

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIAN GILMER; ANTHONY ROGERS; DELORIS
WILKINS; JERRY WILLIAMS and RAYMOND
ROBBINS,

Plaintiffs,

v.

ALAMEDA-CONTRA COSTA TRANSIT
DISTRICT,

Defendant.

No. C 08-05186 CW
ORDER ON CROSS-
MOTIONS FOR
SUMMARY JUDGMENT

_____ /

This is a Fair Labor Standards Act case. Plaintiffs are a group of bus drivers employed by Defendant, Alameda-Contra Costa Transit District. Plaintiffs move for summary judgment, arguing that Defendant violated § 7 the Fair Labor Standards Act by failing to pay Plaintiffs one and one-half times their hourly rate as overtime compensation for "start-end" and "split-shift" travel time.¹ Defendant cross-moves for summary judgment, arguing that this travel time is not compensable and that Plaintiffs' claims should be dismissed under the Motor Carrier Act exemption to the

¹Plaintiffs have decided not to pursue their claim for "foreign division" travel time.

1 FLSA. 29 U.S.C. § 213(b). The motions were heard on November 12,
2 2009. Having considered oral argument and all of the papers filed
3 by the parties, the Court grants Plaintiffs' motion in part and
4 denies it in part and denies Defendant's motion.

5 BACKGROUND

6 Defendant operates a number of bus routes throughout Alameda
7 and Contra Costa counties. Routes are assigned on a seniority
8 basis through periodic sign-ups by bus drivers.

9 Bus drivers' terms of employment and pay are set forth in a
10 collective bargaining agreement (CBA) entered into by Defendant and
11 the Amalgamated Transit Union, Local 192, AFL-CIO. Drivers do not
12 submit time cards or punch time clocks to keep track of their hours
13 worked. However, the time drivers spend driving buses is tracked
14 by an electronic system called SATCOM. Skowbow Decl. at ¶ 8.
15 Drivers are guaranteed payment for at least eight hours of work for
16 every day that they work, even if they work less than eight hours
17 on a given day. Monrad Decl., Exh. 13, CBA § 59.

18 Plaintiffs define start-end travel as the time spent returning
19 from the ending point of a daily assignment back to the starting
20 point.² Section 54.01 of the CBA defines start-end time as
21 resulting from drivers "reporting for duty or checking in at the
22 home terminal or at some other place differing from the relief
23 point by reasons of the District's requirement to do so." Monrad
24 Decl., Exh. 13, CBA § 54.01. If drivers' shifts end at a different
25 locations than where they began, irrespective of whether they

26
27 ²"Start-end" time could also be thought of as "return-to-
start" time.

1 actually return to their starting point at the end of the day, they
2 are paid for their time based on the "scheduled running time" that
3 it would take public transit (i.e. a different bus or BART) to
4 return to the starting point. Skowbo Decl. ¶ 21. All ending
5 points are located near bus stops or BART stations. The "scheduled
6 running time" is the time published by Defendant or BART that it
7 takes for public transit to travel to a location during peak travel
8 times, which are the morning and evening rush hours. Id. at ¶ 20.
9 It does not include time spent walking to the bus stop or BART
10 station, waiting for the bus or BART or transferring between busses
11 or BART trains.

12 Plaintiffs define split-shift travel as the time it takes them
13 to travel between the two parts of a "split-run," where the ending
14 point of the first part of the run differs from the starting point
15 of the second part of the run. Section 54.02 of the CBA defines
16 split-shift travel as travel resulting from "unpaid breaks in split
17 runs where the second part of the run picks up at a point different
18 from where the first part leaves off." Monrad Decl., Exh. 13, CBA
19 § 54.02. When the break between parts is sixty minutes or less, it
20 is paid as regular time worked, including any time spent in travel.
21 Id. at § 62. Plaintiffs' claims regarding split-shift travel refer
22 to travel between the ending point of the first part of the run and
23 the starting point of the second part of the run, when the break
24 between the two parts is more than sixty minutes. Drivers are paid
25 straight time rates for their "scheduled running time" between
26 points in this situation. About twenty-five percent of all
27 drivers' runs involve split-runs with breaks in excess of sixty
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1 minutes. Skowbo Decl. at ¶ 7.

2 Defendant does not dictate how drivers should spend their time
3 between shifts or how they should travel between the ending point
4 of the first part and the starting point of the second part.

5 Skowbo Decl. at ¶ 24.

6 Prior to a June 11, 2008 contract modification, drivers were
7 paid for start-end travel time and split-shift travel time (if
8 their breaks between shifts were greater than sixty minutes) at
9 straight time based on the "scheduled running time of the service
10 then available." Kelly Decl. at ¶ 3. On this date, the CBA was
11 modified to provide that travel time would be paid at straight time
12 "except when such travel causes a driver's total work time to
13 exceed 8 hours per day or 40 hours per week, in which case such
14 overtime travel shall be compensated at straight time, plus 15% as
15 an overtime premium." Monrad Decl., Exh. 13, CBA § 54.01.

