (D. Conn. 2005).

B. Fair Labor Standards Act and the Motor Carrier Exemption

By its enactment of the FLSA in 1938, Congress sought to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); *see Williams v. Tri-State Biodiesel, L.L.C.*, No. 13-CV-5041, 2015 WL 305362, at *4 (S.D.N.Y. Jan. 23, 2015); *Masson v. Ecolab, Inc.*, No. 04-CV-4488, 2005 WL 2000133, at *4 (S.D.N.Y. Aug. 17,

2005). One of its provisions requires employers to pay an employee one-and-one-half times his regular pay rate for work in excess of forty hours per week.[6] 29 U.S.C. § 207(a)(1); *Williams*, 2015 WL 305362, at *4. This mandate, however, is subject to certain exemptions, which, in light of the strong considerations upon which the FLSA is predicated, "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 spirits." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *accord, Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 81 (2d Cir. 2015). An employer bears the burden of proving that an FLSA exemption applies. *Arnold*, 361 U.S. at 394 n.11; *accord, Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

One of the applicable exemptions is commonly referred to as the "motor carrier exemption." 29 U.S.C. § 213(b)(1); *Fox v. Commonwealth Worldwide Chauffeured Transp. of N.Y. LLC*, 865 F. Supp. 2d 257, 263-64.

---

[6] The overtime requirements of the FLSA are generally mirrored in the corresponding provisions of the NYLL. *See Reiseck v. Univ. Commc'ns of Miami, Inc.*, 591 F.3d 101, 105 (2d Cir. 2010) ("The NYLL, too, mandates overtime pay and applies the same exemptions as the FLSA."); *Guadalupe v. Tri-State Emp't,Mgmt. & Consulting, Inc.*, No. 10-CV-3840, 2013 WL 4547242, at *7 (E.D.N.Y. Aug. 28, 2013) ("Like the FLSA, the NYLL establishes certain minimum wage rates and mirrors the FLSA's requirement that employees be compensated at an overtime rate of one-and-one-half times their regular hourly pay for time worked in excess of 40 hours in a week.").

The relevant FLSA provision governing the exemption provides, in pertinent part, that

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

29 U.S.C. § 213(b)(1); *Fox*, 865 F. Supp. 2d at 264. The exemption applies to those employees who

> (1) [a]re employed by carriers whose transportation of passengers or property by motor vehicle is subject to [the Secretary of Transportation's] jurisdiction under section 204 of the Motor Carrier Act, 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.

29 C.F.R. § 782.2(a); *Williams*, 2015 WL 305362, at *5.

In this case, the parties do not appear to dispute that Equity is subject to the Secretary of Transportation's jurisdiction or that plaintiff, while employed by Equity, was "engage[d] in activities of a character directly affecting the safety of operation of motor vehicles[.]" *Compare* Dkt. No. 21-8 *with* Dkt. No. 22-18. Instead, their dispute centers upon whether plaintiff

was engaged in the transport of property in interstate commerce within the meaning of the motor carrier exemption. *Id.*

Courts have explained that, for the motor carrier exemption to apply, the employer must show that "the activities of the individual [employee] involved interstate travel of a character that was more than de minimus *or* that interstate travel was a 'natural, integral and inseparable part' of the position[ ] [the employee] held." *Dauphin v. Chestnut Ridge Transp.*, No. 06-CV-2730, 2009 WL 2596636, at *2 (S.D.N.Y. Aug. 20, 2009) (quoting *Morris*, 332 U.S. at 433) (emphasis added, alteration omitted); *accord, Romero v. Flaum Appetizing Corp.*, No. 07-CV-7222, 2011 WL 812157, at *4 (S.D.N.Y. Mar. 1, 2011). When determining whether an employee falls into the exempt class, the "name given to the [employee's] position is not controlling, rather it is the character of the activities involved in the employee's performance of his job that controls." *Walden v. Sanitation Salvage, Corp.*, No. 14-CV-0112, 2015 WL 1433353, at *3 (S.D.N.Y. Mar. 30, 2015) (citing *Pyramid Motor Freight Corp. v. Ispass*, 333 U.S. 695, 707-08 (1947)). "If not all of an employee's activities affect the safety of operations of motor vehicles in interstate commerce, a court must consider 'the character of the activities rather than the proportion of either the employee's time or his activities.'" *Williams*, 2015 WL 305362, at *3 (quoting *Morris*, 332 U.S. at 431).

One way in which interstate travel can be a natural, integral, and inseparable part of an employee's position is when any employee may be required to

perform interstate travel, regardless of the actual time spent by employees individually on interstate travel. *Williams*, 2015 WL 305362, at *7. "In the case of drivers, courts often phrase the ultimate issue as whether the employee could *reasonably have expected* to drive in interstate commerce." *Id.* at *8 (emphasis added). When making this determination, a court must make a "fact-specific analysis, including an examination of the method by which the employer assigns the interstate activity to the pertinent class of employees, the nature of the employer's business, and perhaps to a lesser degree, the proportion of interstate-to-intrastate employee activities." *Id.* (quotation marks omitted).

Equity argues that interstate travel was an integral part of plaintiff's job because he was likely to travel outside of New York State during the course of his employment. Dkt. No. 22-18 at 13-16. In support of that argument, defendant relies on Linda Wilbur's deposition, at which she testified that the method of assigning routes for drivers was random, and at any time plaintiff could have been assigned an interstate transportation route. Dkt. No. 21-6 at 32-33. Defendant also points to plaintiff's acquisition of a tandem license and the signed employee addendum providing that he may have to travel interstate as further indicia of the likelihood that he would have to travel interstate. *Id.* at 61-62; Dkt. No. 22-8 at 9; Dkt. No. 22-14 at 2. In addition, defendant notes that many of the over-the-road drivers drove to interstate warehouse locations during their standard workdays. Dkt. No. 22-5 at 83-84.

The present record, however, discloses the existence of a genuine dispute regarding whether plaintiff was expected to make trips outside of the State of New York, and whether he ever did. According to Wilbur, plaintiff's responsibilities as a shuttle driver and those of the other over-the-road drivers were fundamentally different. Dkt. No. 21-6 at 19-22. More specifically, she noted that over-the-road drivers "are the drivers that pickup and deliver to the Pepsi satellites [located within and outside New York State]." *Id.* at 20. A shuttle driver, on the other hand, is primarily responsible for shuttling single trailers from the Latham facility to the Exit 24 compound, and then return to the facility with "any dunnage or empty trailers." *Id.* at 22. In addition, reasonable facffinders could differ in opinion, as do the parties, over whether Wilbur's testimony that "everyone" is required to make interstate trips applies only to over-the-road drivers or instead includes shuttle drivers, as well. Dkt. No. 21-6 at 33. Moreover, while plaintiff did receive a tandem license, he obtained it late in his employment, only traveled with a tandem trailer once within New York State, and there is no record that he ever was asked to or actually did travel outside of New York State. Dkt. No. 22-8 at 9; *see also* Dkt. No. 23 at 4. Because the record evidence reveals a genuine dispute of material fact with respect to whether there was any likelihood that plaintiff's job involved interstate travel, neither party is entitled to summary judgment based upon this particular argument.

