UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 21-1125

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

Plaintiffs-Appellees,

v.

CRST EXPEDITED, INC.; CRST INTERNATIONAL, INC.,

Defendants-Appellants.

No. 21-1482

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

Plaintiffs-Appellees,

v.

CRST EXPEDITED, INC.; CRST INTERNATIONAL, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF OF THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES, SUPPORTING AFFIRMANCE

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Pursuant to Federal Rule of Appellate Procedure 29(a)(2), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellees in this case. For the reasons set forth below, the district court correctly concluded that time spent by long-haul truck drivers riding in truck sleeper berths that exceeded 8 hours per day is compensable under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201 *et seq*.

STATEMENT OF INTEREST

The Secretary administers and enforces the FLSA, 29 U.S.C. 204, 211(a), 216(c), 217, and thus has a substantial interest in ensuring that employers comply with the minimum wage requirement in section 6, 29 U.S.C. 206, and specifically that courts correctly determine what constitutes "hours worked" subject to the minimum wage requirement.[1] The Secretary also has a substantial interest in ensuring that courts correctly apply the Department of Labor's ("Department") interpretive regulations regarding what constitutes hours worked, particularly regulations concerning waiting time, sleeping time, and travel time. 29 C.F.R. 785.15-.16, .21-.22, .41.

[1] While determining "hours worked" is also relevant for compliance with the FLSA's overtime compensation obligations, 29 U.S.C. 207(a), overtime is not at issue in this case because long-haul drivers like Plaintiffs are exempt from the FLSA's overtime compensation requirements. 29 U.S.C. 213(b)(1).

STATEMENT OF THE ISSUE

Whether time spent by long-haul truck drivers riding in trucks' sleeper berths that exceeded 8 hours per day was compensable under the FLSA.

STATEMENT OF THE CASE

1. Plaintiffs are student drivers trained and employed as long-haul truck drivers by Defendants CRST Expedited, Inc. and CRST International, Inc. (collectively "CRST"), affiliated trucking companies. App. 442-43.

CRST uses a team-driving approach in which two drivers are assigned to each truck, allowing the company "to run goods all the way across the country in half the time it takes" trucks with one driver, while complying with certain driving time limitations set by the Department of Transportation ("DOT"). App. 444. DOT regulations, intended to promote highway safety by reducing accidents related to driver fatigue, limit drivers to 11 hours of driving during a 14-hour period, after spending 10 consecutive hours "off-duty" as that term is understood by DOT. 49 C.F.R. 395.3(a). While one driver is driving the truck, the other driver rides in the truck's passenger seat or sleeper berth to be on hand when it is time for the drivers to switch roles. App. 444, 494. Team driving is "very arduous" in that the driving teams are in close contact for long periods of time, with little privacy, and typically return home only once every three weeks. App. 444.

DOT regulations require drivers to log their time as (1) "driving time," (2) "on-duty time" (such as waiting for dispatch, conducting pre- and post-trip inspections, fueling, and loading or unloading), (3) "sleeper berth time," or (4) "off-duty time" (when the driver is relieved of all duties, such as meals breaks, and showers, and up to 2 hours riding in the truck's passenger seat). App. 460-61. Student drivers, such as Plaintiffs, may log substantially more than 8 hours per day of sleeper berth time. App. 461, 494, 498. For instance, one Plaintiff logged an average of 14.35 hours per day in the sleeper berth during a thirty-six day trip. App. 494.

CRST drivers are paid a certain rate per mile based on the driver's experience level. App. 461. Student drivers such as Plaintiffs earn less than their more experienced counterparts. *Id.*[2]

2. Montoya filed this lawsuit as a collective action and alleged *inter alia* that CRST violated the FLSA by failing to pay its team drivers the minimum wage for all hours worked, namely for time in excess of 8 hours per day spent riding in the trucks' sleeper berths. App. 442, 464.

[2] To the extent that CRST's piecework pay formula results in a driver earning less than $7.25 per hour for all "hours worked," CRST has violated the FLSA. 29 U.S.C. 206; 29 C.F.R. 776.5.

