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Issue Date: 04 August 2010

Case No. 2006-SCA-27

In the Matter of:

HHMT INC., a Corporation, and
HAL D. HICKS, an Individual,

Respondents.¹

APPEARANCES:

William C. Posternack, Esq.
Kevin M. Wilemon, Esq.
United States Department of Labor
Chicago, Illinois
For the Administrator

John F. Theil, Esq.
Theil Law Firm, LLP
St. Louis, Missouri
For the Respondent HHMT

Hal D. Hicks
Pro se Respondent

BEFORE: LARRY S. MERCK
Administrative Law Judge

¹ This case originally included four additional Respondents, Pam Mason, Janie Ensminger, Shelly Myles, and SLM Trans Inc. As explained in the Procedural History section of this Decision and Order, a default judgment was entered against Ms. Mason. Ms. Ensminger, Ms. Myles, and SLM Trans Inc. entered into settlement agreements with the Administrator.

DECISION AND ORDER

This proceeding arises under the provisions of the McNamara-O'Hara Service Contract Act ("SCA"), 41 U.S.C. § 351 *et seq.*, and the regulations issued thereunder at 29 C.F.R. Parts 4 and 6. The recipient of a federal service contract violates the SCA if it fails to (1) pay service employees the required wage, (2) pay minimum fringe benefits, or (3) keep adequate records. Employers must pay service employees for all hours worked, under the standards of the Fair Labor Standards Act § 29 C.F.R. Part 785, as incorporated by 29 C.F.R. § 4.178. Employers who violate the SCA are required to pay back wages and are barred from receiving future federal contracts for a period of three years.

The United States Department of Labor has filed suit against Respondents HHMT Inc. and Hal D. Hicks, alleging that they failed to pay service employees for all hours worked during the performance of United States Postal Service ("USPS") Contracts 98010, 752LE, 62237, and 62836.

Parties

Respondent HHMT Inc. is a corporation in the State of Illinois. (AX 5).² The company was incorporated under the name "Hal D. Hicks Mail Transportation Inc." on approximately March 15, 2000. On May 17, 2001, the company registered "Mail-A-Way" as an assumed corporate name. On approximately December 23, 2002, Hal D. Hicks Mail Transportation Inc. shortened its corporate name to "HHMT Inc." The assumed name of Mail-A-Way was cancelled on April 1, 2003. *Id.* For purposes of this Decision and Order, I will refer to the company as "HHMT," regardless of whether it was officially known as Hal D. Hicks Mail Transportation Inc., Mail-A-Way, or HHMT Inc., at that precise point in time. HHMT operated postal contracts 98010 and 752LE, which are at issue in this case.

Respondent Hal D. Hicks is a Florida resident who has operated USPS mail-hauling contracts since 1978. Mr. Hicks was awarded postal service contracts as a sole proprietor, including routes 62237 and 62836. Mr. Hicks also worked for, and had an ownership interest in, Midwest Transit, a company in the mail-hauling business. Mr. Hicks formed HHMT and was its sole shareholder until January 1, 2002. Many of HHMT's employees and drivers formerly worked for Mr. Hicks at Midwest Transit.

² In this Decision and Order, "ALJX" refers to Administrative Law Judge Exhibits, "AX" refers to Administrator's Exhibits, "HX" refers to Mr. Hicks's Exhibits, "RX" refers to HHMT's Exhibits, and "TR" refers to the transcript of the hearing.

Mr. Hicks asserts that he sold HHMT in 2002, but continued to serve as a “consultant” for the company in subsequent years.

The Administrator of the U.S. Department of Labor’s Wage and Hour Division is the prosecuting party in this claim. An investigation of HHMT and Mr. Hicks began in 2002 and was performed by various Wage and Hour Division investigators, including Troy Mouton, Frank McCowsky, Fred Wrightam, Lisa Hoffman, and James Yochim. Mr. Yochim supervised the investigation, determined the amount of back wages owed, and testified at the hearing.

Procedural History

On August 14, 2006, the Administrator filed a complaint against two corporations and four individuals: HHMT Inc., SLM Trans Inc., Hal D. Hicks, Shelly Myles, Pam Mason, and Janie Ensminger. (ALJX 1). The complaint alleged that the named Respondents violated the SCA by failing to pay service employees adequate wages and fringe benefits. The original complaint related to five government mail-hauling contracts, numbered 98010, 52237, 62836, 752LE, and 500BE. *Id.*

The original Respondents were given several extensions to file answers to the complaint. (ALJX 2-23). By January 11, 2007, all Respondents had filed answers with the exception of Pam Mason. (ALJX 25). The case was then assigned to the undersigned administrative law judge, and I subsequently issued a Prehearing Order on February 20, 2007. (ALJX 26). A hearing was originally scheduled for October 30, 2007. (ALJX 29). On September 12, 2007, the Administrator filed a Motion for Entry of Judgment by Default Against Respondent Pam Mason. (ALJX 59). By Order issued November 30, 2007, I granted the Administrator’s request and entered a default judgment against Ms. Mason, based on the declaration of the Wage and Hour investigator and Ms. Mason’s failure to respond to the complaint, subsequent correspondence, and an Order to Show Cause. (ALJX 69). At the request of the parties, the hearing was continued. (ALJX 60).

In January 2008, the parties asked to participate in a settlement judge proceeding, to attempt resolution of some or all of the issues in the case. (ALJX 72). The hearing was again continued. (ALJX 73). As a result of the settlement negotiations, the Administrator reached agreements with SLM Trans Inc., Shelly Myles, and Janie Ensminger, and requested that those parties be dismissed as Respondents. (ALJX 77, 82). On October 14, 2008, counsel for the Administrator filed a motion to dismiss Respondent Janie Ensminger as a party; that motion was granted by Order, issued November 18, 2008. (ALJX 82, 88). By Order, issued February 13, 2009, I approved consent findings between the Administrator and Respondents SLM Trans

Inc. and Shelly Myles, which resolved the remaining disputes between those parties. (ALJX 94). As of February 2009, only Mr. Hicks and HHMT remained as Respondents in this case.

During the pretrial process, the parties filed several motions to compel discovery, requests for protective orders, and motions for sanctions. (ALJX 31-32, 45, 80, 96, 98, 105, 107). Respondents' counsel also requested a further continuance, because Respondents were still receiving discovery responses from the Administrator. (ALJX 109). I granted a continuance by Order issued May 27, 2009; the hearing was rescheduled to commence on November 3, 2009. *Id.*

On October 9, 2009, the Administrator filed a motion for sanctions, based on its inability to schedule a deposition with Mr. Hicks. (ALJX 111). On October 20, 2009, two weeks prior to the November hearing, Respondents' counsel filed another motion for continuance, which the Administrator opposed. (ALJX 114). During a conference call with the parties, the Administrator's counsel clarified that while he wished to depose Mr. Hicks, he did not desire another continuance for that purpose. Respondents' request for a continuance was denied, and no sanctions were imposed. (ALJX 116; TR at 21-27).

Just prior to the hearing, Respondents' counsel, John Theil, withdrew as counsel for Mr. Hicks; Respondents requested permission for Mr. Theil to continue in his representation of HHMT and for Mr. Hicks to represent himself *pro se*. (ALJX 119-21). I discussed with all parties the issue of conflicts of interest and potential conflicts of interest. (TR at 6-13). Mr. Hicks and Mr. Theil assured the court that no conflict existed, and with no objection from the Administrator, I allowed Mr. Theil and Mr. Hicks to proceed as desired. *Id.*

The formal hearing in this case began on November 3, 2009, and lasted 13 days. The hearing commenced in Evansville, Indiana, from November 3, 2009, to November 6, 2009. (TR at 1-961). The parties reconvened for one day on November 16, 2009, in Knoxville, Tennessee. (TR at 962-1080). The hearing continued in Evansville, Indiana from January 19, 2010, through January 22, 2010 (TR at 962A-1080A,³ 1081-1816), and then in Cincinnati, Ohio from January 25, 2010, until its conclusion on January 28, 2010. (TR at 1817-2692).