16 Since the June 11 modification, Defendant has paid Plaintiffs
17 the fifteen percent overtime premium for start-end travel.
18 However, Plaintiffs argue that they should receive time and one-
19 half overtime for the "scheduled running time" of start-end travel
20 performed in excess of eight hours per day or forty hours per week.

21 With respect to split-shift travel with a break of greater
22 than sixty minutes, Plaintiffs allege that, despite the June 11
23 modification, Defendant pays for this time only at straight time
24 rates and only for "scheduled running time," even if that time is
25 incurred as overtime. Plaintiffs argue that they should receive
26 overtime rates for the "actual running time" of split-shift travel
27 incurred in excess of eight hours in one day or forty hours in one

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1 week.

2 LEGAL STANDARD

3 Summary judgment is properly granted when no genuine and
4 disputed issues of material fact remain, and when, viewing the
5 evidence most favorably to the non-moving party, the movant is
6 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
7 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
8 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
9 1987). The parties appear to agree on the facts as to the manner
10 in which pay is calculated.

11 DISCUSSION

12 The FLSA requires that employers pay covered employees at
13 least the federal minimum wage for all hours worked, and time and
14 one-half for all hours worked in excess of forty hours in a single
15 work week. 29 U.S.C. §§ 206(a)(1), 207(a)(1). "Work" is "physical
16 or mental exertion (whether burdensome or not) controlled or
17 required by the employer and pursued necessarily and primarily for
18 the benefit of the employer." See Tenn. Coal, Iron & R. Co. v.
19 Muscoda Local No. 123, 321 U.S. 590, 598 (1944). The term "work"
20 includes even non-exertional actions. See Armour & Co. v. Wantock,
21 323 U.S. 126, 133 (1944) (noting that even "exertion" is not the
22 sine qua non of "work" because "an employer . . . may hire a man to
23 do nothing, or to do nothing but wait for something to happen").

24 By contrast, "[p]eriods during which an employee is completely
25 relieved from duty and which are long enough to enable him to use
26 the time effectively for his own purposes are not hours worked."
27 29 C.F.R. § 785.16. Each case is fact-specific: "Whether the time

1 is long enough to enable him to use the time effectively for his
2 own purposes depends upon all the facts and circumstances of the
3 case." Id.

4 The Portal-to-Portal Act (Portal Act) amended the FLSA to
5 exclude from FLSA coverage "walking, riding, or traveling to and
6 from the actual place of performance of the principal activity or
7 activities which such employee is employed to perform," as well as
8 "activities which are preliminary to or postliminary to said
9 principal activity or activities," where such "traveling" or
10 "activities" "occur either prior to the time on any particular
11 workday at which such employee commences or subsequent to the time
12 on any particular workday at which he ceases, such principal
13 activity or activities." 29 U.S.C. § 254(a). The Supreme Court
14 has held that "activities performed either before or after the
15 regular work shift . . . are compensable . . . if those activities
16 are an integral and indispensable part of the principal activities
17 for which [the employees] are employed." Steiner v. Mitchell, 350
18 U.S. 247, 256 (1956).

19 The Portal Act contains an exception to § 254(a):

20 Notwithstanding the provisions of subsection (a) of this
21 section which relieve an employer from liability and
22 punishment with respect to any activity, the employer
shall not be so relieved if such activity is compensable
by either--

23 (1) an express provision of a written or nonwritten
contract in effect, at the time of such activity,
24 between such employee, his agent, or
collective-bargaining representative and his
employer; or

25 (2) a custom or practice in effect, at the time of
26 such activity, at the establishment or other place
where such employee is employed, covering such
27 activity, not inconsistent with a written or
nonwritten contract, in effect at the time of such

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1 activity, between such employee, his agent, or
2 collective-bargaining representative and his
employer.

3 29 U.S.C. § 254(b). The Portal Act further states:

4 (c) Restrictions on activities compensable under
5 contract or custom

6 For the purpose of subsection (b) of this section, an
7 activity shall be considered as compensable under such
8 contract provision or such custom or practice only when
it is engaged in during the portion of the day with
respect to which it is so made compensable.

9 (d) Determinations of time employed with respect to
activities

10 [I]n determining the time for which an employer employs
11 an employee with respect to walking, riding, traveling,
or other preliminary or postliminary activities
12 described in subsection (a) of this section, there shall
be counted all that time, but only that time, during
13 which the employee engages in any such activity which is
compensable within the meaning of subsections (b) and
14 (c) of this section.

15 The initial burden of proof in an FLSA overtime case rests
16 with the plaintiff. See Anderson v. Mt. Clemens Pottery Co., 328
17 U.S. 680, 686-87. An employee seeking to recover unpaid minimum
18 wages or overtime under the FLSA "has the burden of proving that he
performed work for which he was not properly compensated."