Regardless of whether plaintiff was expected to deliver goods outside of New York State as part of his job, the interstate commerce requirement of the motor carrier exemption can be satisfied if interstate travel was a natural, integral, and inseparable part of plaintiff's position, even if his conduct was wholly intrastate, when the delivery of goods actually constitutes "interstate movement of goods." *Bilyou*, 300 F.3d at 224. "Even if a carrier's transportation does not cross state lines, the interstate commerce requirement is satisfied if the goods being transported within the borders of one State are involved in a 'practical continuity of movement' in the flow of interstate commerce." *Bilyou*, 330 F.3d at 223 (quoting *Walling v. Jacksonville Paper* Co., 317 U.S. 564, 568 (1943)); *see Project Hope v. M/V IBN SINA*, 250 F.3d 67, 74 (2d Cir. 2001) (noting in the Carmack Amendment context, which is also governed by the interstate commerce requirements of 49 U.S.C. § 13501, that the nature of a shipment is determined "by reference to the intended final destination of the shipment as that intent existed when the shipment commenced"); 29 C.F.R. § 782.7(b)(1) ("[The motor carrier exemption applies even] where the vehicles do not actually cross State lines but operate solely within a single State, if what is being transported is actually moving in interstate commerce.").

Equity generally argues that plaintiff's intrastate deliveries were within the flow of interstate commerce, fulfilling the interstate commerce prong of the motor carrier exemption. Dkt .No. 22-18 at 17. In response to this argument, plaintiff improperly emphasizes the

fact that the products being delivered by him, as the shuttle driver, were destined for a warehouse without fulfilling a specific customer order. Dkt. No. 21-6 at 86; Dkt. No. 21-8 at 9; Dkt. No. 25 at 4. In this regard, plaintiff relies on *Baird v. Wagoner Transp.* Co., 425 F.2d 404 (6th Cir. 1970), Dkt. No. 21-8 at 17-18, a case that has been widely criticized and expressly called into questioned [sic] by both the Department of Transportation and the Department of Labor.[7] *See Billings v. Rolling Frito-Lay Sales, LP*, 413 F. Supp. 2d 817, 821 (S.D. Tex. 2006) (citing authorities).

After reviewing the relevant and binding authority governing this matter, I find that the proper inquiry, as suggested above, is the intent of the shipper at the time of shipment. *See Bilyou*, 300 F.3d at 223-24 ("Whether the transportation is of an interstate nature can be determined by reference to the intended final destination of the transportation when that ultimate destination was envisaged at the time the transportation commenced." (quotation marks omitted)). In this case, unlike some of those relied on by plaintiff, Equity did not own the goods in question, nor was it contemplated under the Agreement that it would further transport the goods from the warehouses to which they were being shipped to end customers. Dkt. No. 21-6 at 85-86, 128-42. Under the Agreement, Equity was only expected to transport products from its Latham facility

[7] Both plaintiff and one of the governing regulations, 29 C.F.R. § 782.7, rely heavily upon the Sixth Circuit's decision in *Baird*.

to a final destination, which regularly was located outside of New York State. *Id.* at 86; Dkt. No. 22-5 at 83-84; Dkt. No. 22-6 at 30-32. It is not disputed that plaintiff frequently transported trailers from the Latham facility to the Exit 24 compound knowing that the trailers had pre-determined final destinations located outside of New York. Dkt. No. 21-5 at 74-75, 87-88. Plaintiff acknowledges that he knew from reading the bills of lading and speaking to over-the-road drivers where the trailers he transported to the Exit 24 compound were bound, and was aware that some of his trailers were pre-destined for warehouses in New Jersey, New England, and Pennsylvania. *Id.* at 87-88. Though plaintiff may never have personally transported a trailer across state lines, when he relayed filled trailers to the Exit 24 compound, he was essentially "one leg of a route to an out of state destination." *Bilyou*, 300 F.3d at 224. If, as the plaintiff himself suggests, the court examines for "the essential character of the commerce, manifested by the shipper's fixed and persisting transportation intent at the time of shipment," Dkt. No. 21-8 at 13 (quotation marks and alteration omitted), it is clear that plaintiff transported many trailers that were destined for interstate satellite warehouse locations.

In sum, because the record reflects, without contradiction, that plaintiff's intrastate transportation of trailers constituted the first leg of the transportation of goods where the final destinations included locations outside of New York State, defendant has carried

its burden of showing that plaintiff was engaged in activities of a character directly affecting the safety of operation of motor vehicles in the transportation in interstate commerce, and that his position falls into the motor carrier exemption of the FLSA's overtime requirements. Accordingly, no reasonable factfinder could conclude that, while employed at Equity, plaintiff was subject to the overtime provisions of the FLSA.[8]

IV. SUMMARY AND CONCLUSION

Because defendant has carried its burden of proving that no reasonable factfinder could conclude that the motor carrier exemption does not apply to the circumstances presented in this action, plaintiff's claim that he is entitled to overtime pay under the FLSA must fail. Accordingly, it is hereby

---

[8] For the same reasons that plaintiff's FLSA claim lacks merit I also conclude that his overtime claim under the NYLL fails because that provision is subject to the same exemption. *See Reiseck*, 591 F.3d at 105 ("The NYLL, too, mandates overtime pay and applies the same exemptions as the FLSA."); *Hernandez v. NJK Contractors, Inc.*, No. 09-CV-4812, 2015 WL 1966355, at *39 (E.D.N.Y. May 1, 2015) ("The NYLL incorporates and restates the FLSA, such that the analysis of overtime claims under the NYLL is generally the same as under the FLSA." (citing 12 N.Y.C.C.R. § 142-3.2)). Even if I were to disagree and find that plaintiff may nonetheless maintain his NYLL claim, I would conclude that it would be improvident to exercise supplemental jurisdiction over that claim, having dismissed plaintiff's only federal cause of action. *See Lundy v. Catholic Health Sys. of Long Island Inc.*, 711 F.3d 106, 118 (2d Cir. 2013) (upholding the district court's dismissal of the plaintiff's NYLL claims where it had determined that "the same standard applied to the FLSA and NYLL claims").

