

**STATEMENT AS TO THE BASIS FOR AMENDMENT
TO SECTIONS 2, 11 AND 12 OF WAGE ORDER NO. 9
REGARDING EMPLOYEES IN THE TRANSPORTATION
INDUSTRY**

TAKE NOTICE that the Industrial Welfare Commission of the State of California (“IWC”), in accordance with the authority vested in it by the California Constitution, Article 14, Section 1, as well as by Labor Code Sections 500-558, and 1171-1204, has promulgated amendments to Wage Order 9, Sections 2, 11 and 12, for employees working in the transportation industry. The promulgation of the amendments was initiated by a request contained in a letter petition dated October 29, 2002, from the California Conference Board of the Amalgamated Transit Union, the California Teamsters Public Affairs Council, and the California Conference of Machinists, through their attorney, Shane Gusman. This letter incorporated by reference a prior letter of petition dated April 25, 2001 and petitioners requested that both letters be taken together as their formal petition to the IWC under California Labor Code Section 1176.1. Petitioners requested that “the IWC eliminate the exemption for meal periods and rest breaks for public employees covered by Wage Order 9.” No specific language was proposed in the petition letters.

However, in their letters of petition to the IWC, the petitioners asked that “...the IWC open an investigation into the working conditions of public transit drivers and other commercial drivers with respect to their exemption from required meal periods and rest periods.” The petitioners asserted that the current exemption for publicly employed commercial and transit drivers resulted in conditions that are detrimental to the health and safety of workers and of the public. They asserted that on a routine basis some commercial drivers are required to log 10-hour shifts and employers are not required to provide either meal or rest periods. Petitioners also urged the IWC to consider the issue of equity. They alleged that “...private employers engaged in public transit operations through subcontracting are covered by the wage orders. Thus, their employees are entitled to rest and meal periods even though they are performing the same work as those transit employees who are not.”

The IWC began its preliminary investigation under the provisions of Labor Code Sections 1173, 1178, and 1178.5, in the summer of 2001 in response to the petition letter of April 25, 2001.

A hearing on the matter was held before the IWC on June 15, 2001, at 505 Van Ness Ave. in San Francisco. Several proponents spoke including the following: Shane Gusman representing the California Conference Board of the Amalgamated Transit Union, the California Teamsters Public Affairs Council, and the California Conference of Machinists; Tom Rankin, on behalf of the California Labor Federation, AFL-CIO, Matt McKinnon representing the Machinists Union and J. P. Jones with the United Transportation Union. The proponents explained that most of the drivers affected would be public transit drivers but that some commercial drivers as in haulers of property were

also affected. They pointed out specific inequities as in the fact that while public transit drivers and commercial drivers are not covered by break and mealtime provisions of Wage Order 9, Laidlaw drivers (employees of a private contractor) who are performing the exact same duties are entitled to 10 minute break period after four hours and the normal lunch periods required under Wage Order 9. Regarding worker safety, proponents stated that bus drivers can be behind the wheel 10 hours a day and on duty 15 hours, while intrastate haulers of property can be required to drive a 12 hour shift and be on duty 15 hours. Without breaks and meal period, petitioners asserted that the drivers' health and the public safety is affected. Some commercial drivers operate vehicles 45 feet long weighing 80,000 pounds, and according to the speakers not requiring breaks and meal periods creates a public safety hazard due to driver fatigue. In addition testimony urged that the IWC consider the fact that these drivers have the lives and safety of school children and the disabled riders in their hands and their safety may be compromised by not requiring that school bus drivers be given regular breaks and meal periods.

Commissioner Rose established that most of the drivers the speakers represented were working under negotiated contracts and he asked if the drivers were "...enjoying something else within those contracts because of the exclusion?" Mr. Gusman and Mr. Jones replied that most of the drivers they represent are covered by contracts and that nothing has been provided on meal and rest periods except end of the route "recovery time" that is only allowed if the driver is on schedule. Picking up a wheelchair passenger, construction, weather etc. often results in the driver being behind schedule. Therefore issues beyond the driver's control can eliminate any possibility of a break or meal period. Mr. McKinnon stated that the issue is not whether or not workers are covered by a contract, but whether the IWC should protect these workers.

