HB

338

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM January 27, 1983

SUBJECT: Payment of overtime
(HB 338)

TO: House Labor and Commerce Committee
Attn: Ken Johnson

FROM: Thomas A. Sofo
Legislative Counsel

You have asked this office for an analysis of HB 338.

Section 1 of the bill adds a new paragraph to AS 23.10.060, the Alaska statute which addresses the payment for overtime in this state. The numbered paragraphs currently in AS 23.-10.060 contain exemptions for certain employees or types of work from the general overtime law that requires work in excess of 40 hours a week or 8 hours a day to be compensated at one and one-half times the regular rate of pay. HB 338 would add one more exception to the list by exempting work performed by an employee under a trade work plan. Although I am not completely familiar with how these plans work, it is my understanding that employees are able to trade hours, or possibly days worked with one another for their personal convenience. The trading of hours or days under the bill would require the approval of the employer so that work operations were not unnecessarily disrupted. The result of some of these informal "trades" might be that certain employees would be working more than 8 hours in a given day or more than 40 hours in a calendar work week. These extra work days or hours be balanced off by time off on other days or weeks when the subject employee wanted to maximize his nonwork time. In theory the total number of hours worked by two employees who normally work 40 hours a week would not be greater than 80 hours a week, although one of the employees in a given week might have worked 48 of those hours while the other employee with whom he has traded a work day may have worked only 32 hours. As the hypothetical illustrates, the application of this plan has the potential to make an employer liable for overtime payment in a given day or week

even though the cumulative hours worked by the employees involved would not otherwise subject the employer to overtime liability. It is for that reason that an exception to the overtime provisions of AS 23.10.060 was necessary.

This statute would apply to those employees covered by AS 23.10.060. Apparently, the Department of Labor has decided to oppose HB 338 based on their understanding that it was requested by a business identified as Seair. Although the backup material is somewhat confusing on this point, the department believes that this bill would be in violation of the federal Railway Labor Act while at the same time also apparently recognizing that Seair is not necessarily covered by that Act. Because of this confusion you have requested an opinion concerning the relationship of this amendment to the Railway Labor Act, 45 U.S.C. 151 - 188. A good treatment of that subject is contained in the Opinion of the Attorney General, No. 7, April 15, 1980 which is cited following AS 23.10.060. As the opinion states, federal statutes do not expressly preempt the state in the subject matter area of overtime pay for air transportation employees. The federal Fair Labor Standards Act 29 U.S.C. 201 - 219, exempts from the operation of the mandatory overtime provisions of that act air carrier employees subject to the provisions the Railway Labor Act. The question before the attorney general was whether Alaska could pose its own mandatory overtime provisions on employees who were otherwise exempt from the federal mandatory overtime provisions.

As the Alaska Supreme Court has already recognized, provisions of the Alaska Wage and Hour Act which are more favorable to employees than federal law are not preempted by the Fair Labor Standards Act. Webster v. Bechtel, Inc., 621 P.2d 890. However, since 42 U.S.C. 213(b)(3) explicitly exempted employees which were covered by the federal Railway Labor Act, a specific analysis of that Act is necessary. As to the extension of the Alaska mandatory overtime provisions to air transportation employees, I am in agreement with the conclusions reached by the Attorney General in the opinion cited above. Those conclusions are as follows:

> "1. In the case of pilots, flight crews, and other interstate air carrier employees whose activities are directly and substantially related to the transportation activities of the carrier, and who are covered by a valid existing collective bargaining agreement or

agreements with the carrier, the State is precluded from applying its overtime laws due to the preemptive nature of the Railway Labor Act.

"2. In instances where no collective bargaining agreements apply, crews of interestate air carriers are nonetheless beyond the jurisdiction of state overtime law because of the commerce clause implications discussed above.

"3. Non-flight personnel of interstate carriers who are not covered by valid existing collective bargaining agreements are not exempt from state law. As to those individuals the provisions of state overtime law apply.

"4. Air carriers operating solely intrastate would not seem to fall under the exclusionary scope of either the Railway Labor Act or of the Commerce Clause absent unusual fact situations. Accordingly, the protections of the Alaska Wage and Hour Act dealing with overtime extend to those individuals."