ORDERED as follows:

(1) Plaintiff's motion for summary judgment (Dkt. No. 21) is DENIED;

(2) Defendant's cross-motion for summary judgment (Dkt. No. 22) is GRANTED; and

(3) The clerk is respectfully directed to enter judgment dismissing plaintiff's complaint in this matter in its entirety.

Dated: October 22, 2015
Syracuse, New York

/s/ David E. Peebles
David E. Peebles
U.S. Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of November, two thousand sixteen.

Donald P. Kennedy,

Plaintiff-Appellant,

v.

Equity Transportation Company, Inc.,

Defendant-Appellee.

ORDER

Docket No: 15-3459

Appellant, Donald P. Kennedy, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 29 United States Code, Section 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.

Title 29 United States Code, Section 213: Exemptions.

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

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

Title 49 United States Code, Section 31502: Requirements for qualification, hours of service, safety, and equipment standards.

(a) Application. This section applies to transportation –

(1) described in sections 13501 and 13502 of this title [49 USCS §§ 13501 and 13502]; 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.

REGULATIONS INVOLVED

Title 29 Code of Federal Regulations, Section 782.1: Statutory provisions considered.

(a) Section 13(b)(1) of the Fair Labor Standards Act provides an exemption from the maximum hours and overtime requirements of section 7 of the act, but not from the minimum wage requirements of

section 6. The exemption is applicable 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 204 of the Motor Carrier Act of 1935, (part II of the Interstate Commerce Act, 49 Stat. 546, as amended; 49 U.S.C. 304, as amended by Pub. L. 89-670, section 8e which substituted "Secretary of Transportation" for "Interstate Commerce Commission" – Oct. 15, 1966) except that the exemption is not applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service solely by virtue of section 204(a)(3a) of part II of the Interstate Commerce Act. (Pub. L. 939, 84th Cong., second sess., Aug. 3, 1956, secs. 2 and 3) The Fair Labor Standards Act confers no authority on the Secretary of Labor or the Administrator to extend or restrict the scope of this exemption. It is settled by decisions of the U.S. Supreme Court that the applicability of the exemption to an employee otherwise entitled to the benefits of the Fair Labor Standards Act is determined exclusively by the existence of the power conferred under section 204 of the Motor Carrier Act to establish qualifications and maximum hours of service with respect to him. It is not material whether such qualifications and maximum hours of service have actually been established by the Secretary of Transportation; the controlling consideration is whether the employee comes within his power to do so. The exemption is not operative in the absence of such power, but an employee with respect to whom the Secretary of Transportation has such power is

excluded, automatically, from the benefits of section 7 of the Fair Labor Standards Act. (Southland Gasoline Co. v. Bayley, 319 U.S. 44; Boutell v. Walling, 327 U.S. 463; Levinson v. Spector Motor Service, 330 U.S. 649; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Morris v. McComb, 332 U.S. 422)

(b) Section 204 of the Motor Carrier Act, 1935, provides that it shall be the duty of the Interstate Commerce Commission (now that of the Secretary of Transportation (see § 782.0(c))) to regulate common and contract carriers by motor vehicle as provided in that act, and that "to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees, and safety of operation and equipment." (Motor Carrier Act, sec. 204(a)(1)(2), 49 U.S.C. 304(a)(1)(2)) Section 204 further provides for the establishing of similar regulations with respect to private carriers of property by motor vehicle, if need therefor is found. (Motor Carrier Act, sec. 204(a)(3), 49 U.S.C. 304(a)(3))

(c) Other provisions of the Motor Carrier Act which have a bearing on the scope of section 204 include those which define common and contract carriers by motor vehicle, motor carriers, private carriers of property by motor vehicle (Motor Carrier Act, sec. 203(a)(14), (15), (16), (17), 49 U.S.C. sec. 303(a)(14), (15), (16), (17)) and motor vehicle (Motor Carrier Act, sec. 203(a)(13)); those which confer regulatory powers with respect to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce (Motor

Carrier Act, sec. 202(a)), as defined in the Motor Carrier Act, sec. 203(a)(10), (11), and reserve to each State the exclusive exercise of the power of regulation of intrastate commerce by motor carriers on its highways (Motor Carrier Act, sec. 202(b)); and those which expressly make section 204 applicable to certain transportation in interstate or foreign commerce which is in other respects excluded from regulation under the act. (Motor Carrier Act, sec. 202(c))

Title 29 Code of Federal Regulations, Section 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 of foreign commerce

within the meaning of the Motor Carrier Act provide no basis for exemption under section 13(b)(1) of the Fair Labor Standards Act. (Walling, v. Comet Carriers, 151 F. (2d) 107 (C.C.A. 2); Hansen v. Salinas Valley Ice Co. (Cal. App.) 144 P. (2d) 896; Reynolds v. Rogers Cartage Co., 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds, 166 F. (d) 317 (C.A. 6); Earle v. Brinks, Inc., 54 F. Supp. 676 (S.D. N.Y.); Walling v. Villaume Box & Lumber Co., 58 F. Supp. 150 (D. Minn.); Hager v. Brinks, Inc., 11 Labor Cases, par. 63,296 (N.D. Ill.), 6 W.H. Cases 262; Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938 (D. Minn.); Dallum v. Farmers Cooperative Trucking Assn., 46 F. Supp. 785 (D. Minn.); McLendon v. Bewely Mills (N.D. Tex.); 3 Labor Cases, par. 60,247, 1 W.H. Cases 934; Gibson v. Glasgow (Tenn. Sup. Ct.), 157 S.W. (2d) 814; cf. Morris v. McComb, 332 U.S. 422. See also § 782.1 and §§ 782.7 through 782.8.)

Title 29 United States Code, Section 782.7: Interstate commerce requirements of exemption.