³ The transcript includes two sets of pages numbered 962-1080. The first set of pages is a record of the proceedings on November 16, 2009, in Knoxville, Tennessee; in this Decision, these pages will be referred to as 962-1080. The second set is a record of the proceedings on January 19, 2010, in Evansville, Indiana; those pages will be referred to as 962A-1080A.

Evidence

During the hearing, the Administrator's initial complaint as well as all pre-hearing motions, orders, and correspondence were admitted into the record as ALJX 1-25, 1A. (TR at 26, 2534-35).

The Administrator submitted the following exhibits at the hearing: AX 1-43, 20A-23A, 26A-27A. (TR at 31, 39, 1434, 1450, 1496-97, 2615). Each of these exhibits was admitted into the record. *Id.* Mr. Hicks submitted exhibits HX 1-28, which were admitted into the record. (TR at 299, 301, 474, 608, 618, 730, 783, 829, 857, 860, 887, 966A-67A, 1231-32, 1837-39, 1919). Finally, HHMT submitted one exhibit, RX 1, which was also admitted. (TR at 665).

The Administrator's exhibits, labeled AX 20-27, AX 20A-23A, and AX 26A-27A, contain the calculations of back wages allegedly owed to each driver. Based on the difficulty interpreting the hand-written calculations and with the agreement of all parties, I instructed counsel for the Administrator to restructure and resubmit the calculations of back wages owed, within 45 days of the conclusion of the hearing. (TR at 2528-29). On April 16, 2010, the Administrator submitted printed spreadsheets of the back wage calculations, labeled AX 20-27. These new printouts replace the version of AX 20-27 admitted at the hearing, as well as AX 20A-23A, 26A-27A. As explained to the parties, this Decision will be based on the revised computations; accordingly, future references to AX 20-27 in this Decision and Order refer to the revised computations received on April 16, 2010.

Briefs and Closing Arguments

The parties were afforded 75 days post-hearing to submit briefs. (TR at 2531). During the hearing, I explained that Mr. Hicks and HHMT would have the opportunity to make legal arguments in their briefs. (TR at 633, 1385, 1394, 1891, 2009, 2012). I also explained that Respondents would be able to review the Administrator's revised back wage calculations post-hearing, and to dispute the method or result of the calculations in their briefs. (TR at 1846, 2020, 2531, 2735). I instructed Respondents to "be very specific in explaining why the calculations are wrong, citing clearly to the documents in the record and the hearing testimony." (TR at 2531). Mr. Hicks and counsel for HHMT requested that a combined brief be filed on behalf of both Respondents, and they were given permission to file a joint closing argument. (TR at 2532-33).

The parties were subsequently granted two extensions for filing their briefs. *See* Orders issued March 10, 2010, May 10, 2010. All parties were ordered to submit their final arguments by June 3, 2010, with reply briefs due June 24, 2010. *Id.* The Administrator's

brief was received by this office on June 2, 2010; however, no brief or closing argument was received from Mr. Hicks or HHMT.⁴ The record was thereafter closed.

Issues

The issues in this case are:

1. Did Respondent HHMT violate the prevailing wage provisions of the SCA and 29 C.F.R. § 4.6 in the performance of Contract 98010?
2. Did Respondent HHMT violate the prevailing wage and fringe benefit provisions of the SCA and 29 C.F.R. § 4.6 in the performance of Contract 752LE?
3. Did Respondent Hicks violate the wage and fringe benefit provisions of the SCA and 29 C.F.R. § 4.6 in the performance of Contract 62237?
4. Did Respondent Hicks violate the prevailing wage provisions of the SCA and 29 C.F.R. § 4.6 in the performance of Contract 62836?
5. If violations of the SCA are found, what are the amounts of back wages and fringe benefits that Respondents owe to the affected service employees under each contract?
6. If violations of the SCA are found, is Respondent Hicks a “party responsible” under § 3(a) of the SCA for the violations on Contracts 98010 and 752LE, in addition to Contracts 62237 and 62836?
7. If violations of the SCA are found, have Respondents established that unusual circumstances exist to relieve them from debarment under § 5(a) of the SCA?

(Administrator’s Brief at 10-11).⁵

I have based the following findings of fact and conclusions of law on my analysis of the entire record, including all exhibits admitted into evidence, the testimony at the hearing, the arguments of the parties, and applicable regulations, statutes, and case law.

⁴ Counsel for HHMT was phoned twice to ask about the status of the brief, but the calls were not returned.

⁵ In its brief, the Administrator withdrew the issue of whether Respondents violated the provisions of 29 C.F.R. § 4.6(g) by failing to maintain adequate records. (Administrator’s Brief at 11).

I have carefully considered all of the evidence in this case, including that not specifically mentioned in this Decision and Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background / Testimony

The following individuals testified at the hearing: HHMT employees, Pam Mason, Ricky Dowty, Paula Duncan, John Fulk, and Cindy Bridwell; drivers, Allen Anderson, Ron Jackson, David Bradley, Gary Yandell, Todd Bennett, Billy Ash, and Patrick Muller; Wage and Hour Division Assistant District Director James Yochim; and Respondent Hal Hicks. (TR at 1-2691). Depositions of Shelly Myles and Billy Ash were also admitted into the record. (AX 19, 19A; HX 25).

The documentary evidence submitted by the parties contains, *inter alia*: the four USPS contracts at issue in this case (AX 1-4); HHMT corporate records and correspondence (AX 5-7, 40-41); discovery requests and responses (AX 8-18); time sheets and payroll records for most drivers (AX 18, 29, 31, 32; HX 7, 13-19); Wage and Hour Division interview statements from various employees (HX 3, 6, 8-13, 20-24); correspondence between HHMT employees and Wage and Hour investigators (HX 4-5; RX1); back wage computations (AX 20-27, 20A-23A, 26A-27A); a chart for sleep time deductions (AX 30); and Wage and Hour Division Opinion Letters (AX 33-36).

James Yochim, Assistant District Director Wage and Hour Division

James Yochim, an assistant district director with the Department of Labor's Wage and Hour Division, testified at the formal hearing. (TR at 1415-2317). Mr. Yochim has worked for the Wage and Hour Division for 20 years, first as an investigator, and then as an assistant district director for the past 10 years. (TR at 1416-17). As an investigator, he completed approximately 30 to 50 investigations each year, with a total of 20 to 25 investigations under the SCA. (TR at 1418-19). As an assistant district director, Mr. Yochim has also supervised approximately 10 cases under the SCA, including two previous investigations involving Midwest Transit and Mr. Hicks, in 1999 and 2002. (TR at 1419-22, 1440-42). Mr. Yochim was also aware of prior investigations of Midwest Transit in 1985 and 1990. (TR at 1428-37).

Mr. Yochim testified about the present investigation of Mr. Hicks and HHMT, which began in 2002. (TR at 1423-28). Several investigators were involved early in the investigation, including Troy Mouton, Frank McCowsky, Fred Wrightam, and Lisa Hoffman. (TR at 1422). Mr. Yochim was the supervisor of the investigation. *Id.* Mr. Wrightam and Ms. Hoffman conducted witness interviews, interfaced with HHMT

employees, and performed initial calculations of back wages due. (TR at 1424-27). Based on the employee witness statements, payroll records, and time sheets, the investigators determined that Mr. Hicks and HHMT violated the prevailing wage and fringe benefit requirements of the SCA and Fair Labor Standards Act, and a complaint was filed. (TR at 1427; ALJX 1). Mr. Wrightam retired in July of 2006; Mr. Yochim continued to supervise the investigation and recalculated all back wages due for the four contracts at issue in this case—Contracts 98010, 752LE, 62237, and 62836. (TR at 1423, 1442-43).