19 Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). In
20 view of the remedial purpose of the FLSA and the employer's
21 statutory obligation "to keep proper records of wages, hours and
22 other conditions and practices of employment," this burden is not
23 to be "an impossible hurdle for the employee." Id.

24 [W]here the employer's records are inaccurate or
25 inadequate and the employee cannot offer convincing
26 substitutes . . . the solution . . . is not to penalize
the employee by denying him any recovery on the ground
27 that he is unable to prove the precise extent of
uncompensated work. Such a result would place a premium

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1 on an employer's failure to keep proper records . . . ;
2 it would allow the employer to keep the benefits of an
employee's labors without paying due compensation as
3 contemplated by the [FLSA].

4 Id. The burden then shifts to the employer to show the precise
5 number of hours worked or to present evidence sufficient to negate
6 "the reasonableness of the inference to be drawn from the
7 employee's evidence." Id. at 688. If the employer fails to make
8 such a showing, the court "may then award damages to the employee,
9 even though the result be only approximate." Id.

10 "The FLSA is construed liberally in favor of employees;
11 exemptions are to be narrowly construed against the employers
12 seeking to assert them." Cleveland v. City of Los Angeles, 420
13 F.3d 981, 988 (9th Cir. 2005) (quotation marks and citations
14 omitted). "To extend an exemption to other than those plainly and
15 unmistakably within its terms and spirit is to abuse the
16 interpretive process and to frustrate the announced will of the
17 people." Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir.
18 1983). "An employer who claims an exemption from the FLSA has the
19 burden of showing that the exemption applies" Id.

20 I. Evidence of Start-End and Split-Shift Travel Time

21 Defendant argues that Plaintiffs' claims fail because
22 Plaintiffs do not maintain records of the actual time they spent
23 performing start-end and split-shift travel. However, Defendant
24 maintains time records for drivers' assigned schedules, which
25 include detailed information for every scheduled run. The
26 schedules include information such as the time and place that their
27 shifts start and end, and the start-end travel time and the split-

1 shift travel time, both listed according the scheduled run times.
2 Monrad Decl., Exh. 4. They also reflect that drivers are not
3 compensated at time and one-half for start-end travel time and
4 split-shift travel time on days when they work more than eight
5 hours or weeks when they work more than forty hours. Monrad Decl.,
6 Exh. 4, 7. Determining the exact amount of travel time is an issue
7 for the damages phase of this action. The Court may enter summary
8 judgment on Defendant's liability even if actual damages cannot
9 precisely be calculated. As noted above, the Court may "award
10 damages to the employee, even though the result be only
11 approximate." Anderson, 328 U.S. at 688.

12 II. Start-End Travel Time

13 Defendant claims that start-end travel time is not compensable
14 under the Portal Act. As noted above, the Portal Act includes
15 exceptions for activities that are compensable under either an
16 express contract or a "custom or practice." 29 U.S.C. § 259(b).
17 The implementing regulations explain the significance of the
18 exceptions to the Portal Act as follows:

19 If time spent in such an activity would be time worked
20 within the meaning of the Fair Labor Standards Act if
21 the Portal Act had not been enacted, then the question
22 whether it is to be included or excluded in computing
23 hours worked under the law . . . depends on the
24 compensability of the activity under the relevant
25 contract, custom, or practice applicable to the
26 employment. . . . But where, apart from the Portal Act,
27 time spent in such an activity would not be time worked
28 within the meaning of the Fair Labor Standards Act,
although made compensable by contract, custom, or
practice, such compensability will not make it time
worked under section 4(d) of the Portal Act.

29 C.F.R. § 790.5(a). Ordinary travel time from home to work, even
prior to the enactment of the Portal Act, was not considered hours

1 worked. Anderson, 328 U.S. at 691. Moreover, § 785.34 of the
2 regulations states:

3 [29 U.S.C. § 254(b)] provides that the employer shall
4 not be relieved from liability if the activity is
5 compensable by express contract or by custom or
6 practice not inconsistent with an express contract.
7 Thus traveltime at the commencement or cessation of
8 the workday which was originally considered as working
9 time under the Fair Labor Standards Act (such as
10 underground travel in mines or walking from time clock
11 to work-bench) need not be counted as worktime unless
12 it is compensable by contract, custom or practice. If
13 compensable by express contract or by custom or
14 practice not inconsistent with an express contract,
15 such travel time must be counted in computing hours
16 worked. However, ordinary travel from home to work
17 (see § 785.35) need not be counted as hours worked
18 even if the employer agrees to pay for it.

19 Thus, the exceptions to the Portal Act do not render compensable
20 time that would not otherwise have been compensable under the FLSA.
21 29 C.F.R. § 790.7 ("[E]ven where there is a contract, custom, or
22 practice to pay for time spent in such a 'preliminary' or
23 'postliminary' activity, section 4(d) of the Portal Act does not
24 make such time hours worked under the Fair Labor Standards Act.").
25 Accordingly, Plaintiffs' start-end travel time, even if they were
26 paid for it, would not be included in computing their hours worked
27 for overtime purposes if it were considered travel from work to
28 home. Thus, the question is whether start-end travel time is
different from work-to-home commute time.