Based on the above analysis, certain air transportation employees would be covered by the Alaska law regarding the payment of overtime, as well as the exceptions to that law. Those persons would be ground employees of interstate carriers who are not covered by collective bargaining agreements and all employees of air carriers operating solely intrastate. However, there remains one important issue. Although the above analysis has identified the scope of coverage of the Alaska Wage and Hour Act as it pertains to certain air transportation employees, it has not addressed the basic issue of whether trade work programs are preempted by the federal Fair Labor Standards Act. The Fair Labor Standards Act only requires the payment of overtime for time worked in excess of 40 hours in a work week, 29 U.S.C. 207, while the Alaska statute requires overtime pay for time worked in excess of 40 hours a week or 8 hours a day. To the extent that the state has a higher minimum standard as to hours per day, it is free to tailor an exception to that standard based on trade work plans. However, if under a situation such as the hypothetical above, see page 2, the result of the trade work plan is that an employee works more than 40 hours in a given week without receiving overtime, the plan would violate the federal law as to those workers covered by the federal statute. Guaranteed weekly pay and fluctuating work week plans must meet the standards set

forth in the federal statute and are inapplicable in this instance. 29 C.F.R. 402-778.414 and 29 C.F.R 778.114.

The trade work plan is not preempted by federal law if in its application certain employees work more than 8 hours in a day. The plan is possibly preempted by federal law only to the extent certain employees might work more than 40 hours in a given week without receiving overtime compensation for those hours in excess of 40.

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PMS DWIGHT PERKINS, RUSH
245 MARINE WAY NO.7
JUNEAU AK 99801

THIS IS YOUR COPY OF MESSAGE SENT TO REPRESENTATIVE JOHN J COWDERY

REQUEST YOU HOLD OPEN THE RECORD REGARDING TESTIMONY OF I A P M O OFFICIAL ON PERMANENT INJUNCTION FOR UNIFORM PLUMBING CODE AND RESEARCH DIRECTORY CONCERNING THE USE OF PLASTIC PIPE FOR DRINKING WATER.

LOS ANGELES SUPERIOR COURT EXTENDED AND MADE PERMANENT THE INJUNCTION. COURT ORDER TO FOLLOW

RAYMOND J LICCARDINI, GENERAL COUNSEL CALIFORNIA PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION

1524 EST

IPMRFUB RHO

Bill No. House Bill 338

Date January 27, 1984

Title "An Act relating to the payment of overtime; and providing for an effective date."

Contact: Eileen Plate
465-2700
Bob Bacolas
465-4870

This legislation amends the law relating to the payment of overtime to exclude work performed by an employee under a trade work plan from the law requiring the payment of overtime for more than 40 hours of work a week. A trade work plan allows an employee to trade hours or days worked with another employee with the approval of the employer.

This bill does not take into consideration a number of factors. One of the basic principles of premium pay for overtime is to inhibit employees from working excess hours. The federal government, in order to set the standard, enforces the Safety Law, the Eight Hour Law, and the Workweek Law on all government contracts whether they be for construction, service, or manufacturing. These laws are intended to deter the employer from attempting to circumvent the laws designed to protect the employees' rights to healthy and profitable employment.

Even if this law were passed, any employer who attempted to practice a "trade work plan" would find himself in violation of federal law the first time an employee worked more than forty hours in one week, unless overtime were paid or otherwise exempted. If this legislation is intended to permit employees to trade shifts or workdays in the fashion of let's say, "I'll work for you on Tuesday, which is my day off, if you will work for me on Monday, which is your day off," then there is no need for such legislation. If, however, the intent is to allow me to work your shift for you after I have already worked mine on any given day of the week, then we have a situation where an employer can use any number of forms of economic leverage to make an employee work beyond the statutorily permitted number of hours, to the determent of the employee while enriching the employer. Keep in mind that the basic philosophy of the overtime law was to penalize the employer each time he permitted an employee to work past the regular workday or workweek.

Such a scheme has long been recognized as generally detrimental to the work force. The overtime laws were intended as a remedial labor legislation specifically to preclude such schemes in the workplace.

The department is opposed to this legislation. A zero fiscal note has been prepared.