The calculations were based on the following information: available payroll records and time sheets; contract documents, including route schedules and wage determinations; information obtained during discovery; and witness statements and testimony. (TR at 1444-46, 1451-52). Mr. Yochim described the violations identified on each of the four USPS contracts, as well as his calculations of back wages for each driver. The contract-specific testimony is summarized later in this opinion.

Hal Hicks, Respondent

Hal D. Hicks testified on his own behalf at the formal hearing. (TR at 2430-2691). Mr. Hicks explained that he first became involved in the mail contracting business in 1978, when he was awarded two mail-hauling contracts, which he operated in his own name as a sole proprietor. (TR at 2431). In addition to his own mail contracts, Mr. Hicks managed the operations of Midwest Transit, a company formed in June of 1980 by Mr. Hicks's attorney. (TR at 2431, 2638, 2640). Midwest Transit began as a bonding company, which operated mail routes on which the prior contractor had defaulted; in approximately 1984, Midwest Transit became a full-time mail contractor. (TR at 2431-32). Mr. Hicks performed certain duties for Midwest Transit, but did not do "salaried work" until 1990. (TR at 2432, 2643). Mr. Hicks eventually became a Director, President, and partial owner of the company. (TR at 2633-38). In 2001, Midwest Transit was taken over by a receiver, and Mr. Hicks no longer had a relationship with the company. (TR at 2432).

Mr. Hicks incorporated HHMT in 2000, and continued to haul mail under contracts awarded to that company. (TR at 2433; AX 5). Mr. Hicks sold HHMT in 2002, and retained no stock or officer role. Mr. Hicks explained that he continued to work as a consultant, as he had experience with all of the routes operated by HHMT. (TR at 2433-34). He drew no salary and was not compensated for his work. *Id.*

Mr. Hicks also testified about his experience with routes 62237, 62836, 98010, and 752LE. (TR at 2434-49). Generally, Mr. Hicks pointed to the post office schedules for the various contracts and argued that the drivers should have been able to complete

each route within the time allotted. (TR at 2430-2691). He also explained that the USPS conducted a survey each year on each route, to determine the actual amount of time that it took to complete the trip. (TR at 2439-40). Mr. Hicks's route-specific testimony is discussed later in this opinion.

Pam Mason, HHMT President

Pamela K. Mason, an HHMT employee and an initial Respondent in this case, testified at the formal hearing. (TR at 41-161). Ms. Mason worked for HHMT for four or five years, beginning in the fall of 2001. (TR at 45). Prior to her employment with HHMT, Ms. Mason worked for Midwest Transit and Sumner Mobile Homes, both of which were operated by Mr. Hicks. (TR at 47-48). At Midwest Transit, Ms. Mason worked as Mr. Hicks's secretary. When a receiver took over in 2001, she was hired by Mr. Hicks at HHMT. (TR at 50).

Ms. Mason's home initially housed the offices of HHMT; approximately one year later, the offices moved to West Street in Olney, Illinois. (TR at 51-54). During that time, Ms. Mason continued to act as a secretary for Mr. Hicks, performing daily clerical tasks. (TR at 54). Ms. Mason shared an office with Karen Fulk, and with Mr. Hicks "whenever he was there." (TR at 55). Mr. Hicks was not in the office every day and did not have a schedule of when he would come to the office; Ms. Mason did note that Mr. Hicks was in the office during Department of Transportation audits. (TR at 56-57).

Ms. Mason testified that she checked with Mr. Hicks before making major decisions on equipment issues such as broken down trucks. (TR at 57). Regarding bid preparations, Ms. Mason stated that Mr. Hicks would do the initial preparation of the contract and she would type it up. *Id.* Ms. Mason signed contract bids at times; also, HHMT accountant Mike Burton used her digital signature on such documents. (TR at 58).⁶

Ms. Mason became president of HHMT after the company moved to Olney. (TR at 62). She was unsure who appointed her as president, but assumed it was Mr. Hicks. (TR at 62-63). She also had an ownership interest in HHMT of 27 shares of stock. (TR at 63-64). Ms. Mason never paid for the stock and did not have any paperwork or stock certificate documenting her ownership; when she left HHMT in 2005, she relinquished her interest in the stock and received no compensation for it. *Id.*

⁶ Ms. Mason was asked about her signature on several contracts and documents; in many cases, she believed that her electronic signature was used, or that another individual had signed on her behalf. (TR at 58, 68-69, 74, 102, 111-14, 130, 155). In other cases, Ms. Mason admitted to signing the documents, but testified that she did so at the direction of Mr. Hicks or Mr. Burton. (TR at 77-79, 82-83, 111-14).

Paula Duncan, HHMT Payroll Manager

Paula Jo Duncan worked for HHMT from March 2003 until December 2003, and was in charge of payroll. (TR at 512). In January and February 2004, while a replacement was being hired, Ms. Duncan continued to do the company's payroll on a part-time contract basis. (TR at 512, 591, 627). Ms. Duncan obtained the job from an online posting; she was interviewed and hired by Mr. Hicks. (TR at 513-17). Ms. Duncan was responsible for the payroll for all routes, including 98010, 752LE, 62237, and 62836. (TR at 518-19). She also paid the office staff and herself. (TR at 520). Although Ms. Duncan performed payroll work for contracts operated by both Mr. Hicks and HHMT, she received only one pay check, from HHMT, and was not compensated separately for her work on Mr. Hicks's "box routes," 62237 and 62836. *Id.*

Ms. Duncan testified that the drivers submitted their time sheets to Cindy Bridwell, who then passed the paperwork to Ms. Duncan for payment. (TR at 521). Ms. Duncan stated that she did not always pay the drivers for all hours recorded on their time sheets. (TR at 524). Delays due to weather or breakdown were listed in a section of the time sheet labeled "remarks"; these hours were considered "non-driving" time and were compensated at the minimum wage rate or \$6.50 per hour. (TR at 525-28, 532). Ms. Duncan generally spoke with Rick Dowty regarding whether to pay any extra amount. (TR at 525, 531-32). She testified that Mr. Hicks and Mr. Dowty gave specific instructions on how to pay the drivers for each route; there was a chart of how much was to be paid "regardless." (TR at 534). Ms. Duncan would pay a certain number of hours for the route, plus a minimum wage rate for additional hours due to breakdown or weather delay. (TR at 535).

There were other times when additional hours were not paid at all; but Ms. Duncan could not recall specific cases. (TR at 535-36). Ms. Duncan recalled Mr. Hicks telling her not to pay certain hours. (TR at 536). Questions about payroll were typically discussed with her co-workers, Janice Sherer and Pam Mason; they would then consult Rick Dowty, and for more difficult questions, Ms. Mason would contact Mr. Hicks. (TR at 537-38). Ms. Duncan testified that Mr. Hicks visited the office during her employment, and that she would discuss payroll issues with him. (TR at 540-41). Ms. Duncan also described disputes with Mr. Hicks regarding the Department of Labor investigation and the documents that were requested by the investigators. (TR at 542-44). She testified that certain payroll records and time sheets were removed from the office at the direction of Mr. Hicks prior to the arrival of the investigators. (TR at 542-44, 601-02, 650-51).

