U.S. Department of Labor

Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Telephone: (513) 684-3252
Facsimile: (513) 684-6108

Date: December 1, 2000
Case No. 1995-SCA-26

In the Matter of

U.S. Dept. of Labor,

Complainant,

v.

J.N. Moser Trucking, Inc.,
d/b/a/ Moser Enterprises,
Donald H. Schleining, an individual
and Kirsty S. Schleining, an individual

Respondents.

APPEARANCES:

Karen Mansfield, Esq.
Linda Panko, Esq.
Chicago, IL 60604
For the Claimant

Donald Rothschild, Esq.
Richard Bruen, Esq.
Summit, IL 60501
For the Respondent

Before: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351, *et seq.*, (hereinafter "SCA" or "the Act"), and the regulations issued thereunder at 29 C.F.R. Parts 4 and 6. A formal hearing was held in this matter on March 16, 1999, through March 19, 1999. All parties were afforded full opportunity to present evidence as provided in the Act and regulations.

ISSUES:

The parties entered into a Stipulation and Partial Settlement Agreement on March 16, 1999, in which it was agreed that the hearing would address the following two issues:

1. Whether "bobtail time" spent by employees operating Moser's vehicles is compensable as hours worked. "Bobtail time" is defined as time spent driving Moser vehicles from Moser terminals or parking facilities to postal facilities and the transfer of Moser vehicles from postal facilities to Moser terminals or parking facilities. If "bobtail time" is compensable, then how many working hours were devoted to "bobtail time."

2. If Respondents are found to have violated any of the provisions of section 2(a)(1) or 2(a)(2) on the "bobtail" issue, then whether "unusual circumstances" exist to relieve Respondents from debarment in connection with any of the violations found on the above-listed issues, under section (5)(a) of the SCA.

(Administrative Ex. 29)[1]

FINDINGS OF FACT:

The Respondent, J.N. Moser Trucking, Inc., d/b/a/ Moser Enterprises (hereinafter "Moser"), is a corporation having offices in Illinois and Florida. The sole business of Moser's Illinois operation, the subject of the present proceeding, is hauling mail between postal facilities in accordance with approximately 38 contracts it holds with the U.S. Postal Service. (Tr. 616; Rx. 1) The Illinois operation is managed by Moser's Vice-President, Donald H. Schleining, and his wife, Kristy S. Schleining.[2] (Tr. 638)

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[1] In this Decision and Order, "Ax." refers to the Administrator's Exhibits, "Administrative Ex." refers to the Administrative Exhibits, "Rx." refers to the Respondent's Exhibits, and "Tr." refers to the transcript of the hearing.

[2] Moser's Florida operation is managed by Kristy Schleining's brother, William Moser, who is not a party to this action. (Tr. 556-561, 638) Donald Schleining, who had been employed by the company in various capacities since 1971, was

Investigator Gerald Becker of the U.S. Department of Labor, Wage and Hour Division, investigated Moser between September 14, 1993 and March 9, 1994, to determine whether Moser paid its employees the wages and benefits required under the Service Contract Act and the applicable contracts. (Tr. 364-366; Rx. 1) Becker testified that the Schleinings provided him with all requested documentation, and were generally cooperative with his investigation. (Tr. 488, 501-502, 724) After reviewing Moser records and interviewing employees, Becker concluded, among other things, that Moser's practice of not paying its drivers for travel (bobtail) time spent driving to and from its terminal and the postal facility at the beginning and end of each day was a violation of the SCA. (Tr. 365, 367) Thereafter, the Administrator, Wage and Hour Division filed a complaint alleging SCA violations and seeking debarment of Moser and Donald and Kristy Schleining.

The Respondents have stipulated that Moser did not pay its drivers for bobtail time or for any post-trip interior cleanup. (Rx. 1, par. 5-6, 8, 12; Tr. 246-62, 565) Becker computed unpaid hours, underpaid hours, and fringe benefits allegedly owed drivers after timing all of the bobtail routes. (A. Ex. 4) Becker's bobtail calculations include pre-trip inspection, warmup time, and concluding duties. (Tr. 398) The parties stipulated that these calculations may be used for purposes of this matter and constitute an accurate means of quantifying unpaid hours, underpaid hours, and fringe benefits, if such are found to be due. (Rx. 1)

During 1992 through 1993, the period of the Wage and Hour Division's investigation, Moser employed approximately 45 to 50 truck drivers to haul mail between various postal facilities. (Tr. 645) Several Moser drivers and former drivers testified that on a typical day they pick up a Moser truck at Moser's terminal in Montgomery, Illinois[3], perform a brief pre-trip inspection which consists of checking the lights, fluids, breaks, and tires, and then drive the truck to the first postal

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delegated responsibility of the Illinois operation in 1991. (Tr. 561, 633-638) All additional references to "Moser" refer to the Illinois operation unless otherwise noted.