(a) As explained in preceding sections of this part, section 13(b)(1) of the Fair Labor Standards Act does not exempt an employee of a carrier from the act's overtime provisions unless it appears, among other things, that his activities as a driver, driver's helper, loader, or mechanic directly affect the safety of operation of motor vehicles in transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act. What constitutes such transportation in interstate or foreign commerce, sufficient to bring such an employee within the regulatory power of the

Secretary of Transportation under section 204 of that act, is determined by definitions contained in the Motor Carrier Act itself. These definitions are, however, not identical with the definitions in the Fair Labor Standards Act which determine whether an employee is within the general coverage of the wage and hours provisions as an employee "engaged in (interstate or foreign) commerce." For this reason, the interstate commerce requirements of the section 13(b)(1) exemption are not necessarily met by establishing that an employee is "engaged in commerce" within the meaning of the Fair Labor Standards Act when performing activities as a driver, driver's helper, loader, or mechanic, where these activities are sufficient in other respects to bring him within the exemption. (Hager v. Brinks, Inc. (N.D. Ill.), 11 Labor Cases, par. 63,296, 6 W.H. Cases 262; Earle v. Brinks, Inc., 54 F. Supp. 676 (S.D. N.Y.); Thompson v. Daugherty, 40 F. Supp. 279 (D. Md.). See also, Walling v. Villaume Box & Lbr. Co., 58 F. Supp. 150 (D. Minn.). And see in this connection paragraph (b) of this section and § 782.8.) To illustrate, employees of construction contractors are, within the meaning of the Fair Labor Standards Act, engaged in commerce where they operate or repair motor vehicles used in the maintenance, repair, or reconstruction of instrumentalities of interstate commerce (for example, highways over which goods and persons regularly move in interstate commerce). (Walling v. Craig, 53 F. Supp. 479 (D. Minn). See also Engbretson v. E. J. Albrecht Co., 150 F. (2d) 602 (C.A. 7); Overstreet v. North Shore Corp., 318 U.S. 125; Pedersen v. J. F. Fitzgerald Constr. Co., 318 U.S. 740, 742.) Employees so

engaged are not, however, brought within the exemption merely by reason of that fact. In order for the exemption to apply, their activities, so far as interstate commerce is concerned, must relate directly to the transportation of materials moving in interstate or foreign commerce within the meaning of the Motor Carrier Act. Asphalt distributor-operators, although not exempt by reason of their work in applying the asphalt to the highways, are within the exemption where they transport to the road site asphalt moving in interstate commerce. See Richardson v. James Gibbons Co., 132 F. (2d) 627 (C.A. 4), affirmed 319 U.S. 44 (and see reference to this case in footnote 18 of Levinson v. Spector Motor Service, 330 U.S. 649); Walling v. Craig, 53 F. Supp. 479 (D. Minn.).

(b)

(1) Highway transportation by motor vehicle from one State to another, in the course of which the vehicles cross the State line, clearly constitutes interstate commerce under both acts. Employees of a carrier so engaged, whose duties directly affect the safety of operation of such vehicles, are within the exemption in accordance with principles previously stated. (Southland Gasoline Co. v. Bayley, 319 U.S. 44; Plunkett v. Abraham Bros., 129 F. (2d) 419 (C.A. 6); Vannoy v. Swift & Co. (Mo. Sup. Ct.), 201 S.W. (2d) 350; Nelson v. Allison & Co. (E.D. Tenn.), 13 Labor Cases, par. 64,021; Reynolds v. Rogers Cartage Co. (W.D. Ky.), 13 Labor Cases, par. 63,978, reversed on other grounds 166 F. (2d) 317 (C.A. 6); Walling v. McGinley Co. (E.D. Tenn.), 12 Labor Cases, par. 63,731;

Walling v. A. H. Phillips, Inc., 50 F. Supp. 749, affirmed (C.A. 1) 144 F. (2d) 102,324 U.S. 490. See §§ 782.2 through 782.8.) The result is no different where the vehicles do not actually cross State lines but operate solely within a single State, if what is being transported is actually moving in interstate commerce within the meaning of both acts; the fact that other carriers transport it out of or into the State is not material. (Morris v. McComb, 68 S. Ct. 131; Pyramid Motor Freight Corp. v. Ispass, 330 U.S. 695; Walling v. Silver Bros. Co. 136 F. (2d) 168 (C.A. 1); Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C.A. 8); Dallum v. Farmers Cooperative Trucking Assn., 46 F. Supp. 785 (D. Minn.); Gavril v. Kraft Cheese Co., 42 F. Supp. 702 (N.D. Ill.); Keegan v. Rupport (S.D. N.Y.), 7 Labor Cases, par. 61,726, 3 W.H. Cases 412; Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956, 5 W.H. Cases 926). Transportation within a single State is in interstate commerce within the meaning of the Fair Labor Standards Act where it forms a part of a "practical continuity of movement" across State lines from the point of origin to the point of destination. (Walling v. Jacksonville Paper Co., 317 U.S. 564; Walling v. Mutual Wholesale Food & Supply Co., 141 F. (2d) 331 (C.A. 8); Walling v. American Stores Co., 133 F. (2d) 840 (C.A. 3); Baker v. Sharpless Hendler Ice Cream Co. (E.D. Pa.), 10 Labor Cases, par. 62,956 5 W.H. Cases 926) Since the interstate commerce regulated under the two acts is not identical (see paragraph (a) of this

section), such transportation may or may not be considered also a movement in interstate commerce within the meaning of the Motor Carrier Act. Decisions of the Interstate Commerce Commission prior to 1966 seemingly have limited the scope of the Motor Carrier Act more narrowly than the courts have construed the Fair Labor Standards Act. (see § 782.8.) It is deemed necessary, however, as an enforcement policy only and without prejudice to any rights of employees under section 16 (b) of the Act, to assume that such a movement in interstate commerce under the Fair Labor Standards Act is also a movement in interstate commerce under the Motor Carrier Act, except in those situations where the Commission has held or the Secretary of Transportation or the courts hold otherwise. (See § 782.8(a); and compare Beggs v. Kroger Co., 167 F. (2d) 700, with the Interstate Commerce Commission's holding in Ex parte No. MC-48, 71 M.C.C. 17, discussed in paragraph (b)(2) of this section.) Under this enforcement policy it will ordinarily be assumed by the Administrator that the interstate commerce requirements of the section 13(b)(1) exemption are satisfied where it appears that a motor carrier employee is engaged as a driver, driver's helper, loader, or mechanic in transportation by motor vehicle which, although confined to a single State, is a part of an interstate movement of the goods or persons being thus transported so as to constitute interstate commerce within the meaning of the Fair Labor Standards Act. This policy does not extend to

drivers, driver's helpers, loaders, or mechanics whose transportation activities are "in commerce" or "in the production of goods for commerce" within the meaning of the act but are not a part of an interstate movement of the goods or persons carried (see, e.g., Wirtz v. Crystal Lake Crushed Stone Co., 327 F. 2d 455 (C.A. 7)). Where, however, it has been authoritatively held that transportation of a particular character within a single State is not in interstate commerce as defined in the Motor Carrier Act (as has been done with respect to certain transportation of petroleum products from a terminal within a State to other points within the same State – see paragraph (b)(2) of this section), there is no basis for an exemption under section 13(b)(1), even though the facts may establish a "practical continuity of movement" from out-of-State sources through such in-State trip so as to make the trip one in interstate commerce under the Fair Labor Standards Act. Of course, engagement in local transportation which is entirely in intrastate commerce provides no basis for exempting a motor carrier employee. (Kline v. Wirtz, 373 F. 2d 281 (C.A. 5). See also paragraph (b) of this section.)