Cindy Bridwell, HHMT Employee

Cindy Bridwell testified at the formal hearing as a witness for Mr. Hicks. (TR at 2366-2428). Ms. Bridwell began working for Midwest Transit in 1989, and was responsible for logs, time sheets, and fuel receipts. (TR at 2367-68). Ms. Bridwell testified that she was later hired by Pam Mason to work at HHMT, where Ms. Mason was her supervisor. (TR at 2417).

Ms. Bridwell worked with the logs at HHMT and described the program that was used to enter the log information; the program would identify irregularities, particularly regarding a driver's adherence to the speed limit. (TR at 2368-71, 2408-09). Once she finished reviewing the logs, the time sheets were sent to the payroll department. (TR at 2372). Ms. Bridwell commented on some of the drivers' tendency to fill out incomplete logs, and drivers who tended to be more meticulous. (TR at 2378-80). Specifically, she stated that Gary Yandell and Ron Jackson did an inadequate job of logging their hours. (TR at 2378-79, 2388).

Shelly Myles, Chairman of HHMT

Shelly Myles was deposed on February 17, 2009. (DX 19). Ms. Myles is the daughter of Hal Hicks and was employed by Midwest Transit from 1996 to 2002. (DX 19 at 11). She was hired by HHMT in June 2002 as a route supervisor, working remotely from her home on the east coast. (DX 19 at 17-18, 24).

Ms. Myles had an ownership interest in HHMT, having been given stock by her father, and named as CEO or Chairman. (DX 19 at 19-22, 32-34). She never purchased the stock and was surprised to learn that she was part owner and CEO. *Id.* Ms. Myles did not visit the HHMT office in Olney and never attended any board meetings. (DX 19 at 33, 38, 42, 93, 110-13). She resigned in December 2004 over tax issues, and was not compensated for the shares of stock that she returned to HHMT. (DX 19 at 19, 51-55, 63). Ms. Myles dealt primarily with Pam Mason on day to day issues and was unaware of whether Mr. Hicks retained ultimate authority over company decisions. (DX 19 at 46, 66, 71).

Ms. Myles formed SLM Trans Inc. in 2003. SLM Trans began operating some of HHMT's routes in 2005, and the company leased equipment from HHMT, with the option to purchase. (DX 19 at 56-60, 85-87; TR at 2647). In May 2008, the contracts for routes 62237 and 62836 were transferred to SLM Trans. (DX 19 at 86-87).

Contract 98010

USPS Contract 98010 was a service contract to haul mail between Seattle, Washington, and Greensboro, North Carolina. (AX 1). HHMT was awarded the contract and operated the route from July 1, 2002, through September 6, 2005. (AX 1, 9). Under the contract, drivers were to be paid the wage determination rate of \$17.23 per hour, plus \$2.65 per hour in fringe benefits. (AX 1 at 121; AX 9 at 28).

The route was divided into segments. Originally, HHMT drivers hauled mail between the following cities: 1) Seattle, Washington, and Nitro, West Virginia; and 2) Nitro, West Virginia, and Greensboro, North Carolina. (TR at 1334). A team of drivers would depart from Mt. Vernon, Illinois, and drive to Nitro. (TR at 1334). There, they would exchange cargo with a solo driver who was responsible for hauling mail between Greensboro and Nitro. From Nitro, the team of drivers would drive across the country to the bulk mail center in Seattle, where they would unload and load mail. The team would then return to Mt. Vernon, Illinois, where another set of drivers would take over and repeat the trip. *Id.*

The route structure changed two or three times. At one point, the starting point became Olney, Illinois, instead of Mt. Vernon, but the route otherwise remained the same. (TR at 174, 1337). Later, Nitro was eliminated as a stop, and a solo driver was responsible for hauling mail from Greensboro, North Carolina, to Olney, Illinois, where he would meet a team of drivers who hauled mail between Seattle and Olney. (TR at 175). Finally, the trip was changed so that the drivers stopped in Ellensburg, Washington, instead of Seattle. (TR at 176). A solo driver would haul mail between Ellensburg and the bulk mail center in Seattle. *Id.*

The record contains the contract and post office schedules for route 98010. (AX 1). The Administrator also submitted time sheets and payroll records for several of the 98010 drivers. (AX 18, Groups A-O, R-DD). Drivers Billy Ash, Todd Bennett, Patrick Muller, and Gary Yandell testified about their experience driving portions of route 98010. Ricky Dowty testified about the structure of the route and John Fulk testified as to his observations of drivers on the route. Mr. Hicks also testified about his experience with route 98010. James Yochim, of the Wage and Hour Division, testified about the wage violations on Contract 98010 and his calculations of back wages owed.

Ricky Dowty, Supervisor on Route 98010

Ricky Dowty worked as a supervisor at HHMT and testified at the formal hearing. (TR at 163-399). In 1986, Mr. Dowty was hired by Mr. Hicks to work for Midwest Transit. (TR at 168). Mr. Dowty worked for Midwest Transit until February

2002; Mr. Hicks hired him in July 2002 to begin working for HHMT. (TR at 167). Mr. Dowty testified that Mr. Hicks was “the person in charge. That’s who we answered to, all of us that worked there.” *Id.* While questions typically went to Pam Mason, Mr. Dowty believed that Mr. Hicks usually had the final say in a matter. (TR at 170, 236). Mr. Dowty stated that Mr. Hicks was in the office every couple of weeks; he recalled seeing Mr. Hicks working on contract bids and reviewing time sheets. (TR at 209-12, 237, 371).

Mr. Dowty worked as a supervisor and dispatcher for the 98010 route, as well as four “box routes.” (TR at 171, 236). As part of his duties, Mr. Dowty separated the route into segments, and scheduled and dispatched the drivers. (TR at 173-177). Mr. Hicks also played a role in routing decisions. *Id.* Drivers were paid a set number of hours to complete the run, based on the post office schedule, regardless of who drove or how long the trip actually took. (TR at 183-88, 277, 281). Mr. Dowty was told by Mr. Hicks how many hours the route would pay, including four “bonus hours,” to account for delays or meal breaks. (TR at 180-81). Drivers were instructed to write down if the trip took extra time; sometimes they were paid for delays at a lower rate. (TR at 190-91).

John Fulk, HHMT Fleet Manager

John Fulk was called by Mr. Hicks as a witness at the formal hearing. (TR at 2317-2364). Mr. Fulk began working for Midwest Transit in 1988, until it was taken over by a receiver; he was then hired by Mr. Hicks and worked for HHMT until 2005 or 2006. (TR at 2318, 2350-51). He stated that Mr. Hicks was his boss at HHMT. (TR at 2351).

Mr. Fulk was the fleet manager for HHMT; he oversaw the shops and parts department and ensured that equipment was serviced and repaired. (TR at 2319). Mr. Fulk worked at the shop in Olney, Illinois, which was used as a relay point for route 98010. (TR at 2319-20). Each time the trucks returned from Seattle, they would be serviced, with major service every three trips. (TR at 2321). Mr. Fulk testified that the driver from Greensboro would arrive around 2:00 a.m. each night, and that the drivers from Seattle would arrive between 4:00 and 6:00 a.m. (TR at 2324-25). He seldom witnessed drivers performing pre-trip inspections before leaving the parking lot; typically the drivers would load their bags into the truck and leave. (TR at 2341-42). Similarly, he did not see drivers perform post-trip inspections when they returned from a run. (TR at 2342). Mr. Fulk stated, however, that some drivers were very diligent about performing inspections. (TR at 2343).

