

SB

105

SENATE COMMITTEE REPORT

DATE: 3/2/05

FURTHER:

DATE TURNED
IN TO OFFICE: _____

Judiciary Committee considered

SENATE BILL NO. 105

SB 105 OVERTIME WAGES FOR FLIGHT CREW

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members; and providing for an effective date."

and recommends:

- be replaced with _____ CS _____ (_____)
- adopt previous _____ CS _____ (_____)
- attached amendment(s)
- adopt Letter of Intent by _____ Committee
- further referral to _____ Committee

Senate Bill:
 Same Title
 New Title

House Bill:
 Same Title
 Technical Title Change
 New Title w/ SCR # _____

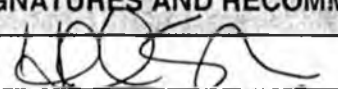
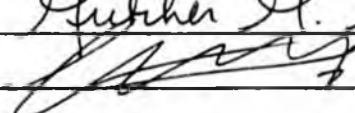
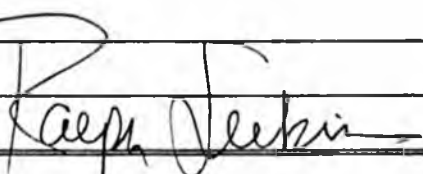
NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

APPROPRIATION - no fiscal note

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
			/	
Richard H. Jones			X	
	X			
CHAIR: 	X			

ALASKA STATE SENATE

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Senator Ralph Seekins
District D

Senate Bill 105 Sponsor Statement

"An Act relating to the retrospective application and applicability of the overtime compensation exemption for flight crew members."

Senate Bill 105 clarifies legislative intent by retroactively removing flight crews from the scope of statutory overtime compensation required under the Alaska Wage and Hour Act found in AS 23.10.060. Retroactivity will apply to work performed on or after January 1, 2000.

The challenges facing the air carrier industry nationwide are extraordinary. Heightened security requirements have necessitated ever larger investments in human and technological resources. Operating expenses continue to escalate as the price of fuel increases. These cost burdens place enormous pressures on already thin margins. The air carrier industry in our state is no different in this respect. Yet the role it plays in our daily lives is arguably much greater.

The Alaska air carrier industry represents a vital link, in fact a bond, between rural communities and hub cities. It provides a lifeline to healthcare facilities. It delivers the groceries and the mail. And it transports the basketball teams and the elders to important events across the state. But now, in addition to the burdens placed on the industry since 2001, we can add the cost of superfluous litigation which threatens the viability of many of our local carriers.

Up until 2003, it had been the Department of Labor's (DOL) uncodified policy that in-state air carriers are exempt from the Alaska Wage and Hour Act's (AWHA) overtime provisions. This policy was rooted in a 1980 Alaska Attorney General opinion. This opinion cited both the federal Railway Labor Act and the U.S. Constitution's Commerce Clause as preempting flight crews from overtime compensation provided through the AWHA.

However, in 2000 uncertainty crept into the DOL's policy as a result of a lawsuit which sought overtime compensation for pilots. By 2003, three class action suits were outstanding representing millions of dollars in claims against Alaska air carriers. Consequently, state lawmakers took action to avoid what could be devastating losses to a critical yet fragile industry.

The 23rd Legislature passed into law a bill (SB 54) that codified what, up to that point, had been DOL policy exempting flight crews from the AWHA overtime compensation rules. While the bill did accomplish this important purpose, it failed to fully enact the legislative intent necessary to deflect court actions seeking recovery for periods dating back to the year 2000.

Senate Bill 105 seeks to fulfill the intent of the 23rd Legislature by implementing the provisions found in AS 23.10.060(d)(19) retroactively to January 1, 2000. This will help ensure the viability of our air carrier industry so that it may continue to perform its vital public function.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: CSSB 105(L&C)
 (S) Publish Date: 3/2/05

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to the retrospective application RDU CIVIL
of the overtime compensation exemption for flight crew..." Component Labor & State Affairs
 Sponsor Senator Seekins
 Requester Senate Labor & Commerce Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill adds a new section in statute applying the overtime compensation exemption for flight crew members set forth in AS 23.20.060 (d)(19) retroactive to work performed on or after January 1, 2000. Any unresolved claims for overtime compensation for employment as a flight crew member on or after January 1, 2000 would fall under this new provision.

Passage of this legislation would have no fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhete, Director Phone 465-3673
 Division: Administrative Services Division Date/Time 2/20/05 12:44 PM
 Approved by: Kathryn Daughhete for Scott Nordstrand, Acting AG Date 2/20/2005
 Agency: Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: CSSB 105(L&C)
 (S) Publish Date: 3/2/05

Revision Date/Time (Note if correction): _____ Department: Labor and Workforce Development
 Title: Overtime Wages for Flight Crew RDU: Labor Standards and Safety
 Component: Wage and Hour
 Sponsor: Senator Seekins
 Requester: Senate L&C Component Number: 345

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: None
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill retroactively applies an exemption to the requirement to pay overtime compensation to flight crew members. There is no anticipated financial impact to the department as a result of this legislation.

Prepared by: Grey Mitchell, Director Phone: 465-4855
 Division: Labor Standards and Safety Date/Time: 2/18/05 9:01 AM
 Approved by: Greg O'Claray, Commissioner Date: 2/18/2005
 Agency: Department of Labor and Workforce Development



LAWS OF ALASKA

2003

Source

SB 54

Chapter No.

AN ACT

Exempting flight crew members of certain air carriers from overtime pay requirements.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

THE ACT FOLLOWS ON PAGE 1

AN ACT

1 Exempting flight crew members of certain air carriers from overtime pay requirements.

2

3 * Section 1. AS 23.10.060(d) is amended by adding a new paragraph to read:

4 (19) work performed by a flight crew member employed by an air
5 carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this
6 paragraph, "flight crew" means the pilot, co-pilot, flight engineer, and flight
7 attendants.

Testimony of Thomas M. Daniel
Senate Labor & Commerce Committee Hearing
Re Senate Bill 105

(February 22, 2005)

Mr. Chairman and members of the Committee. My name is Tom Daniel. I am a partner with the law firm of Perkins Coie in Anchorage, where my practice is devoted primarily to employment law. I am here today to testify in favor of Senate Bill 105, which would make retroactive the law which the Legislature passed in 2003, making pilots exempt from overtime.

In my practice I have handled numerous cases involving overtime claims arising under both federal and Alaska law. Currently, I am defending Hageland Aviation Services in a class action lawsuit asserting overtime for pilots, which goes on despite the exemption for pilots passed by the Legislature in 2003. The lawsuit continues because the judge ruled that the law only applied after the effective date of the Act – but not to claims for overtime that arose before 2003.

I support Senate Bill 105 because it will make clear that the overtime exemption for pilots which the Legislature passed in 2003 was intended to apply to pending lawsuits. But first, let me provide a little background.

Since 1949, pilots of airlines governed by the Railway Labor Act have been exempt from the overtime provisions of the federal overtime law (the Fair Labor Standards Act). (This includes all air carriers engaged in interstate or foreign commerce or that transport U.S. mail, as well as air freight forwarders owned or controlled by such carriers.)

Until 2003, there was no similar exemption under the Alaska overtime law, the Alaska Wage and Hour Act. However, in 1980, the Alaska Attorney General issued an opinion concerning whether air carriers operating in the state of Alaska were subject to the state overtime law. *He concluded that the flight crews of interstate carriers were not subject to the state overtime law.* Exhibit 1.

Based on the Attorney General's opinion, the Alaska Department of Labor consistently has taken the position that pilots of interstate air carriers, including in-state carriers that haul U.S. mail, are exempt from the state overtime law. In 1986, the Department sent an opinion letter to the Alaska Air Carriers Association, in which it stated that state overtime law did not apply to pilots of commuter aircraft and air taxi pilots if they were involved in "interstate transportation of passengers and/or

substantial hauling of the mail." Exhibit 2. The Department has followed that policy up to the present day. Exhibit 3.