Start-end travel time results from Defendant's requirement
that drivers end certain routes in locations different from where
they started. At the end of a run, drivers are not required to
return to the starting point and they are completely free to do as
they wish. Defendant argues that it receives no further benefit

1 from those drivers after their busses reach an end-point. However,
2 Defendant benefits from being able to schedule its bus routes so
3 that end points differ from start points.

4 Plaintiffs admit that there may be "some instances" where
5 drivers finish at a location from which they can easily return home
6 without first returning to the starting point. However, most
7 drivers, especially those who have driven, walked or bicycled to
8 the starting point, must spend time returning to the starting point
9 before going home.

10 To support its argument that start-end time is not compensable
11 hours worked, Defendant relies largely on Wren v. RGIS Inventory
12 Specialists, 2009 WL 2612307 (N.D. Cal.) and Johnson v. RGIS
13 Inventory Specialists, 554 F. Supp. 2d 693 (E.D. Tex. 2007). In
14 both cases, the plaintiffs had the option of meeting at designated
15 "meet-sites" and taking employer-provided shuttles to work-sites.
16 The plaintiffs were not required to take the shuttles and could
17 commute to the work-site however they wished. The plaintiffs were
18 compensated for this time according to company custom and policy.
19 At issue was whether that travel time constituted hours worked
20 under the FLSA. In both cases, the courts held that it did not.

21 In Wren, the court concluded that
22 time spent on company-provided transportation is "normal
23 travel from home to work" and thus, is not considered
24 "work time" under the FLSA and the Portal-to-Portal Act.
25 See 29 C.F.R. § 785.45. This conclusion is supported by
26 the undisputed fact that RGIX employees are not required
27 to use company-provided transportation. Thus, this is
28 not a scenario in which employees are entitled to
compensation under the FLSA because they are "required to
report at a meeting place to receive instructions or to
perform other work there, or to pick up and to carry
tools." See 29 C.F.R. § 785.38; see also D A & S Oil

1 Well Servicing, Inc. v. Mitchell, 262 F.2d 552, 554-55
2 (10th Cir. 1958).

3 Wren, 2009 WL 2612307, at *7.

4 In Johnson, the court concluded that travel time from the
5 meet-site to the work location and back was ordinary
6 home-to-work-and-back travel and was not compensable. 554 F. Supp.
7 2d at 705. The court relied on the fact that the use of the meet-
8 site and company transportation was entirely voluntary. Id. The
9 court also noted that the plaintiff accepted the job with the
10 understanding that she would be working in diverse store locations
11 and that extensive travel was required. Id.

12 The present case is distinguishable because it does not
13 concern optional shuttle buses to work sites. Plaintiffs must
14 travel to the starting point to pick up their buses and do not seek
15 payment for that travel time. However, they are required to end
16 their runs elsewhere. Plaintiffs do not voluntarily choose to end
17 their runs at a different location from where they began. The
18 start-end travel at issue here "is not primarily undertaken for the
19 convenience of [the employees] and bears no relation whatever to
20 their needs." Tenn. Coal, 321 U.S. at 599. Instead the start-end
21 travel is compelled by the scheduling arrangements made by
22 Defendant. Absent fortuitous circumstances, the employees must
23 spend time returning to their starting point before beginning their
24 commute home. This is not normal commute time.

25 In United Transportation Union Local 1745 v. City of
26 Albuquerque, the Tenth Circuit addressed circumstances almost
27 identical to those in the instant case and concluded that start-end

1 travel time by city bus drivers is "classic commuting-to-work"
2 time. 178 F.3d 1109, 1121 (10th Cir. 1999):

3 "Ordinary home to work travel is not compensable under
4 the FLSA, regardless of whether or not the employee
5 works at a fixed location." Imada v. City of Hercules,
6 138 F.3d 1294, 1296 (9th Cir. 1998). See 29 C.F.R.
7 § 785.35 ("An employee who travels from home before his
8 regular workday and returns to his home at the end of
9 the workday is engaged in ordinary home to work travel
10 which is a normal incident of employment. This is true
11 whether he works at a fixed location or at different job
12 sites.").

13 City of Albuquerque, 178 F.3d at 1121. The court concluded, "While
14 it may be more awkward or inconvenient to arrange for
15 transportation to and from work where the employees, like the
16 drivers here, may begin or end their work day at diverse locations,
17 such awkwardness or inconvenience does not change an otherwise
18 non-compensable commute into compensable work time." Id.

19 City of Albuquerque's reliance on the legal authorities it
20 quotes is misplaced. Imada and 29 C.F.R. § 285.25 concern
21 employees who leave home and travel to various different locations
22 to begin their work day. They do not address the situation in
23 which employees end work at a different location from where they
24 begin work. Although City of Albuquerque discounts start-end
25 travel time as the result of mere "awkwardness or inconvenience,"
26 that time spent cannot be overlooked. The ending points are not
27 chosen for the convenience of the employees. Rather, arranging an
28 ending point different from a starting point is "required by the
employer and pursued necessarily and primarily for the benefit of
the employer." Tenn. Coal, 321 U.S. at 598.