(2) The Interstate Commerce Commission 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 or foreign commerce within the meaning of part II of the Interstate Commerce Act if the shipper has no

fixed and persisting transportation intent beyond the terminal storage point at the time of shipment. See Ex parte No. MC-48 (71 M.C.C. 17, 29). The Commission specifically ruled 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 the furtherance of this distribution within the single State is specifically arranged only after sale or allocation from storage. In Baird v. Wagoner Transportation Co., 425 F. (2d) 407 (C.A. 6), the court found each of these factors to be present and held the intrastate transportation activities were not "in interstate commerce" within the meaning of the Motor Carrier Act and denied the section 13(b)(1) exemption. While ex parte No. MC-48 deals with petroleum and petroleum products, the decision indicates that the same reasoning applies to general commodities moving interstate into a warehouse for distribution (71 M.C.C. at 27). Accordingly, employees engaged in such transportation are not subject to the Motor Carrier Act and therefore not within the section 13(b)(1) exemption. They may, however, be engaged in commerce within the meaning of the Fair Labor Standards Act. (See in this connection, Mid-Continent Petroleum Corp. v.

Keen, 157 F. 2d 310 (C.A. 8); DeLoach v. Crowley's Inc., 128 F. 2d 378 (C.A. 5); Walling v. Jacksonville Paper Co., 69 F. Supp. 599, affirmed 167 F. 2d 448, reversed on another point in 336 U.S. 187; and Standard Oil Co. v. Trade Commission, 340 U.S. 231, 238).

(3) The wage and hours provisions of the Fair Labor Standards Act are applicable not only to employees engaged in commerce, as defined in the act, but also to employees engaged in the production of goods for commerce. Employees engaged in the "production" of goods are defined by the act as including those engaged in "handling, transporting, or in any other manner working on such goods, or in closely related process or occupation directly essential to the production thereof, in any State." (Fair Labor Standards Act, sec. 3(j), 29 U.S.C., sec. 203(j), as amended by the Fair Labor Standards Amendments of 1949, 63 Stat. 910. See also the Division's Interpretative Bulletin, part 776 of this chapter on general coverage of the wage and hours provisions of the act.) Where transportation of persons or property by motor vehicle between places within a State falls within this definition, and is not transportation in interstate or foreign commerce within the meaning of the Motor Carrier Act because movement from points out of the State has ended or because movement to points out of the State has not yet begun, the employees engaged in connection with such transportation (this applies to employees of common, contract, and private carriers) are covered by the wage and hours provisions of

the Fair Labor Standards Act and are not subject to the jurisdiction of the Secretary of Transportation. Examples are: (1) Drivers transporting goods in and about a plant producing goods for commerce; (2) chauffeurs or drivers of company cars or buses transporting officers or employees from place to place in the course of their employment in an establishment which produces goods for commerces; (3) drivers who transport goods from a producer's plant to the plant of a processor, who, in turn, sells goods in interstate commerce, the first producer's goods being a part or ingredient of the second producer's goods; (4) drivers transporting goods between a factory and the plant of an independent contractor who performs operations on the goods, after which they are returned to the factory which further processes the goods for commerce; and (5) drivers transporting goods such as machinery or tools and dies, for example, to be used or consumed in the production of other goods for commerce. These and other employees engaged in connection with the transportation within a State of persons or property by motor vehicle who are subject to the Fair Labor Standards Act because engaged in the production of goods for commerce and who are not subject to the Motor Carrier Act because not engaged in interstate or foreign commerce within the meaning of that act, are not within the exemption provided by section 13(b)(1). (Walling v. Comet Carriers, 151 F. (2d) 107 (C.A. 2); Griffin Cartage Co. v. Walling, 153 F. (2d) 587 (C.A. 6); Walling v. Morris, 155 F. (2d) 832 (C.A. 6),

reversed on other grounds in Morris v. McComb, 332 U.S. 422; West Kentucky Coal Co. v. Walling, 153 F. (2d) 582 (C.A. 6); Hamlet Ice Co. v. Fleming, 127 F. (2d) 165 (C.A. 4); Atlantic Co. v. Walling, 131 F. (2d) 518 (C.A. 5); Chapman v. Home Ice Co., 136 F. (2d) 353 (C.A. 6); Walling v. Griffin Cartage Co., 62 F. Supp. 396 (E.D. Mich.), affirmed 153 F. (2d) 587 (C.A. 6); Dallum v. Farmers Coop. Trucking Assn., 46 F. Supp. 785 (D. Minn.); Walling v. Villaume Box & Lbr. Co., 58 F. Supp. 150 (D. Minn); Walling v. DeSoto Creamery & Produce Co., 51 F. Supp. 938 (D. Minn.); Reynolds v. Rogers Cargate Co., 71 F. Supp. 870 (W.D. Ky.), reversed on other grounds 166 F. (2d) 317 (C.A. 6), Hansen v. Salinas Valley Ice Co. (Cal. App.), 144 P. (2d) 896).

15-3459

United States Court of Appeals
for the
Second Circuit

DONALD P. KENNEDY,

Plaintiff-Appellant,

-against-

EQUITY TRANSPORTATION COMPANY, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPELLANT'S CITATION OF SUPPLEMENTAL AUTHORITY PURSUANT TO FED. R. APP. P. 28(j)

(Filed Sep. 20, 2016)

Cooper Erving & Savage LLP
Attorneys for Plaintiff-Appellant
39 North Pearl Street
Albany, New York 12207
(518) 449-3900

Plaintiff-Appellant, by and through her undersigned counsel, hereby request this Honorable Court to take notice of and consider a recent decision from the

United States Court of Appeals for the Fifth Circuit issued yesterday, September 20, 2016, in *Nicole Olibas et al. vs. Native Oilfield Services, L.L.C.*, No. 15-10919 (5th Cir. Sept. 20, 2016) (decision is attached hereto as Exhibit A), which is relevant to whether the record in this case supports a finding that Appellant was exempt from the FLSA's pay overtime under the Motor Carrier Act ("MCA") based on a intrastate theory defense.

The Fifth Circuit in *Olibas* affirmed an FLSA collective action judgment for a group of 110 oilfield truck drivers, rejecting the defendants' argument that the truck drivers engaged in the actual transportation of goods across state lines or the intrastate transportation of goods in the flow of intrastate commerce because the defendants "could not produce drivers' logs, bills of lading, time sheets, or other documents conclusively showing interstate travel by the drivers." *See Nicole Olibas et al. vs. Native Oilfield Services, L.L.C.*, No. 15-10919, at p. 3. The Court further found that defendants "could not produce documentary evidence of any customer orders to support its intrastate theory." *Id*.