Gary Yandell, Driver on Routes 98010, 62836

Gary Yandell testified at the formal hearing on January 19, 2010. (TR at 972A-1080A, 1081-1150). Mr. Yandell worked for HHMT from approximately 2000 to 2005; he also worked for Midwest Transit, SLM Trans and Hal D. Hicks Mail Contract. (TR at 975A-76A, 1005A-06A). Mr. Yandell was a driver on route 98010 from October 2002 until 2005. (TR at 978A-79A). He initially asked Ricky Dowty to add him as a driver on route 98010; when Mr. Dowty refused, Mr. Yandell asked Mr. Hicks, who approved the request. (TR at 1141-42).

Mr. Yandell would sometimes drive from Olney to Greensboro and back as a solo driver, other times he would work as a team driver on the Seattle-to-Olney portion of the route. (TR at 978A-81A). When Mr. Yandell drove from Olney to Seattle, it took approximately 40.5 hours one-way, and the same number of hours on return. (TR at 987A-88A). Mr. Yandell made approximately five to six stops for fuel, which would take anywhere from 15 minutes to one hour; Mr. Yandell would not stop for food. (TR at 989A-90A). Mr. Yandell testified that he was paid for 40.5 hours for a roundtrip run from Olney to Seattle; his team driver received the same amount of pay. (TR at 989A).

Mr. Yandell testified that when the route changed from Seattle to Ellensburg, the trip length was shortened by approximately five hours round-trip; the trip from Olney to Ellensburg would usually take about 38 hours one-way, depending on the weather. (TR at 987A- 988A). However, Mr. Yandell testified that when he drove the run from Olney to Ellensburg, he would sometimes have to wait one to two hours for the driver from Seattle to arrive in Ellensburg. (TR at 988A).

Mr. Yandell also discussed the Olney-to-Greensboro portion of the route, testifying that it took approximately 11 hours one-way to complete this run; however, upon arriving at the final destination in Greensboro, North Carolina, it would take an additional 30 minutes to one hour if Mr. Yandell was instructed to make stops to deliver stamps in that area. (TR at 1000A-01A).

During snow delays and truck breakdowns, Mr. Yandell would note the total number of hours delayed by weather; he testified that he was paid at minimum wage for those hours, whereas he was paid the wage determination rate for his regular driving hours. (TR at 1009A, 1011A-12A). Mr. Yandell testified that he recorded some of the delays as off-duty hours, even though they occurred while he was on-duty; he did this to match his log book with his time sheets. (TR at 1014A-15A).

Mr. Yandell believed that Mr. Hicks was in charge of HHMT as of 2003, and that Pam Mason was a secretary for the company. (TR at 1103-04). He observed Mr. Hicks in the office, and believed that he ran the company. (TR at 1104).

Todd Bennett, Driver on Route 98010

Robert Todd Bennett began employment with HHMT in September 2002 as a mail truck driver on route 98010. (TR at 1151, 1152). He last worked for HHMT in September 2005. (TR at 1152). Mr. Bennett was a team driver on route 98010 during his employment with HHMT. (TR at 1153). He drove the route when it originated in Mt. Vernon; he later drove the Olney to Seattle segment of the route. (TR at 1153).

Mr. Bennett testified that one roundtrip from Olney to Seattle took approximately three and a half days to complete. (TR at 1154). He and his team driver would operate in five-hour shifts, with one driving and the other sleeping. *Id.* Mr. Bennett explained that each time the status changed, this change was noted in the log book as follows: “driving”; “on-duty” for any non-driving, work-related activities; “sleeping” for when drivers would sleep in the sleeper berth; and “off-duty” for when the driver was not responsible for the truck in any way. (TR at 1557).

Mr. Bennett would start the drive from Olney sometime between midnight and 8:00 a.m., depending on the seasons: in the summer, he left later in the morning, and in the winter, he left earlier. (TR at 1155). The Olney-to-Seattle route usually took 38 to 39 hours in either direction; driving from Olney to Ellensburg took approximately 36 to 37 hours in either direction. (TR at 1156). The total route length would vary; snow and ice could lengthen the trip in the winter and road construction, accidents, and detours caused delays as well. (TR at 1161). Mr. Bennett testified that his arrival in Seattle was delayed due to weather conditions about six months out of the year—usually during September to March, when it snowed out west. *Id.* If the route took longer to run, Mr. Bennett recorded additional time in the log book and on his time sheets. (TR at 1162).

Mr. Bennett testified about the non-driving time that was spent on the route, including picking up the truck, performing pre-trip inspections, unloading mail in Seattle, and switching trailers on the truck. (TR at 1160-62). He also spoke about time spent in Ellensburg, Washington, waiting for another driver to switch trailers. (TR at 1166). Mr. Bennett testified that he stopped approximately three to five times in each direction. (TR at 1158). These stops would range from 15 minutes to 45 minutes; if it took a longer time, Mr. Bennett would sometimes record it in his log book. Mr. Bennett did not stop for food; he and his partner would bring coolers and eat in the truck. (TR at 1159). If either driver wanted to eat something hot, he would pick it up at the truck stop while refueling the truck. *Id.* The drivers would not usually stop for showers, but

if they did, they would shower quickly in conjunction with a fuel stop; whoever was driving would refuel while the other driver would shower. (TR at 1188).

Mr. Bennett was paid 40.5 hours for a round-trip from Olney to Seattle. (TR at 1162). The pay was based on a 76 hour trip length; the drivers were paid for driving time, as well as "bonus hours" for a total of 40.5. (TR at 1163). If the trip took less than 40.5 hours each way, the drivers were still paid that amount. If it took more than 40.5 hours due to weather delays or equipment problems, Mr. Bennett was sometimes paid for those extra hours, but he did not recall which circumstances prevented him from always receiving that pay. *Id.* In at least one instance, Mr. Bennett was compensated for a delay at the minimum wage rate instead of the wage determination rate of \$17.23 per hour. (TR at 1164, 1173-74).

Mr. Bennett testified that he had the occasion to go into the offices of HHMT in Olney, Illinois, three to five times per month. (TR at 1167). During those visits, Mr. Bennett observed Mr. Hicks at the office. *Id.* Mr. Bennett identified Mr. Hicks's position as the boss because Mr. Hicks's name was on the side of the truck, his name was on the fuel card, and he informed Mr. Bennett of how to run the route. *Id.* Mr. Bennett also had conversations with Mr. Hicks at the office about topics including possible new mail routes and detours to avoid the State of Oregon. (TR at 1167-69). Rick Dowty was Mr. Bennett's supervisor. (TR at 1178).

Patrick Muller, Driver on Route 98010

Patrick Muller was employed by HHMT from mid to late 2002 until March 2003, and again from October or November 2003 until February 2004. (TR at 1331, 1335-36, 1363). Mr. Muller was a team driver on route 98010. Initially he drove from Mt. Vernon to Nitro to Seattle. (TR at 1334, 1398). Later, he drove from Olney to Nitro to Seattle. (TR at 1337). Mr. Muller testified that he usually teamed with his brother, Richard Lee Muller, who was also employed by HHMT from late 2002 to early 2003. (TR at 1336, 1365). The Muller brothers quit working for HHMT in March 2003. (TR at 1332). They were contacted in the fall of 2003 by an HHMT driver who said the company needed a team to run mail to Seattle. (TR at 1333). Ricky Dowty then rehired the pair. *Id.*

Mr. Muller testified that it took approximately four days to complete a roundtrip from either Mt. Vernon or Olney to Nitro to Seattle and back; he could not recall the precise number of hours. (TR at 1342, 1370). He stated that weather delays and truck breakdowns would sometimes delay the entire round trip. (TR at 1342, 1375).