[3]Moser presently employs approximately 135 to 140 individuals, most of whom live within six miles of its Montgomery terminal. (Tr. 104-105, 184, 194, 273, 577, 643)

facility on their assigned route. (Tr. 72, 158, 195, 267, 325, 716, 850, 925) Upon arriving at the postal facility, the driver hooks a trailer loaded with mail up to the truck and performs a 108 point safety inspection, ensuring that the trailer is secured to the truck. (Tr. 72, 74-75, 129-130, 141, 717-718) From there the driver proceeds to the next postal facilities on his route. When the driver's last run is completed, the driver disconnects the trailer and leaves it at the last postal facility. He then drives the tractor back to the lot at Montgomery.[4] There is testimony that some drivers, once back at the terminal, will sometimes clean the interior of their truck and turn in paper work. (Tr. 82, 215, 268-269)

In addition, the record indicates that several drivers regularly took their vehicles home instead of picking them up and dropping them off at the Moser terminal each day. (Rx. 22) Although the exact number of drivers who took their trucks home (and the frequency with which they did so) cannot reliably be determined from the record, there is persuasive testimony that a significant number of Moser drivers were allowed to take their assigned trucks home and did so on a regular basis. (Tr. 36, 40-41, 52-57, 186, 577-578, 583, 600, 646-647, 804, 820, 840) Drivers who took their assigned vehicles home would drive the Moser vehicle to and from their first and last post office facilities as though they were driving a personal vehicle to and from work. (Tr. 798, 820-821, 840) These drivers would perform a brief pre-trip inspection and warmup at their homes instead of at the Moser terminal. (Tr. 832-833, 850-52)

Regardless of whether a driver took his assigned vehicle home or left it at the Moser terminal, Moser paid for the vehicle's fuel and insurance expenses and arranged for vehicle washing to be performed by an outside service. (Tr. 128, 134-135, 234, 283, 338-39, 599, 719-721, 949) Likewise, Moser arranged for all maintenance on the vehicles to be performed by its mechanics. (Tr. 272, 611-12, 665)

Although most Moser vehicles were kept at the Moser terminal, Moser was also permitted to park its trucks at several postal facilities it services, including the South Suburban facility, the Rock Island facility, the St. Charles facility,

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[4]As explained above, this practice of driving a vehicle from the terminal to a postal facility without a trailer and back again is referred to as "bobtail time." (Rx. 1)

the Fox Valley facility, and the Bulk Mail Center facility. (Tr. 578, 650) While the parking lots at most of these facilities were not regularly used, Don Schleining testified that there were a few drivers who lived close to a particular postal facility who preferred to drive their personal vehicle to the facility and pick up a Moser truck there rather than first having to go the Moser terminal. (Tr. 650-651)

Moser's dispatcher, Dale Augustine, testified that Moser's policy of furnishing drivers with transportation to and from the postal facilities was a means of attracting new drivers. (Tr. 47) Augustine also indicated that drivers were given the opportunity to drive their own vehicles to the postal facilities and pick up a Moser truck which could be parked there, but few drivers chose to do so. (Tr. 48)

Similarly, George Nilo, a Moser driver since 1989, testified that he was told when hired that drivers were furnished a truck to travel to the postal facility. According to Nilo, it was emphasized that a truck could be at the postal facility if the driver preferred, and the decision to drive his own vehicle to the facility was up to each driver. (Tr. 797-798, 803) However, Nilo testified that no one wished to drive his own vehicle to the postal facility due to the additional costs for insurance and gas, and the additional wear and tear on personal vehicles that would be incurred. (Tr. 802-803)

Robert Allgood, a Moser employee since 1987, testified that on his first day of employment Don Schleining gave him the option of either driving his own vehicle from his home to the postal facility or of picking up a company truck at the terminal and driving to the postal facility from there. (Tr. 818, 821) Allgood chose to take the Moser truck because it was less expensive than having to drive his own vehicle back and forth, and stated that he viewed using the Moser truck as a convenience. (Tr. 821, 825)

Likewise, Kevin Augustine, a Moser employee from 1986 through 1994, testified that using a Moser truck was preferable to using his personal vehicle due to the expenses it saved him. (Tr. 841-842) Robert Cartee, a Moser employee since 1990, testified that he would have found other employment if he had been required to drive his personal vehicle to the first postal facility on his assigned route. (Tr. 911-913)