In the present case, like the defendants in *Olibas*, there is no evidence that the Appellant ever drove across state lines [A. 102-104]. Also, there is no evidence, testimonial or documentary, to support a theory that the Appellant was transporting products to be delivered pursuant to any customer orders to support an intrastate continuity of movement theory. In fact, the Shipper in the present case has admitted that at the time the Appellant's transportation of its products began, the Shipper had not [sic] fixed or persistent intent to

transport such products to a final destination (customers) beyond its warehouse locations.

Respectfully submitted,

Dated: September 20, 2016
Albany, New York

COOPER ERVING & SAVAGE LLP

/s/ Carlo A. C. de Oliveira
Carlo A. C. de Oliveira, Esq.
Bar Roll No.: 516271
Attorneys for Plaintiff-Appellant
39 North Pearl Street
Albany, New York 12207-2797
(518) 449-3900

[Certificate Of Compliance With
F.R.A.P. Rule 32(A)(7)(B) Omitted]

[EXHIBIT A]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-10919

NICOLE OLIBAS, On behalf of themselves and all others similarly situated; REGINALD E. WILLIAMS; DONNY J. HODKINSON; TINA MCDONALD; CAROL JOHNSON,

Plaintiffs-Appellees

v.

JOHN BARCLAY; NATIVE OILFIELD SERVICES, L.L.C.,

Defendants-Appellants

REGINALD E. WILLIAMS, On behalf of themselves and all others similarly situated; DONNY J. HODKINSON, On behalf of themselves and all others similarly situated; TINA MCDONALD, On behalf of themselves and all others similarly situated; CAROL JOHNSON, On behalf of themselves and all others similarly situated;

Plaintiffs-Appellees

v.

NATIVE OILFIELD SERVICES, L.L.C., JOHN BARCLAY;

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:11-CV-2388 & 3:12-CV-3196

(Filed Sep. 20, 2016)

Before JOLLY, BARKSDALE, and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

The overarching question presented in this appeal is whether an employer, Native Oilfield Services, L.L.C., and its president, John Barclay, (together, "Native") owed its employee truck drivers overtime under the Fair Labor Standards Act ("FLSA") or whether the drivers were exempt from the FLSA's overtime pay requirement under the Motor Carrier Act ("MCA"). Because we conclude that the district court did not err in denying Native's Renewed Motion for Judgment as a Matter of Law ("JMOL") and Motion for a New Trial, we AFFIRM.

I.

Native provides commercial transportation services to the oil and gas industry, primarily transporting sand for hydraulic fracking. Native's truck drivers

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

filed a collective action against Native, alleging that Native violated the FLSA by failing to pay them overtime for their off-the-clock hours waiting to be assigned a truck or for their trucks to be loaded/unloaded between August 22, 2009, and August 5, 2014. Native countered that the drivers were exempt from the FLSA's overtime pay provisions under the MCA.

At trial, there was no dispute that Native was a motor carrier engaged in interstate commerce or that the drivers operated trucks over 10,000 pounds. There was, however, conflicting testimony over whether the drivers engaged in the actual transportation of goods across state lines or the intrastate transportation of goods in the flow of interstate commerce – situations that would bring the drivers within the ambit of the MCA exemption.[1]

---

[1] For example, a dispatcher testified that 20-25% of loads a day were interstate. Barclay testified that approximately 10% of Native's annual business was interstate loads. Two dispatchers testified that drivers transported sand from out of state to Texas customers. But most drivers testified that they never drove out of state, although one said he had driven out of state and another claimed he knew of others who had done so.

The drivers also testified that they drove out of state on a voluntary basis. Barclay testified that was initially true, but those trips later became mandatory. And Freddie Lee, a dispatcher, testified that drivers would be disciplined for refusing interstate assignments.

Yet Chris Levine, a Native human resources generalist, testified that he could only recall one time when trips were randomly assigned because drivers did not volunteer for them. He also stated that there was no written policy forcing drivers to go out of

Notably, at trial, Native could not produce drivers' logs, bills of lading, time sheets, or other documents conclusively showing interstate travel by the drivers.[2] It also could not produce documentary evidence of any customer orders to support its intrastate theory.[3] Native only produced Interstate Fuel Tax Agreements ("IFTAs"). Although they reflected the out-of-state miles recorded each year, the IFTAs only covered two years, showed no out-of-state travel for long periods, did not identify drivers, and did not record the weights

---

state or be terminated for refusing such an assignment and that Native "rarely had a problem."

One of the only pieces of documentary evidence presented to the jury actually classified drivers as non-exempt, meaning due overtime, even though the jury heard Barclay testify that the drivers were all classified as exempt well before the document was made.

[2] Barclay testified that the log books were destroyed by a third party pursuant to Department of Transportation regulations, which only required them to be retained for six months. Yet he admitted that he had received written discovery requests well in advance of the time when he could have told the third party not to destroy the documents.

As for the daily trip reports, which showed a driver's name, date, the driver's starting and stopping location, and what he or she did during the day, Barclay admitted that they were put in a banker's box after the drivers made a discovery request for them. The reports were then destroyed.

[3] Native's intrastate theory was that, although its drivers transported out-of-state goods intrastate, Native had a fixed and persisting intent to complete the goods' movement across state lines by delivering them to customers.

of vehicles.[4] Moreover, the jury saw a discovery request for documents that "ever informed any driver that he/she could be indiscriminately assigned to drive an interstate trip" that Native responded to with "none."

At the close of trial, the district court refused to give Native's 491-page damages jury instruction, which would have required the jury to determine the total weekly pay and hours worked for each of the 108 plaintiff-drivers for five years. Also, although it otherwise adopted wholesale Native's jury instruction on the second prong of the MCA, the court added, at the drivers' request, a one-sentence example of when a "reasonable expectation" of interstate transport is satisfied. The example identified a single factor of a multi-factor test.[5]

On August 5, 2014, the jury returned a verdict in favor of the drivers. The jury found that: (1) Native failed to establish each essential element of the MCA

---

[4] This matters because the IFTAs also reflect the travel of well-site supervisors, non-class members who drove vehicles under 10,000 pounds (the required vehicle weight for the MCA exemption to apply).