On September 6, 2019, the district court granted summary judgment to Plaintiffs and denied it to CRST on the sleeper berth claim, determining that time riding in trucks' sleeper berths in excess of 8 hours was compensable under the FLSA. App. 494-99. The district court relied on the Department's regulations on hours worked, reading the regulations on travel time, sleeping time, and waiting time "in connection with" each other. App. 495-97 (interpreting 29 C.F.R. 785.15-.16, .22, .41). The district court declined to defer to a 2019 opinion letter of the Department's Wage and Hour Division ("WHD"), which interpreted one of these regulations in isolation to mean that all time in a sleeper berth "is presumptively" noncompensable. App. 498 (citing U.S. Dep't of Lab., WHD, Opinion Letter FLSA2019-10, 2019 WL 3345452 (Jul. 22, 2019), at Addendum ("A-") 40-43).[3]

SUMMARY OF THE ARGUMENT

The district court correctly limited noncompensable "sleeper berth" time to 8 hours per day. Under the FLSA, compensable "hours worked" are not limited to the time an employee is actively performing his or her job duties but includes all time that is spent primarily for the employer's benefit. Consistent with hours worked principles established in Supreme Court precedent and explained in the

[3] As discussed below, WHD withdrew this opinion letter on February 19, 2021, explaining that the interpretation in the letter was inconsistent with its longstanding interpretations.

Department's hours worked regulations, when long-haul truck drivers are driving as a team, time that one driver is required to ride in the sleeper berth so that the driver is physically present and ready to take over the driving when, under DOT regulations, the other driver may no longer drive is on-duty time because it is time spent primarily for the employer's benefit. The Department regulation at 29 C.F.R. 785.41, which provides that an employee driving or required to ride in a truck is engaged in compensable work "except … when permitted to sleep in adequate facilities furnished by the employer," must be read in conjunction with 29 C.F.R. 785.22, which permits, for duty periods of 24 hours or more, the exclusion of a bona fide sleeping period of not more than 8 hours, to conclude that drivers must be compensated for time spent in a truck's sleeper berth in excess of 8 hours per day. This conclusion is consistent with the Department's longstanding position on sleeper berth time.

ARGUMENT

SLEEPER BERTH TIME IN EXCESS OF 8 HOURS PER DAY IS COMPENSABLE

A. "Hours Worked" Principles Under the FLSA

1. The FLSA requires employers to pay their employees at least the federal minimum wage of $7.25 per hour for each hour worked (subject to exceptions not relevant here). 29 U.S.C. 206. It is well-established that work time for which employees must be paid, commonly referred to as "hours worked," is not limited to

the time an employee is actively performing his or her job duties but includes all time the employee spends primarily for the employer's benefit. *See, e.g.*, *Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123*, 321 U.S. 590, 598 (1944) (requiring compensation for all time "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer"); *Skidmore v. Swift & Co.*, 323 U.S. 134, 138-39 (1944) ("Hours worked are not limited to active labor but include time given by the employee to the employer.").

Compensable hours worked includes time spent waiting if that waiting time is primarily for the benefit of the employer. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) ("[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen …. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case."). When an employee is "engaged to wait," the time is compensable. By contrast, when an employee is "wait[ing] to be engaged," the time is noncompensable. *Skidmore*, 323 U.S. at 137. Thus, in *Skidmore*, the Court explained that time firemen were required to wait overnight in a fire hall equipped with sleeping quarters, a pool table, a domino table, and a radio could be compensable, excluding sleeping and eating time, "because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do

so." *Id.* at 136, 139 (reversing the lower court's contrary conclusion and remanding). And in *Armour*, the Court concluded that time that overnight fire guards were required to wait on employer's premises equipped with sleeping quarters, cooking equipment, radios, and cards was compensable, excluding sleeping and eating time, regardless of the fact that the guards could "entertain[] themselves pretty much as they chose." 323 U.S. at 128, 133-34.

2. The Department's regulations in 29 C.F.R. Part 785 outline "the principles involved in determining what constitutes working time." 29 C.F.R. 785.1. Whether waiting time is primarily for the employer's benefit, and thus compensable, depends on the circumstances, such as the length of the wait, its predictability, any restrictions on the employee, and whether the employee can "use the time effectively for his own purposes." *Id.* at 785.15-.16 (citing *Skidmore*, 323 U.S. 134). Waiting time is compensable when "waiting is an integral part of the job." *Id.* at 785.15. Section 785.16 specifically addresses truck drivers, explaining that a driver is on duty when he must wait by or near his truck while it is loaded or watch the truck or its cargo. *Id.* at 785.16(b). Such time is compensable because the driver is engaged to wait. *Id.* However, during a longer layover period when the driver is relieved of all duties and can use the time for his

own purposes (*e.g.*, a 6-hour layover in New York City), he is off duty. *Id.* Such time is noncompensable because the driver is waiting to be engaged. *Id.*[4]

Time spent sleeping is compensable under certain conditions. 29 C.F.R. 785.20. When an employee is on duty for less than 24 hours and is permitted to sleep or engage in other personal activities when not busy, such time is compensable. *Id.* at 785.21. However, during duty periods of 24 hours or more, the employer and employee may agree to exclude from hours worked a bona fide regularly scheduled sleeping period of not more than 8 hours, provided the employer furnishes adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep *(i.e.*, at least 5 hours of sleep). *Id.* at 785.22.