Based on the federal exemption and the state's policy that pilots were exempt from overtime, most Alaska based air carriers have never paid overtime to their pilots. Instead, the carriers have used various pay methods, including payment by the flight hour, fixed monthly salaries, payment by the flight day, or combinations of these methods. Alaska air carriers need the flexibility to adopt unusual pay systems for pilots because their flight schedules must adapt to the harsh weather conditions and remote locations of Alaska. Overtime rules are designed for fixed schedules, not the ever changing schedules necessary to adapt to the flying conditions in Alaska.

Despite the Department of Labor's policy, some plaintiffs' lawyers argued that pilots were not exempt from state overtime. In the late nineties, they began to file lawsuits on behalf of pilots claiming the right to be paid overtime. The first reported case was *Era Aviation v. Lindfors*, decided by the Alaska Supreme Court in 2000, a case which I defended. Although the pilot there lost her overtime claim, uncertainty remained regarding the applicability of state overtime law to pilots of Alaska air carriers. Since that time, at least three lawsuits have been filed against Alaska air carriers claiming overtime pay on behalf of pilots.

Because of this uncertainty, in 2003, the Legislature passed SB 54/HB 94, which amended the Alaska Wage and Hour Act to codify Department of Labor policy and make clear that pilots were exempt from state overtime requirements. The House sponsor of the amendment, Rep. Masek, declared in her sponsor statement, "[t]his legislation was introduced to codify what is existing Department of Labor policy" and "simply puts in statute what is existing policy and exempts flight crew from overtime." Exhibit 4. See also Remarks of Rep. Anderson (bill solidifies the exemption so it cannot be successfully challenged in court). Exhibit 5. Similarly, the Senate sponsor, Sen. Olson, stated that the purpose of the amendment was to "bring certainty to the interpretation of existing federal and state wage and hour statutes" because "[s]everal Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of the overtime exemptions" for flight crews. Exhibit 6.

Unfortunately, the law did not include a provision making it retroactive. Therefore, it may not bar lawsuits for overtime for the time period before the effective date of the law. In fact, in the lawsuit against Hageland Aviation Services, the judge ruled that while the new law does exempt Hageland pilots from the overtime provisions of the Alaska Wage and Hour Act, it only does so *for the period after the effective date of the law, July 16, 2003*. Thus, this lawsuit and two others go on. And

because these lawsuits are class actions, the air carriers face claims that can total millions.

The irony of the lawsuit against Hageland is that the vast majority of the pilots themselves do not support the lawsuit. In fact, the pilot that initiated the lawsuit has stated under oath that he was fairly paid. Instead, he claimed that he was fired because of his age (a claim that was later investigated and rejected by the Alaska Human Rights Commission). But rather than take the age discrimination claim to court, which he had the right to do, he hired a lawyer who apparently saw an opportunity to make a lot of money by using that one pilot to bring a class action lawsuit asserting technical violations of the state overtime law, even though that law was never intended to apply to pilots.

Even though the Hageland case is a class action on behalf of all current and former pilots, only 2 of the approximately 60 current Hageland pilots have chosen to participate in the lawsuit. Out of a total of approximately 82 present or former pilots who could assert claims as class members, 56 (or 68%) have affirmatively taken steps to remove themselves from the class. But despite the fact that the majority of present and former Hageland pilots do not support this lawsuit, it goes on. The case is scheduled for trial in July 2005.

The purpose of the retroactivity bill is to insure that these lawsuits stop, and that no more are brought against Alaska's critical, but beleaguered, air carriers. Alaska air carriers should not have to face huge class action lawsuits brought by a few disgruntled pilots and trial lawyers, when our own state Department of Labor has been telling them for years that they were not required to pay overtime to pilots.

Class action lawsuits like the one against Hageland, can bankrupt small air carriers. The end result is that pilots and other employees lose their jobs, bush customers lose transportation services, and the economy of Alaska is hurt. The only winners are the lawyers who instigate these class actions. A vote in favor of Senate Bill 105 is a vote in favor of Alaska's air carriers, their pilots, and customers. The retroactivity legislation protects them - not the lawyers. For that reason, the proposed legislation is good public policy.

The opponents of this legislation may argue that the judge has already ruled that Hageland violated the Alaska Wage and Hour Act, and therefore, it is unfair to pass a law that will terminate the lawsuit. While it may be true that a judge has ruled that Hageland is liable for overtime pay, his ruling was based on a strained and highly technical reading of the law. He ruled Hageland pilots were not exempt from overtime for two reasons. First, some pilots were paid a daily salary of less than \$300 per day. There would have been no violation if those same pilots had been paid the

same amount of money, but had been paid weekly instead of daily. Second, some pilots were only paid for half a day when they only worked half a day. Based on these two simple facts, the judge concluded that the pilots should have been paid overtime. There is nothing about these findings that show that Hageland pilots were mistreated.

Hageland Aviation Services provides a good case study of the need for Senate Bill 105. Hageland Aviation Services was started by Mike Hageland. Mike came to Alaska from Minnesota in 1972, to be a pilot. He flew for two small carriers in rural Alaska from 1972 to 1981. In 1981, with one airplane, he started Hageland Aviation Services, which provided air charter service from Mountain Village to anyplace in Alaska. Most travel was in the Yukon Kuskokwim Valley. Living in Mountain Village from 1976 to 1990, he flew literally hundreds of medivac flights to the regional hospital in Bethel night or day in all kinds of weather. He gradually bought more airplanes and expanded the service to Bethel. In 1990, Mike joined up with Ron and James Tweto who were operating a single plane charter service in Unalakleet. Together they expanded Hageland Aviation Services further. By 2004, Hageland had bases in Aniak, Bethel, St. Mary's, Unalakleet, Nome, Kotzebue, and Barrow with scheduled flights to over 70 villages from these hubs. Today, Hageland Aviation employs over 180 people, including 60+ pilots.

When Hageland Aviation started operating in 1981, most companies paid their pilots by the flight hour. That means the pilots got paid for a lot of hours in the summer months, but not much in the winter. Hageland is one of the first local airlines to start paying pilots a monthly salary so that they would not starve in the winter time. By the mid-1990s, Hageland restructured the pay again so that pilots could take more time off. Instead of working throughout the month, the pilots were scheduled to work only 20 days each month followed by 10 days off, but still at the same monthly salary. In July 2000, the schedule was changed again to an even more favorable schedule for the pilots - a 15-day on and 15-day off work schedule, still at the same monthly salary.

The only problem with the monthly salary was that some pilots complained that they got paid the same for flying 15 or 16 days in a month that another pilot got paid for flying only 14 days. To solve this problem, Hageland converted the monthly salary to daily salary so that pilots got paid for every day that they flew. The pilots seemed to be happy with this arrangement and no one complained. Yet it is this very pay system, developed for the benefit of the pilots, which the plaintiffs' lawyers have attacked as being in violation of the Alaska Wage and Hour Act.

The end result of the lawsuit against Hageland is that a good corporate citizen that has paid its pilots fairly and provides an essential service in bush Alaska, could

face bankruptcy because of a technical violation of a law that was never intended to apply to it. This injustice can be corrected with the passage of Senate Bill 105. I urge you to pass it.

Thomas M. Daniel
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January 7, 2005

VIA DHL

Senator Ralph Seekins, Chair
Senate Judiciary Committee
State Capitol, Room 125
Juneau, Alaska 99801-1182

Representative Lesil McGuire, Chair
House Judiciary Committee
State Capitol, Room 118
Juneau, Alaska 99801-1182

Re: Airline Pilot Exemption From Overtime

Dear Senator Seekins and Representative McGuire:

Enclosed is a memorandum outlining the history of the airline pilot exemption from overtime under both federal and state law. As you know, the Alaska Legislature passed SB 54/HB 94 in 2003 which amended the Alaska Wage and Hour Act to provide for an express exemption from Alaska law for flight crew members of air carriers. This provision codified what had been the Alaska Department of Labor policy since the mid-80's.