[5] The relevant part of the instruction read:

> [Y]ou should ask whether the Driver Plaintiffs were or could have been called on to drive to states other than Texas as part of their continuing job duties at Native Oilfield. For example, one way drivers can be considered to be 'reasonably expected' to drive in interstate commerce is if interstate trips are indiscriminately distributed by the employer to the drivers as part of their continuing job duties.

exemption; (2) Native failed to pay the drivers overtime in violation of the FLSA; (3) Native willfully violated the FLSA; and (4) the drivers, as a collective unit, averaged eighteen hours of weekly unpaid overtime.[6]

The court ordered the parties to mediate their unresolved dispute over the amount of damages owed. When the parties could not reach a settlement, the drivers moved for entry of judgment, providing the court with supplemental, post-verdict declarations from drivers whose testimony was not presented at trial.[7] The court then determined the drivers' regular hourly rate of pay and the overtime premium without any further jury findings. In order to do these calculations, the court accepted the drivers' post-verdict declarations, which stated whether a driver was paid hourly or by the load. This was necessary, the court explained, because Native failed to maintain adequate payroll records, an obligation mandated by federal law.

On May 8, 2015, the court awarded the drivers $1,673,145 in unpaid overtime compensation, $1,673,145 in liquidated damages, $371,759.59 in attorneys' fees, and $10,564.32 in costs. The court also denied Native's

---

[6] The jury found that the named plaintiffs worked eleven, thirteen, ten and five hours of unpaid weekly overtime.

[7] Because there were four named plaintiffs and 104 opt-in plaintiffs, both sides agreed to use representative testimony consisting of five percent of the drivers.

renewed JMOL motion.[8] It entered final judgment on May 11, 2015.

Native then renewed its JMOL motion and moved for a new trial. The court denied both motions on August 27, 2015.[9]

Native has timely appealed. Native contends that the district court erred: (1) in denying its JMOL and new-trial motions because the weight of the evidence showed that the MCA exemption applied to the drivers; and (2) in denying its new trial motion because: (a) the "reasonable expectation" and damages jury instructions were improper and prejudicial; and (b) the damages calculation was improper because the jury's findings on the average overtime hours worked were not supported by the evidence and the court considered the drivers' post-verdict declarations.

---

[8] On July 31, 2014, at the close of the drivers' presentation of evidence, Native moved for JMOL. The district court denied the motion because of the competing evidence and its lack of authority to make credibility determinations.

[9] In denying those motions, the district court found that: (1) there was sufficient evidence for the jury to reasonably conclude that the MCA exemption did not apply; (2) the jury's determination of the average number of weekly hours worked by the drivers was not against the weight of the evidence, especially in the light of Native's failure to maintain adequate payroll records; (3) it was within its discretion to give the "reasonable expectation" instruction with an example for determining whether the MCA exemption applied; and (4) it did not err in allowing the jury to estimate, based on averages, the weekly hours worked by each plaintiff because the task of calculating actual hours worked would have been confusing and overly burdensome.

II.

A.

We begin by considering the district court's denial of Native's JMOL and new trial motions because it determined that there was sufficient evidence for the jury to reasonably conclude the MCA exemption did not apply. We review the denial of a JMOL motion *de* novo, but "'our standard of review with respect to a jury verdict is especially deferential.'" *Evans v. Ford Motor Co.*, 484 F.3d 329, 334 (5th Cir. 2007) (citation omitted). We review the denial of a new trial motion using the more deferential abuse of discretion standard. *Jackson v. Host Int'l, Inc.*, 426 F. App'x 215, 218 (5th Cir. 2011) (citations omitted).

Native argued below, as it does on appeal, that the court should have granted its JMOL or new trial motions because no rational jury could have found that its drivers did not operate vehicles in interstate commerce or transport intrastate goods that were in interstate commerce. The drivers contended below, as they do on appeal, that: (1) the verdict is supported by the evidence; and (2) Native failed to meet its burden of establishing each element of the MCA exemption.

The FLSA "requires an employer to pay overtime compensation to any employee working more than forty hours in a workweek." *Allen v. Coil Tubing Servs., L.L.C.*, 755 F.3d 279, 282 (5th Cir. 2014) (citing 29 U.S.C. § 207(a)(1)). Although there are exemptions to the FLSA, these exemptions "'are construed narrowly against the employer, and the employer bears

the burden to establish a claimed exemption.'" *Id.* at 283 (citation omitted).

The MCA exemption "states that the FLSA's overtime requirement shall not apply . . . 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 of the MCA." *Id.* (citations and internal quotation marks omitted). Section 31502 and Department of Transportation regulations permit the Secretary to "establish these requirements for employees who" drive vehicles over 10,000 pounds and meet two requirements. *Id.* at 283, 291 n.6 (citations omitted).

Only the second requirement is contested here.[10] It requires employees to "'engage in activities of a character directly affecting the safety of operation of motor vehicles . . . in interstate . . . commerce.'" *Id.* at 283 (citations omitted). "Interstate commerce" is "'the actual transport of goods across state lines or the intrastate transport of goods in the flow of interstate commerce.'" *Id.* (citation omitted). And "the 'character of the activities involved in the performance of [the employee's] job . . . is controlling.'" *Id.* (citations omitted).

The MCA exemption will not apply if "'the continuing duties of the employee's job have no substantial

---

[10] Native satisfied the first requirement: that employees be "employed by carriers" who are "subject to [the DOT's] jurisdiction" because they are "engaged in interstate commerce." *Id.* at 283 (citations and internal quotation marks omitted).

direct effect on such safety of operation or where such safety-affecting activities are so trivial, casual, and insignificant as to be de minimis.'" *Id.* at 284 (citation omitted). But, generally, the exemption applies if employees are, or are "'likely to be, called upon in the ordinary course of [their] work to perform, either regularly or from time to time, safety-affecting activities . . . that are interstate in nature.'" *Id.* (citations omitted). Employees are likely to be called upon to perform such activities if they "'could reasonably have been expected to [engage] in interstate commerce consistent with their job duties.'" *Id.* (citations omitted). This, in turn, is determined by a multi-factor test.[11]

Native has not shown that the district court erred in denying its JMOL motion. It was a pure jury question whether to believe the employees or the employer. *See Dalton v. Toyota Motor Sales, Inc.*, 703 F.2d 137, 140 (5th Cir. 1983). The jury heard conflicting testimony. Even though it could have decided in favor of Native, the jury decided in favor of the drivers.

---

[11] Courts consider the following factors, none of which is dispositive: (1) whether all employees in the class have similar job duties, even if only some employees in the class make interstate trips; (2) whether the employer regularly sends some drivers to interstate destinations; (3) whether the employer requires its drivers to meet DOT requirements; (4) whether and with what frequency project assignments are subject to change; (5) whether the drivers' assignments are given via dispatch based on customer need; (6) whether drivers have fixed or dedicated routes; (7) whether assignments are distributed indiscriminately; and (8) whether drivers risk termination for refusing trips from dispatch. *See id.* at 285-86, 286 n.4; *Songer v. Dillon Res., Inc.*, 618 F.3d 467, 475 (5th Cir. 2010).