The compensability of travel time depends on whether the time spent in travel is primarily for the employer's benefit. *See generally* 29 C.F.R. 785.35-.41. Where the travel is *itself* the work performed for the employer's benefit, that travel time constitutes compensable hours worked, except for bona fide sleeping and meal periods. *Id.* at 785.41. "An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is *required to ride therein* as an assistant or helper, is *working while riding*, except during bona fide meal periods or when he is

[4] For the purpose of FLSA compliance, what constitutes "on duty" and "off duty" time is determined with reference to the principles set forth in sections 785.15-.16 rather than the DOT regulations in 49 C.F.R. Part 395, which were promulgated for a different purpose and do not address compensability. *See infra* 11-12.

permitted to sleep in adequate facilities furnished by the employer." *Id.* (emphasis added).

3. WHD's Field Operations Handbook ("FOH") describes the operation of the waiting, sleeping, and travel time principles in determining truck drivers' hours worked. FOH 31b09, A-5.[5] It provides that truck sleeper berths are adequate sleeping facilities for purposes of 29 C.F.R. 785.22 and 785.41 and reads section 785.41 in the context of the sleeping time regulations at sections 785.21-.22, explaining that treating sleeper berths as adequate sleeping facilities applies only to "continuous tours of duty during trips away from home for a period of 24 hours or more." FOH 31b09(a). In contrast, for trips of less than 24 hours, all time on duty while in the truck (except bona fide meal periods) is compensable, even sleeper berth time. *Id.*

In determining whether time is on or off duty, the FOH explains that, consistent with the waiting time regulations at sections 785.12-.16, waiting or layover time will be considered noncompensable off-duty time if the driver "is completely relieved of all duties and responsibilities, is permitted to leave the truck

[5] The FOH "is an operations manual that provides [WHD] investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance …." FOH, https://www.dol.gov/agencies/whd/field-operations-handbook (last visited Mar. 23, 2022).

or temporary station to go anywhere, knows in advance that work will not resume until a specified time, and the period of layover is of sufficient length to be used effectively for the employee's own purposes." FOH 31b09(c)(1).

B. Applying Hours Worked Principles, Sleeper Berth Time in Excess of 8 Hours Per Day Is Compensable Under the FLSA

1. Applying the principles outlined above, time spent riding in trucks' sleeper berths in excess of 8 hours per day is on-duty time for the purposes of the FLSA and, thus, compensable. As the district court explained, under CRST's team driving approach, drivers were generally required to ride in the truck when not driving, confined either to the passenger seat or to the sleeper berth. App. 494. Consistent with the Supreme Court's *Armour* and *Skidmore* decisions, the time spent riding in the sleeper berth was time during which the drivers were engaged to wait because the time so spent was primarily for the benefit of CRST so that the relief driver would be physically present when the first driver's permitted driving hours expired. This time spent riding in the truck's sleeper berth was "integral to the job" and thus constituted on-duty time. *See* 29 C.F.R. 785.15; *see also Gelber v. Akal Sec., Inc.*, 14 F.4th 1279, 1281, 1284-85 (11th Cir. 2021) (air security officers' time riding on required return flights to United States without deportees, in which they could sleep, meditate, play video games, or watch TV, was compensable).

The fact that sleeper berths may contain some amenities, such as television and internet, does not render the time spent so confined any less compensable than the time in which the employees were required to wait overnight on their employer's premises in *Armour* and *Skidmore*. Passing the time by watching television or surfing the internet is the modern-day equivalent of listening to the radio or playing cards, dominoes, and pool to pass the time. *Armour*, 323 U.S. at 128; *Skidmore*, 323 U.S. at 136. Like the employees in *Armour* and *Skidmore* who were required to wait overnight on their employer's premises, the drivers were confined to a small space in a truck's sleeper berth, such that their time "even though pleasurably spent," was not necessarily "spent in the ways the [drivers] would have chosen had they been free to do so." *Skidmore*, 323 U.S. at 164; *see also Gelber*, 14 F.4th at 1281, 1285.