Mr. Muller was questioned about his time sheets, some of which were admitted into the record. (TR at 1351-1400; AX 18 Group U). Mr. Muller and his brother

recorded the time that they each spent driving as “on duty” time; other time for pre-trip inspections or fuel stops were also listed on the time sheets in a separate column. (TR at 1343, 1346). Mr. Muller testified that they did not routinely stop for meals or showers, unless there was a delay. (TR at 1344-45). Mr. Muller did not recall whether he was paid for non-driving hours or hours that he was delayed, but stated that if he was paid, it was at a minimum wage rate. (TR at 1349, 1356, 1357).

As an HHMT employee, Mr. Muller dealt primarily with Pam Mason and Ricky Dowty. (TR at 1335). He did not “really know” Mr. Hicks, but recalled seeing him at the office on several occasions and knew that Mr. Hicks was “the man.” (TR at 1368).

Billy Ash, Driver on Routes 98010, 752LE, 62237

Billy Ash testified at the formal hearing on January 19, 2010, and was previously deposed on March 11, 2009. (TR at 1194-1328). Mr. Ash began his employment with HHMT on December 23, 2003, and was a driver on routes 98010, 752LE, and 62237. (TR at 1196). After working for HHMT, Mr. Ash drove for SLM Trans until 2008. (TR at 1298). His testimony regarding routes 752LE and 62237 will be discussed later in this opinion.

Mr. Ash drove route 98010 from January 28, 2004, until June 2004, with some additional trips in July and August 2004. (TR at 1206, 1208, 1285-86, 1316, 1318-19). During that time, Mr. Ash drove the Olney-to-Seattle portion of the route as a team driver. (TR at 1208-09). Mr. Ash testified that he picked up the truck in Olney, performed a 15-minute pre-trip inspection, and then left for Seattle. (TR at 1210). Mr. Ash testified that when the weather was uneventful, the trip from Olney to Seattle would take approximately 40 to 48 hours one-way. (TR at 1211). When the route became Olney-to-Ellensburg in June or July of 2004, the trip length decreased by approximately two hours. (TR at 1219).

Mr. Ash testified that he made three to four fuel stops during the trip; he and his team partner rarely stopped for food because both drivers brought coolers. (TR at 1211-13). Mr. Ash testified that he initially alternated with his partner, driving and sleeping in five hour shifts; later, Mr. Ash would drive 11 hours and then take 11 hours in the sleeper portion of the truck. (TR at 1213-14). Mr. Ash testified that he was paid 40 hours for completing the trip; later, the pay decreased to 38 hours. (TR at 1214). If the hours on his time sheets were less than the allowed time to run this route, he would receive bonus hours; however, if his time ran over the allotted time, Mr. Ash was not paid for those extra hours of work. (TR at 1324). Mr. Ash recalled that he was only paid extra time when the truck would break down, but not for weather delays; the rate of pay for those extra hours was at a lesser rate than regular pay rate. *Id.*

Mr. Ash was hired by Rick Dowty; he spoke with Mr. Hicks about route 98010 periodically when they met in the HHMT office. (TR at 1207). Mr. Ash testified that he talked to Mr. Hicks about the fact that his time was not being paid correctly on several occasions but he could not recall specifically when the conversations occurred. (TR at 1220-21).

Hal Hicks

During his testimony at the formal hearing, Respondent Hal Hicks was questioned about his experience with route 98010. Mr. Hicks rode on route 98010 to Seattle at least three times. (TR at 2441-42). Mr. Hicks discussed the start time for the Olney-to-Seattle and Mt. Vernon-to-Seattle portions of the route; he stated that there was no reason for a driver to arrive for duty before 2:00 or 4:00 a.m., respectively. (TR at 2549, 2557-59). Mr. Hicks also discussed the back wage computations by the Wage and Hour Division, particularly the amount of time allowed for meal breaks during the trip from Illinois to Seattle. (TR at 2566-77). Mr. Hicks argued that the drivers had time for 2.5 hours of meal breaks per day—either five stops at 30 minutes, or one 2-hour stop and a shorter stop for 30 minutes. (TR at 2571, 2602). On cross examination, Mr. Hicks admitted that the drivers were not required to take meal breaks, and he did not claim that they actually took 2.5 hours of meal breaks. (TR at 2627).

James Yochim, Assistant District Director, Wage and Hour Division

Assistant District Director Yochim identified wage violations for 29 drivers on route 98010; at the formal hearing, he testified about his calculation of back wages owed by HHMT. (AX 20-21). For team drivers who were on duty for a period of time greater than 24 hours, Mr. Yochim testified that HHMT violated the SCA by only paying drivers for time actually spent driving, as opposed to all hours worked. (TR at 1504, 1519, 1523, 1534, 1549, 1556, 1567, 1578, 1579, 1585, 1591, 1600, 1602, 1605-06, 1610, 1636, 1646-47, 1653, 1657, 1666, 1670-73, 1677). Mr. Yochim stated that HHMT paid drivers for driving time only, whereas the company should have paid drivers for all on-duty time, including that spent in the sleeper portion of the truck. (TR at 1441). Mr. Yochim calculated back wages based on available time sheets, pay stubs, and employee testimony. *Id.* For solo driver James London, Mr. Yochim testified that HHMT did not pay the driver for all hours worked, as reflected by London's time sheets and pay stubs. (TR at 1622-23).

It took team drivers multiple days to complete one round trip from Illinois to Washington on route 98010. If the time sheets provided a start time on the first day and the end time on the last day, Mr. Yochim used that information to arrive at a total trip length. Otherwise, Mr. Yochim used an average trip length, based on the payroll

records and testimony of other drivers. (TR at 1505, 1577, 1580, 1592, 1600, 1605, 1613, 1616, 1621, 1650, 1654, 1657, 1667, 1673, 1678). An average of 95 hours was used for Mt. Vernon to Seattle to Nitro to Mt. Vernon; an average of 75 hours was used for Olney to Seattle to Olney. *Id.* Mr. Yochim obtained those figures by taking the trip length of several drivers who listed start and stop times on their time sheets, and averaging those figures from an approximately eight-month period. (TR at 2239-40; AX 20 at 1). The Administrator provided the computations of these averages in AX 20.

Mr. Yochim explained that the drivers should have been paid for all on-duty hours, not simply those spent driving the truck. (TR at 1441). Because the drivers were on duty for more than 24 hours at a time, the employer was permitted to deduct up to eight hours per day for non-compensated sleep time; an employer could also deduct bona fide meal periods, during which a driver was relieved from duty for at least 30 minutes. (TR at 1447-48, 1466). Accordingly, Mr. Yochim deducted sleep time according to the chart at AX 30, and deducted time for meals, based on three 30-minute breaks per 24 hour period. (TR at 1601, 2109). Based on those computations, as revised post-hearing, Mr. Yochim determined that the drivers of HHMT on route 98010 were owed a total of \$143,393 in unpaid wages.

On cross-examination, Mr. Hicks questioned Mr. Yochim about the calculations of meal breaks. (TR at 2068-70). Mr. Hicks contended that under Illinois law, drivers were given at least 20 minutes of unpaid break time every 5 hours, for a total of 2.5 hours per 24-hour period. (TR at 2110-13). He argued that 2.5 hours should have been deducted each day, instead of the 1.5 hours deducted by Mr. Yochim. *Id.*

Mr. Hicks also questioned Mr. Yochim regarding the back wage computations for particular drivers. Mr. Hicks pointed to driver statements about timing and total mileage, indicating that the trip from Olney to Seattle and back took only 68 to 72.5 hours, instead of the 75-hour average used by Mr. Yochim. (TR at 2052-55). On cross-examination by HHMT's counsel, Mr. Yochim stated that when the start and stop times were not clear, he used the average trip length instead of contacting the individual drivers to clarify their time sheets or obtain more information. (TR at 2236-39).