In sum, the Court concludes that start-end travel time is

1 compensable under the FLSA. Plaintiffs seek overtime compensation
2 for start-end travel time calculated on "scheduled running time."

3 As noted above, section 4(d) of the Portal Act provides:

4 [I]n determining the time for which an employer employs an
5 employee with respect to walking, riding, traveling, or
6 other preliminary or postliminary activities described in
7 subsection (a) of this section, there shall be counted all
8 that time, but only that time, during which the employee
9 engages in any such activity which is compensable within the
10 meaning of [the contract/custom exception to the Portal
11 Act].

12 The Department of Labor regulation implementing this provision
13 notes that "only the amount of time allowed by the contract or
14 under the custom or practice is required to be counted. If, for
15 example the time allowed is 15 minutes but the activity takes
16 twenty-five minutes, the time to be added to other working time
17 would be limited to 15 minutes." 29 C.F.R. § 785.9(a). Section
18 54.01 of the CBA provides that pay for start-end travel time "shall
19 be computed on the scheduled running time of the services then
20 available." Accordingly, Plaintiffs' start-end travel time,
21 according to the scheduled running time, must be counted as hours
22 worked when calculating their overtime rate. Therefore, the Court
23 grants Plaintiffs' motion for summary judgment and denies
24 Defendant's motion for summary judgment on this issue.

25 II. Split-Shift Travel Time

26 Defendant does not contend that split-shift travel time is
27 excepted from FLSA coverage by the Portal Act. Nevertheless,
28 Defendant argues that such time is not statutorily compensable.
Both parties rely on City of Albuquerque for support. Although, as
discussed above, the court there held that start-end travel time

1 was non-compensable, it also concluded that split-shift travel time
2 was compensable. City of Albuquerque, 178 F.3d at 1119. The court
3 concluded:

4 We believe there is a meaningful distinction between
5 time spent shuttling to or from a relief point, where a
6 working shift just ended or is about to begin, and the
7 remainder of the drivers' split shift periods, during
8 which they have an extended block of time in which to
9 pursue, as most testified they do, purely personal
10 pursuits. While shuttling to or from a relief point,
11 the drivers are not free to do whatever they wish --
12 they must spend that time traveling to or from a
13 location dictated by the City, and situated to serve the
14 City's need to provide an efficient and useful bus
15 transportation system. They travel to and from such
16 points as a necessary part of their principal activity
17 of driving particular bus routes for the City.

18 Id. Defendant argues that City of Albuquerque is distinguishable
19 because the plaintiffs in that case were required to take a city
20 operated shuttle between the end point of their first shift and the
21 beginning point of their second shift. However, nothing in the
22 court's reasoning relies on this fact. Although drivers there and
23 here are free to use the time between the first and second run as
24 they wish, they "must get to and from diverse relief points if they
25 are to perform their principal activity of driving the particular
26 bus route assigned them." Id. at 1120 (emphasis in original).
27 Thus, the split-shift travel time is "integral and indispensable"
28 to a "principal activity." IBP, Inc. v. Alvarez, 546 U.S. 34, 33
(2006). The fact that the entire split-shift period is not
compensable "does not mean that all activity related to that
period, including any associated travel, should be treated the
same." City of Albuquerque, 178 F.3d at 1120. Therefore, split-
shift travel time is compensable under the FLSA.

1 Because split-shift travel time constitutes a part of the
2 drivers' "principal activity" and is not excepted by the Portal
3 Act, the amount of split-shift travel time that must be counted as
4 hours worked is the actual time spent in split-shift travel, not
5 the "scheduled running time" of the services then available. Under
6 the FLSA, all time during which the employee was "suffer[ed] or
7 permit[ted]" to work are included as hours worked. 29 U.S.C.
8 § 203(g). Therefore, the Court concludes that the amount of split-
9 shift travel time which counts toward the drivers' weekly hours
10 worked must be calculated using the amount of time it would
11 actually take drivers to travel directly from the end point of
12 their first shift to the beginning point of their second shift.
13 Accordingly, the Court grants Plaintiffs' motion for summary
14 judgment and denies Defendant's motion for summary judgment on this
15 issue.

16 III. De Minimis Doctrine

17 Defendant argues that Plaintiffs' split-shift travel claim
18 should be dismissed pursuant to the de minimis doctrine. The Court
19 disagrees.

20 "The de minimis rule is concerned with the practical
21 administrative difficulty of recording small amounts of time for
22 payroll purposes." Lindow v. United States, 738 F.2d 1057, 1062
23 (9th Cir. 1984) The de minimis rule applies

24 only where there are uncertain and indefinite periods of
25 time involved of a few seconds or minutes duration, and
26 where the failure to count such time is due to
27 considerations justified by industrial realities. An
28 employer may not arbitrarily fail to count as hours
worked any part, however small, of the employee's fixed
or regular working time or practically ascertainable

1 period of time he is regularly required to spend on
2 duties assigned to him.

