SCA-118

June 22, 1979

This is in reply to your letter regarding the application of this Department's policies on compensable hours of work to drivers employed by highway mail haul contractors who are subject to the provisions of the Service Contract Act and the Fair Labor Standards Act.

As you have noted, the wage obligations involved are based on the requirements of the Service Contract Act which, in turn, incorporates the fundamental policies adopted under the Fair Labor Standards Act in 29 CFR Part 785 with respect to hours worked. From your discussion, it would appear that you have concluded, among other things, that there is a lack of uniformity of basic principles among sections 785.21, 785.22, and 785.41 of Part 785. However, as explained below, these sections are entirely consistent with one another.

At the outset, it is important to understand what types of activity are considered working time under the FLSA. As made clear in Armour & Co. v. Wantock, 323 U.S. 126 (1944) and Skidmore v. Swift & Co., 323 U.S. 134 (1944), an employee who, because of the requirements of his employer, is not at liberty to go where he pleases or do what he pleases is nevertheless engaged in compensable activity, even though he is inactive. The reason for this is that the employer has usurped the employee's time. Both Armour and Skidmore involved firemen who, for extended periods of time, were relieved of active duties but were required to remain on or near their employers' premises in order to be available in case of emergencies. Although the firemen could play cards, listen to the radio and indulge in other forms of recreation, they were considered to be on duty, and were therefore engaged in compensable activity, inasmuch as their waiting time was spent in a manner they may not have chosen, had they been free to do so. These general principles are illustrated in IB 785.15, relating to on duty time.

On the other hand, where an employee is completely relieved of all duties and responsibilities, is permitted to go where he pleases, knows in advance that he will not have to resume work until a specified time, and if the period is of sufficient length to be used for the employee's own purposes, then he is considered off duty and he is not engaged in compensable activity. See IB 785.16.

When an employee is on duty in the sense that his employer has usurped his time, the employee is sometimes permitted by his employer to sleep during part of that time. The treatment of this sleep time is covered in IB 785.21 and 785.22, as you are aware. IB 785.21 deals with the sleep time of an employee who is required to be on duty for less than 24 hours. Such an employee is considered to be engaged in compensable activity even though he is permitted to sleep or engaged in other personal activities when not busy. It makes no difference that the employee is furnished with sleeping facilities. (Of course, bona fide meal periods do not have to be compensated, even where the tour of duty is less than 24 hours. See IB 785.19.)

Where an employee is required to be on duty for 24 hours or more, a different rule applies with respect to sleeptime. In such a case, IB 785.22(a) states that the employer and the employee may agree to exclude from hours worked a bona fide regularly scheduled sleeping period of not more

than 8 hours, provided that adequate sleeping facilities are furnished by the employer and that the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is of more than 8 hours, only 8 hours may be deducted. Where no express or implied agreement to the contrary is present, the sleeping time constitutes hours worked. The actual amounts of excludable time will, of course, depend on the actual time the employee is sleeping. (IB 785.22(a) also makes clear that bona fide meal periods need not be compensated.)

IB 785.22(b) deals with interruptions of sleep. It provides as follows:

If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

[Citation omitted.]

Section 785.41 appears in that portion of Part 785 which deals with travel time, and reads as follows:

Any work which an employee is required to perform while

traveling must of course be counted as hours worked. An

employee who drives a truck, bus, automobile, boat, or

airplane, or an employee who is required to ride therein

as an assistant or helper, is working while riding, except

during bona fide meal periods or when he is permitted to

sleep in adequate facilities furnished by the employer.

As we have previously informed you, it has long been our position that section 785.41 must be read in conjunction with sections 785.21 and .22, rather than as a separate position regarding sleeping time. See, e.g., Wage and Hour Administrator's Opinion Letter No. 214 of February 17, 1964 (CCH Wage-Hour Administrative Rulings 30,806). In other words, section 785.41 makes clear that even when an employee is the operator of a vehicle, or is an assistant or helper to such an operator, sleeping time may be excluded from hours worked where "adequate facilities" are furnished. However, the limitations of sections 785.21 and 785.22 obviously apply, since section 785.41 does not alter the general rules on sleep time. To read section 785.41 as permitting the deduction from hours worked of even more than 8 hours of sleep in a period of 24-hours or more leads to the anomalous result that a truck driver with a small berth to sleep in could have more sleep time deducted from hours worked than a non-traveling employee in a large, comfortable bed.