Moreover, the evidence was clearly sufficient to support the jury's finding that the MCA exemption did not apply here, particularly because Native did not keep records or otherwise provide irrefutable evidence to challenge its drivers' testimony.

Because it fails to show the court erred in denying its JMOL motion under *de novo* review, Native also fails to show that the court erred in denying its new trial motion under the more deferential abuse of discretion standard.

B.

Native also argues that it is entitled to a new trial because two jury instructions were infirm. We review a court's decision to deny a new trial motion and "the propriety of jury charges and instructions under the deferential abuse of discretion standard." *Jackson*, 426 F. App'x at 220 (citation omitted); *Bagby Elevator Co. v. Schindler Elevator Corp.*, 609 F.3d 768, 772 (5th Cir. 2010) (citation omitted).

1

First, Native contended below, as it does on appeal, that the court erred by providing an instruction that did not list all the factors to be considered under the MCA's "reasonable expectation" analysis. The drivers asserted below, as they do on appeal, that the court did not commit reversible error because: (1) the instruction properly stated the law, as Native admitted; and (2) the

court carefully indicated that the example it used was merely one factor in the analysis.

It is clear that the district court did not abuse its discretion in giving this instruction because the instruction did not misguide the jury or, given the entire record, affect the outcome of the action. *See Bagby Elevator Co.*, 609 F.3d at 772. Although the instruction mentions only one factor – indiscriminate assignment – as an example, there was plenty of evidence before the jury as to the other factors, as Native itself contends. Thus, the jury was aware of other considerations for determining whether the drivers were exempt under the MCA. Moreover, the instruction is clear that "indiscriminate assignment" is merely one consideration among many because the addition begins, "For example. . . ."

2

Second, Native contended below and on appeal that the court erred by denying its proposed damages instruction, which required the jury to determine the actual hours all the drivers worked. The drivers countered both below and on appeal that: (1) the damages instruction was over four hundred pages long; and (2) the Fifth Circuit allows juries to determine the average weekly hours worked based on representative testimony.

The district court did not abuse its discretion in refusing to give Native's damages instruction. First,

Native's proposed instruction, 108 four-page spreadsheets, would have been overly burdensome and confusing to the jury. Second, FLSA damages may be estimated, especially when the employer fails to keep required payroll records. *E.g.*, *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 318 (5th Cir. 1981). Estimates may come from representative testimony, and the "[t]estimony of some employees concerning the hours worked by groups of non-testifying employees is sufficient if those who do testify have personal knowledge of the work performed by those who do not." *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1331 (5th Cir. 1985) (citations omitted).

Based on their personal knowledge, representative drivers testified to the hours they and their non-testifying colleagues worked. The drivers also submitted declarations at trial establishing how many hours the non-testifying drivers worked. On the other hand, Native could not produce documentation for a more accurate estimation of damages, nor could it produce records supporting an alternative damages model. Accordingly, the court did not err in giving the jury instructions.

C.

Finally, Native argues that it is entitled to a new trial because the court did not correctly calculate damages. We review a court's denial of a new trial motion and decision to admit evidence for an abuse of discretion. *MCI Comm'n Servs., Inc. v. Hagan*, 641 F.3d 112,

117 (5th Cir. 2011) (citation omitted); *Jackson*, 426 F. App'x at 218 (citation omitted).

1.

First, Native contended below, as it does on appeal, that the court erred because the evidence did not support the jury's finding that the drivers collectively averaged eighteen hours of overtime a week. The drivers argue, as they did below, that sufficient evidence supports this finding.

The district court did not abuse its discretion in accepting the jury's finding of average hours worked. The jury's function "'as the traditional finder of facts'" is "'to weigh conflicting evidence and inferences [] and determine the credibility of witnesses.'" *Dalton*, 703 F.2d at 140. The jury was presented with evidence that some drivers worked less than eighteen hours and some up to thirty hours of weekly overtime.[12] It then determined that the drivers collectively averaged eighteen hours of weekly overtime. Because averages are the central or typical value in a set of data and, again, Native failed to maintain proper records, the court did not base its decision on a clearly erroneous assessment of the evidence.

[12] The jury heard Chris Gonzales and David Zamarripa testify that they and other drivers typically worked seventy-hour weeks, giving them thirty hours of weekly overtime.

2.

Second, Native contended below, as it does on appeal, that the drivers' post-verdict declarations, which described how they were paid, were improperly considered by the court in calculating the amount of overtime due because they were an inappropriate motion to reopen. The drivers countered below, as they do on appeal, that the declarations were proper because: (1) they specifically pertain to a damages model, which only became an issue after the jury's liability finding; and (2) Native failed to maintain payroll records.

In FLSA cases, the fact finder determines whether employees are due unpaid overtime and, if so, the number of unpaid hours worked. *Black v. SettlePou, P.C.*, 732 F.3d 492, 496 (5th Cir. 2013). But "the proper determination of the regular rate of pay and overtime premium to which an employee is entitled is a question of law" to be determined by the court. *Id.* (citations omitted).

The district court did not abuse its discretion in considering the post-verdict declarations. They were irrelevant to the jury's findings of liability. Damages are properly determined by the court, not the jury, and the declarations supported one damages model the drivers presented. Moreover, Native did not rebut the declarations with its own evidence for calculating damages. Native also did not show that the probative value of the declarations was outweighed in any way by prejudice to Native. In short, the district court did the best it could in calculating damages given Native's failure

to provide adequate records from which damages could be more precisely determined.

III.

The district court committed no reversible errors. The jury's verdict on liability is amply supported by the evidence, especially because Native failed to produce irrefutable documentary evidence contradicting the drivers' testimony. The jury instructions were not infirm. The court did not abuse its discretion in giving the "reasonable expectations" instruction because the instruction neither misguided the jury nor, given the whole record, affected the case's outcome. The court also did not abuse its discretion by denying Native's damages instruction because FLSA damages may be estimated and Native's instruction would have been overly burdensome and confusing to the jury. The court's award of damages was not an abuse of discretion for reasons similar to our upholding the jury verdict – namely, Native offered no documentary evidence and failed to keep proper records. Under these circumstances, we can find no error in the district court accepting the testimony of the drivers and calculating damages on the basis of certain assumptions. Accordingly, in all respects, the judgment of the district court is AFFIRMED.