Attempting to refute the applicability of these hours worked principles and seminal Supreme Court cases, CRST argues that sleeper berth time is, by definition, "off-duty" time within the meaning of the DOT regulations. CRST Br. 5-6, 20, 23. However, CRST fails to explain why DOT regulations, enacted for the purpose of highway safety, would control rather than FLSA hours worked principles. Nor could it, as DOT itself recognizes that its regulations do not address what time is compensable under the FLSA. DOT, Federal Motor Carrier Safety Administration ("FMCSA"), Hours of Service of Drivers; Driver Rest and

Sleep for Safe Operations, 65 Fed. Reg. 25,540, 25,564-65 (May 2, 2000 Notice of Proposed Rulemaking) ("Some motor carriers, drivers, and enforcement officials have not understood the differences between the current FMCSA and WHD definitions of duty time, off duty time, interstate commerce, and record keeping methods. The FMCSA believes some motor carriers that have not understood the difference may miscalculate the minimum wage, placing the motor carrier in violation of the FLSA. The driver may lose pay because the driver recorded time based upon the current FMCSA regulations and guidance rather than using WHD regulations and guidance for duty time."); DOT, FMCSA, Guidance Q&A, Question 1, *available at* http://www.fmcsa.dot.gov/regulations/title49/section/395.2 (last visited Mar. 23, 2022) (DOT disclaimer that its regulations "do not address questions of pay"); *see Julian v. Swift Transp. Co.*, 360 F. Supp. 3d 932, 944 (D. Ariz. 2018) ("[T]he DOT regulations provide no meaningful guidance regarding matters of compensation."); *Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2018 WL 5118449, at *2-4 (W.D. Ark. Oct. 19, 2018) (rejecting contention that DOT regulations provide the applicable definitions for on- and off-duty time for FLSA purposes); *Haworth v. New Prime, Inc.*, 448 F. Supp. 3d 1060, 1067-68 (W.D. Mo. 2020) (same). To the extent that CRST relies on *Petrone v. Werner Enters., Inc.*, Nos. 8:11CV301, 8:12CV307, 2017 WL 510884, at *8-9 (D. Neb. Feb. 2, 2017), this case suffers the same fault as CRST's argument because it

fails to recognize that DOT regulations do not govern compensability under the FLSA.

In a similar vein, CRST attempts to discount the relevancy of the Supreme Court's *Armour* and *Skidmore* decisions by arguing that the drivers were not being called upon to work during their sleeper berth time – a point Plaintiffs contest, Pls.' Br. 5, 48 – whereas the employees in *Armour* and *Skidmore* were occasionally called upon to work during their long overnight shifts. CRST Br. 21-22, 26. While *Armour* and *Skidmore* did present factual scenarios in which employees could be called to work during their idle overnight shifts, the Supreme Court did not make this a prerequisite for time to be deemed compensable. Indeed, the Court in *Armour* explained that an employer may, if it chooses, hire an employee "*to do nothing*, *or* to do nothing but wait for something to happen." *Armour*, 323 U.S. at 133 (emphasis added); *see also Gelber*, 14 F.4th at 1285 (air securities officers did not have duties to perform while riding on return flight).

The relevant inquiry is whether "time is spent predominantly for the employer's benefit or for the employee's." *Armour*, 323 U.S. at 133; *Gelber*, 14 F.4th at 1281. A trucking company may hire a second driver to do nothing other than travel with the truck to be physically present to take over driving after the first driver has driven a certain number of hours. Hiring the second driver and requiring him to travel with the truck provides a significant benefit to the trucking company

in that it can deliver its load more quickly than its competitors who do not use a team-driving model. Indeed, it is difficult to see how the company is not the primary beneficiary of this time (excluding up to 8 hours of bona fide sleeping time as well as meal times) as it allows the driver to be ready to take over driving when the other driver is no longer allowed to do so. The fact that a driver is prohibited under DOT regulations from driving or performing other duties during this sleeper berth time does not change this analysis.

CRST cites *Owens v. Loc. No. 169, Ass'n of W. Pulp & Paper Workers*, 971 F.2d 347, 354 (9th Cir. 1992), for the proposition that courts do not focus on whether time "benefits the employer's 'business model.'" CRST Br. 24. In so doing, CRST cherry-picks language from the case, mischaracterizing the decision and its import. *Owens* cited to the Supreme Court's test in *Armour* that "time spent waiting for work is compensable if the waiting time is spent 'primarily for the benefit of the employer and his business.'" 971 F.2d at 350 (quoting *Armour*, 323 U.S. at 133). The plaintiffs in *Owens* were mechanics that were on-call after they left the job site at the end of their normal shift. *Id.* at 348. During their on-call time, they attended out-of-town sporting events, held other paid employment, travelled for pleasure, coached or attended their children's sporting events, participated in community and church activities, and visited friends and family, among other activities. *Id.* at 353. Given these particular facts, the court