To the extent that Wirtz v. Nurserymen's Supply Co., Inc., 58 CCH Lab. Cas. 32,068, 18 WH Cases 522 (S.D. Fla. 1968), is inconsistent with IB 785, it is not controlling, except in the jurisdiction of that court. In that case, the long-haul truck drivers entered into an agreement with their employer that 10 hours sleeper berth time per day were to be treated as off-duty time. The court ruled that the 8-hour limit on sleep time IB 785.22 did not apply, because section 785.22 refers to employees who are on duty for 24 hours or more, whereas in Nurserymen's Supply the employees were on duty only 14 hours a day. However, as is plain from Armour & Co. v. Wantock and Skidmore v. Swift & Co., supra, the truck drivers in the sleeping berth were in fact on duty, because they were in a place they would not be if they had been totally free to do what they pleased. As those Supreme Court cases make clear, no mere agreement to treat such time as off duty time can alter the actual character of the time as on duty time.

In other words, a long-haul driver in a truck cab is considered to be on duty under IB 785 regardless of whether he is driving, sitting beside the driver, or in the sleeper berth. Where such an employee is on duty for 24 hours or more, IB 785.22 permits bona fide meal periods and up to 8 hours of sleeping time to be deducted from the computation of hours worked.

Time during which an employee is considered on duty under the Department of Transportation regulations to which your letter refers is not governed by the same principles as apply under the FLSA. DOT's Motor Carrier Safety Regulations (49 CFR Part 395) are concerned primarily with the safe operation of motor vehicles and not with compensable hours of work. To this end they limit the amount of driving that an individual may engage in without having rested beforehand. In this connection, section 395.2(a)(4) excludes from "on-duty time" any time "spent resting in a sleeper berth ***." Under the FLSA, however, treating all such sleeper berth time as off duty, and therefore noncompensable, would be contrary to the basic principles laid down in Armour & Co. v. Wantock and Skidmore v. Swift & Co., as described above. Moreover, section 4(b) of the Service Contract Act limits the granting of exemptions only where such action is "in accord with the remedial purpose of this Act to protect prevailing labor standards." For these reasons, the Department cannot grant your request for an exemption from the Service Contract Act treating on duty and off duty time under it the same as under DOT regulations.

In summary, IB 785.21, .22 and .41 are consistent with each other, and to the extent that they differ from DOT regulations relating to truck drivers, they do so because of different statutory purposes.

Another question you have raised with us is how much sleep time can properly be deducted for mail haul drivers who are on continuous tours of duty of more than 24 hours but less than 48 hours. This matter, as you know, has been under consideration within the Department for some time. IB 785.22(a), in permitting "not more than 8 hours" of sleep time to be excluded from hours worked where an employee is "on duty for 24 hours or more," does not deal with the question squarely. The Department now clarifies the matter by taking the position that where a continuous tour of duty is more than 24 hours but less than 48 hours, a maximum of one extra hour of sleep time over the standard 8 hours can be deducted from working time for each hour beyond 40 that the tour of duty extends. Thus, in a 42-hour continuous tour of duty, no more than 10 hours could be deducted for sleeptime. Therefore, if an employee on this 42-hour continuous tour of duty slept for 5 hours in the middle of the tour and 5 hours at the end, for example, all of

this sleep time could be deducted from hours worked. Similarly, in a 45-hour continuous tour of duty, a maximum of 13 hours could be deducted.

Under this rule, however, as is true of sleep time generally, an employer cannot deduct more than the maximum time allowable for sleep time, and if the employee in fact sleeps a shorter period of time, only that shorter period may be deducted. Additionally, for any sleep time to be deducted, the employee must get at least 5 hours of sleep (see IB 785.22(b) above).