APPROVED:

Jeri Robinson
Commissioner

POSITION PAPER/Department of Labor

OPINION NO. 7

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

420 "L" STREET, SUITE 300
ANCHORAGE, ALASKA 99501
(907) 276-3550

April 15, 1980

The Honorable Edmund Orbeck
Commissioner
Department of Labor
P.O. Box 1149
Juneau, AK 99811

Re: Enforcement of Alaska Overtime Laws with Respect to Air Carriers in Alaska
AS 23.10.060
A66-102-80

Dear Commissioner Orbeck:

You have inquired whether the Department of Labor may enforce the mandatory overtime provision of the Alaska Wage and Hour Act (AS 23.10.060-150) with respect to employees of air carriers operating within the State of Alaska. The answer to your question depends upon the nature of the employer's business, the nature of work performed by the individual employee, the existence or nonexistence of a valid collective bargaining agreement between the employer and its employees, whether the air carrier operates intrastate or interstate, and finally, whether the application of state law would create a burden upon interstate commerce.1/

1/ Specifically not addressed in this memorandum is the question of whether by the use of "flex-time contracts", an employer may avoid the mandatory payment of overtime to those employees who work irregular weekly or daily hours. That issue is currently before the Supreme Court of Alaska in the case of State of Alaska v. Bechtel, Inc., Supreme Court No. 4139. See also, Attorney General's Opinion dated February 10, 1978.

I

THE RELATIONSHIP BETWEEN THE FEDERAL FAIR LABOR STANDARDS ACT AND THE ALASKA WAGE AND HOUR ACT

The Federal Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219, specifically exempts from the operation of the mandatory overtime provision (§ 207) "any employee of a carrier by air subject to the provisions of §§ 181-188 of Title 45" 29 U.S.C. § 213(b)(3). The Alaska Wage and Hour Act, AS 23.10.050 et seq. contains no such exemption.2/

In passing the Fair Labor Standards Act Congress did not intend to foreclose all attempts by the individual states to regulate wages and hours. The Act itself states that none of its maximum hours provisions operates to excuse noncompliance by employers with any state law which establishes a higher standard. It is only where the standards set by the FLSA are higher than the comparative state standards that the Act serves to preempt the state activity. H.R. Rep. No. 2182 at 15 (75th Cong.). See also Eastern Sugar Associates v. Pena, 222 F.2d 934 (1st Cir. 1955); Rivera v. Div. of Industrial Welfare, 71 Cal. Rptr. 739 (1968); 29 C.F.R. § 778.5. Thus, merely because the federal law exempts airline employees

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2/ The Alaska Act, which is based upon the Federal Fair Labor Standards Act, McGinnis v. Stevens, 543 P.2d 1221, 1238 (Alaska 1975), originally contained the airline exemption. (Sec. 3, ch. 171 SLA 1959.) However, the Act was amended in 1970 to eliminate that exemption. (Sec. 1, ch. 243 SLA 1970, effective October 31, 1970.)

from mandatory overtime entitlement, it does not follow automatically that the state law must do likewise. Here, the State seeks to compel air carriers to pay overtime to those employees who have worked in excess of eight hours per day or 40 hours per week. Clearly, the State act has set a standard which is considerably higher than the comparative federal provision since the federal law does not contain an eight hour work day limitation.

Accordingly, in light of the authority recited above, and consistent with the State of Alaska's current position in State of Alaska v. Bechtel, Inc. Supreme Court No. 4139, presently pending before the Alaska Supreme Court, we feel that the Fair Labor Standards Act does not expressly preempt the Alaska Wage and Hour Act on the question of whether airline employees are excluded from the mandatory overtime directive of AS 23.10.060. A substantial question remains, however, as to whether the State Act has been nonetheless preempted through enactment and operation of the Federal Railway Labor Act, 45 U.S.C. §§ 151-188.

II

THE RELATIONSHIP OF THE RAILWAY LABOR ACT TO THE ALASKA WAGE AND HOUR ACT

There are two conflicting lines of reasoning concerning the impact of the Railway Labor Act upon attempted state regulation of wages and hours in industries subject

Railroad Co., 372 U.S. 284 (1963); Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, 334 A.2d 636 (Pa. 1975), app. dism'd for want of subs. fed. ques., 423 U.S. 806 (1975); Gibbons v. Kansas City Southern Railway Co., 34 CCH Labor Cases, ¶ 71,276, 100 So.2d 319 (La. 1957).

In 1957, the United States Supreme Court had occasion to again examine the relationship between the Railway Labor Act and the regulation by states of working conditions in affected industries. California v. Taylor, 353 U.S. 553 (1957) involved the question of whether the Railway Labor Act operated to require that the terms of a collective bargaining agreement between a state-owned and operated railroad and its employees would prevail over conflicting provisions of state civil service law. The Court held that it did. Terminal Railroad Association v. Brotherhood of Railroad Trainmen, supra, was definitively distinguished. The Court stated that the state regulation in Terminal had withstood challenge because it was directed at the establishment of regulations governing safety and health and was not concerned with the right secured by federally protected collective bargaining. 353 U.S. at 560. Accordingly, it was outside of the scope of the Railway Labor Act. In Taylor, on the other hand, the state was attempting to regulate working conditions not specifically or directly connected to the maintenance of health or safety, in contra-

