UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1125

JUAN CARLOS MONTOYA, on behalf of himself and all others similarly situated; MAURICE SMITH; JEAN PAUL BRICAULT, JR.,

Plaintiffs-Appellees,

v.

CRST EXPEDITED, INC.; CRST INTERNATIONAL, INC.

Defendants-Appellants.

No. 21-1482

JUAN CARLOS MONTOYA, on behalf of himself and all others similarly situated; MAURICE SMITH, on behalf of himself and all others similarly situated; JEAN PAUL BRICAULT, JR. , on behalf of himself and all others similarly situated; JOSE TORRES ROSADO, on behalf of himself and all others similarly situated; AUSTIN CODDINGTON, on behalf of himself and all others similarly situated; KEVIN HAMILTON, on behalf of himself and all others similarly situated; LARRY WIMBISH, on behalf of himself and all others similarly situated; RINEL TERTILUS, on behalf of himself and all others similarly situated,

Plaintiffs-Appellees,

v.

CRST EXPEDITED, INC.; CRST INTERNATIONAL, INC.

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
No. 1:16-cv-11353-PBS

BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC., AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amicus American Trucking Associations, Inc. certifies that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE*

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and was created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 1,800 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. ATA regularly represents the common interests of the trucking industry in courts throughout the nation.

Many of ATA's members regularly move freight using commercial trucks equipped with sleeper berths, in which drivers routinely spend time between duty periods. Thus, ATA and its members have an acute interest in the proper treatment of sleeper berth time under the Fair

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* All parties have consented to the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2). No counsel for either party authored this brief in whole or in part, and no party, party's counsel, or person other than the amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Labor Standards Act. In addition, ATA's familiarity with relevant industry practices will assist the Court in evaluating the issue posed in this case.

ARGUMENT

For decades, motor carriers and commercial drivers alike have operated under the understanding that, for purposes of the Fair Labor Standards Act (FLSA), time during which drivers are permitted to rest in a truck's sleeper berth—when they are not performing work, are not in readiness to work, and are in fact prohibited by Department of Transportation (DOT) regulations from being called to work until a predefined multi-hour period has elapsed—is not "time worked" and therefore not compensable. That understanding is consistent with the earliest guidance from the Department of Labor (DOL) on the application of the FLSA to sleeper berth time just a few years after the statute's enactment, and with the plain language of the interpretive regulation that DOL issued more than 65 years ago to address sleeper berth time. This understanding has been so stable and pervasive that, from the time of the FLSA's enactment in 1938 until 2014, ATA has been able to identify just a *single* court decision addressing a claim for

unpaid sleeper berth time under the FLSA—and that court roundly rejected it. *See Wirtz v. Nurserymen's Supply Co.*, No. 66-681, 1968 U.S. Dist. LEXIS 10129, at *9–*11 (S.D. Fla. July 30, 1968).

The decision below is not merely incorrect: it would upset generations of settled understanding and practices across the trucking industry. Moreover, if this Court were to affirm the district court's erroneous holding, it would create a conflict with the only other circuit court to reach this issue, and put motor carriers—who by the very nature of their business typically operate in multiple jurisdictions—in the impossible position of having to apply the same federal wage statute in conflicting ways in different parts of the country. This Court should reverse, and join the Ninth Circuit in rejecting the contention that sleeper berth time is presumptively on duty and therefore compensable under the FLSA. *See Nance v. May Trucking Co.*, 685 F. App'x 602, 605 (9th Cir. 2017) (unpublished).

A. The Decision Below Upsets Generations of Settled Understanding of the FLSA's Treatment of Sleeper Berth Time.

1. The text of the FLSA is itself notoriously unclear on what constitutes compensable work time. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005) ("[n]either 'work' nor 'workweek' is defined in the statute").