However, Patrick Hamilton, a seasonal driver with Moser during the winter of 1991/1992, 1992/1993, and 1993/1994, testified that he was only given the alternative of picking up a truck at a location other than the Montgomery terminal once. (Tr. 330, 333) He noted that "they started that after I left." However, on cross-examination, Hamilton admitted that he had never asked whether he could pick up a truck anywhere other than at the terminal. (Tr. 340)

Jerry Nelson, a seasonal driver with Moser during the winters of 1991/1992 and 1992/1993, testified that he was not offered the opportunity to pick up truck at any place other than the Montgomery terminal. (Tr. 352-357) According to Nelson, Dale Augustine informed him that Moser did not want to park trucks at different facilities. (Tr. 352) Nelson also called the Schleinings "liars", and stated that he was testifying at the hearing because he did not like the way he was treated at Moser. (Tr. 358-359)

Although the parties stipulated that Moser did not pay its drivers for bobtail time or for the initial pre-trip inspection at the Moser terminal, there is inconsistent testimony as to whether drivers were paid for performing the 108 point safety inspection on the truck and trailer after arriving at the postal facilities. Harry French, a Moser driver from 1992 to 1994, testified that the starting time was recorded as the time the trailer pulled away from the first postal facility, not the time he arrived at the facility. (Tr. 192, 214) Junior Smith, a Moser driver from June 1992 through July 1993, said he reported the time he left the facility as his starting time. (Tr. 102) Thomas Henrikson, a Moser driver from July 1993 through December 1994, testified that he was not compensated for getting to the first postal facility 15 minutes before start of his run, as he was required to do. (Tr. 75, 232, 290-291) George Nilo, a Moser driver since 1989, testified that payment began when "hooked up under that trailer". (Tr. 398) However, Angel Hernandez, a Moser driver from May 1992 through May 1994, testified that he wrote down on his time sheet the time he arrived at the post office and the time he returned from his trip. (Tr. 165) Donald Schleining testified that drivers were paid for the entire time once they arrived at the postal facility, (Tr. 649) and that Moser began adding one-half hour to drivers pay checks in July 1992 as compensation for pre- and post-trip time spent at postal facilities. (Tr. 246, 567-568, 717-718) However, he acknowledged that this one-half hour was

added only to the checks of drivers who went to the Carol Stream and Palatine postal facilities. (Tr. 732-733) Thus, the testimony taken as a whole indicates that Moser began to compensate drivers for the pre-trip and post-trip inspections (including the 108 point safety inspection) performed at the first and last postal facilities on the route in July 1992, but only for those drivers who drove the Carol Stream and Palatine routes. Therefore, the drivers on other routes were not compensated for this inspection time.

In response to a complaint the Wage and Hour Division had regarding Moser's method of recording its driver's hours, the Schleinings, with Becker's approval, revised Moser's time keeping system. (Tr. 501, 575; Rx. 16) Previously, drivers were paid via "trip rates" calculated by the Postal Service based on calculated departure and arrival schedule times for each run. (Tr. 395-396, 565, 799) Kristy Schleining testified that drivers are now paid "hourly from the time they begin their trip till the time they complete it." (Tr. 565) Thus, where a driver's pay was formerly determined based on the contract schedule supplied by the Post Office, pay rates are now determined based on the time recorded on the driver's timesheets.

In 1994, primarily in response to questions raised by the Administrator's investigation, Moser arranged for parking lots to be set up near the Carol Stream and Palatine postal facilities. (Tr. 39-40, 267-268, 295, 502-503, 579, 725-726, 908-912) Moser intended to park trucks at these rental lots and require drivers assigned these routes to drive their personal vehicles to these lots rather than picking up a truck at the Moser terminal. (Tr. 909) Several Moser drivers, however, threatened to quit when informed of this possibility, due to the increased travel expenses they would incur. (Tr. 667-668, 908-915)

Due to the reluctance of many drivers to drive their personal vehicles to parking lots located on or near the assigned postal facilities, Moser prepared written agreements allowing drivers to choose between postal facility parking or bobtail driving. (Tr. 586-587, 669; Rx. 17-18) This agreement provides, in part, that the driver "understands that should he so desire, the Employer will provide a tractor at or near the location of the postal facility, and further acknowledges that Employee is entitled to earn wages from the time he begins operation of said tractor . . . ." (Rx. 17) The agreement

further purports to waive any right the driver may have to wages for bobtail time in exchange for "the Employer's trucks, equipment, and fuel[.]" (Rx. 17) Thus, Moser drivers were formally presented with the option of either picking up their assigned truck at the Moser terminal and bobtailing to the first postal facility on their route or driving their personal vehicle to a parking lot located on or near the postal facility. (Tr. 39-40, 294-295, 580, 653, 908-909) Few drivers, however, opted to pick up their assigned vehicles at the postal facility parking lots. (Tr. 582) Kristy Schleining testified that only 12 Moser drivers out of approximately 140, most of whom live near the first postal facility on their route, are using postal facility parking. (Tr. 580-583, 670-671) Thus, the great majority of Moser drivers have chosen to pick up a Moser truck at the terminal and bobtail to the first postal facility rather than drive their personal vehicle to the first postal facility.