vention of an express collective bargaining agreement. That practice was not permissible, said the Court, since by means of the Railway Labor Act, Congress had preempted the field of employer-employee bargaining agreements in all "affected industries". The key factor is the existence of a valid collective bargaining agreement. Where such an agreement exists, its terms must prevail over inconsistent state legislation. See also United Airlines, Inc. v. Industrial Welfare Commission, 28 Cal. Rptr. 238 (1963); Railway Employees' Department v. Hanson, 351 U.S. 225 (1951); Pan American World Airways v. Division of Labor Law Enforcement, 203 F. Supp. 324 (N.D. Cal. 1962).

It would seem to us that the Taylor line of cases is more clearly controlling in this instance. In attempting to compel the payment of overtime by interstate air carriers to employees covered by collective bargaining agreements which provide otherwise the State is interfering with an agreement which has "the imprimatur of federal law upon it". Railway Employees' Department v. Hanson, 351 U.S. at 232. In doing so, the State has run afoul of the preemptive provisions of the Railway Labor Act. Insofar as the Alaska Wage and Hour Act operates to require the payment of overtime to affected employees of interstate air carriers covered by valid collective bargaining agreements, that Act is invalid since it

has been preempted by the Railway Labor Act. We must still ascertain, however, which employees are "affected" so as to be exempt from the operation of state law.

III

ACTIVITIES WHICH FALL
WITHIN THE AIR CARRIERS EXEMPTION

The inclusion of air carriers (and their employees) within the scope of the Railway Labor Act is found in subch. II of that Act, 45 U.S.C. §§ 181-188. Section 181 provides:

> All of the provisions of subchapter I of this chapter except section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

Clearly, any commercial airline operating into or out of Alaska falls within the language of the Railway Labor Act. Equally clearly, pilots (expressly) and other members of the flight crew (by implication) are covered by the air carrier provisions of the Railway Labor Act and thus fall outside the purview of the Alaska Wage and Hour Act, at least insofar as the payment of overtime is concerned. However, application of the Railway Labor Act to any other employees of an air carrier depends upon an analysis of sec. 181 of the federal act and specifically upon the definition of the term "employee"

contained therein.

The Railway Labor Act was enacted for the purpose of avoiding the interruption of commerce caused by labor disputes and of assuring unimpeded continuity of transportation operations. Williams v. Jacksonville Terminal Co., 315 U.S. 586 (1942), reh. denied, 315 U.S. 830 (1942); National Airlines, Inc. v. International Association of Machinists & Aerospace Workers, 308 F. Supp. 179 (S.D. Fla. 1970), rev'd on other grounds 430 F.2d 957 (5th Cir. 1970), cert. denied 400 U.S. 992 (1971); Pan Am World Airways, Inc. v. United Brotherhood of Carpenters & Joiners of America, 324 F.2d 217 (9th Cir. 1963), cert. denied 376 U.S. 964 (1964). To that end the Railway Labor Act has direct application only to those employees of the carrier whose work bears a direct relationship to the transportation activities of the carrier. International Longshoremen's Association, AFL-CIO v. North Carolina State Port Authority, 370 F. Supp. 33 (E.D.N.C. 1974), aff'd, 511 F.2d 1007 (4th Cir. 1974); Roland v. United Airlines, Inc., 75 F. Supp. 25 (N.D. Ill. 1947). The mere fact that some of an employer's activities are related to transportation does not automatically subject all of that employer's activities to the Railway Labor Act. Instead, each activity must be scrutinized individually to see if the specific activity bears the necessary relation to transportaion. Jackson v. Northwest

Airlines, 70 F. Supp. 501 (M.D. Minn. 1947), aff'd 185 F.2d 74 (8th Cir. 1950), cert. denied 342 U.S. 812 (1951). Whether a particular employment situation satisfies the requisite nexus test is a question of fact which must be separately examined in each case. Edwards v. Southern Railway Co., 258 F. Supp. 212 (E.D. N.C. 1966).

Therefore, the Department of Labor is well advised to closely investigate and analyze each employee's activity in order to ascertain whether the activity bears a substantial and direct relationship to the transportation activities of the employer. Any employment activities which fail to satisfy this requirement fall outside of the coverage of sec. 181 of the Railway Labor Act and thus are subject to state regulation unless the attempted regulation is otherwise barred by operation of the Commerce Clause of the United States Constitution.