Unfortunately, the prior law did not include a provision making it retroactive. As a result, there are still three pending lawsuits brought by pilots against various airlines seeking overtime. This problem could be resolved with a simple amendment to existing law making the pilot exemption retroactive. I have explained the background of this in more detail in the attached memo, but the amendment that I propose would read as follows:

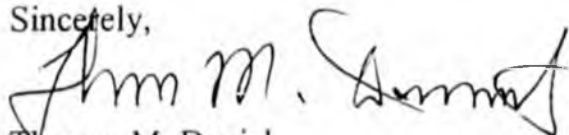
[29098-0001/AA050070.004]

January 7, 2005
Page 2

AS 23.10.060(d)(19) is hereby amended as follows: This section applies retrospectively: (1) to all work performed after January 1, 2000; and (2) to all pending administrative and judicial actions under AS 23.10.060(b) that are not resolved by final court judgment or administrative decision on the effective date of this Act.

If you need any additional information, please do not hesitate to contact me.

Sincerely,



Thomas M. Daniel

TMD:mlc

Enclosure

cc: Jerry Mackie

January 7, 2005

TO: Senator Ralph Seekins and Rep. Lesil McGuire
FROM: Tom Daniel *TMD*
RE: **History of Pilot Exemption from Overtime**

Since 1949, pilots of airlines governed by the Railway Labor Act have been exempt from the overtime provisions of the federal overtime law (the Fair Labor Standards Act). (This includes all air carriers engaged in interstate or foreign commerce or that transport U.S. mail, as well as air freight forwarders owned or controlled by such carriers.)

Until 2003, there was no similar exemption under the Alaska overtime law, the Alaska Wage and Hour Act. However, in 1980, the Alaska Attorney General issued an opinion concerning whether air carriers operating in the state of Alaska were subject to the state overtime law. *He concluded that the flight crews of interstate carriers were not subject to the state overtime law.* Exhibit 1.

Based on the Attorney General's opinion, the Alaska Department of Labor consistently has taken the position that pilots of interstate air carriers, including in-state carriers that haul U.S. mail, are exempt from the state overtime law. In 1986, the Department sent an opinion letter to the Alaska Air Carriers Association, in which it stated that state overtime law did not apply to pilots of commuter aircraft and air taxi pilots if they were involved in "interstate transportation of passengers and/or substantial hauling of the mail." Exhibit 2. The Department has followed that policy up to the present day. Exhibit 3.

Based on the federal exemption and the state's policy that pilots were exempt from overtime, most Alaska based air carriers have never paid overtime to their pilots. Instead, the carriers have used various pay methods, including payment by the flight hour, fixed monthly salaries, payment by the flight day, or combinations of these methods. Alaska air carriers need the flexibility to adopt unusual pay systems for pilots because their flight schedules must adapt to the harsh weather conditions and remote locations of Alaska. Overtime rules are designed for fixed schedules, not the ever changing schedules necessary to adapt to the flying conditions in Alaska.

Despite the Department of Labor's policy, some plaintiffs' lawyers argued that pilots were not exempt from state overtime. In the late nineties, they began to file lawsuits on behalf of pilots claiming the right to be paid overtime. The first reported case was

Era Aviation v. Lindfors, decided by the Alaska Supreme Court in 2000. Although the pilot there lost her overtime claim, uncertainty remained regarding the applicability of state overtime law to pilots of Alaska air carriers. Since that time, at least three lawsuits have been filed against Alaska air carriers claiming overtime pay on behalf of pilots.

Because of this uncertainty, in 2003, the Legislature passed SB 54/HB 94, which amended the Alaska Wage and Hour Act to codify Department of Labor policy and make clear that pilots were exempt from state overtime requirements. The House sponsor of the amendment, Rep. Masek, declared in her sponsor statement, "[t]his legislation was introduced to codify what is existing Department of Labor policy" and "simply puts in statute what is existing policy and exempts flight crew from overtime." Exhibit 4. See also Remarks of Rep. Anderson (bill solidifies the exemption so it cannot be successfully challenged in court). Exhibit 5. Similarly, the Senate sponsor, Sen. Olson, stated that the purpose of the amendment was to "bring certainty to the interpretation of existing federal and state wage and hour statutes" because "[s]everal Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of the overtime exemptions" for flight crews. Exhibit 6.

The 2003 law tracks the language of the exemption for pilots under federal law. It reads:

AS 23.10.060(d) [the overtime exemption section] is amended by adding a new paragraph to read:

(19) work performed by a flight crew member employed by an air carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this paragraph, "flight crew" means the pilot, co-pilot, flight engineer, and flight attendants.

Exhibit 7. The amendment was signed by the Governor on April 22, 2003, and became effective on July 16, 2003.

Unfortunately, the law did not include a provision making it retroactive. Therefore, it may not bar lawsuits for overtime for the time period before the effective date of the law. In fact, in the lawsuit against Hageland Aviation Services, Judge Michalski ruled that while the new law does exempt Hageland pilots from the overtime provisions of the Alaska Wage and Hour Act, it only does so *for the period after the effective date of the law, July 16, 2003*. Thus, this lawsuit and two others go on. And because these lawsuits are class actions, the air carriers face claims that can total millions.

The legislature could still pass a law making the exemption retroactive, which should clarify that the Legislature intended to apply the pilot exemption to all pending lawsuits. I have attempted to draft language that accomplishes two purposes. First, it

provides that the exemption applies to any claim that a pilot of any airline might make based on work performed before the pilot exemption was passed, but which is not yet barred by the two-year statute of limitations. Second it clearly provides that the exemption applies to all pending cases:

AS 23.10.060(d)(19) is hereby amended as follows:

This section applies retrospectively: (1) to all work performed after January 1, 2000; and (2) to all pending administrative and judicial actions under AS 23.10.060(b) that are not resolved by final court judgment or administrative decision on the effective date of this act.

TMD:tmd

ALASKA DEPT. LAUDJAY & HAMMOND, GOVERNOR
RECEIVED

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

APR 21 '80
420 "L" STREET, SUITE 100
ANCHORAGE, ALASKA 99501
(907) 276-3550

April 15, 1980

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

RECEIVED
APR 24 1980

LABOR LAW COMPLIANCE DIV.
Anchorage Office

Re: Enforcement of Alaska Over-
time 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.

Exhibit 1

The Honorable Edmund Orbeck
Commissioner
Department of Labor

April 15, 1980
Page 2

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

^{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

to, or arguably subject to, the Railway Labor Act. Each finds its source in an opinion of the United States Supreme Court.

In Terminal Railroad Association of St. Louis v. Brotherhood of Railroad Trainmen, 318 U.S. 1 (1943) the Supreme Court addressed a claim by the appellant Railroad Association that the Illinois Commerce Commission's order requiring the Association to provide cabooses for its train employees was invalid because the field in which the state had attempted regulation was one which had been preempted by the federal government under the terms of the Railway Labor Act. The Court was not persuaded by the Association's argument. In upholding the Commission's order, the Court declared that:

the Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce.

318 U.S. at 6. See also Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942), rehearing denied, 315 U.S. 830 (1942); Brotherhood of Locomotive Engineers v. Baltimore & Ohio

Railroad Co., 372 U.S. 284 (1963); Baltimore & Ohio Railroad Co. v. Commonwealth of Pennsylvania, 334 A.2d 636 (Pa. 1975), app. dismiss'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-

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Commissioner
Department of Labor

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Page 6

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"

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Department of Labor

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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 transportation. Jackson v. Northwest

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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). *Would this hold true for a pilot who works on an air carrier that*

flies inter-state but the pilot flies only inter-state?

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

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Page 10

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 intra-state 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

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Department of Labor

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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.

37 same returned for original photo

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*
Eric Olson
Assistant Attorney General

BILL SHEFFIELD, GOVERNOR

DEPARTMENT OF LABOR
LABOR STANDARDS & SAFETY DIVISION

3001 EAGLE STREET
POUCH 7-021
ANCHORAGE, ALASKA 99510
PHONE: (907) 264-2435

September 3, 1986

Cynthia Andrecheck
Executive Director
Alaska Air Carriers Association
4134 Ingra Street, Suite 201
Anchorage, AK 99503

WHOL #53

Dear Ms. Andrecheck:

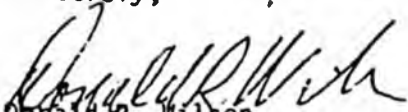
This will acknowledge receipt of your recent letter in which you made further inquiry into the exempt status of "commercial, part 135 air taxi and commuter flying."