Your letter also raises the question of whether sleep time may be deducted from a driver's working time only where the driver is "on duty" for 24 hours or more, or also where the driver is "away from home" for 24 hours or more. In this connection, you note that WH Publication 1344, under the heading "Work Performed While Traveling" on page 12, states that "time spent in sleeping berths by truck drivers and helpers may be excluded from hours worked only when they are on trips away from home of more than 24 hours ***." Of course, the authoritative interpretation of hours worked under the FLSA is in 29 CFR Part 785, whereas WH Publication 1344 and similar pamphlets are laymen's guides to the law phrased in general, informal language. IB 785.22 specifically refers to the situation where an employee "is required to be on duty for 24 hours or more" (emphasis added). Obviously, if an employee is merely away from home for 24 hours, but is off duty for 12 of those hours, for example, the total duty time is less than 24 hours, and no sleep time may be deducted.

Sometimes when a driver is away from home, it may not make a difference whether or not certain layover periods are treated as on duty or off duty time. This is true in the case you describe involving the round-trip journey from Kansas City to Denver. Under the facts given, the drivers leave Kansas City at 3:00 a.m. and drive straight through to Denver, where they arrive at 5:30 p.m., 14-1/2 hours later. After an 8-hour layover in Denver, they leave at 1:30 a.m. and drive 14-1/2 hours back to Kansas City, arriving at 6:00 p.m. If the drivers are on duty in Denver, their total continuous on duty time is 14-1/2 plus 8 plus 14-1/2 hours, or 37 hours in all. Accordingly, up to 8 hours of sleep time may be deducted, leaving 29 hours of compensable time. If they are off duty in Denver, they have two on duty periods totalling 29 hours, and each period is less than 24 hours. Hence no sleep time can be deducted and the total on duty time is 29 hours. Thus, regardless of whether the drivers are on duty or off duty during the 8-hour layover in Denver, the total amount of compensable time (ignoring bona fide meal periods) is 29 hours.

In the other example your letter describes, there could be a different result in the application of the sleep time rule, depending on whether the employees are on duty or off duty during a layover. The employees drive from Dallas to San Francisco and back during a 72-hour span. (We assume that their layover in San Francisco is too short to be considered off duty time.) On the return trip there is a 2-hour layover in Deming, New Mexico, after which there is a 17-hour drive back to Dallas. During the 2-hour layover, you state that the drivers are free to eat, shave, shower, play pool or do whatever else they desire. Based on the information provided, we are unable to state unequivocally whether this period is off duty time. Whether or not the 2-hour period is on duty or off duty time depends on the factors discussed at the beginning of this letter.

If the 2-hour layover is on duty time, the total continuous on duty time would then be 72 hours. As a result, up to 24 hours of sleep time could be deducted (8 hours times 3 days), thereby leaving 48 hours of compensable time.

If the 2-hour layover were off duty time, the drivers in question have a 53 hour on duty period (from Dallas to San Francisco to Deming, New Mexico), a 2-hour off duty period, and a 17 hour on duty period. During the 53-hours on duty period, up to 16 hours can be deducted for sleep time, leaving 37 hours of compensable time. During the last leg of 17 hours, no sleep time can be deducted. Hence the total amount of compensable time is 37 plus 17 hours, or 54 hours. (In discussing this case, we have ignored bona fide meal periods.)

As the discussion in this example makes clear, where layover time is off duty time, it is likely to reduce the amount of sleep time that could be otherwise deducted from a tour of duty. We would generally consider a continuous tour of duty to be broken where an employee, during a layover period, is off duty within the meaning of IB 785.16 as discussed above. However, because of the special circumstances under which team drivers work, we would not regard such a layover period as breaking a tour of duty if the employer paid wages for that period.

In addition, we would not consider any time spent in noncompensable bona fide meal periods and bona fide regularly scheduled sleeping periods to break a tour of duty, provided that such meal and sleep periods do not exceed the limitations in IB 785.22 and the "40-hour" rule set forth above. (If such meal and sleep periods were deemed to break the tour of duty, there would rarely if ever be a tour of duty long enough for an employer to be able to deduct such periods as provided in IB 785.22.)

Sincerely,

C. Lamar Johnson
Deputy Administrator
Wage and Hour Division