concluded that employees were not engaged to wait during the on-call time. *Id.* at 354. While the court focused on the degree to which the mechanics were restricted during the on-call time, *id.*, the court described that inquiry as a factor to determine if the time is primarily for the benefit of the employer, *id.* at 350. Regardless, the restrictions placed on the mechanics were quite different from those placed on Plaintiffs, who were confined to their trucks for long periods of time. Similarly, the plaintiffs in *Birdwell v. City of Gadsen, Ala.*, 970 F.2d 802, 807 (11th Cir. 1992), and *Bright v. Hous. Nw. Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991), had considerably more latitude than Plaintiffs. In *Birdwell*, when police detectives were on-call, they could engage in their normal activities so long as they responded to calls promptly and soberly. 970 F.2d at 810. In *Bright*, the plaintiff was permitted be on call anywhere within 20-30 minutes of his worksite, including his own home, and could engage in any activities provided he remained sober. 934 F.2d at 676. None of these courts have disavowed the relevance of determining whether the employer primarily benefits from the time at issue, nor could they without falling afoul of binding Supreme Court precedent.[6]

[6] CRST's citation to *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014), CRST's Br. 24, is likewise unavailing as that case concerned the interpretation of the Portal-to-Portal Act, 29 U.S.C. 254(a), specifically whether post-shift security screenings were excludable from hours worked. It thus has no bearing on the issue presented in the instant case.

Finally, CRST argues that restrictions on drivers' activities that are inherent to being on a moving truck should not be considered in evaluating whether travel time is predominantly for the employer's or employees' benefit. CRST Br. 25-26. However, the cases CRST cites are inapposite. In *Dean v. Akal Security, Inc.*, the Fifth Circuit rejected air security officers' claim for compensation for bona fide meal periods during return flights to the United States when they were not responsible for supervising deportees (they were paid for all the flight time other than the meal periods). 3 F.4th 137, 141 (5th Cir. 2021).[7] The compensability of meal periods, which is not at issue in this case, is addressed in 29 C.F.R. 785.19, which explicitly provides that the ability to leave an employer's premises is not required for a noncompensable bona fide meal period. 29 C.F.R. 785.19(b). Likewise, *Rousseau v. Teledyne Movible Offshore, Inc.* addressed time spent by oil workers living on derrick barges for seven-day stints, largely at oil drilling sites or docked. 805 F.2d 1245, 1247 (5th Cir. 1986). Unlike the present case, *Rousseau* did not involve employees who were "working while riding," *i.e.*, travel that was itself work, pursuant to 29 C.F.R. 785.41.[8]

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[7] As noted *supra* 10, in *Gelber*, the Eleventh Circuit explained that time that air security officers spent riding on return flights to United States without deportees, in which they could sleep, meditate, play video games, or watch TV, was compensable. 14 F.4th at 1281, 1284-85.

[8] Instead, the situation in *Rousseau* involved employees residing on their employer's premises, which is addressed in 29 C.F.R. 785.23 and subject to the

2. Because the time drivers ride in the truck, including in the sleeper berth, is on-duty time and drivers are engaged in long-haul operations requiring duty periods of 24 hours or more, both sections 785.22 and 785.41 apply to determine the compensability of the sleeper berth time. 29 C.F.R. 785.22 (for duty periods of 24 hours or more, up to 8 hours per day of bona fide sleeping time may be excluded from compensable hours worked); *id.* at 785.41 (a driver "is working while riding except … when he is permitted to sleep").[9] The district court correctly read section 785.41 in tandem with section 785.22 to limit noncompensable sleeper berth time to 8 hours per day. App. 496 ("While [section] 785.41 does not cap the amount of time an employee is 'permitted to sleep,' when it is read in connection with [section] 785.22(a), a bona fide sleeping period would appear to be eight hours."); *see also Julian*, 360 F. Supp. 3d at 947-48 (interpreting section 785.41 in light of section 785.22, "is consistent with the overall statutory and regulatory scheme aimed at protecting employees' health and wellbeing" (internal citation omitted)); *Browne*, 2018 WL 5118449, at *5 (harmonizing sections 785.41 and 785.22).

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exceptions set forth in FOH 31b02 for employees residing temporarily on hard-to-reach jobsites, such as offshore drilling sites.