The department has adopted the position of the U.S. Department of Labor, as set forth in Section 13(b)(3) of the FLSA, 1938 as amended; specifically, commuter aircraft and air taxi pilots are exempt only if involved in interstate transportation of passengers and/or substantial hauling of the mail. If their activities are solely intrastate or without the "mail hauling" functions then the exemptions otherwise extended would not apply.

The "federal position" you addressed in your letter for air carriers can be found at Section 13(b)(3) of the FLSA, 1938 as amended and at section 215 (b)(3) of Title 29, U.S.C.

Please advise if we can be of further assistance.

Sincerely,


Donald R. Wilson
Deputy Director
Labor Standards & Safety Division

0564w

EXHIBIT 2

STATE OF ALASKA

DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

WAGE AND HOUR ADMINISTRATION
LABOR STANDARDS & SAFETY DIVISION

TONY KNOWLES, GOVERNOR

3301 Eagle Street, Suite 301
P.O. Box 107021
Anchorage, Alaska 99510-7021
Phone: (907) 269-4900
Fax: (907) 269-4916

May 10, 2002



Peter Nosek
Birch, Horton, Bittner and Cherot
1127 West Seventh Avenue
Anchorage, AK 99501-3399

Dear Mr. Nosek:

In response to your inquiry of May 8 concerning the issue of federal preemption of the Alaska Wage and Hour Act (AWHA), please refer to the attached AG Opinion from Eric Olson dated April 15, 1980.

In brief, Olson advised the department that:

1. Pilots, flight crews and other interstate 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, are not covered by the AWHA due to the preemptive nature of the Railway Labor Act.
2. Flight crews of interstate carriers who are not subject to a collective bargaining agreement are nonetheless outside the jurisdiction of the AWHA under the Commerce Clause of the U. S. Constitution.
3. Non-flight employees of interstate carriers who are not under a collective bargaining agreement are subject to the AWHA.
4. Air carriers who operate solely intrastate are subject to the AWHA.

Exhibit 3

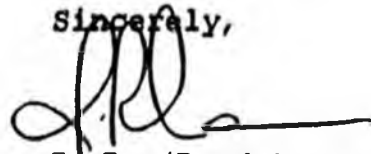
May 10, 2002

Attorney Olson's analysis speaks for itself. Suffice it to say that this advice still fashions the department's enforcement posture today.

It might be of interest to you that the AWA originally contained language which exempted coverage under the Railway Labor Act. The original version of AS 23.10.060(6) was repealed by the legislature in 1972 (§ 1 ch 45 SLA 1972). Subsequently, the reviser of statutes dropped several repealed exemptions and renumbered the remainder erasing any record of the previous existing exemptions.

I hope this information is helpful. If you have further questions, do not hesitate to contact me.

Sincerely,



J. R. (Randy) Carr
Chief
Labor Standards

RAM:plm
Attachment
Chief/2002 may/Peter Nosek

Sponsor Statement

HB 94

"An Act exempting flight crew members of certain air carriers from overtime pay requirements."

This legislation was introduced to codify what is existing Department of Labor policy related to the treatment of a flight crew for purposes of overtime in a non-collective bargaining air-carrier.

Over the course of time, Alaska courts have ruled in a mixed fashion that has cast a cloud on how flight crews should be treated by the Wage and Hour Division for purposes of overtime.

This legislation simply puts in statute what is existing policy and exempts flight crews from overtime.

EXHIBIT

4

SB 54-OVERTIME PAY FOR AIRLINE EMPLOYEES

DRAFT

CHAIR ANDERSON announced that the only order of business would be SENATE BILL NO. 54, "An Act ▶▶exempting◀◀ ▶▶flight◀◀ ▶▶crew◀◀ ▶▶members◀◀ of certain air carriers from overtime pay requirements."

Number 0057

SENATOR DONALD OLSON, Alaska State Legislature, sponsor of SB 54, said the bill provides certainty in the interpretation of the existing federal and state wage and hour statutes as they pertain to the payment of overtime in the air transportation industry. Because of their unique working conditions, ▶▶flight◀◀ crews have been considered professionals exempt from the standard 8-hour workday, 40-hour workweek, and the associated overtime pay, as required under the current statutes. Along with the maximum ▶▶flight◀◀ hours set by the Federal Aviation Administration [FAA], these exemptions at both the state and federal level have allowed the industry to structure flexible schedules for ▶▶flight◀◀ ▶▶crew◀◀ personnel.

SENATOR OLSON noted, however, that several Alaska court decisions have raised questions about the interpretation of the state wage and hour laws and the application of overtime exemptions for ▶▶flight◀◀ crews. Senate Bill 54 explicitly adds ▶▶flight◀◀ crews to the list of occupations in employment situations that are exempt from Alaska's overtime wage and hour requirements. The bill cites provisions under the federal Railway Labor Act that governs air carriers in order to provide consistency between federal and state applications of this exemption. He urged the committee to pass SB 54.

Number 0224

JIM WILSON, Chairman, Legislative Committee, Alaska Air Carriers Association, testified that his group supports passage of SB [54]. He stated that the current practice among the majority of association ▶▶members◀◀ is to accept the interpretation by the Alaska Department of Labor and Workforce Development, Division of Labor Standards and Safety, Wage and Hour section, that ▶▶flight◀◀ crews are exempt from overtime rules. This approach to calculating payroll is an industry standard used in all other states. During an informal poll of ▶▶members◀◀, it was found that

EXHIBIT 5

flight crews from the various Alaska-based companies prefer their exempt status primarily due to their employers' abilities to create flexible work schedules.

MR. WILSON added that SB 54 brings stability to Alaska law as applied to flight crews of air carriers that are governed by the Railway Labor Act. Passage will ensure that the state's executive branch interpretation of wage and hour overtime law is the same as that applied by Alaska courts. The bill applies to the flight crews of any air carrier in the state engaged in interstate work, foreign work, or transportation of U.S. Postal Service mail. The only flight crews unaffected are those who perform work for air carriers that operate only in-state charter/air taxi work.

Number 0403

REPRESENTATIVE GATTO asked whether this bill has any limits on this overtime exemption.

MR. WILSON described several variations on a flight crew's circumstances: a 10-hour day followed by a six-hour day; very short days during the winter's brief hours of daylight; very long hours in the summer, when the person is on duty but only flying part of that time; and bad weather days when the crew is sent home early. Mr. Wilson said this exemption from overtime gives air carriers the flexibility to schedule flight crews. It allows the crews to know that they are going to get paid for a full day even though they didn't work the full day. He explained he was a pilot for many years before opening his own business [Coastal Helicopters, Inc].

Number 0511

MR. WILSON replied to questions from Representative Gatto about whether the FAA regulates the exemption of overtime and which employees are affected. Mr. Wilson said he can only fly a pilot so many hours a day and have the person on duty so many hours a day. He explained that applies to all members of the flight crew. On larger airplanes, the flight crew consists of pilots, flight attendants, co-pilots, and flight engineers. He explained that ticket agents and custodians are not considered flight crew and are not covered by this overtime exemption. These workers can be scheduled for regular work hours because they're not getting in an airplane and leaving the base of operations.

Number 0631

REPRESENTATIVE GUTTENBERG asked how the Railway Labor Act

applies to large airlines.

MR. WILSON replied that most of the employees on large airlines are covered because they do intrastate travel. Alaska, through its courts, is the only state that has challenged the current wage and hour rule. Other states are covered by the Railway Labor Act.

Number 0678

CHAIR ANDERSON added that intrastate airlines such as Alaska Airlines and Northwest Airlines are already covered by separate labor agreements, so this bill does not affect them.

MR. WILSON, responding to a question from Representative Guttenberg, explained that a baggage handler moving cargo is not considered flight crew.

Number 0746

REPRESENTATIVE LYNN stated that in the Air Force, loadmasters flew on cargo planes and played a critical role in loading the cargo properly, doing the weight and balance calculations, and keeping the cargo from shifting during flight. He asked whether the equivalent position of a loadmaster working for cargo companies would be covered by SB 54.