Section 3 of the FLSA purports to define "hours worked," but speaks merely of "the hours for which an employee is employed," and articulates two narrow exclusions, for certain periods of time spent changing clothes or washing. 29 U.S.C. § 203(o). The statutory definition of "employ," in turn, "includes to suffer or permit to work." *Id.* § 203(g). *See* 29 C.F.R. § 785.6 (noting that the FLSA "contains no definition of 'work,'" and only "a partial definition of 'hours worked.'")

2. Early in the FLSA's history, the DOL opined unequivocally that sleeper berth time is not compensable under the statute. In 1943, DOL announced that, per the Administrator of the Wage and Hour and Public Contracts Divisions, "[t]ruck drivers riding in the trucks' sleeping berths while the relief driver is at the wheel need not be compensated in accordance with the [FLSA] for time so spent." WHD Release R-1933 (Feb. 15, 1943). The Administrator "emphasized that all other time spent right [*sic*] on the truck and furthering the employer's business would be considered 'hours worked' and hence compensable under the Act." *Ibid.* The release also noted that "[t]his position … is in accord with that of the Interstate Commerce Commission," *ibid.*, which at the time played the role that the Federal Motor Carrier Safety Administra-

tion (FMCSA) within DOT does today in establishing hours-of-service regulations that govern the on-duty limits for commercial drivers. *See* Motor Carrier Act of 1935 § 204(a), Pub. L. 74-255; 49 U.S.C. § 31502(b).

3. Shortly thereafter, a series of Supreme Court decisions clarified the scope of compensable time under the FLSA, in terms entirely consistent with DOL's 1943 pronouncement on sleeper berth time. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S 590, 598 (1944), the Court described "work or employment" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." In a pair of follow-up cases involving firefighters, the Court recognized that "work" under the FLSA does not always entail "exertion," because "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Whether "waiting time" was "working time" (and therefore compensable under the FLSA), the Court held, was a question of whether "the employee was engaged to wait," or "waited to be engaged." *Skidmore v. Swift*, 323 U.S. 134, 137

(1944). If an employee's waiting time is spent in "instant readiness to serve," that time is presumptively compensable even if no work in the sense of exertion is performed. *Armour*, 323 U.S. at 133.

4. Nothing in the Court's 1944 FLSA cases conflicted with DOL's 1943 conclusion that sleeper berth time was not compensable: during a driver's off-duty sleeper berth period, a driver is *not* typically in "instant readiness to serve." (Indeed, under hours-of-service regulations that have been in place since at least 1968, *see* 33 Fed. Reg. 19,700, 19,758–59 (Dec. 28, 1968)—and likely going back to the earliest such regulations promulgated by the ICC in the late 1930s—a driver resting in the sleeper berth cannot permissibly be called to work until the end of the required off-duty period). Unsurprisingly, then, DOL adhered to its 1943 conclusion in a 1951 opinion, rejecting the proposition that "all time spent away from the home terminal by interstate truck drivers must be counted in determining the total number of hours worked" for purposes of "the computation of minimum wages." WHD Opinion Letter FLSA-289 (July 18, 1951). DOL observed that "all time spent by truck drivers and relief drivers in driving, or riding on, their employer's trucks or in loading, unloading or performing other work for the em-

ployer is hours worked." *Ibid.* However, DOL recognized that a commercial driver's "hours of work are not considered to include certain periods which they are permitted to use for their own purposes, and during which they are relieved of all duties for the employer." *Ibid.* Those periods include "bona fide meal periods, and periods spent in sleeping in a sleeper berth … where such periods are of sufficient length to be used effectively by the employee … and the employee is actually relieved of all duties and responsibilities." *Ibid.*

5. In 1955, the Wage and Hour Division of DOL issued a comprehensive set of interpretive regulations articulating the "principles for determining hours worked" under the FLSA. 20 Fed. Reg. 9,963 (Dec. 24, 1955).[1] Those regulations specifically addressed sleeper berth time in much the same terms as the Division's 1951 opinion, expressly concluding that a truck driver is not working "during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer." 29 C.F.R. § 785.41.