Contract 752LE

USPS Contract 752LE required mail to be hauled from Dallas, Texas, to locations in southeastern United States, including: Baton Rouge, Louisiana; Haughton, Louisiana; Birmingham, Alabama; and Montgomery, Alabama. (AX 4 at 1, 11-12, 25-26). The route was divided into segments, with drivers hauling mail between Dallas and Haughton, Haughton and Montgomery, or Dallas and Baton Rouge. Under the

contract, drivers were to be paid the wage determination rate of \$15.26 to \$17.08 per hour, plus \$2.15 to \$2.90 per hour in fringe benefits. (AX 9 at 24-25; AX 4 at 27, 86, 119, 123).

The record contains the contract and post office schedules for route 752LE. (AX 4, 4 supp.). The Administrator also submitted time sheets for several of the 752LE drivers, and Mr. Hicks offered additional time sheets at the hearing. (AX 18, Groups C, EE, FF, GG, HH, II, JJ, KK, LL; HX 7, 13, 14).

Drivers, Allen Anderson, Billy Ash, David Bradley, and Ron Jackson each testified about their experience driving portions of route 752LE; Mr. Hicks testified about his experience as well. Mr. Yochim testified about HHMT's violations of the SCA and his calculations of back wages owed to drivers on this route.

Allen Anderson, Driver on Route 752LE

Allen Anderson was employed by HHMT from July 2001 until approximately September 17, 2002, as a team driver on Contract 752LE. (TR at 409-10). During the entire period of Mr. Anderson's employment, route 752LE required him to drive from the post office in Montgomery, Alabama, to a truck stop in Haughton, Louisiana, with a stop in Birmingham, Alabama. (TR at 410, 420). Mr. Anderson explained that the drivers would pick up the truck at a gas station in Montgomery, perform a 15 to 30 minute pre-trip inspection, and then drive to the post office in Montgomery, approximately five minutes away. (TR at 412-14). The drivers would load the mail into the trailer; this task took at least 30 minutes, as the drivers had to wait for the mail to be sorted and placed in baskets. (TR at 414-15). After postal employee placed a plastic seal on the trailer, the team would drive 2 or 2.5 hours to Birmingham. (TR at 416, 436).

Mr. Anderson testified that it took 45 minutes to one hour to load the mail in Birmingham. (TR at 416). The drivers departed from Birmingham and drove to a truck stop in Haughton, Louisiana, where the driver would fuel the truck, pull into a parking space and "drop" the trailer, perform a post-trip inspection, and then wait for a relay driver from Dallas to arrive. (TR at 416-17). It took approximately 45 minutes to fuel the truck and perform the post-trip inspection. (TR at 417). Mr. Anderson testified that they always arrived at the stop before the Dallas driver and were usually in Haughton for approximately an hour. (TR at 418-19). While waiting, the drivers would eat or possibly shower. Mr. Anderson noted that during stops, one driver was always responsible for the mail in the truck. (TR at 419, 465). After the Dallas driver arrived and the trailers were swapped, the team would return to Montgomery via Birmingham, where they would unload mail from Dallas. (TR at 419).

Mr. Anderson testified that it typically took 11 to 12 hours to drive from Montgomery to Birmingham to Haughton, including stops at the post offices, loading, and unloading. (TR at 420). The return trip took slightly less time due to decreased traffic, approximately 10 to 11 hours. (TR at 421). Mr. Anderson testified that they normally arrived back in Montgomery between 4:30 and 5:00 a.m. (TR at 448-49). There, the drivers would unload the mail for approximately 30 minutes, then wait for about 30 minutes to begin the trip again at 5:30 or 6:00 a.m. (TR at 422, 461). Mr. Anderson stated that the drive took 23 hours round trip, unless there was a significant detour. *Id.*

Mr. Anderson was consistently paid for 10 hours per day. (TR at 423, 498). He completed time sheets and log papers to reflect the time it actually took to drive the route, but he was always paid for a 10-hour work day. (TR at 425-29, 498). Mr. Anderson testified that there were occasionally significant delays, for instance when a bridge over the Mississippi River was being repaired. (TR at 425-27). On rare occasion, the team would drive further west than Haughton if the Dallas driver was running late. (TR at 425, 427). Approximately once every two weeks, he took the truck for an oil change, which took approximately an hour; rarely, he brought the truck to a shop for other maintenance. (TR at 428-29). Mr. Anderson recorded the extra time spent driving or doing these tasks, but was never paid for any additional hours. (TR at 425-29). He did not complain about being paid only 10 hours per day, because he did not realize that he was entitled to more pay. (TR at 500-01).

On cross-examination, Mr. Hicks asked Mr. Anderson about the regulations that limited a professional driver to driving no more than 10 hours per day. (TR at 431-37). Mr. Hicks also showed Mr. Anderson the post office schedule for route 752LE; Mr. Anderson testified that he had not seen the schedule before. (TR at 440). Mr. Anderson testified that the team consistently left Montgomery prior to the scheduled time because of rush hour traffic into Birmingham, and that they never returned to Montgomery by 2:45 a.m., the scheduled arrival time. (TR at 446-47, 460). While the schedule allowed for 15 minutes in Birmingham, Mr. Anderson testified that it always took longer, "every day." (TR at 441). Mr. Anderson mentioned to Pam Mason that the drivers were consistently late; she said that she would take care of it. (TR at 442). Despite arriving late on a consistent basis, Mr. Anderson believed that the post office did not issue late slips because it had been "taken care of." (TR at 449).

Mr. Anderson testified that he had never met Mr. Hicks prior to the hearing. (TR at 430). He believed that he was hired by Ms. Mason, on the recommendation of another driver. *Id.* The trailer that Mr. Anderson drove carried the name Midwest Transit. (TR at 415).

David Bradley, Driver on Route 752LE

David Bradley was employed by HHMT from approximately December 2001 to February 2005. (TR at 971-72). He and his wife, Dianne, were drivers on route 752LE, and drove as a team between Montgomery, Alabama, and Haughton, Louisiana. (TR at 975). They generally made two round trips in a row, on Saturday and Sunday. (TR at 975, 985, 1012).

On the first trip, Mr. and Mrs. Bradley would arrive at the truck shortly after 5:00 a.m., perform a pre-trip inspection, load equipment and coolers, and be at the post office dock in Montgomery at approximately 5:30 a.m. (TR at 975-78). They would load the mail, and drive to Birmingham, where they would arrive at approximately 8:00 a.m. (TR at 978-79, 1003). At the post office in Birmingham, some mail was unloaded and additional mail was loaded. The process would take about 45 minutes. (TR at 979-80). The couple would then drive from Birmingham to Haughton, where they would arrive between 3:15 and 3:30 p.m. (TR at 980, 1003). In Haughton, they would fuel the truck, purchase food, and wait for the relay driver to arrive from Dallas. *Id.* Once the other driver arrived, they would swap trailers, perform a pre-trip inspection on the new trailer, and leave for Birmingham by 5:00 or 5:15 p.m. (TR at 981). Mr. Bradley stated that while they waited in Haughton they were not off-duty, because they were still responsible for the mail and the truck while they were not at a secured location. (TR at 1005).

Once the team returned to Birmingham, mail was again unloaded and loaded. (TR at 983-84, 1005). The Bradleys would arrive back in Montgomery at approximately 4:00 a.m. and be finished unloading between 4:30 and 4:45 a.m. *Id.* The next round trip would begin at 5:30 a.m. (TR at 985). During the break, Mr. Bradley stated that they would get breakfast, assemble their time sheets, or perform other tasks as needed. (TR at 984). The round trip took approximately 23 hours; there was only one hour during the day when they were not responsible for mail. (TR at 985).