Pursuant to a stipulation entered into December 18, 1996, $1,242,180 of Moser funds, representing the entire amount the Administrator claimed Moser owes various employees for the 1992-93 period, was withheld by stipulation. (Rx. 1, par. 14) The parties subsequently entered into a stipulation on March 16, 1999, resolving all but the issue of whether Moser is required to compensate its drivers for bobtail time. (Administrator's Ex. 29) After this stipulation, $900,584 of the original $1,242,180, consisting of $830,393 for allegedly compensable bobtail driving time and $70,191 for allegedly unpaid fringe benefits, remains at issue. (Tr. 408)

CONCLUSIONS OF LAW:

Bobtail Time:

The definition of "hours worked" comes from the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and the regulations at 29 CFR § 785 *et seq.* Whether time is compensable under the FLSA turns on whether the employee's time is spent predominantly for the employer's benefit or for the employee's. Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). Moreover, "[w]hether 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." Id. Activities are not compensable if undertaken "for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." Dunlop v. City Electric, Inc., 527

F.2d 394, 398 (5th Cir. 1976)(quoting Mitchell v. Southeastern Carbon Paper Co., 228 F.2d 934 (5th Cir. 1955)). However, pre-shift and post-shift activities are compensable if these activities are "an integral and indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956).

The Department of Labor refers to an opinion letter from the Deputy Assistant Administrator of the Wage and Hour Division dated November 20, 1990, stating that a contractor is required to pay a driver for the time spent in returning an empty vehicle to the commencement point of a mail route because "the driver is clearly completing the run by returning himself/herself and the vehicle at the direction of the contractor in order to be available for the next run." (Ax. 3)

The record contains another opinion letter from the Wage and Hour Division with an illegible date, which concludes that "bobtail driving, when performed for the convenience or at the direction of the employer," is covered under the SCA and must be paid at the required SCA rate. (Ax. 3) The letter further notes that, in the particular case the letter was addressing, the "bobtail driving by the firm's mail haul drivers during the investigation period was performed at the direction of the employer and not for the convenience of the employees." Id.

I do not find that these opinion letters are of binding authority on the issue of whether bobtail time is compensable. While agency regulations are entitled to deference, the same cannot be said for opinion letters. The United States Supreme Court has held that the opinion letters of administrative agencies do not have the force and effect of regulation because they are not subject to the notice and comment provisions of the APA. See Reno v. Koray, 515 U.S. 50, 61, 115 S. Ct. 2021, 1321 L. Ed 2d. 46 (1995); EEOC v. Arabian American Oil Co., 499 U.S. 144, 157, 111 S. Ct. 117, 113 L. Ed. 2d. 117 (1999). They are "entitled to respect under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), but only to the extent they have the "power to persuade." Arabian American Oil, 515 U.S. at 61. I do not find the opinion letters submitted in this case to be particularly persuasive. Neither of the two that relate directly to the issue of bobtail time involved situations where pick-up was provided for the convenience of the employee rather than the convenience of the employer. Therefore, whether bobtail time is compensable must be analyzed primarily based on the Armour and Dunlop standards.

Moser would be required to compensate its drivers for bobtail driving if the activity was performed for Moser's convenience or at Moser's direction. See Dunlop, 527 F.2d at 398. The evidence of record, however, does not support such a finding. Rather than requiring its drivers to pick up a truck at a particular location, Moser offered its drivers the option of either picking up a truck at its terminal or driving their own vehicles to or near the first postal facility where a truck could be parked waiting for them. Even before Moser entered into a formal written agreement with its drivers regarding bobtail time in 1994, testimony from Donald Schleining and two long-time Moser employees, Dale Augustine and George Nilo, indicates that drivers were informed that a vehicle could be made available to them at a postal facility if they preferred.[5] (Tr. 650-651, 48, 797-798, 803) This policy of allowing drivers a choice of where to pick up Moser vehicles was subsequently memorialized in the written agreement entered into between Moser and certain of its drivers in 1994. (Rx. 17-18) As the drivers had a genuine choice between picking up a Moser truck at the terminal and bobtailing to the first postal facility or driving their personal vehicle to the first postal facility, it can only be concluded that the drivers were acting for their own convenience and not under Moser's direction.