IV

COMMERCE CLAUSE RAMIFICATIONS

Art. I, sec. 8, cl.3 of the United States Constitution confers upon Congress the power "to regulate commerce with foreign nations, and among several states, and with the Indian tribes." Since there is a national interest in the free flow of interstate commerce, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Bibb v. Navaho Freight Lines, Inc., 359 U.S. 520 (1959), the Supreme Court, under the auspices of the Commerce Clause, will strike down any state law which serves to substantially

impede that national interest. Southern Pacific Company v. Arizona, 325 U.S. 761 (1945). Under the Commerce Clause states have full unbridled regulatory authority over intrastate systems. Gibbons v. Ogden, supra. Interstate, however, a state has no regulatory authority except when exercised for the purpose of advancing a judicially recognized legitimate local interest and only so long as the regulation does not unduly burden interstate commerce. The paramount recognized legitimate state interest is the state's management of the health and safety of its citizens. Smith v. Alabama, 124 U.S. 165 (1888). However, in cases where an impediment to the free flow of commerce results from the state's enforcement of its own laws, the monetary or economic interests of the state of her citizens are not recognized legitimate local interests sufficient to withstand Commerce Clause challenges. Hood & Sons v. Dumond, 336 U.S. 525 (1949).

The impact upon interstate commerce of the regulation of the working hours of pilots and flight crews by individual states is obvious. Since the planes themselves move interstate competing or conflicting state laws governing work hours could result in substantial administrative and operational difficulties. Such problems, in turn, could jeopardize the smooth flow of interstate air carriage. State regulation of support personnel (that is to say employees other than flight

crews), however, would not appear to have such a direct and potentially burdensome impact upon commerce. In situations where the states are not preempted from exercising regulatory authority, the state's interest in the welfare of its citizens is entitled to greater weight. Southern Pacific Company v. Arizona, 325 U.S. at 767. In such a case courts traditionally have balanced the strength of the local interest against the impact upon interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Where the state interest is substantial, attempted regulation does not interfere with the national commerce, and no less restrictive alternative exists, the state law may be upheld. Southern Pacific Company v. Arizona, supra; Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). Such would seem to be the case where non-flight personnel are concerned. For the State to apply the protections of its wage and hour laws to such employees would not appear to result in any undue burden upon interstate commerce.

V.

CONCLUSION

In summary the following principles appear to be valid with respect to the authority of the Alaska Department of Labor to enforce the mandatory overtime provisions of the Alaska Wage & Hour Act in favor of employees of airlines and air carriers operating within the State of Alaska.

1. In the case of pilots, flight crews, and other interstate air carrier employees whose activities are directly and substantially related to the transportation activities of the carrier, and who are covered by a valid existing collective bargaining agreement or agreements with the carrier, the State is precluded from applying its overtime laws due to the preemptive nature of the Railway Labor Act.

2. In instances where no collective bargaining agreements apply, crews of interstate air carriers are nonetheless beyond the jurisdiction of state overtime law because of the commerce clause implications discussed above.

3. Non-flight personnel of interstate carriers who are not covered by valid existing collective bargaining agreements are not exempt from state law. As to those individuals the provisions of state overtime law apply.

4. Air carriers operating solely intrastate would not seem to fall under the exclusionary scope of either the Railway Labor Act or of the Commerce Clause absent unusual fact situations. Accordingly, the protections of the Alaska Wage and Hour Act dealing with overtime extend to those individuals.

Very truly yours,

AVRUM M. GROSS
ATTORNEY GENERAL

By:
Eric Olson
Assistant Attorney General

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STATE OF ALASKA 1984 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: November 30, 1983

REQUEST
Bill/Resolution No.: HB 338
Title: "...Payment of overtime..."

Sponsor: Representative Fritz
Requestor: Judiciary, Labor, & Comm.
Date of Request: April 25, 1983

FISCAL DETAIL
Agency Affected: Labor
Program Category Affected: Worker Protection
BRU, Program or Subprogram(s) Affected: Labor Standards & Safety

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 84	FY 85	FY 86	FY 87	FY 88	FY 89
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:

Not Applicable

ANALYSIS: Attach a separate page for analysis

Prepared By: NB Robert J. Bacolas by bs — Robert J. Bacolas, Sr. — Phone: 465-4870
Division: Labor Standards & Safety — Date:

Approved by Commissioner: NB Jim Robison — Jim Robison — Date: 12/13/83
Agency: Labor

LEG:A:9
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