Commissioner Coleman asked to be informed of how many drivers were operating under union contracts. Mr. Jones indicated that possibly 11 out of the thirteen public transit districts are unionized. Commissioner Coleman asked the IWC staff to find out if A.B. 60 exempted those workers under bargaining agreements from most of the requirements of the statute, such as meal and rest periods, under the theory that the agreement will negotiate these issues. Mr. Gusman stated that many drivers are not covered by bargaining agreements.

Opponents of the petition also spoke. Mr. Douglas Barton represented the California Transit Authority. He stated the following: that he was not aware of one public transit entity in the state that was not organized; that the issues of meals and break periods were clearly on the minds of all parties in negotiations; that public needs for reliable service and schedules were balanced with the needs of the drivers; and that drivers were more interested in how the work is laid out than in meal periods. He stated that he never heard a driver complain about not being allowed to eat. He advised the commission that this matter should be left "...to the collective bargaining process to be dealt with as an issue of public accountability at the local level." He explained in some detail how shifts are run and how breaks are given and commented that his transit district had an outstanding system and an outstanding safety record.

Mr. Rick Ramacier, general manager of the Contra Costa Transit Authority, also spoke in opposition to the IWC convening a Wage Board on this matter. Mr. Ramacier stated that recently the Contra Costa Transit Authority had renegotiated a 3- year contract, and that a meal break issue never came up. He indicated that they work out schedules with the unions that take bathroom stops into consideration and that many working conditions such as shifts and recreational and comfort accommodations are negotiated in lieu of a formal lunch break.

There was testimony regarding whether the IWC taking action would add flexibility to the bargaining process, as suggested by Commissioner Cremins, or limit the flexibility of the negotiations. After the opponents to a Wage Board spoke, Mr. Matt McKinnon and Mr. Tom Rankin spoke in favor of a wage board. Mr. McKinnon vigorously urged that his members sent him there to state that they do care about meal and rest periods, and that “What we’re asking for is something very simple and straightforward: that workers get treated the same in both private and public sector doing this work.” Mr. Rankin, representing the California Labor Federation, stated the same viewpoint. He added that the duty of the IWC is to look at the wages and working conditions of all the workers in California. He pointed out that the IWC had already included public employees under the minimum wage law. He also stated that all of the discussion presented in this meeting is really the proper discussion for a wage board in his opinion. Mr. Rankin and Mr. Jones stated that individual drivers will be nominated to serve on the Wage Board although none were present in this hearing and all viewpoints of employees and employers will come together at the appropriate time and place if the IWC convenes a Wage Board.

Commissioner Bosco expressed several concerns after the testimony was heard. He saw two issues “...one, do we want to get into the province of public employees...and secondly, do we want to augment contracts, union contracts?” In addition, he suggested that the IWC explore the issue of public safety as it might be affected by the exclusion of public drivers from meal and rest period requirements. He suggested that a Wage Board was premature and would probably come back to the Commission with a deadlock, so more investigation was warranted. Commissioner Cremins spoke in favor of convening a Wage Board and commented that Wage Order 16 allows exemptions to be bargained for but they must be considered and dealt with and not remain silent on the issue and that is what he was suggesting he would like to see in this Wage Order.

Chairman Dombrowski suggested that the matter be continued and set on the agenda for the next meeting. He asked that both sides provide information on the issues the Commissioners raised to the IWC staff to be prepared for the next meeting that was set for June 29, 2001.

At the meeting held in June, the IWC staff reported that neither side had presented facts or statistics regarding the public safety issue or other issues raised at the previous meetings. Subsequently, the petition was withdrawn by the proponents because the proponents chose to move forward with a legislative proposal that they hoped would address the problems the petitioners wished to remedy.