The DOL argues that transporting the vehicles between the employer's lot and the postal facilities is for the benefit and convenience of the employer because the mail cannot be hauled without bringing the trucks to the postal facility or that trailers full of mail cannot be hauled unless the Respondents' trucks are delivered to the postal facilities to pick them up. This argument, however, ignores that Moser could leave its trucks at parking facilities on or near the postal facilities it services. Therefore, the trucks could remain parked at or near the postal facilities if they were not being used by the drivers to travel back and forth. Thus, it is not clear that Moser receives any benefit or convenience from having drivers take the trucks back and forth between the terminal and the postal

[5] Although the testimony of Patrick Hamilton and Jerry Nelson conflicts with this, I find their testimony less compelling as they were only seasonal employees and so would be less familiar with Moser's business practice. (Tr. 330, 333, 340, 352-359) In addition, Hamilton admitted that he had not inquired into alternate parking situations, and Nelson appeared biased against the Respondents. Id.

facilities, except perhaps the benefit of providing a service for its employees. See Fox v. General Telephone Co. of Wis., 271 N.W.2d 161, 165 (3rd D. Wis. 1978). Indeed, Donald Schleining offered testimony indicating that it may actually be less expensive for Moser to keep its trucks at the postal facility lots rather than the Moser terminal. (Tr. 563-667) Therefore, as bobtail driving is not required of Moser drivers and Moser receives no benefit of consequence from this practice, I find that Moser is not required to compensate its drivers for this bobtail time. Cf. Vega v. Gasper, 36 F.3d 417, 425 (5th Cir. 1994); Baker v. GTE North Inc., 110 F.3d 28 (7th Cir. 1997).

Pre- and Post-Trip Inspection Time:

Similarly, the time drivers spent performing brief pre-and post-trip inspections of the trucks prior to leaving the Moser terminal does not constitute compensable time. It is true that pre-trip inspections by drivers are compensable if the inspections are "an integral part of" and "indispensable to" the driver's principle activity. Barrentine v. Arkansas-Best Freight System, Inc., 750 F.2d 47, 50 (8th Cir. 1984). As explained above, however, the drivers are under no requirement to pick up a truck at the Moser terminal. As this activity was not necessary to the performance of the drivers' duties, it cannot be considered an "integral" or "indispensable" part of their principle activity, i.e., hauling mail between postal facilities. By allowing its drivers to use its trucks as transportation to the postal facilities, Moser was providing its drivers a service. The fact that the drivers performed an inspection before availing themselves of this service does not render the time spent doing so compensable. See Pollution Control Construction Co., 88-WAB-06 (April 27, 1990).

On the other hand, the time the drivers spent hooking the trailer up to the truck after arriving at the postal facility and performing the 108-point inspection is integral and indispensable to the drivers' primary duties. See Barrentine, 750 F.2d at 50; Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 (5th Cir. 1961). It is not disputed that the drivers are required to perform this on-site inspection as part of their duties. Furthermore, this inspection is required by Department of Transportation regulations. 49 CFR 396.13 requires that "before driving a motor vehicle, the driver shall: a.) Be satisfied that the motor vehicle is in safe operating condition." As this pre-trip inspection was required by both Moser and the DOT, it is, therefore, necessary to the

performance of the drivers' duties, and thus an "integral" or "indispensable" part of their principle activity. Such activities are compensable under the standard set forth in Barrentine.

Time spent by drivers cleaning up their trucks after their shift is not integral or indispensable to their duties and is therefore not compensable. There is nothing in the record that would indicate that drivers who did this cleanup were required to do so by either Moser or by any applicable DOT regulation.

As noted above, I find that Moser did not compensate its drivers for this preliminary time until July 1992, and then only the drivers who serviced the Palatine and Carol Stream postal facilities. Therefore, I conclude that Moser Trucking, Inc., and Donald H. and Kristy Schleining, are individually and jointly liable for payment of this pre-trip inspection time. The parties have stipulated the amount of back wages owed each employee in this case. (Adm. Ex. 19) However, these calculations are cumulative amounts owed for the alleged bobtail time, pre-trip inspections and post trip inspections. As discussed above, bobtail time is not compensable under the SCA or the regulations to it. Therefore, as provided in the Order below, the Department of Labor shall have two weeks from the date of this opinion to submit calculations for the amount of wages owed each of the employees listed in Appendix A of this Decision and Order for their performance of the pre-trip inspections. Once that submission is received, the Respondent will then have two weeks to respond to the accuracy of the Department of Labor calculations.