3 29 C.F.R. § 785.47. "Employers, therefore, must compensate
4 employees for even small amounts of daily time unless that time is
5 so minuscule that it cannot, as an administrative matter, be
6 recorded for payroll purposes." Lindow, 738 F.2d at 1062-63. In
7 addition to the practical administrative difficulty of recording
8 the additional time, courts also consider the aggregate amount of
9 compensable time and the regularity of the additional work. Id. at
10 1063. The burden is on the employer to show that the time consumed
11 by the activity is de minimis. Rutti v. Lojack Corp., Inc., 578
12 F.3d 1084, 1095 n.11 (2009).

13 Defendant argues that Plaintiffs' claim for split-shift
14 compensation "averages out to significantly less than a minute per
15 day per driver." Motion at 21. Defendant relies on a ninety-six
16 week period, from December 2, 2007 to September 29, 2009, for this
17 calculation.³ Plaintiff objects to this ninety-six week period as
18 an unrepresentative sample.⁴ It is not clear which weeks
19 Plaintiffs would have preferred to analyze because they have not
20 presented a counter-argument based on different data. This sample

21
22 ³Although Plaintiffs claim damages from August 7, 2006 to the
23 present, Defendant provided ninety-six weeks worth of data (from
24 December 2, 2007 to September 29, 2009) to Plaintiffs during
discovery. At the hearing on these motions, Defendant claimed that
it does not keep time records going back further than December 2,
2007.

25 ⁴Plaintiffs object to the evidence relied upon by Defendant to
26 make its de minimis arguments -- the declarations of Sandra Lewis-
27 Williams and Phillip Alman. The Court overrules this objection
because the declarations are reliable and do not violate Federal
Rules of Civil Procedure 26 and 37.

1 covers a large portion of the entire period of claimed harm, which
2 began on August 7, 2006 and continues to the present. Because
3 Plaintiffs have not presented evidence to the contrary, the Court
4 will use the data from these ninety-six weeks.

5 Over this time period, of the five named Plaintiffs, one
6 experienced no instances of split-shift travel during any week in
7 which he worked more than forty hours, one experienced it in one
8 week, two experienced it in four weeks and two experienced it in
9 twelve weeks. Lewis-Williams Decl. at 3-4. Defendant asserts that
10 named Plaintiffs' overtime split-shift travel time averages to less
11 than thirty seconds of compensation per day. Id. at 5. Defendant
12 arrived at this daily average by adding the split-shift overtime
13 hours incurred by all five named Plaintiffs in the ninety-six week
14 period, and dividing those hours by the total number of hours
15 worked by all named Plaintiffs in those ninety-six weeks.
16 Defendant then divided the average weekly minutes by five to get
17 the average daily minutes per Plaintiff.⁵

18 In Lindow, the Ninth Circuit noted that "most courts have
19 found daily periods of approximately 10 minutes de minimis even
20 though otherwise compensable." Lindow, 738 F.2d at 1062. However,
21 the court also stated, "There is no precise amount of time that may
22 be denied compensation as de minimis . . . No rigid rule can be
23 applied with mathematical certainty." 738 F.2d at 1062.

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25 ⁵Defendant also performed an analysis in which it took a
26 random sample of fifty drivers from a list of 1,338 prospective
27 class members and concluded that the average split-shift travel
time per day subject to overtime pay was one minute and forty-four
seconds. Allman Decl. at 5.

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1 Here, although Plaintiffs' daily claims over a ninety-six week
2 period constitute a small portion of time, it is misleading to
3 focus on daily averages. For instance, Plaintiff Gilmer worked
4 overtime twelve weeks out of ninety-six, counting his split-shift
5 travel time. In those weeks, he worked overtime from forty-seven
6 to one-hundred-five minutes. Lewis Williams Decl. at 3. These
7 amounts are not insubstantial. The total for the twelve weeks is
8 797 minutes.⁶ However, divided into minutes per day over ninety-
9 six weeks, this amounts to approximately one minute and forty
10 seconds of uncompensated overtime worked per day.

11 Courts allow plaintiffs to aggregate their overtime claims so
12 that courts may grant "relief for claims that might have been
13 minimal on a daily basis but, when aggregated, amounted to a
14 substantial claim." Lindow, 738 F.2d at 1063. The Ninth Circuit
15 noted, "We would promote capricious and unfair results, for
16 example, by compensating one worker \$50 for one week's work while
17 denying the same relief to another worker who earned \$1 a week for
18 50 weeks." Id. Thus, aggregation is not designed to be used as a
19 tool for defendants to dilute plaintiffs' claims. Doing so would
20 conflict with the remedial purposes of the FLSA. Anderson, 328
21 U.S. at 687.