Number 0895

SENATOR OLSON said that any flight crews with loadmasters work for carriers that are represented by unions. In the civilian world, responsibility for load duties rests with the pilot in command.

Number 0953

REPRESENTATIVE ROKEBERG agreed, saying it's not necessary to include loadmasters in the bill because the cargo carriers in the state are usually covered by collective bargaining agreements.

SENATOR OLSON said the flight crews on larger air carriers operating under FAR [Federal Aviation Regulations] Part 121 are usually covered by a collective bargaining agreement. He said he was not aware of any small carriers that had loadmaster personnel with specialized training.

Number 1033

TOM VANHOOMISSEN, Flight Deck Member, ERA Aviation, concurred that there's no carrier in Alaska with a loadmaster except for

Lynden Air Cargo, which operates the C-130 [Hercules, a four-engine turboprop aircraft].

REPRESENTATIVE ROKEBERG commented that if Saturn [Freight Systems] flew into the state hauling cargo, presumably the crew and the loadmaster would be covered by the Alaska Wage and Hour Act.

MR. WILSON said most of the aircraft used for air cargo in Alaska are older and frequently have a third officer who assists with loading and unloading.

CHAIR ANDERSON suggested that the key is whether the loadmaster is traveling with the flight crew.

Number 1150

REPRESENTATIVE ROKEBERG said it would be worthwhile to research this issue. He said Alyeska Pipeline Service Company has a contract with Saturn [Freight Systems] to spray retardant materials on oil spills. He said such planes might have a loadmaster or cargo master on board.

REPRESENTATIVE LYNN confirmed his understanding that the pilot in command is responsible for everything on the airplane.

REPRESENTATIVE ROKEBERG asked whether the Alaska Air Carriers Association has looked at the Alaska Wage and Hour Act and tried to work with the Department of Labor & Workforce Development to develop voluntary flexible work hour plans under AS 23.10.060(d)(14)(A) and (B).

Number 1220

MR. WILSON replied he has talked with staff at the Department of Labor & Workforce Development numerous times, and they've always said that flight crews fall under the professional category [of AS 23.10.55 (9)]. He said staff told him that the best way to handle paying flight crews would be through an exemption, which is the purpose of SB 54.

REPRESENTATIVE ROKEBERG explained that the voluntary flexible work hour plan is allowed under the Alaska Wage and Hour Act, and it seemed like it might be applicable in these situations. In statute, the plans are limited to 10 hours a day, they have to be pre-approved, and it takes considerable effort to get those hours approved. He noted for the record that those plans do not provide the flexibility that the air carriers need to do their crew scheduling. Even though that provision is in the law, it's not workable. He said he agrees with the response [by the Department of Labor & Workforce Development staff that an

exemption in law is the best way to handle the issue]

CHAIR ANDERSON reiterated that the sponsor statement notes that the court's interpretations of the exemption from overtime are contradictory. This bill solidifies that exemption so it cannot be successfully challenged in court.

Number 1309

SENATOR OLSON confirmed that clarifying the overtime exemption is the intent of the bill. He said there is a lingering question about whether a load person on a big cargo carrier like Saturn is covered by SB 54.

REPRESENTATIVE ROKEBERG said he's not sure that the question has been answered. If large air carriers are covered by a collective bargaining agreement, then the Alaska Wage and Hour Act does not apply. If the loadmaster on a cargo plane is not covered by a bargaining agreement, that person would have to be paid overtime under state law.

SENATOR OLSON said larger carriers, such as Saturn Air and Southern Air Transport have collective bargaining agreements that are governed by the federal Railway Labor Act. But he said there's still a question about the smaller [Federal Aviation Regulation Part] 135 [single pilot] air taxi operators that may have several nonunionized workers. He said that the federal mandate under the Railway Labor Act applies in that case. Normally, those pilots are only flying within the state.

Number 1463

MARCIA DAVIS, General Counsel, ERA Aviation, speaking at the request of Representative Crawford, said SB 54 addresses flight crews specifically, because they are professional employees that have the protections of the FAA safety regulations that backstop any potential abuse of the employee. These employees are also governed by the national mediation board on the federal side. She said including loadmasters with flight crews mixes apples and oranges. The loadmasters are not addressed by the FAA safety duty hour limitations, so they don't have that safety backstop. They also have a different level of training than pilots, flight engineers, and flight attendants. She stated that she would be very concerned about loading them into this bill. She said she also believes the Department of Labor & Workforce Development would take exception to adding loadmasters to SB 54. She said that if she represented a group of loadmasters, she would want to keep them covered by the Alaska Wage and Hour Act so they would have overtime protection.

Number 1560

MR. VANHOOMISSEN said that as an employee who enjoys exempt status, he supports including flight attendants in the flight crew. As a result of FAA regulations, the flight attendants are no less professional and no less necessary than the crewmembers in the cockpit. He also said that a flexible work schedule is an extremely important benefit. Flexible schedules allows the flight crews to have input into their schedules and some control over their family lives. He said he thinks such flexibility contributes to air safety in the long run.

MR. VANHOOMISSEN, responding to a question from Representative Rokeberg, said none of his flight crews are covered by collective bargaining agreements.

Number 1638

PAUL SHOLTON, Northern Air Cargo, testified he did not think the loadmasters should be included in SB 54. He said a jet doesn't take very long to get to Nome or Barrow, and these guys work on the ramp in the meantime. He said it would be very confusing to pay loadmasters differently while on the plane or on the ramp. He said loadmasters only go on the jets, not on the DC-6 aircraft that fly slower.

REPRESENTATIVE ROKEBERG asked Mr. Sholton to comment on whether he supports the SB 54.

MR. SHOLTON said he supports SB 54 because it recognizes flight crewmembers as professionals and shows consideration for the level of discretion they use, their expertise, and training.

Number 1757

SENATOR OLSON summarized the intent of SB 54. He said loadmasters are not covered under the same federal regulations as the rest of the flight crew as defined in this bill. As pointed out by Ms. Davis with ERA Aviation, the flight crews have a regulatory backdrop to protect them. He asked the committee to pass SB 54.

Number 1784

REPRESENTATIVE DAHLSTROM moved to report SB 54 out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, SB 54 was reported from the House Labor and Commerce Standing Committee.

DRAFT

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 3:40 p.m.

House

03

HL&C

03/19/03

1516

**ALASKA STATE LEGISLATURE
HOUSE LABOR AND COMMERCE STANDING COMMITTEE
March 19, 2003
3:16 p.m.
DRAFT**

MEMBERS PRESENT

Representative Tom Anderson, Chair
Representative Bob Lynn, Vice Chair
Representative Nancy Dahlstrom
Representative Norman Rokeberg
Representative David Guttenberg

MEMBERS ABSENT

Representative Carl Gatto
Representative Harry Crawford

COMMITTEE CALENDAR

HOUSE BILL NO. 111

"An Act extending the termination date of the Regulatory Commission of Alaska; and providing for an effective date."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

HOUSE BILL NO. 119

"An Act permitting grants to certain regulated public utilities for water quality enhancement projects and water supply and wastewater systems."

- MOVED HB 119 (L&C) OUT OF COMMITTEE

HOUSE BILL NO. 120

"An Act excluding service contracts from regulation as insurance; and providing for an effective date."

