STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
525 GOLDEN GATE AVENUE
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1989.12.07

ADDRESS REPLY TO:
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SAN FRANCISCO 94101

Legal Section

December 7, 1989

Dana D. Howells, Esq.
Musick, Peeler & Garrett
One Wilshire Blvd.
Los Angeles, CA 90017

Re: Request for Opinion on Travel Time as Hours Worked - Travel in Excess of 8 Hours in 24-Hour Period

Dear Mr. Howell:

Your letter of November 17th addressed to Mr. Aubry has been assigned to this office for response. You ask for an opinion from DLSE regarding payment for travel time.

Your letter quotes from DLSE Interpretive Bulletin No. 84-6-Rev. (dated February 21, 1984) which was issued by the Labor Commissioner in compliance with Labor Code §1198.4.

You state that your client would like an opinion as to whether they are in compliance with state standards by paying 8 hours at normal wages for days on which employees are "non-working passengers on planes or other forms of transportation for 8 or more hours."

You go on to state that: "For employees who normally work only 8 hours, the rest of the day would normally consist of commuting time, meal periods, and time away from work."

The Interpretive Bulletin which was issued by then Labor Commissioner C. Robert Simpson, Jr., and which you rely upon in reaching your conclusions, states, in pertinent part:

> "In the absence of a collective bargaining agreement covering pay for travel time, the Industrial Welfare Commission Orders require that time spent traveling during either regular working hours or in addition to regular working hours, if such travel is done pursuant to the employer's instructions, is considered work time.

> This means that extended travel time is considered hours worked even though no productive work is performed. It should also be noted that an employer in the absence of a collective bargaining agreement covering pay for travel time may establish a different rate of pay for travel beyond the normal work day, but not less than the minimum wage."

In view of this rather explicit language, it is not clear how you can conclude that "because 'an employer is not required to pay for that portion of travel time that would occur during meal periods or periods for recreational purposes, including time for sleeping and relaxation' an employer should not be obligated to pay for more than 8 hours - assuming no work is being performed while the employee is a passenger."

It is likely that you are placing undue reliance on the federal regulations which provide that one need not be paid for time outside of the "regular working hours" when no actual work is being performed. This interpretation of the Fair Labor Standards Act is obviously the result of the definition of "hours worked" under the FLSA which the U.S. Supreme Court set out in the 1944 case of Tennessee Coal Iron & Railroad Co. v. Muscoda Local No. 12, 321 U.S. 590. The High Court in that case held that employees subject to the Act must be paid for all time spent "in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer or his business."

The federal rule you quote simply reflects the fact that as a passenger one is not involved in "physical or mental exertion" and, pursuant to the above definition, need not be compensated under the federal law.

Unlike the FLSA, the Industrial Welfare Commission Orders specifically define the term "hours worked"[1/] as follows:

> "'Hours worked' means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." C.C.R. §11010(2)(G) (Emphasis added)

1/ It should be noted that there is no clear definition of "Hours Worked" in the Fair Labor Standards Act. The Act does refer to "hours worked" in regard to certain specified activities such as "changing clothes" and "washing" when the employment is covered by a collective bargaining agreement; but there is no definition of the term in general.

As you can see, the definition of the term "hours worked" under the IWC Orders necessarily results in an enforcement policy different from that used by the U.S. Department of Labor under the FLSA. Thus, in California, since the travel is at the direction of the employer, the employee is obviously subject to the control of the employer during the travel time. Therefore, except for the specific periods referred to in the Interpretive Bulletin, all hours spent in travel must be compensated..

I hope this adequately addresses the issues raised in your letter. If you have any questions you may wish to contact one of the Division's thirty-two District Offices throughout the State of California.

Yours truly,

H. Thomas Cadell, Jr.

H. THOMAS CADELL, JR.
Chief Counsel

c.c. James H. Curry
Simon Reyes