Debarment:

Congress has promulgated that any person found to have violated the minimum wage and fringe benefit requirements of the Act shall be placed on a list of contractors and subcontractors ineligible to receive government contracts for the provision of services. The violator shall be retained on the ineligible list for three years and will be relieved of the debarment only upon a showing that an "unusual circumstance" exists that dictates against debarment. 41 U.S.C. §354. Congress amended the Act in 1972 to add the "unusual circumstances" standard to relieve violators from debarment, but clearly expressed their intent that it should only be used to provide relief where debarment "would have been wholly disproportionate to the offense." See 29 C.F.R. §4.188 (b)(2). The burden of proving the existence of

unusual circumstances is on the respondent. A to Z Maintenance Corp. v. Dole, 710 F. Supp. 853, 855 (D.D.C. 1989); See 29 CFR § 4.188(b)(1).

The factors that must be weighed in determining whether "unusual circumstances" exist were set forth by the Secretary in Washington Moving and Storage Co., No. SCA-168 (August 12, 1973) and In re Quality Maintenance Co., 21 WH cases 1094, 11-00-1101 (December 28, 1973), [decision of the Assistant Secretary]. The seven factors listed below have been approved by a panel of the United States Court of Appeals for the District of Columbia in Federal Food Services, Inc. v. Donovan, 658 F.2d 830, 831 (D.C. Cir. 1981) (summarized)and adopted by the Sixth Circuit in U.S. v. Todd, 38 F. 3d 277, 278 (6th Cir. 1994):

1. Whether a history of past violations of the Act exists;

2. The nature, extent and seriousness of the past violations;

3. Whether the violations were wilful, or in the circumstances shown there was culpable neglect to ascertain whether certain practices were in compliance, or in culpable disregard of whether they were or not, or other culpable conduct;

4. Whether the Respondent's liability turned on bona fide legal issues of doubtful certainty;

5. Whether the Respondent has demonstrated good faith, cooperation in the resolution of issues and a desire and intention to comply with the requirements of the Act;

6. The promptness with which the employees were paid the sums due; and,

7. Evidence of repeated violations.

Application of these factors to the facts of this case favor a recommendation that unusual circumstances do exist to relieve the Respondents from the ineligible list.

As to the first factor, a history of violations, the record shows that Moser has previously been investigated four times for violations of the SCA. The first occurred in 1972 and resulted in the payment of $1,385.44 to six drivers. See Respondent's

Brief at 58, U.S. Dept. of Labor v. J.N. Moser Trucking, Inc., (1999-SCA-26). The record does not reveal what specifically the focus of this investigation was. Moser was again investigated in December 1977. This inquiry lead to a Decision and Order by Administrative Law Judge Everette E. Thomas approving the settlement between Moser and the DOL and directing Moser to pay $54,237.47 to thirty employees. (Administrative Exhibit 19, Tr. 381-382) While the settlement agreement for this instance is included in the record, it is unclear with what distinct violation of the SCA Moser was charged. The Settlement agreement merely states that Moser was liable for payment of back wages and fringe benefits. (Administrative Ex. 19) The final two investigations occurred in 1984 and resulted in a payment of $47,985 in back wages to forty employees and $928 to five employees. (Administrative Ex. 19, Tr. 388-389) The record is again unclear as to what violations were alleged.

Respondent states in their Brief, incorrectly, that pursuant to Rule 408 of the Federal Rules of Evidence, incorporated into the Act and Regulations at 29 C.F.R. §18.408, that evidence of settlements or compromises is not admissible. Section 18.408 stands for the proposition that evidence of settlements or compromises are not admissible to prove *present* liability under the Act. However, the rule "does not require exclusion when evidence is offered for another purpose." Breuer Elec. Mfg. Co. v. Toronado Systems of America, Inc., 687 F. 2d 182, 185 (7th Cir. 1982). When used as here, as part of a multi-factor analysis to determine the Respondent's fitness to remain on the eligibility list as opposed to liability, the prior settlement agreements are clearly admissible.

As noted above, all prior DOL investigations resulted in settlement agreements. No investigation led to an adjudication of liability. Additionally, the last investigation concluded over fifteen years ago. I, therefore, find that these previous investigations have little relevance to the current litigation. Since these prior investigations, Moser had undergone a complete change in personnel and management. The Schleinings did not assume control of the company until seven years after the 1984 DOL investigation.

Considering the second factor, seriousness and extent of the present and past violations, I find that neither the present investigation nor past investigations reveal a serious violation of the Act. Turning first to past investigations, the record

does not clearly state what the circumstances where that led to the four previous DOL probes. In their brief, the DOL states that the three investigations between 1977 and 1984 included "unpaid bobtail time" as an issue. (Complainant's brief at 15, U.S. Dept. of Labor v. J.N. Moser Trucking, Inc., 1999-SCA-26) Since I have previously determined that bobtail time is not compensable under the Act, then these previous investigations would weigh against a finding that past violations of the Act were serious.