Assembly Bill 1677 was proposed by Senator Koretz on February 28, 2001, and among many proposals the bill included the following language “This bill would require that public employees who operate commercial motor vehicles be subject to the same regulations regarding meal and rest periods as their private employee counterparts, *or to receive equivalent protections through a collective bargaining agreement.*” This bill was passed by both houses and the enrolled bill was sent to the governor. The governor vetoed the bill.

Subsequently, by letter of October 29, 2002, the petition to appoint a Wage Board to consider possible amendments to Wage Order 9 was re-urged. The letter indicated that since the initial hearing in June, 2001, described above, the parties had engaged in extensive negotiations to no avail and that A.B. 1677, a proposed legislative solution had been vetoed.

On November 22, 2002, the IWC met and took additional testimony and accepted letters and documents provided by representatives of both sides. At this meeting the Commission voted to appoint and convene a Wage Board to consider possible amendments to Wage Order 9. A motion to convene a wage board was made by Commissioner Cremins soon after the public testimony on this matter started. Mr. Cremins apologized for offering a motion prior to all testimony being heard, but explained that he had just received word of a family emergency that required him to leave immediately. A vote was taken and the motion to convene a wage board passed. However, in spite of the vote to convene the wage board taken early in the meeting, the IWC agreed to take all public testimony offered, as required by law.

Mr. Douglas Barton, representing the California Transit Authority, testified at this hearing and reiterated much of his testimony given to the Commission in June, 2001. He stated that the public transit arena was unique for many reasons, the first of these being that the public transit exists because the private sector failed when private companies tried to provide transit. He stated that publicly run entities have a high degree of public accountability for the safety and well-being of the workers and of the public. Public officials serve on the boards of public transit entities, meetings are held in public, and Mr. Parker suggested that is how the situation should continue, and not to bring the industry under the IWC regulations and break with tradition. Mr. Barton also stated that most public transit companies are unionized and contract driven and that one solution arrived at by a wage board could not possibly meet the many different needs of very differing areas served.

Commissioner Bosco stated his opinion that a wage board could provide the right arena to arrive at flexible and ingenious solutions to the different needs of different locales. He expressed a firm belief that the wage board could solve the problem of drivers not being able to take breaks for a brief meal and a bathroom stop. Mr. Barton responded that drivers do get to eat and use the bathroom, but not in “...the prescribed intervals that are typical of a wage order.” He repeated that the localized solutions are worked out

depending on schedules and routes, and that a wage board could not solve the problem with one rule applied to everyone in the State.

Commissioner Coleman expressed her agreement with Commissioner Bosco that drivers certainly need reasonable breaks. She also stated that she had worked on 4 billion dollars of transit initiatives to Silicon Valley, but that she did not think a statewide single solution would fit all localities. She agreed with Mr. Barton that local solutions should continue to be worked out, not a wage order solution. At this point, the before mentioned vote on Commissioner Cremins' motion was called for. The motion passed 4-1, with Commissioner Coleman casting the single "nay" vote.

Mr. Barry Broad testified that he wished to get clarification regarding the scope of the investigation by the wage Board. He indicated that his understanding was that the group of workers affected would be all public commercial drivers and not just public transit drivers. Commissioner Dombrowski instructed the staff to craft the charge to the wage board to include public drivers of commercial vehicles.

Mr. Rick Ramacier of the Contra Costa Transit Authority testified that some pieces of work lend themselves to regular and scheduled meal and rest breaks and some do not. He pointed out that generally the public transit authorities pay their drivers better than private companies like Laidlaw. He stated that meal and break periods were never a priority with drivers in Contra Costa in 30 years of negotiations. He described the process in Contra Costa County by which many and varied problems regarding scheduling and meal and break periods are addressed, and he stated a single wage order rule for all situations won't work.