[9] To the extent that the drivers ever had layover periods of sufficient length in which they were completely received of all duties such that their duty periods were less than 24 hours, all sleeper berth time during such duty periods is compensable. 29 C.F.R. 785.21, .41.

CRST's characterization of section 785.41 as a trucking-specific regulation that "trumps" section 785.22, which it describes as a more general regulation, CRST Br. 29-31, is misplaced. The Department's Part 785 regulations should be read wholistically. *Jay v. Boyd*, 351 U.S. 345, 360 (1956) (explaining that a body of regulations must be read together giving effect, if possible, to all of its provisions); *McCuin v. Sec'y of HHS*, 817 F.2d 161, 168 (1st Cir. 1987) (same). Section 785.41 concerns work performed while travelling but does not address sleeping time generally, and therefore does not alter the generally applicable guidance on sleeping time set out at sections 785.21 and 785.22. The regulations can and should be read together.

3. The cases in which courts have declined to limit noncompensable sleeper berth time, on which CRST relies, failed to address relevant portions of the Department's regulations and were wrongly decided. In *Nance v. May Trucking Co.*, No. 3:12-cv-01655, 2014 WL 199136, at *6-7 (D. Or. Jan. 15, 2014), *aff'd in relevant part*, 685 F. App'x 602 (9th Cir. 2017) (unpublished), the district court concluded, without discussing or even citing the on-duty and off-duty regulations at sections 785.15-.16, that the trainee drivers were not on duty when riding in the sleeper berth. The court also erred in its analysis of section 785.41 by failing to take account of section 785.22. Instead, the court considered only section 785.21 and summarily dismissed that regulation's relevance based on its flawed

conclusion that the plaintiffs were not on duty when riding in the sleeper berth (plaintiffs appeared not to have even argued that section 785.22 was relevant). In an unpublished decision, the Ninth Circuit affirmed the district court's decision on the sleeper berth issue, but only cited to section 785.41, not sections 785.15-.16 or .21-.22. 685 F. App'x at 605. Given the brevity of its analysis, it is not clear if the Ninth Circuit considered the other relevant regulations beyond section 785.41. Similarly, in *Petrone*, the district court failed to consider the Department's regulations at 785.15-.16 to determine whether, under hours worked principles, the plaintiffs were on or off duty, instead assuming that the DOT regulations determined this issue. 2017 WL 510884, at *5-9.[10]

C. Requiring Compensation for Sleeper Berth Time in Excess of 8 Hours Per Day Is Consistent with WHD's Longstanding Prior Interpretation

1. WHD has, for nearly six decades, interpreted the FLSA to require compensation for sleeper berth time in excess of 8 hours per day. As recently as February 2021, WHD reiterated this longstanding position. Neither short-lived recent guidance, nor early guidance on hours worked undermines WHD's longstanding and current position.

[10] *Kennedy v. LTI Trucking Servs., Inc.*, No. 4:18CV230, 2019 WL 4394539, at *5 (E.D. Mo. Sept. 13, 2019), and *Blodgett v. FAF, Inc.*, 446 F. Supp. 3d 320, 328-29 (E.D. Tenn. 2020), are inapposite because both involved solo drivers who, because they were not working as part of a team, were not "riding" while in the sleeper berth and had the ability to leave their trucks and pursue activities of their own choosing.

2. From 1961 to 2019, WHD consistently took the position that section 785.41 must be read in conjunction with the sleeping time regulations in sections 785.21-.22, thus limiting the amount of excludable sleeper berth time for duty periods of 24 hours or more to 8 hours each day.

In 1961, the FOH clarified that for duty periods of 24 hours or more, sleeper berths would be regarded as adequate sleeping facilities under section 785.41 and for duty periods of less than 24 hours, sleeper berth time could not be excluded from hours worked, consistent with section 785.21. FOH Insert No. 483 (Mar. 23, 1961), A-29. In three separate opinion letters issued later in the 1960s, WHD made explicit that section 785.41 must be read in light of the sleeping time regulations at sections 785.21-.22. U.S. Dep't of Lab., WHD, Opinion Letter FLSA-213 (Jan. 6, 1964), A-30; U.S. Dep't of Lab., WHD, Opinion Letter FLSA-214 (Feb. 17, 1964), A-31; U.S. Dep't of Lab., WHD, Opinion Letter FLSA-235 (Nov. 18, 1966), A-32. The latter two of these letters explicitly limited excludable sleeper berth time for trips of 24 hours or more to no more than 8 hours per day. FLSA-214; FLSA-235.