- MOVED CSHB 120 (L&C) OUT OF COMMITTEE

PREVIOUS ACTION

BILL: HB 111

SHORT TITLE: EXTEND REGULATORY COMMISSION OF ALASKA
SPONSOR(S): RLS BY REQUEST OF THE GOVERNOR

Jrn-Date Jrn-Page Action

02/19/03 0250 (H) READ THE FIRST TIME -
REFERRALS

02/19/03 0250 (H) L&C, FIN

02/19/03 0250 (H) FN1: (CED)

02/19/03 0250 (H) GOVERNOR'S TRANSMITTAL LETTER

02/19/03 0250 (H) REFERRED TO LABOR & COMMERCE

03/10/03 (H) L&C AT 3:15 PM CAPITOL 17

03/10/03 (H) Heard & Held

MINUTE(L&C)

03/17/03 (H) L&C AT 3:15 PM CAPITOL 17

03/17/03 (H) <Bill Hearing Postponed to
3/19>

03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

BILL: HB 119

SHORT TITLE: WATER/SEWER/WASTE GRANTS TO UTILITIES
SPONSOR(S): REPRESENTATIVE(S) COGHILL

Jrn-Date Jrn-Page Action

02/24/03 0286 (H) READ THE FIRST TIME -
REFERRALS

02/24/03 0286 (H) L&C, FIN

02/24/03 0286 (H) REFERRED TO LABOR & COMMERCE

03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

BILL: HB 120

SHORT TITLE: SERVICE CONTRACT SALES ARE NOT INSURANCE
SPONSOR(S): REPRESENTATIVE(S) COGHILL

Jrn-Date Jrn-Page Action

02/24/03 0286 (H) READ THE FIRST TIME -
REFERRALS

02/24/03 0286 (H) L&C

03/05/03 (H) L&C AT 3:15 PM CAPITOL 17

03/05/03 (H) Heard & Held

MINUTE(L&C)

03/12/03 (H) L&C AT 4:00 PM CAPITOL 17

03/12/03 (H) Heard & Held
MINUTE(L&C)
03/19/03 (H) L&C AT 3:15 PM CAPITOL 17

WITNESS REGISTER

DAVE HARBOUR, Chair
Regulatory Commission of Alaska (RCA)
Anchorage, Alaska
POSITION STATEMENT: Spoke about his new position as chair of
the RCA.

REPRESENTATIVE JOHN COGHILL
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Spoke as the sponsor of 119 and HB 120.

[The witnesses for HB 119 are forthcoming.]

RYNNIEVA MOSS, Staff
to Representative John Coghill
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 120, answered
questions.

ACTION NARRATIVE

TAPE 03-23, SIDE A
Number 0001

CHAIR TOM ANDERSON called the House Labor and Commerce Standing
Committee meeting to order at 3:16 p.m. Representatives
Anderson, Lynn, Dahlstrom, and Guttenberg were present at the
call to order. Representative Rokeberg arrived as the meeting
was in progress.

HB 111 -EXTEND REGULATORY COMMISSION OF ALASKA
DRAFT

CHAIR ANDERSON announced that the first order of business would
be HOUSE BILL NO. 111, "An Act extending the termination date of
the Regulatory Commission of Alaska; and providing for an
effective date."

CHAIRMAN ANDERSON informed the committee that he was assigning
HB 111 to a subcommittee consisting of himself and
Representatives Dahlstrom and Guttenberg. He announced that the
subcommittee would meet next Thursday, March 27, 2003. He
requested a one page position statement expressing the needed
changes from interested parties.

Number 0152

DAVE HARBOUR, Chair, Regulatory Commission of Alaska (RCA), Department of Community & Economic Development, thanked the committee for the confirmation process. He expressed pleasure with all the edification he has received. He discussed the circumstances under which he took the position as chair of the RCA. He commented on the RCA's dedicated staff of specialists. Mr. Harbour related that he feels a special sense of mission from the legislature and governor because one appointed him and the other confirmed him. He turned to the RCA's public obligation and the legislature's monitoring of the RCA. With regard to monitoring, Mr. Harbour pointed out that after some 2,000 orders since the RCA came into being in 1999, only about 15 major appeals have occurred. Virtually all of those appeals have been sustained by the court system, with the exception of one which was turned back for a procedural reason. With regard to the future, he specified his priority of communication with the legislature, the administration, as well as the regulated community. He noted his expectation and assumption that such communication would be returned to the RCA. If there are ways in which the processes effecting the public interest can be improved, there should be discussion about them and attempts made to achieve consensus while moving the state forward and maximizing the efficiencies of the RCA.

DRAFT

[The minutes for HB 119 are forthcoming.]

HP 120 -SERVICE CONTRACT SALES ARE NOT INSURANCE

DRAFT

CHAIR ANDERSON announced that the final order of business would be HOUSE BILL NO. 120, "An Act excluding service contracts from regulation as insurance; and providing for an effective date."

Number 1598

REPRESENTATIVE ROKEBERG moved that the committee adopt the proposed committee substitute (CS), Version 23-LS0537U, Ford, 3/19/03, as the working document. There being no objection, Version I was before the committee.

REPRESENTATIVE ROKEBERG related that [Version I addresses] all the committee's questions. Furthermore, the legislation has a zero fiscal note that was prepared by the committee.

REPRESENTATIVE LYNN related his understanding that this legislation protects any licensed realtor providing a home

warranty for real estate in the state.

REPRESENTATIVE JOHN COGHILL, Alaska State Legislature, speaking as the sponsor of HB 120, deferred to representatives from the administration.

REPRESENTATIVE ROKEBERG pointed out that [Version 1] clearly does what Representative Lynn understood, which is why [the language on page 2, lines 23-25] is included. Furthermore, underwriters would still pay the premium tax under Section 1 language.

Number 1484

RYNNIEVA MOSS, Staff to Representative John Coghill, Alaska State Legislature, said she understood Representative Lynn's understanding to be that a realtor could sell a home warranty and not have to have a license to sell insurance. She said that understanding is correct.

REPRESENTATIVE COGHILL pointed out that Section 2, [paragraph (h)(2), page 2, lines 23-25] attempts to clarify that.

REPRESENTATIVE ROKEBERG said, "My understanding is on home warranty underwriting, that [subparagraph (e)(1)(C) in Section 1, page 2, lines 5-8] is controlling, ... notwithstanding [subparagraph (e)(2)(E)] below, where a home warranty, except as described in (1)(C) of this subsection, is excluded as found in (1)(C) above."

REPRESENTATIVE COGHILL deferred to the representative of the administration. He noted the need on page 2, line 13 to delete "or" because it isn't necessary.

REPRESENTATIVE ROKEBERG pointed out that home warranties are not excluded [from oversight by the Division of Insurance] per the language on page 2, line 17. Therefore, home warranties still pay the premium tax, except if the [home warranty] is a component part of a home under [subparagraph (e)(1)(C) in Section 1]. Representative Rokeberg clarified that the home warranty is not excluded from payment of premium tax because it is an underwritten item. But [paragraph (h)(2)] of Section 2 excludes the [seller of the warranty] from being licensed in order to sell [the home warranty]. He said for the record that he wanted to show that some service contracts could cover component parts without intending to be home warranties. So, a [company underwriting] a home warranty would still pay a premium tax, but a [company offering a service contract] on a washer and dryer component part would not [pay a premium tax].

CHAIR ANDERSON noted that the sponsor seems to concur with

Representative Rokeberg's comments.

Number 1316

REPRESENTATIVE GUTTENBERG inquired as to why Chair Anderson had written the fiscal note.

REPRESENTATIVE ROKEBERG explained that statute specifies that if the department doesn't provide a fiscal note, then the first committee of referral can do so.

Number 1291

REPRESENTATIVE ROKEBERG moved to report CSHB 120 out of committee with individual recommendations and the accompanying fiscal notes.

REPRESENTATIVE ROKEBERG withdrew his aforementioned motion and moved that the committee adopt Conceptual Amendment 1 as follows: page 2, line 13, after "serviced," delete "or". There being no objection, Conceptual Amendment 1 was adopted.

Number 1247

REPRESENTATIVE ROKEBERG moved to report CSHB 120, Version 23-LS0537L, Ford, 3/19/03, out of committee with individual recommendations and the accompanying zero fiscal note. There being no objection, CSHB 120(L&C) was reported from the House Labor and Commerce Standing Committee.

DRAFT

ADJOURNMENT

There being no further business before the committee, the House Labor and Commerce Standing Committee meeting was adjourned at 4:30 p.m.

House

03

HL&C

03/27/03

1300

ALASKA STATE LEGISLATURE

**HOUSE LABOR AND COMMERCE STANDING COMMITTEE
SUBCOMMITTEE ON HB 111**

March 27, 2003

1:00 p.m.