Ms. Sue Zulke, representing the Orange County Transit Authority explained the negotiation method and procedure for working out problems on "tight" runs. She indicated the process recently resolved problems for drivers on four such tight runs. She stated that in the last negotiation between the company and drivers, 112 issues were raised by drivers and only one dealt with breaks. She also provided the commission with a comparison between Foothill Transit, who contracts with a private Transit company for its drivers, and Orange County Transit in regard to pay and benefits. She stated that Orange County is paying drivers 82% more than Foothills is paying the privately contracted for drivers. She also stated the cost to Contra Costa to provide the breaks as suggested will be 2.3 million per year.

Ms. Mindy Jackson, transit Director for El Dorado County testified that 56 of 58 counties in California have rural operations of some kind and that these operations require long routes and shifts on public highways, state highways and country roads. These facts make the break periods a serious operational problem and to implement breaks would reduce the services offered by El Dorado County. She indicated that in the 91-92 negotiations, it was agreed that several long runs would have breaks scheduled, but that soon after these were put in place, the drivers came to employers and requested that they be allowed to revert to no scheduled breaks so they could finish their runs and leave more quickly.

At the IWC meeting held on January 10, 2003, the IWC appointed a Wage Board consisting of 5 members representing employers in the transit industry, with one alternate, and five members representing employees of the transit industry, with one alternate.

The Wage Board was charged by the IWC as follows:

The IWC charges you to consider all material provided to you for review, and after review to report to the IWC your recommendations on the following matter:

- 1. Should the meal and rest period requirements in Wage Order 9, sections (11) and (12) be amended to include public drivers of commercial vehicles.**
- 2. Should any proposed amendment include language to the effect that the existence of a collective bargaining agreement which provides protections equivalent to the current meal and break period requirements of Wage Order 9 will satisfy the meal and break period requirements of the Wage Order.**

The wage board met on April 9, 2003. All testimony, documents, letters, and other exhibits in the possession of the Commission or the IWC staff was copied and forwarded to each of the participants in the wage board discussions and decision-making process. The proceedings and findings of this meeting were presented to the IWC in the form of the wage board report submitted by the chair to the IWC. The report reflected that all appointed members were present and C. Allen Poole chaired the board. During the brief meeting, employee representative Barry Broad explained that he and employer representative Douglas Barton had met prior to the meeting and worked out proposed amendments as well as proposed language for they felt should be included in the IWC's Statement as to the Basis for adopting the proposed amendments, if the IWC voted to approve the amendments. The proposed amendments and proposed language are as follows:

Wage Order 9, Section 2, Definitions

(C) "Commercial driver" means an employee who operated a vehicle as described in subdivision (b) of Section 15210 of the Vehicle Code.

(L) "Public Transit Bus Driver" means a commercial driver who operates a transit bus and is employed by a government entity.

Section 11, Meal Periods

(F) This section shall not apply to any public transit bus driver covered by a valid collective bargaining agreement if the bargaining agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning its meal period provisions, premium wage rated for all overtime hours

worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

Section 12, Rest Periods

(C) This section shall not apply to any public transit driver covered by a valid collective bargaining agreement if the bargaining agreement expressly provides for meal periods for those employees, final and binding arbitration of disputes concerning meal period provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the State minimum wage rate.

In addition, language that was proposed by the wage board and later adopted by the IWC to be incorporated into this Statement as to the Basis is as follows:

“ In approving the amendment to the wage order to extend meal and rest period requirements to commercial drivers employed by government entities, the wage board included language allowing an exemption from Sections 11 and 12 for a collective bargaining agreement covering public transit drivers if the agreement ‘expressly provides’ for meal and rest periods for those employees and contains other protective conditions. It was the intent of the wage board that this provision provide the parties to the collective bargaining agreement maximum flexibility to define the length of meal and rest breaks and the circumstances in which such breaks will be taken as long as the agreement makes some provision for meal and rest breaks for the drivers covered by the agreement.”