In 1978 and 1979 opinion letters, WHD took the same position – that sections 785.41 and 785.22 must be read together and therefore a maximum of 8 hours per day of sleeper berth time is excludable from hours worked for on-duty periods of 24 hours or more – for drivers employed by mail haul contractors under

both the FLSA and Service Contract Act ("SCA"). U.S. Dep't of Lab., WHD, Opinion Letter SCA-117 (Apr. 26, 1978), A-33-34; U.S. Dep't of Lab., WHD, Opinion Letter SCA-118 (June 22, 1979), A-35-39.[11] As the 1979 letter explained, when considering section 785.41, "the limitations of sections 785.21 and 785.22 obviously apply, since section 785.41 does not alter the general rules on sleep time." SCA-118. This is the case because "a long-haul driver in a truck cab is considered to be on duty under [Part] 785 regardless of whether he is driving, sitting beside the driver, or in the sleeper berth." *Id.* The position set forth in these letters remained WHD's enforcement position for decades until 2019. *See, e.g.*, *HHMT, Inc.*, No. 2006-SCA-27, 2010 WL 3894596 (OALJ Aug. 4, 2010); *Joy Don, Inc.*, No. SCA-673-684 (OALJ Dec. 28, 1978), A-45-59.

3. In 2019, WHD issued an opinion letter in which it adopted the position that, under section 785.41, "the time drivers are relieved of all duties and permitted to sleep in a sleeper berth is presumptively non-working time that is not compensable" and rescinded its five prior opinion letters reaching the opposite

[11] The SCA sets wage requirements for certain federal service contracts and incorporates FLSA principles for determining compensable hours worked. WHD enforcement matters involving the application of Part 785 principles to sleeper berth time have arisen more frequently in SCA cases because the applicable required wage in SCA cases is often substantially higher than the federal minimum wage of $7.25 per hour, making it more likely that the failure to account for all hours worked will result in a wage violation enforced by WHD.

conclusion (FLSA-213; FLSA-214; FLSA-235; SCA-117; SCA-118). FLSA2019-10, A-40-43. The reasoning given was that WHD had concluded that the prior, long held position was "unnecessarily burdensome for employers." *Id.*

Five courts have addressed WHD's 2019 opinion letter, including the district court here; all five have found it to be unpersuasive, not relevant, and/or not entitled to deference. App. 498-99 (finding FLSA2019-10 unpersuasive because it did not address whether its new interpretation was consistent with the Department's other regulations, it departed from WHD's prior interpretation, and "the only reason the agency provide[d] for its flip-flop is that its prior interpretation was unnecessarily burdensome for employers," which did not support deference in light of the FLSA's purpose of protecting workers); *Julian v. Swift Transp. Co.*, No. CV-16-00576, 2019 WL 10948736, at *3 (D. Ariz. Dec. 10, 2019) ("The analysis in the [FLSA2019-10] letter contains a wide variety of indications that it does not reflect the [Department's] fair and considered judgment."); *Haworth*, 448 F. Supp. 3d at 1070-71 (explaining that "the Court sees nothing in the FLSA or [Department] regulations to support the 'presumption'" in FLSA2019-10 "that sleeper-berth time in a moving truck is not compensable" and the letter's presumption ignores the waiting time regulations as well as the sleeping time regulation at section 785.22); *Sanders v. W. Express, Inc.*, No. 1:20-CW-03137, 2021 WL 2772801, at *7-8 (E.D. Wash. Feb. 11, 2021) (declining to defer

to FLSA2019-10 because its shift in policy "is both inconsistent with the purposes of the FLSA and not reflective of the agency's considered judgment"); *see also Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2020 WL 412126, at *3 (W.D. Ark. Jan. 24, 2020) (declining to decertify FLSA collective action following issuance of FLSA2019-10).

On February 19, 2021, WHD withdrew FLSA2019-10 explaining that it was "inconsistent with longstanding WHD interpretations regarding the compensability of time spent in a truck's sleeper berth," and that "[s]everal courts have declined to follow this letter, determining, among other things that it is inconsistent with the Department's regulations; unpersuasive; and not entitled to deference, in part because the letter did not adequately explain WHD's change in position." WHD, Opinion Letter Search (FLSA2019-10), A-44, *available at* https://www.dol.gov/agencies/whd/opinion-letters/search (last visited Mar. 23, 2022). It also reinstated the previously withdrawn opinion letters FLSA-213, FLSA-214, FLSA-235, SCA-117, and SCA-118. *Id.* The district court and other courts correctly declined to adopt the interpretation set forth in this short-lived guidance, in effect for only 19 months between July 2019 and February 2021 and since withdrawn.[12]