COMMITTEE CALENDAR

HOUSE BILL NO. 111

"An Act extending the termination date of the Regulatory
Commission of Alaska; and providing for an effective date."

NOTE: There are no tapes or log notes available for this
subcommittee meeting.

House

03

HL&C

03/28/03

Alaska State Legislature



Out of Session:
PO Box 531
Golovin, Alaska 99762
(907) 443-5599

In Session:
State Capitol, Suite 510
Juneau, Alaska 99801-1182
(800) 597-3707
(907) 465-3707
(907) 465-4821 Fax

SENATOR DONALD C. OLSON

DISTRICT S

Alakanuk
Ambler
Anaktuvuk Pass
Atkasuk
Barrow
Brevig Mission
Browerville
Buckland
Chevak
Deering
Diomedes
Elim
Emmonak
Gambell
Golovin
Homer Bay
Kaktovik
Kenai
Kivalina
Kobuk
Kolik
Kotzebue
Koyuk
Mekoryuk
Mountain Village
Newtok
Nighthute
Noatak
Nome
Noorvik
Nulqsut
Nunam Iqua
Pitka's Point
Point Hope
Point Lay
 Savoonga
Scammon Bay
 Selawik
 Shaktolik
 Shishmaref
 Shurvik
 St. Mary's
 St. Michael
 Tebbins
 Upernivik Bay
 Unalakleet
 Wainwright
 Wales
 White Mountain

SB 54 SPONSOR STATEMENT

By Senator Olson

Introduced SB 54 to bring certainty to the interpretation of existing federal and state wage and hour statutes as they pertain to payment of overtime in the air transportation industry. Because of the uniqueness of their working conditions, flight crews have been considered professionals that are exempt from the standard 8 hour work day, 40 hour week and associated overtime pay requirements [AS 23.10.055(9)]. In conjunction with the maximum flight hour requirements set by the Federal Aviation Administration, these exemptions at both the state and federal level have allowed the industry to structure wage and hour schedules best suited to the work requirements of their flight crew personnel.

Several Alaska court decisions have raised a question about the correct application of state wage and hour laws and the application of overtime exemptions. Indeed, the confusion has stimulated other court challenges.

SB 54 explicitly adds flight crews to the list of occupations and employment situations that are exempt from Alaska's overtime wage and hour requirements. The bill cites the provisions of the federal Railway Labor Act that governs air carriers in order to provide consistency between federal and state applications of the exemption.

EXHIBIT 6

ALASKA BILL TEXT

Chapter 11

AN ACT

VERSION: Enacted

April 17, 2003
Olson

"An Act exempting flight crew members of certain air carriers from overtime pay requirements."

TEXT:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.10.060(d) is amended by adding a new paragraph to read:

(19) work performed by a **flight crew** member employed by an air carrier subject to 45 U.S.C. 181 - 188 (subchapter II of the Railway Labor Act); in this paragraph, "**flight crew**" means the pilot, co-pilot, **flight** engineer, and **flight** attendants.

2003 AK S.B. 54 (SN)

END OF DOCUMENT

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Exhibit 7



JAN 25 2005

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ELDON TANNER, JOSEPH R. ANZIVINO JR.,
GAIL A. JONES and KENNETH R. JONES, on
Behalf of themselves, and all others similarly
situated,

Plaintiffs,

vs.

VISTA REAL ESTATE, INC. d/b/a Prudential
Vista Real Estate, JACK WHITE REAL ESTATE,
INC. d/b/a Prudential Jack White Real Estate, a
wholly owned subsidiary of Vista Real Estate, Inc.,
RICK FULLER, real estate broker for Prudential
Vista Real Estate, GREG GUNNARSON, real
estate broker for Prudential Jack White Real Estate,
RON POLLOCK, real estate broker during relevant
time periods for Prudential Jack White Real Estate,
THE PRUDENTIAL REAL ESTATE
AFFILIATES, INC., AND THE PRUDENTIAL
INSURANCE COMPANY OF AMERICA d/b/a
Prudential Financial Services,

Jointly, Severally and/or in the Alternative,

Defendants.

Case No. 3AN 02-11090 CI

SUMMARY

The plaintiff, a real estate buyer, alleges that his broker violated Alaska's dual agency statute by not disclosing in writing that he also represented the seller. This suit was prompted, in part, by earlier litigation where a realtor testified that agents dislike the consumer protection legislation and seldom comply with the ten-year-old dual law. The plaintiff sought to test that representation and to provide incentive for future compliance by asking for class certification and seeking actual damages, punitive damages and

forfeiture of real estate commissions on behalf of persons injured by violation of the statute.

The real estate defendants chose to seek relief in the legislature rather than defend this case before a jury of ordinary citizens. They succeeded. The legislature passed a retroactive statute designed to neuter this lawsuit by limiting recovery to actual damages for violation of the written disclosure requirement.

The plaintiff challenges the constitutionality of that amendment. But the Alaska Supreme Court has held that retroactive legislation is constitutional as long as the law does not impair fundamental expectations or vested rights. The Court has also held that punitive damages and forfeiture of commissions are discretionary remedies designed to promote public policy and not a vested right of an injured party, at least until a jury actually makes an award. For these reasons I must find the amendment constitutional.

DISCUSSION

Eldon Tanner entered into a real estate contract with Vista Real Estate in 2000. At the time of the contract Alaska law required a real estate agent acting as a representative of both buyer and seller -- a dual agent -- to "inform[] both the seller and buyer of the dual agency and obtain[] written consent to the dual agency from both principals."¹ The statute was silent regarding damages available to a party injured by violation of the law.

Tanner claims that Vista was a dual agent and failed to disclose the dual agency in writing. He filed suit in September of 2002. He asks for class certification and seeks to

¹ Former AS 08.88.396 (1990).

recover actual and punitive damages and forfeiture of real estate commissions on behalf of all persons similarly situated.

Tanner's suit was prompted in part by an earlier lawsuit and administrative proceeding before the Alaska Real Estate Commission where a realtor was sanctioned for violating the written disclosure requirement. The realtor testified that the requirement was impractical and that many realtors violated it. The Real Estate Commission sanctioned the realtor \$20,000 and suspended her license for 120 days, in part because the agent did not acknowledge any wrongdoing in her intentional violation of the law.

Instead of defending this case in court, Vista and other realtors sought relief from the Alaska legislature. They claimed that the written disclosure requirement for dual agency was impractical and a mere technicality. They warned that the industry was at risk for as much as \$70 million in damages and loss of insurability if they lost this lawsuit.

The legislature determined that the written disclosure requirement enacted in 1990 was "flawed" and imposed an unfair burden on the industry. They amended AS 08.88.396 to authorize recovery of only actual damages for persons injured by violation of the statute. The plaintiff claims that the retroactive statute is an unconstitutional impairment of rights vested under his real estate contract.

IMPAIRMENT OF CONTRACT

The Alaska and United States constitutions bar the state from passing laws that impair rights under existing contracts.² While an accrued but unlitigated cause of action

²Alaska Const. art. I sec. 15; U.S. Const., art. 1, sec. 10, cl.1.

is a significant property interest³, the Alaska Supreme Court has held that "a remedy may be modified [retroactively] as long as the result does not unreasonably affect the value of the right."⁴ The question raised here is whether a party to a real estate contract has a vested or substantial right to pursue punitive damages and forfeiture of commissions for violation of the 1990 dual agency statute.⁵

The Alaska Supreme Court has held, on numerous occasions, that punitive damages are not intended to compensate an injured party but instead reflect an expression of public policy.⁶ This reasoning led Justice Fabe to conclude in Evans ex rel Kutch v. State, 56 P.3d 1046 (Alaska 2002), that if the legislature expressed its view of public policy by limiting punitive damages "before they are awarded to successful plaintiffs, no constitutional problem exists." Id. at 1058, emphasis original.

Although Evans did not involve a contract claim, the reasoning applies here. If Mr. Tanner did not have a vested right to collect punitive damages, the retroactive application of the 2003 amendment prohibiting recovery of those damages did not substantially impair the rights under his contract.