This language is hereby incorporated as part of the Statement as to the Basis for amending Wage Order 9.

Employee representative Barry Broad explained that the proposed amendments would make the meal and rest break provisions of Wage Order 9 applicable to drivers of commercial vehicles employed by governmental agencies effective either on July 1, 2004, or after the expiration date of a valid bargaining agreement but in no case later than August 1, 2005. As noted in the wage board report, Mr. Broad stated that “...the amendments proposed to Sections 11 and 12 create an exception in cases where collective bargaining agreements expressly provide for meal and break periods, final and binding arbitration of disputes, premium pay for overtime, and a regular hourly pay rate of not less than 30 percent more than the state minimum wage.” Mr. Broad also explained that Section 2 of the proposal contains language the wage board can recommend to be included in the Statement as to the Basis. (as cited above)

Employer representative Barton confirmed that both sides had worked diligently to arrive at a proposal. As stated in the wage board report to the Commission, “He noted that public transit is a unique industry, and that local transit agencies need enough flexibility

to develop schedules for their employees and customers. He said that the industry was almost completely unionized, and the proposed amendments recognize the importance of allowing management and workers to negotiate issues within the collective bargaining context.

In addition the wage board was given a copy of A.B. 98 (Koretz), which contains language that clarifies the authority of the IWC to grant exemptions from meal and break periods to transit employees covered by a valid bargaining agreement. A.B. passed the legislature and was signed into law in 2003, prior to the public hearings on the proposed amendments to Wage Order 9 approved by the IWC.

Employer representative Marlene Heuser of the Orange County Transportation Authority expressed concern that the language proposed requires employers and employees to come to agreement about meal and rest periods in collective bargaining, as opposed to the current requirement that the issues must be the subject of bargaining but not necessarily agree to by both sides. She also felt the language was vague and ambiguous.

Employer representative Brenda Diederichs, Los Angeles County Transportation Authority, agreed with Ms. Heuser that the language was vague and ambiguous. She noted that it may be impractical for many public agencies to provide specific meal and rest breaks. She expressed concerns about the cost impact and stated that it will cost the Los Angeles County Transit Authority over 10 million dollars per year to implement the proposed changes. She also stated that in 20 years of bargaining history that meal and break periods were never an issue in the Los Angeles Transit Authority.

Mr. Barton acknowledged the concerns expressed but stated he felt the proposed changes gave maximum flexibility to employers, that the problem of bathroom breaks had been an issue for many years, and acknowledged that non-union shops might be more restricted than union shops by the proposals but that there were very few of those.

Mr. Broad stated that 30 percent of public transit service is provided by private contractors whose workers are already subject to Wage Order 9 requirements also that the San Mateo bargaining agreement providing breaks and meal periods works well.

Employer representative Pia-Harris, San Marcos Council Member, stated that she supported the proposal but that since her district's bargaining agreement expired on July 1, 2005, she asked for more time for implementation. Mr. Broad amended the last time proposed after expiration of a bargaining agreement to August 1, 2005.

Peter Cooper, California Labor Federation, stated he felt the proposal was fair and flexible and he was in favor of it.

A motion was made and seconded to accept the proposal, a vote was taken, and the motion passed 8-2, employer representatives Diederich and Heuser opposed.

On July 9, 2003, the IWC met and as part of its agenda considered the Wage Board Report and the proposals made by the wage board. Mr. Shaw of the California Transit

Authority appeared and testified on behalf of the proposal, and particularly recommended the adoption of the proposed language for the Statement as to the Basis. Also appearing in support was Barry Broad, Douglas Barton, Peter Cooper (California Labor Federation) James Jones (United Transportation Union), and Allen Davenport (Service Employees International Union).