22 Although the amount of overtime Plaintiffs seek is not large
23 in the scheme of a work-day, it does not approach the realm of
24 "split second absurdities" against which the Supreme Court
25 cautions. Id. at 692. Accordingly, the Court concludes that

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27 ⁶Defendant's expert incorrectly calculated that these minutes
totalled 793. Lewis-Williams Decl. at 3.

1 Defendant has not carried its burden to prove that Plaintiffs'
2 overtime claims for split-shift travel time are de minimis.

3 IV. Willfulness and Liquidated Damages

4 A. Willfulness

5 Under the FLSA, claims for unpaid compensation are typically
6 subject to a two-year statute of limitations. 29 U.S.C. § 255(a).
7 However, the limitations period may be extended to three years for
8 a cause of action "arising out of a willful violation" of the
9 statute. Id. "A violation of the FLSA is willful if the employer
10 'knew or showed reckless disregard for the matter of whether its
11 conduct was prohibited by the [FLSA].'" Chao v. A-1 Med. Servs.,
12 Inc., 346 F.3d 908, 918 (9th Cir. 2003) (quoting McLaughlin v.
13 Richland Shoe Co., 486 U.S. 128, 133 (1988)). "If an employer acts
14 unreasonably, but not recklessly, in determining its legal
15 obligation" under the FLSA, its action is not willful. McLaughlin,
16 486 U.S. at 135 n.13. Plaintiffs have presented enough evidence to
17 allow a jury reasonably to conclude that Defendant acted willfully
18 in its violations of the FLSA. However, the Court denies
19 Plaintiffs' motion for summary judgment on this issue because there
20 are triable issues of fact as to whether Defendant acted willfully.
21 Therefore, Plaintiffs may present evidence pertaining to
22 Defendant's liability for unpaid wages commencing three years
23 before the filing of this lawsuit.

24 B. Liquidated Damages

25 For violations of the FLSA's overtime wage provisions,
26 employers "shall be liable to the . . . employees affected in the
27 amount of . . . overtime compensation, as the case may be, and in
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1 an additional equal amount as liquidated damages." 29 U.S.C.
2 § 216(b) (1999); see Overnight Motor Transp. Co. v. Missel, 316
3 U.S. 572, 583-84 (1942) (observing that FLSA liquidated damages are
4 not penalties exacted by law but, rather, compensation to the
5 employee occasioned by the delay in receiving wages due).

6 Under 29 U.S.C. § 260, courts need not award
7 liquidated damages in every instance; instead, courts
8 retain discretion to withhold a liquidated damages
9 award, or to award less than the statutory liquidated
10 damages total, where an employer shows that, "despite
11 the failure to pay appropriate wages, the employer
12 acted in subjective 'good faith' and had objectively
13 'reasonable grounds' for believing that the acts or
14 omissions giving rise to the failure did not violate
15 the FLSA." Herman v. RSR Sec. Servs. Ltd., 172 F.3d
16 132, 142 (2d Cir. 1999); see 29 C.F.R. § 790.17(i)
17 n.110 (1999).⁷

18 Alvarez v. IBP Inc., 339 F.3d 894, 909 (9th Cir. 2003). On the
19 record presented to the Court to date, Plaintiffs have not carried
20 their burden to prove that there are no genuine issues of material
21 fact as to whether Defendant acted in good faith and had
22 objectively reasonable grounds for failing to compensate Plaintiffs
23 overtime wages for start-end and split-shift travel time.
24 Accordingly, the Court denies Plaintiffs' motion on this issue.

25 V. The Motor Carrier Act Exemption

26 Defendant contends that Plaintiffs are not covered by the

27 ⁷Section 260 provides in relevant part:

28 In any action . . . to recover unpaid minimum wages,
unpaid overtime compensation, or liquidated damages, under
the [FLSA], if the employer shows to the satisfaction of
the court that the act or omission giving rise to such
action was in good faith and that he had reasonable
grounds for believing that his act or omission was not a
violation of the [FLSA], the court may, in its sound
discretion, award no liquidated damages or award any
amount thereof

1 maximum hour and overtime provisions of the FLSA because the Motor
2 Carrier Act (MCA) exemption applies. 29 U.S.C. § 213(b)(1). The
3 MCA exemption applies to "any employee with respect to whom the
4 Secretary of Transportation has power to establish qualifications
5 and maximum hours of service pursuant to the provisions of section
6 31502 of Title 49." Id. In accord with the regulatory authority
7 of the Department of Transportation, the MCA exemption covers
8 employees of motor private carriers who engage in activities
9 affecting the safe operation of motor vehicles on public highways
10 and involve the transportation of goods in interstate commerce. 49
11 U.S.C. § 31502. For the statutory exemption under § 213(b)(1) to
12 apply, the Secretary need not actually regulate the driver or the
13 employer; it applies whenever the Secretary has the authority to
14 regulate a driver's hours and safety. Klitzke v. Steiner Corp.
15 110 F.3d 1465, 1468 (9th Cir. 1997). The MCA exemption is to be
16 construed narrowly against employers and applies only to those
17 falling "plainly and unmistakably within [the] terms and spirit" of
18 the exemption. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 396
19 (1960). Defendant bears the burden of proving the MCA exemption
20 applies. Id. at 394 n.11; Donovan v. Nekton, Inc., 703 F.2d 1148,
21 1151 (9th Cir. 1983).