[1] In 1961, these regulations were recodified in their present form, without material change to any of the provisions discussed below. 26 Fed. Reg. 190 (January 11, 1961).

The 1955 regulations also explained how the *Skidmore* distinction between (compensable) time engaged to wait and (non-compensable) time waiting to be engaged plays out in the trucking context: "[a] truck driver who has to wait at or near the job site for goods to be loaded" or "is required to take care of his employer's property" while awaiting a trip is "engaged to wait." 29 C.F.R. § 785.16(b). But a driver who arrives at a destination at noon, "and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip" is "waiting to be engaged," and the intervening period is "not working time," notwithstanding the fact that the driver is far from home as part of a longer, ongoing trip. *Ibid; see also id.* § 785.16(a) ("[p]eriods during which an employee is completely relieved from duty and are long enough to enable him to use the time effectively for his own purposes are not hours worked.").

6. The 1955 regulations also included the provisions regarding the treatment of *on-duty* sleep time—sleep time during which an employee remains in readiness to work—which the court below relied on in reaching the erroneous conclusion that a maximum of eight hours of sleeper berth time could be excluded from compensable time under the FLSA.

Those regulations specify that under certain conditions, "*[w]here an employee is required to be on duty for 24 hours or more*, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked." 29 C.F.R. § 785.22(a) (emphasis added); *see also id.* § 785.21 (for on-duty periods less than 24 hours, an employee "*who is required to be on duty for specified hours* is working even though … permitted to sleep when not busy" (emphasis added)).

But because commercial drivers are *not* required to be on-duty during their sleeper berth periods—on the contrary, they *cannot* be in readiness for work during those periods without violating the hours-of-service regulations, 49 C.F.R. § 395.2—the trucking industry has never, to ATA's knowledge, understood §785.22(a) to speak to the question of sleeper berth time. By contrast, § 785.41 *expressly* addresses the subject, unequivocally categorizing such time as separate from hours worked, and thus (at least until recently) has consistently been understood in the trucking industry to govern the treatment of sleeper berth time under the FLSA. This widespread understanding is reflected in the fact that, for nearly sixty years after the 1955 interpretive regulations

were promulgated, there appears to be just a *single* court decision addressing the contention that § 785.22 applies to sleeper berth time. *Wirtz*, 1968 U.S. Dist. LEXIS 10129. The *Wirtz* court observed that the relevant question was "not whether on-duty time is compensable or non-compensable, but whether [the sleeper berth time at issue] is on-duty or off-duty." *Id.* at *10. And it held that drivers, who "regularly had the opportunity to sleep ten hours during every 24 hour period on the road," *id.* at *5, were not on duty during their sleeper berth periods. *Id.* at *11. Thus "the sleeping time was properly recorded as non-compensable," and § 785.22(a)'s eight-hour limitation on the exclusion of *on-duty* sleep time was beside the point. *Ibid.*

As far as ATA has been able to determine, that 1968 decision is the *only* case involving a claim like the one here—that contrary to the explicit language of § 785.41, sleeper berth time is presumptively working time and therefore compensable—until 2014, when one district court rejected the theory, *Nance v. May Trucking Co.*, No. 3:12-CV-01655-HZ, 2014 WL 199136, at *1 (D. Or. Jan. 15, 2014), *aff'd in relevant part,* 685 F. App'x 602 (9th Cir. 2017), and another entered a default judgment adopting it, without the benefit of adverse briefing, *Punter v. Jasmin*

Intern. Corp., No. 12-7828, 2014 WL 4854446, *2 (D.N.J. Sept. 30, 2014).[2] The years since have seen multiple trial courts confront this theory—the court below among them—with diverging results. *Compare Petrone v. Werner Enters.*, Nos. 8:11CV041 & 8:12CV307, 2017 WL