In this case, I have concluded above that only the pre-trip Department of Transportation mandated inspections are compensable under the Act. I find that failure to pay employees for this time does not amount to a serious violation under the Act because the Act is somewhat ambiguous concerning compensation for this time and the DOL itself did not clearly annunciate that this time was compensable until after the conclusion of the investigation in this case.

The third factor to be considered is whether the violation was wilful or the result of culpable neglect on the part of the Respondents. Wilfulness of a violation, warranting suspension under the SCA, has been found to require a finding of either an intentional misdeed or such gross neglect of a known duty as to be the equivalent. See Capitol Packaging Co. v. U.S., 350 F.2d 67 (10th Cir. 1965).

The facts do not support a finding of wilful misconduct by Moser in this case. No provision of the SCA or any of the regulations speak directly on the subject of compensation for pre-trip inspections. Because the law upon which the DOL charges Moser to have knowledge is unclear on it face, I find it impossible for Moser to have intentionally violated either the Act or the regulations.

The DOL cites two other sources from which Moser could have gleaned knowledge. The first are a series of Informational Fact sheets distributed by DOL to SCA contractors. These fact sheets attempt to answer the most often asked questions by contractors. However, it was not until March of 1996, three years after this investigation was completed, that the DOL included in their Informational Fact Sheet that pre-and post-shift inspections were compensable. (Administrative Ex. 19) Also included in the record are several opinion letters written between 1979 and 1990 by various DOL administrators and deputy administrators that purport to inform contractors that certain work by employees is

compensable. (Administrative Ex. 19) Several of these letters refer to pre-and post-shift inspections and the like. The DOL would charge Moser with knowledge of these letters and cite them as evidence that the Respondent knew they were in fact in violation of the SCA and continued to willfully ignore the dictates of the Act. However, as stated above, the United States Supreme Court held in Reno, 515 U.S. at 61, and Arabian American Oil Co., 499 U.S. 144 at 157, that the opinion letters of administrative agencies did not have the force and effect of regulation because they were not subject to the notice and comment provisions of the APA. Therefore, even if Moser had knowledge of them, I find that the letters alone are not enough to find the Respondents' conduct willful under the Act.

As the actions of Moser were not willful, neither are they the result of culpable neglect. Culpable neglect is not defined by either the statute or the regulations. However, the regulations do state that "a contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice from the Department of Labor." 29 C.F.R. § 4.188 (a)(4). Both the First and Fourth Circuits have defined culpable conduct under the SCA as more than "mere negligence." See Werner v. Upjohn, Co., 628 F. 2d 848, 857-57 (4th Cir 1980); U.S. v. Dantran, Inc., 171 F. 3d 58, 68 (1st Cir. 1999).

The testimony in this case establishes that the Schleinings did not know the practice of compensating for pre-shift inspection time was potentially unlawful until the DOL investigation. (Tr. 786-88) While the conduct of the Respondents may rise to the level of negligence in this respect, I do not find that it qualifies as culpable due to the ambiguous nature of the statute and the regulations. While the regulation cited above does impose an "affirmative obligation" on Respondents, the provision necessarily assumes that a contractor would have a reason to question its own compliance based upon a plain reading of the regulations. A plain reading of the regulations would not raise the compensation for pre-trip inspections issue because they are ambiguous at best in this area.

The fourth factor turns on a bona fide question of law. The above analysis clearly demonstrates that this element is present.

Factor five considers the Respondents' efforts to bring their actions in compliance with the Act and the sixth factor concerns the promptness with which the employees were paid the sums due them. As noted above, Moser began to pay employees on the Palatine and Carol Stream runs, for such inspections in July 1992. The Respondents have also settled other portions of this case and stipulated to the holding of over 1.2 million dollars until the remaining issues in this case can be settled. (Administrative Ex. 29) I find these facts to be strong evidence of good faith on the part of Moser, to demonstrate a willingness to bring their actions into compliance with the Act and to as promptly as possible pay employees the monies owed them.

Factor seven regards evidence of repeated violations of the Act. As discussed above, the last violation occurred over fifteen years ago and was committed by wholly different management personnel. Therefore, I find that Moser's earlier SCA violations do not weigh against them in this debarment proceeding.