22 The Secretary does not have automatic jurisdiction over all
23 drivers of an interstate carrier; jurisdiction extends only to
24 drivers who reasonably could be expected to make one of the
25 carrier's interstate runs, and that means more than a remote
26 possibility. Reich v. American Driver Service, Inc., 33 F.3d 1153,
27 1156 (9th Cir. 1994). An "employee's minor involvement in
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1 interstate commerce does not necessarily subject that employee to
2 the Secretary of Transportation's jurisdiction for an unlimited
3 period of time, and if the employee's minor involvement can be
4 characterized as de minimis, that employee may not be subject to
5 the Secretary of Transportation's jurisdiction at all." Id.
6 (internal quotation marks and citations omitted).

7 Moreover, for the reasonable expectation test to apply, "a
8 carrier's involvement in interstate commerce must be established by
9 some concrete evidence such as an actual trip in interstate
10 commerce or proof that interstate business was solicited," Rossi v.
11 Associated Limousine Svcs., 438 F. Supp. 2d 1354, 1361, 1362 (S.D.
12 Fla. 2006), and the carrier must be shown to "have engaged in
13 interstate commerce within a reasonable period of time prior to the
14 time at which jurisdiction is in question," Reich, 33 F.3d at 1156.

15 Here, the bus drivers themselves do not ever cross state
16 lines. Although Defendant contends that the MCA exception applies
17 because drivers regularly operate buses on interstate highways, it
18 does not cite any authority to support this proposition. Defendant
19 also argues that its express services to the Port of Oakland and
20 Oakland International Airport bring the drivers under the MCA
21 exemption. However, "where a carrier transports passengers between
22 an airport and another point in the state, operating wholly within
23 a state, selling no through tickets, and having no common
24 arrangements with connecting out-of-state carriers, such transport
25 represents intrastate commerce regardless of the passengers'
26 ultimate destination or intent to complete an interstate journey."
27 Morrison v. Quality Transp. Servs., Inc., 474 F. Supp. 2d 1303,

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1 1310 (S.D. Fla. 2007) (internal quotation marks omitted). Thus,
2 the fact that drivers may pick up and drop off passengers at the
3 Port of Oakland and the Oakland International Airport is irrelevant
4 absent the presence of a "through-ticketing" arrangement with an
5 interstate carrier.

6 Defendant asserts that it maintains such a "through-ticketing"
7 arrangement with Amtrak in the Capital Corridor program. However,
8 the evidence does not support Defendant's argument that its
9 arrangement with Amtrak is a true through-ticketing arrangement with
10 an interstate transportation provider. A through-ticketing
11 arrangement is one in which a passenger can use one pass for
12 transportation on Defendant's buses as well as transportation
13 between states. See United Transp. Union Local 759 v. Orange
14 Newark Elizabeth Bus Co., 111 F. Supp. 514, 518 (D. N.J. 2000).
15 Here, Defendant's contract is with the "Capitol Corridor Joint
16 Powers Authority," not with Amtrak itself. Moreover, there is no
17 single ticket or prearranged package that can be purchased for
18 travel on both Amtrak and Defendant's busses. Defendant has not
19 presented any evidence that proves that any individuals who use
20 Capitol Corridor transfers actually travel to or from another
21 state. Accordingly, Defendant has not carried its burden of
22 showing that the MCA exemption "plainly and unmistakably" applies
23 to any Plaintiff. Therefore, the Court denies Defendant's summary
24 judgment motion on this issue.

25 CONCLUSION

26 For the foregoing reasons, the Court grants in part and denies
27 in part Plaintiffs' motion for summary judgment (Docket No. 70) and
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1 denies Defendant's motion for summary judgment (Docket No. 78).
2 Start-end and split-shift travel time is compensable as hours
3 worked under the FLSA and must be included in calculating hours
4 worked for overtime purposes. Start-end travel time shall be
5 calculated based on scheduled running time; and split-shift travel
6 time shall be calculated based on actual travel time, which will be
7 determined at the damages phase of this action. At this juncture,
8 the Court concludes that Plaintiffs are not entitled, as a matter
9 of law, to liquidated damages or a finding that Defendant acted
10 willfully; rather, factual disputes must be resolved. Within two
11 weeks from the date of this order, the parties shall meet and
12 confer to discuss a plan for discovery. A further case management
13 conference will be held on April 27, 2010 at 2:00 p.m.

14 IT IS SO ORDERED.

15 Dated: 01/15/10



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17 CLAUDIA WILKEN
18 United States District Judge
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