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[2] To be sure, on several occasions after promulgating the 1955 interpretive regulations, DOL issued opinions taking the view that § 785.22 limits to eight hours the amount of sleeper berth time that may be excluded from compensable time each day. First, in a short 1964 letter that does not so much as mention § 785.41 (much less discuss it), the Administrator of the Wage and Hour Division opined that § 785.22 applied "where truck drivers … *are on trips away from home for a period of 24 hours or more*." WHD Opinion Letter FLSA-214 (Feb. 17, 1964) (emphasis added). That opinion, however, conflicts with the plain text of § 785.22(a), which applies "[w]here an employee is *required to be on duty for 24 hours or more*," (emphasis added), not merely when the employee is away from home for such a period. *See also* 29 C.F.R. § 785.16(b). Another brief letter, WHD Opinion Letter FLSA-235 (Nov. 18, 1966) is similar, both in overlooking §785.41 entirely, and treating § 785.22 as applicable "where truck drivers … are on trips away from home for a period of 24 hours or more," regardless of whether they are actually on-duty the entire time. It was not until 1978 that DOL expressly suggested that § 785.22 constituted a limit on § 785.41's characterization of sleeper berth as non-working time, WHD Opinion Letter SCA-117 (Apr. 26, 1978), a suggestion it made once again the following year, WHD Opinion Letter SCA-118 (June 22, 1979).

Each of these DOL opinions depends on the premise that a driver is continuously on duty for the entire duration of a trip, and thus that § 785.22 applies, but as explained further below, that premise is false. *See infra* pp. 13–14 & 15 n.3. And in any event, the point remains that—these opinion letters notwithstanding—the industry understanding among carriers and drivers alike remained consistent with the plain text of § 785.41 and DOL's earlier opinions, as evidenced by the dearth of litigation on this issue until 2014.

510884, at *7 (D. Neb. Feb. 2, 2017) (sleeper berth time presumptively off-duty and non-compensable under § 785.41); *Blodgett v. FAF, Inc.*, 446 F. Supp. 3d 320, 328 (E.D. Tenn. 2020) (rejecting application of § 785.22(a) to off-duty sleeper berth time); *and Kennedy v. LTI Trucking Servs., Inc.*, No. 4:18CV230 HEA, 2019 WL 4394539, at *3 (E.D. Mo. Sept. 13, 2019) (rejecting "presumption that … sleeper berth time was compensable" and "presumption of continuous duty for over-the-road truck drivers"); *with Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2018 WL 5118449, at *5 (W.D. Ark. Oct. 19, 2018) (presuming sleeper berth time to be on duty and applying § 785.22(a)); *and Julian v. Swift Transp. Co.*, 360 F. Supp. 3d 932, 952 (D. Ariz. 2018) (same). To date, the only court of appeals to reach this question has been the Ninth Circuit, which affirmed the district court's holding that under § 785.41 sleeper berth time is not work time under the FLSA (and thus non-compensable), albeit in an unpublished decision. *Nance*, 685 Fed. App'x at 605.

B. Drivers in a Sleeper Berth Are Not On Duty for FLSA Purposes When Relieved of Work and Not in Readiness to Work, Because They Are Free to Use a Predetermined Period for Their Own Purposes.

The upshot of the history above is that plaintiffs' position turns on its

head the stable understanding of sleeper berth time under the FLSA that prevailed from the statute's enactment until at least 2014—a period of some 76 years. While that of course is not in itself sufficient reason to reject plaintiffs' argument, it is good cause to view with skepticism their invitation to ignore the plain language of the interpretive regulations that have been on the books, unchanged, for the vast majority of that period, and which have fostered that stable understanding. "[W]hile it may be 'possible for an entire industry to be in violation of the [FLSA] for a long time'" without attracting notice despite the ubiquity of sleeper berths in the trucking industry, "the 'more plausible hypothesis'" is that the industry's practice is lawful. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 157 (2012) (quoting *Dong Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510–511 (7th Cir. 2007)) (alteration in *Christopher*).