The right to collect forfeiture of a real estate commission for violation of the statute is also not a vested right. The Alaska Supreme Court has twice held that forfeiture of a real estate commission for breach of contract or violation of fiduciary obligation is a discretionary remedy, reserved for cases where the court finds that deterrence of

³ Patrick v. Lynden Transport, Inc., 765 P.2d 1375, 1378 (Alaska 1988).

⁴ Hagberg v. Alaska National Bank, 585 P.2d 559, 561 (Alaska 1978).

⁵ Energy Reserves Group v. Kansas Power & Light, 459 U.S. 400 (1983).

⁶ See, e.g., Providence Washington Insurance Co. v. City of Valdez, 684 P.2d 861, 862 (Alaska 1984); Portwood v. Copper Valley Elec. Assn. Inc., 785 P.2d 541, 543 (Alaska 1990).

intentional misconduct is necessary.⁷ In both cases the court distinguished between actual damages caused by a breach and the discretionary remedy of forfeiture damages.⁸ In other words, the forfeiture remedy is, like punitive damages, not intended to compensate for actual losses but instead designed to serve public policy by deterring an agent from similar conduct in the future.

Hagberg v. Alaska National Bank is also instructive. There the legislature amended a law regulating remedies for default on real estate contracts. Prior law required a defaulting debtor to pay the entire obligation on a note in order to prevent foreclosure on the property. The amendment allowed the debtor to stop foreclosure by bringing payments on the note current but did not require payment of the entire note. Holding the law constitutional the court stated:

We find no impairment of the contract clause... An obligor on a note must still pay the principal and interest... The beneficiary is deprived of his right to insist on payment of the entire debt... However,... [t]his modification does not reduce the value of a beneficiary's note or the security ensuring payment in any perceptible way.⁹

The loss of the right to seek forfeiture here is similar to the loss of the bank's right to accelerate payment on a note when a buyer is in default. Tanner may still collect his actual damages. But the legislature has expressed its view that public policy is not advanced by allowing him also to collect the discretionary remedy of forfeiture.

⁷ Veach v. Meyers Real Estate, Inc., 599 P.2d 746, 748-49 (Alaska 1979); Winn v. Mannhalter, 708 P.2d 444, 452 (Alaska 1985).

⁸ Id.

⁹ 585 P.2d. 561-62.

OTHER CLAIMS

The plaintiff alleges other constitutional infirmities. He claims that the statute takes his property without fair compensation.¹⁰ He argues that the statute denies him substantive due process of law.¹¹ And he asserts that the statute violates the equal protection clause of Alaska's constitution by treating realtors who ignored the dual agency law different from those who complied.¹²

But, each challenge rests on the premise that the retroactive statute deprives him of a substantial right. Because, as discussed above, unvested punitive or equitable damages are not a substantial right, these remaining challenges must fail.

Evans, supra, holds that a retroactive statute limiting a claim for unvested punitive damages is not a taking. Tanner's due process and equal protection claims require the court to balance the legitimate public policy objective of the statute against the injury caused by the law.¹³ The Alaska Supreme Court defers to the legislature in making policy regarding punitive and other equitable damages.¹⁴ The legislature determined that the dual agency statute was flawed and that collection of punitive damages and commissions would cause severe economic harm. The court may not substitute its judgment for that policy. Tanner's side of the equation does not outweigh that expression of policy because the statute does not impair any vested economic rights.

¹⁰ "Private property shall not be taken or damaged for public use without just compensation." Alaska Const. art. I, sec. 18.

¹¹ "No person shall be deprived of life, liberty, or property, without due process of law." Alaska Const. art. I, sec. 7.

¹² "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law." Alaska Const. art. I sec. 1.

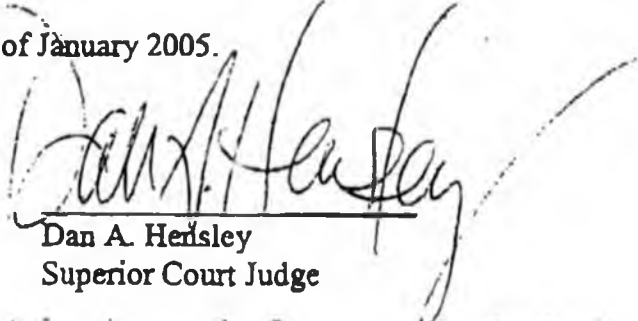
¹³ See, Anderson v. State ex rel Berling Sea Fisherman's Assoc. 78 P.3d 710, 716 (Alaska 2003), and Wilson v. Municipality of Anchorage. 669 P.2d 569, 572 (Alaska 1983).

¹⁴ Evans, supra., and Anderson, supra.

CONCLUSION

The defendants' motion to dismiss the plaintiff's claims for punitive damages and forfeiture of commissions is GRANTED.

Dated at Anchorage, Alaska this 24th day of January 2005.



Dan A. Hersley
Superior Court Judge

I certify that on January 24, 2005 a copy was mailed to: Trickey, Freeman, Wagstaff, Sandberg, Earnhart, Horetski



Nancy M. McKewin, Judicial Assistant

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March 8, 2005

The Honorable Ralph Seekins, Chair
Senate Judiciary Committee
Alaska Legislature
Juneau, Alaska

Re: **Constitutionality of Senate Bill 105**

Dear Chairman Seekins and Members of the Senate Judiciary Committee:

Senate Bill 105 makes retroactive legislation passed in 2003, which made pilots exempt from overtime. Senate Bill 105 is designed to end class action lawsuits that threaten the financial viability of Alaska air carriers. In opposing this bill, the class action plaintiff lawyers have argued that Senate Bill 105 might be unconstitutional because it would affect litigation that is already pending in the courts. Despite this argument, the overwhelming weight of authority demonstrates that Senate Bill 105 is fully constitutional.

First, federal courts addressing this question have held that retroactive legislation which affects pending court cases brought under the Fair Labor Standards Act ("FLSA"), the federal counterpart of the Alaska Wage and Hour Act, are fully constitutional.

- For example, in *Baker v. GTE North Inc.*, 110 F.3d 28, 30 (7th Cir. 1997), a group of employees sued for unpaid overtime under the FLSA. The employees won in the trial court and obtained a judgment for time they spent traveling to the jobsite. While on appeal, Congress retroactively amended the FLSA so that the employees did not have to be paid for their travel time. The Seventh Circuit held that the amendment was constitutional and dismissed the employees' lawsuit.
- Other federal decisions have also held that retroactive amendments to the FLSA are constitutional. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 261-62 (2nd Cir. 1948); *Seese v. Bethlehem Steel Co., Shipbuilding Div.*, 168 F.2d 58, 65 (4th Cir. 1948); *Austin v. City of Bisbee, Arizona*, 855 F.2d 1496, 1436 (9th Cir. 1988).
- The United States Supreme Court has held that "the constitutional impediments to retroactive civil legislation are now modest." *Landgraf v. USI Film Prods.*, 511 U.S.

[29098-0001-000000/AA050670.011]

March 8, 2005
Page 2

244, 272 (1994). All that is required for retroactive legislation to be constitutional is that "retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guarantee Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Second, the Alaska Supreme Court is likely to rule that Senate Bill 105 is constitutional:

- The Alaska Supreme Court follows federal law in determining whether retroactive legislation is constitutional. *See Norton v. Alcoholic Control Bd.*, 695 P.2d 1090, n.4-n.6 (Alaska 1985). Therefore, it would likely follow the federal decisions cited above.
- In 2003, the Alaska Legislature passed a retroactivity amendment to the Alaska Wage and Hour Act which limited the amount of unpaid overtime an employee could receive. The Alaska Attorney General issued an opinion that the legislation was constitutional. 2003 Informal Op. Att'y Gen. No. 883-03-0153 (June 9, 2003).
- In *Fairbanks North Star Borough v. State*, 753 P.2d 1158, 1159 (Alaska 1988), the case had already been litigated to the Alaska Supreme Court and was on appeal for a second time before the Alaska Legislature passed retroactive legislation. The Alaska Supreme Court applied the retroactive legislation to the case.

In sum, there is no constitutional impediment to the passage of Senate Bill 105.

Sincerely,



Thomas M. Daniel

TMD:sc