In summary, after weighing all relevant factors, I find that the totality of the evidence presents unusual circumstances that warrant relieving the Respondents from the ineligibility list. The violation in this case results from an ambiguous regulation rather than wilful or culpable conduct on the part of Moser. Forbidding the Respondents from obtaining further contracts under the Act would be contrary to the stated purpose of the Act and Congressional intent.

ORDER

IT IS HEREBY ORDERED that:

1. The instant Decision and Order is an interium order pending completion of the directives that follow.

2. The United States Department of Labor shall have fourteen days from the date of this opinion to submit calculations for the amount of wages owed each employee listed above for their performance of the pre-trip inspections. Once that submission is received, the Respondents shall then have fourteen days to respond to the accuracy of the Department of Labor calculations.

3. Upon submission of the calculations of the parties, the undersigned will issue a Supplemental Decision and Order within 20 days thereafter which shall incorporate the interim Decision and Order and shall become my final and appealable order in this case.

4. In all other respects, for the reasons stated above, the complaint against the Respondents, is hereby dismissed.

_____

DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Within 40 days after the date of the decision of the administrative law judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board pursuant to 29 C.F.R. Part 8, with a copy thereof to the Chief Administrative Law Judge. (6.20)

APPENDIX A

James Allen	Ken Hovis
Robert Allgood	Archie Hubbard
Joe Allison	Carlos Hughes
Richard Anderson	Paul Huntley
Stephan Anderson	Blair Jackson
Steven Aubrey	Randy Jay
Kevin Augustine	Scott R. Johnson
Jeffery Babbitt	Terry Johnson
Michael Bakos	Robert Jones
Edward Beck	Ken Kames
Jack Bennett	Joe Kraus
Rick Bennett	Dan Kresz
Scott Bennett	David Landry
James Berry	Robert Leal Jr.
Carl Bickle	Cliff Leesman
Kent Binder	Mark Lipke
Richard Binder	Jerry Lockwood
Richard H. Binder	Joseph Lopez
Charles Boys	Todd Lurz
Paul Brentise	John Lyons
Darryl Brown	Eric Martin
Kent Brown	Walter Massie
Gerald Bumgarner	Paul McLaughlin
Herschel Carey	Cary Merchant

Delma Carico	Donald Moore
Steve Carico	Jessie Moore
Alan Carroll	Henry Grady Morris
Rob Cartee	Mike Moscardelli
Mike Cartee	Jerry Nelson
Bobby Cartwright	George Nilo
Michael Catich	Darryl Nix
David Chapman	Russell Nolan Jr.
Carl Chehowski	Charles Nowicki
George Coe	Christopher Nowicki
Kevin Colon	Esteban Obregon
Tom Connors	James Ottinger
Joe Cook	Billy Parker
Louis Crain	Dan Peterson
Dale Cyko	Eddy Phillips
Jim Dano	Gerald Pratte
James Day	James Richmond
Don Dewey	James Rightenour
William DeWitz	Joe Riviera
James Dixon	Ronald Robertson
Donald Doye	Leonard Rowcliff
Don Drees	Edward Saldana
Ken Drees Sr.	Dalton Sartin
Billy Duck	Steven Savage
Bryan Dunnigan	Paul Schierer
Oscar Duron	Douglas Schnoes
Daniel Edwards	Harold Schardy

Dennis Edwards	Calvin Seals
Troy Emmett	Kenneth Shank
Kenneth Enck	Dale Shupe
Larry Fallin	Juan Sierra
Richard Fischer	Gary Simmons
Steven Fitzgerald	Sherman Sims
Charles Fosnock	Junior Smith
Keith Foster	Llyod Spencer
Harry French	James Spiegel
Patrick Friel	Robert Spiers
Steve Friesenecker	Dennis Stearns
Lawrence Fullmer	Glen Taylor
Loran Ganzer	Wayne Thomas
Gary Goldman	Kenneth Thompson
Scott Goldman	Bobby Thurman
Antonio Gonzales	James Tyrell
Carson Green	Jay VanWagoner
Robert Grote	Arthur Veal
Ronald Grohn	Robert Walker
Patrick Hamilton	Kim Wall
Ron Hammerman	William Walls
Jim Hansford	Billy Ward
Daniel Harkins	James Westbrook
Mark Harreld	Martin Wildermoth
Thomas Henrickson	Dennis Wilke
Angel Hernandez	Robert Wilson
Dean Hiles	Kenneth Winckler

Kenneth Hill	Donald Winlett
Richard Hill	Dan Wisdom
Russell Hill	Benjamin Wisiewski
William Hill	Walter Woodruff
Thomas Hobbie	William Yearton
Douglas Hoffman	Raymond Zick
Guy Holcomb	Raymond Zick
Joe Holler	
Robert Holtz	