[12] That this letter was in effect for only 19 months after decades of WHD's opposite interpretation, together with the fact that the failure to account for all hours worked will result in only the very lowest paid drivers, such as the student-driver Plaintiffs, earning less than the federal minimum wage of $7.25 per hour, belies CRST's assertion that ensuring that these drivers receive the federal

4. CRST's reliance on WHD's early guidance, covering a short span of years following the passage of the FLSA in 1938, CRST Br. 32, is likewise unavailing. In 1943, WHD issued a brief press release stating that "[t]ruck drivers riding in the trucks' sleeping berths while the relief driver is at the wheel need not be compensated in accordance with the [FLSA] for time so spent," but that "all other time spent on the truck and furthering the employer's business would be considered 'hours worked' and hence compensable." U.S. Dep't of Lab., WHD, Press Release R-1933 (Feb. 15, 1943), A-13; *see also* FOH, Hours Worked, at VIII (1942 ed., rev. 1943) ("1942 FOH"), A-11 ("All time spent riding on their employer's trucks by truck drivers and relief drivers should be considered hours worked except time actually spent in the sleeping berths."); FOH 130.41 (1948 ed., rev. 1949) ("1948 FOH"), A-22 (same).

This early guidance predated WHD's 1955 adoption of regulations addressing sleeping time as a general matter, and the adoption of the 8-hour cap on excludable sleeping time when an employee is on duty for 24 hours or more.[13] The

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minimum wage for sleeper berth time in excess of 8 hours per day would "upend" the long-haul trucking industry, CRST Br. 36-38.

[13] In 1955, the Department promulgated the hours worked regulations at 29 C.F.R. Part 785 (the 1955 publication was also titled WHD Interpretive Bulletin Part 785 (Dec. 1955)), which codified and expanded on earlier guidance. The 8-hour cap on excludable sleeping time was first promulgated in 1955 at section 785.3(e)(2) and moved to section 785.22 in 1961. To the extent that WHD's earlier guidance

guidance was refined, and thereby superseded, by WHD's subsequent guidance in the 1960s and 1970s that made it increasingly clear that no more than 8 hours of sleeper berth time per day could be excluded from compensable hours worked for truck drivers on duty for 24 hours or more.[14]

Moreover, there is no evidence suggesting that this early guidance contemplated the possibility that drivers would use sleeper berths for anything other than sleeping. This is confirmed by a 1951 opinion letter in which WHD explained that, in general, all time spent by drivers in driving, riding, loading or unloading or performing other tasks constituted hours worked, with the exception of "periods which they are permitted to use for their own purposes, and during which they are relieved of all duties for the employer," such as "bona fide meal periods, and *periods spent in sleeping* in a sleeping berth or other sleeping accommodations … where such periods are of sufficient length to be used

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discussed sleeping time, it did so only on an ad hoc basis. 1942 FOH, Hours Worked, VI.E., VIII., A-9, 11; 1948 FOH 130.37-.39, .41, .44-.45, A-22-23.

[14] The two 1964 letters made explicit that the 1943 press release had been superseded by subsequent WHD guidance. FLSA-213 (section 785.41 superseded the 1943 press release); FLSA-214 (explaining that the application to drivers of section 785.22's 8-hour cap on excludable sleeping time when employee is on duty for 24 hours or more, and the corollary rule that no sleeping time can be excluded when on duty for less than 24 hours even though some time may be spent in the sleeper berth, "in effect … add[ed] limitations concerning the duration of trip and of the sleeping time to the statement" in the 1943 press release, and that the 1943 press release had been superseded by subsequent guidance).

effectively by the employee for the intended purpose." U.S. Dep't of Lab., WHD, Opinion Letter FLSA-289 (Jul. 18, 1951), A-28 (emphasis added). While not yet setting a specified limit on the number of hours spent in a sleeper berth that could be excluded from compensable hours worked, this letter clarified that only bona fide sleeping time (and meal periods) could be so excluded. Despite CRST's argument to the contrary, CRST Br. 33, the 1951 letter does not support CRST's contention that it may exclude an unlimited amount of sleeper berth time from drivers' compensable hours worked, nor that time that is not actually used for sleep can be so excluded.

Consistent with WHD's longstanding interpretation of nearly six decades, sleeper berth time in excess of 8 hours per day is compensable under the FLSA. Neither the earlier guidance it superseded, nor the 2019 opinion letter, since withdrawn, detract from the persuasiveness of WHD's long-held interpretation.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2022, I electronically filed the foregoing Brief of the Secretary of Labor as *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the First Circuit via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

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