1. CRST has explained in detail why sleeper berth time is neither work time nor time during which the driver is "engaged to wait," and thus is not compensable under the FLSA as the plain language of § 785.41 indicates. See Appellants' Br. 20–39. The fundamental error of the decision below, and of the handful of other courts to have reached a

similar conclusion, is the false premise that a commercial driver is continuously on duty simply by virtue of remaining in the course of an ongoing trip. App. 496–97. *See also Julian*, 360 F. Supp. 3d at 951–52; *Browne*, 2018 WL 5118449 at *3–*4. If that premise were correct, § 785.41 would be incoherent: it makes no sense, in the context of the FLSA, to characterize sleeper berth time as separate from "hours worked" if that time were, in fact, on duty. The premise is also at odds with § 785.16(b), which makes clear that drivers are *not* continuously on duty while away from home, if during a trip they are relieved from all duty for a specific period long enough to use effectively for their own purposes.

2. To the extent that the decision below (and others like it) turns on a perception that drivers in a sleeper berth—who "by nature of the job, cannot leave the truck while it is in motion," App. 494—are not sufficiently able to use that time for their own purposes, that perception is inconsistent both with reality and with the history of DOL's interpretations.

As far back as 1951, DOL expressly specified "periods spent in sleeping in a sleeping berth" as an example of "periods which [drivers] are

permitted to use for their own purposes." FLSA-289 (emphasis added).[3] But drivers in a contemporary sleeper berth are far better positioned "to use the time effectively for [their] own purposes," § 785.16(a), than they were sixty years ago. For one thing, modern sleeper berths are typically larger, quieter, vastly more comfortable, and better equipped; and improvements in truck suspension and highway design make for a better experience for a driver in the sleeper berth of a moving truck.

More to the point, drivers of previous generations had comparatively limited ways to use sleeper berth time for their personal purposes: aside from sleeping, they could read, eat a packaged meal, or perhaps listen to the radio. Drivers today, by contrast, can speak with family or

[3] Relatedly, DOL's 1979 opinion letter appears to turn on the notion that, "as is plain from *Armour & Co. v. Wantock* and *Skidmore v. Swift & Co.*, … 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*." SCA-118 (emphasis added). But the firemen in *Armour* and *Skidmore* were on duty because their employer required them to remain ready to respond to alarms during the waiting periods at issue, not simply because they remained at their work locations. *Armour*, 323 U.S. at 166; *Skidmore*, 323 U.S. at 136. And the 1979 DOL opinion's approach cannot be squared with § 785.16(b), which explains that a truck driver is off duty when relieved from work for a predetermined period, even when far from home in the midst of an ongoing trip, because the driver is able "to use the time effectively for his own purposes" despite being somewhere he would not otherwise be.

friends; pay bills and attend to other personal business online; or access virtually limitless libraries of music, reading material, movies, and television programming. *See Blodgett*, 446 F. Supp. 3d at 328–29 ("while in the sleeper berth of the truck, [plaintiff] would sleep, call home, pay his personal bills, and otherwise take care of personal as opposed to company, business"). And with compact refrigerators, microwaves, and other appliances such as air fryers and induction cooktops, drivers can even prepare fresh and elaborate meals in their sleeper berths. *See* Priya Krishna, *How Truck Drivers Cook on the Road*, N.Y. Times, Dec. 20, 2021, *available at https://www.nytimes.com/2021/12/20/dining/truck-drivers-cooking-covid.html*.

While there in no denying that drivers in a truck's sleeper berth do not have *every* option for using that time that they might have if they were elsewhere, that is not the standard articulated in § 785.16(a). And if, as DOL rightly concluded, time spent in a 1950s-era sleeper berth was off duty because drivers could use that time for their own purposes, that is all the more true today, given the far greater range of personal purposes to which a driver can put that time.

CONCLUSION

The Court should reverse the district court's summary judgment order on the compensability of sleeper berth time under the FLSA.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) & 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,647 words.

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Dated: January 18, 2022

s/ Richard Pianka
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