Appearing in opposition were Mr. Christopher Kahn, representing Orange County Transportation Authority, Sue Zulke, Orange County Transportation Authority, and Suzanne Fox, Los Angeles Metropolitan Authority. Ms. Zulke strongly urged that the IWC lacks the authority to provide an exemption to the meal and rest break provisions for employees covered by a valid bargaining agreement. She stated that Senate Bill 88 and Senate Bill 1208 limited the authority of the IWC to adopt the amendments as proposed. She requested that until such time as the IWC receive statutory authority to provide such an exemption, that the IWC refrain from acting on the wage board's proposal.

Prior to the July 9, 2003 meeting of the wage board by letter of May 7, 2003, IWC Chairman Dombrowski was formally notified by Mr. Richard J. Bacigalupo, Assistant Executive Officer of the Orange County Transit Authority, that his agency was of the opinion that the IWC did not have the authority to adopt the proposals recommended even though they were approved by a two-thirds vote of the wage board, that would normally require the IWC to approve the proposal and send the measure to public hearing. He further stated that the transit authority together with other transit employers was opposing A.B. 98 that contained language specifically authorizing the IWC to exempt employees as proposed in the amendments. He felt that the opposition would succeed as in the opposition to the vetoed A.B. 1677 the prior year.

Chairman Dombrowski sought the legal opinion of counsel to the IWC, Marguerite Stricklin. Ms. Stricklin advised that the IWC had no choice at this time whether to send the proposal to public hearing, but was required to send the proposal out since it was approved by a two-thirds majority of the wage board, and she also stated that a vote of the Commission should be taken regardless of the mandatory result. She cited Labor Code 1178.5 mandating the approval of recommendations supported by at least two thirds of the wage board, and also cited section 1182(a) which mandates the Commission to ultimately adopt such a recommendation absent a finding "...that there is no substantial evidence to support such a recommendation."

It was moved and seconded that the Commission accept the recommendation of the wage board, and the motion passed 5-1 unanimously.

Public meetings were held in October, 2003, in San Diego, San Francisco, and Sacramento. On October 10, 2003, in San Diego, Commissioner Rose convened the hearing and took public testimony. James Jones appeared for the United Transportation Union, that represents many transit districts in California, and spoke for the proposal. Barry Broad appeared in support of the measure and shared the information that A.B. 98 had passed and was signed into law by Governor Gray Davis, and the law clarified that the IWC had the authority to adopt the exemptions as proposed.

Mr. Ed Procter, business agent for Amalgamated Transit Union, Local 1574. He expressed support for the amendments, and also stated that his union had anticipated this development and worked out a bargaining agreement to deal with meal and break periods a year ago. He stated that he had driven a bus for over twenty-five years and that sitting in the driver's seat for three and four straight hours with no break for food or bathroom use was an extreme but common hardship that his employer, the San Mateo Transit District, refused to address.

Ms. Judylynn Gries, representing the Riverside Transit Agency, spoke in opposition to the amendments. She stated that accommodating the required breaks would cost her agency approximately 15 percent of its annual budget, or 4.5 million dollars per year. She also stated that the ATU drivers were upset when they heard about the amendments because they were afraid that they would supercede their tenured bidding order, that allowed senior drivers to get very desirable routes.

There was no other testimony at any public meeting regarding these proposals. The proposals were unanimously adopted by the IWC in its meeting in Sacramento on October 17, 2003, based in part on the mandates set forth in Labor Code Section 1178.5 and Section 1182(a), i.e. that any proposal recommended to the IWC by the wage board by over two-thirds of the voting members be sent out for public hearings (1178.5) and ultimately adopted (1182 (a) by the IWC unless a finding is made that there is no substantial evidence to support the recommendation. **The amendments shall be in effect as of July 1, 2004.**

The IWC has received no testimony, correspondence, or other information that would support changing these decisions.

The IWC received no compelling evidence, and concluded there was no authority at this time, to warrant making any other changed to the provisions of this Section.