Mrs. Bradley typically drove on the outbound trip from Montgomery to Haughton and Mr. Bradley drove the return trip; when either one was not driving, he or she would sleep in the truck's bunk. (TR at 985-86, 1051). Although the round trip took approximately 22 to 23 hours, each driver was only paid for 10 to 11.5 hours. (TR at 986, 1010, 1013-15, 1024, 1039). In the beginning, the Bradleys were paid only 10 hours per trip; Mr. Bradley was told that 10 hours was "what the route paid." (TR at 1063). He complained, stating that the drivers should be paid from the time they start until they end, regardless of the postal contract; eventually they were paid for all hours listed on their time sheets. (TR at 1010, 1015, 1064). Mr. Bradley routinely compared his time sheets to his pay checks. (TR at 1062).

Mr. and Mrs. Bradley were typically paid the same amount. (TR at 986). When breakdowns occurred, Mr. Bradley believed that he was paid for the extra time that he waited for repairs; he did not recall the rate at which he was paid, but thought it was minimum wage. (TR at 1051-52).

Mr. Bradley was hired by Allen Anderson, and supervised by Mr. Anderson and Ron Jackson. (TR at 991, 1022-23). Mr. Bradley also spoke with Mr. Hicks concerning issues such as route alteration and authorization to have a truck repaired. (TR at 987).

Ron Jackson, Driver on Route 752LE

Ronald Jackson was employed by HHMT, and was a solo driver on route 752LE from May or June of 2001 to December 2004. (TR at 680). Prior to his employment with HHMT, Mr. Jackson worked for Midwest Transit. (TR at 682). Mr. Jackson drove the segment of route 752LE from Dallas, Texas, to Baton Rouge, Louisiana. (TR at 680). At some point during his tenure, the route changed to include a stop in Lafayette, Louisiana. (TR at 680-81). Mr. Jackson typically drove the route twice per week. He also acted as a supervisor from the beginning of his employment until approximately June 2004. (TR at 681).

Mr. Jackson testified that the drivers, including him, would pick up the truck at a Freightliner shop in Baton Rouge, perform a 15-minute pre-trip inspection, and then drive 15 or 20 minutes to the post office. (TR at 682-84). It took 30 minutes to load the mail; afterwards he would depart for Dallas. (TR at 684-85). Unloading the mail in Dallas took anywhere from 15 minutes to an hour. (TR at 686). Unless the truck required repair, he would go to a hotel or park the truck to sleep during a 10 hour layover. (TR at 687).

Mr. Jackson was due back at the post office at 10:30 p.m., where he would load the mail for an 11:00 p.m. departure. (TR at 690-91). He would make some stops along the route, to use restroom facilities or purchase food. (TR at 729). Mr. Jackson would arrive back in Baton Rouge at approximately 8:10 a.m. (TR at 728). He testified that with the pre- and post-trip inspections, and 15 minutes travel time to get to and from the post offices, that the total trip length was 10 hours and 40 minutes. *Id.*

Mr. Jackson testified that the trip from Baton Rouge to Dallas, back to Baton Rouge took approximately 21 hours and 50 minutes or 22 hours, excluding the layover in Dallas. (TR at 693-94, 803). Mr. Jackson stated that he was paid only 20 hours—10 for each direction. *Id.* In approximately 2003, a stop was added in Lafayette, Louisiana, for the outbound trip from Baton Rouge to Dallas. The return trip did not require a stop in Lafayette. (TR at 694-96). Mr. Jackson testified that the stop added one hour to

the journey, for a total of 23 hours. (TR at 696, 699). He was not paid any additional money for this detour. *Id.* Mr. Jackson also testified that he indicated “11 hours going, 10 hours coming back” on his time sheets. (TR at 739).

On cross-examination, Mr. Jackson was asked about witness statements that were produced from interviews with Wage and Hour Division investigators in 2003 and 2004. (HX 6, 8, 9, 10). In a statement dated January 14, 2003, Mr. Jackson discussed the trip from Baton Rouge to Dallas, stating that he would start at 1:00 a.m. and finish in approximately 10 hours and 45 to 50 minutes. (HX 8). Regarding the trip from Dallas to Baton Rouge, Mr. Jackson stated that he began at 10:00 p.m. by performing a pre-trip inspection; he would be in Baton Rouge and finished with his duties at 8:30 a.m., for a total time of 10 hours and 30 minutes. Mr. Jackson also stated “I work 10 hours per trip, and that’s what I put on my time sheet. I get paid for 8.5 hours of driving time alone.” (TR at 854; HX 8).

In a signed statement dated April 7, 2004, Mr. Jackson stated that “since October 2003, I have been paid 10 hours per leg, which is about right. The drive time is right at 8-1/2 hours, plus there is a pre-trip inspection which takes about 15 minutes, 10-15 minutes to drive the tractor from the Freightliner in Baton Rouge where it is kept to the post office, the loading and unloading (which each take about 30 minutes).” (HX 6). Mr. Jackson was questioned about this statement, and testified that while the trip took more than 10 hours, 10 hours of pay was the minimum that he was willing to accept for the trip. (TR at 737-38, 765).

Mr. Jackson was also questioned about witness statements dated September 22, 2004, and December 27, 2004. At those times, Mr. Jackson stated that the trip from Baton Rouge to Dallas took 11 hours, and the trip from Dallas to Baton Rouge took approximately 10.5 hours. (HX 9-10). Mr. Jackson agreed that his memory of the trip would have been better in 2003 and 2004 than at the time of the hearing in 2009. (TR at 942).

Mr. Jackson testified that he had several conversations with Mr. Hicks during his employment with HHMT, particularly regarding pay. (TR at 699, 708). He also spoke with Mr. Hicks about authorizations to repair the trucks, and irregularity notices from the post office. (TR at 700-02; AX 41). The record contains several notes to Mr. Jackson, instructing him to phone Mr. Hicks. (AX 41). Mr. Jackson confirmed that he spoke with Mr. Hicks upon receiving the notes. (TR at 707-15). Mr. Jackson also spoke with Mr. Hicks about whether the company would provide a hotel for the 10-hour layover in Dallas. (TR at 688).

Billy Ash, Driver on Routes 98010, 752LE, 62237

Billy Ash testified that he started driving route 752LE on a one-time assignment from November 28, 2004, to December 25, 2004. (TR at 1221, 1306). Mr. Ash drove this route with his wife as a team driver, driving from Montgomery to Haughton, with a stop in Birmingham. (TR at 1223). In Haughton, Mr. Ash would drop off the trailer and pick up another trailer coming from Dallas. (TR at 1224). Mr. Ash testified that sometimes he would have to wait one to two hours for the driver from Dallas to arrive in Haughton; in those instances, the drivers would take showers, purchase something to eat, and fuel the truck if it was necessary to do so. (TR at 1224-25). Mr. Ash testified that he approached Mr. Hicks to request a position on route 752LE; Mr. Hicks approved the request. (TR at 1221-22).

Mr. Ash typically drove from Montgomery to Haughton and his wife drove the return trip. (TR at 1223). Mr. Ash testified that it took approximately 11 hours to complete a trip on this route. *Id.* The team typically made one fuel stop, but did not stop for food along the route. (TR at 1223, 1225). Mr. Ash also recalled that the truck broke down three or four times, but he was not paid for those extra hours. (TR at 1281).

Hal Hicks

During his testimony, Mr. Hicks was questioned about his experience with route 752LE. Mr. Hicks discussed route 752LE in general, noting that it was a drop-and-pick route, where the truck was loaded and sealed by postal personnel—the drivers did no loading or unloading. (TR at 2474-75).

Mr. Hicks was questioned about the Montgomery-to-Haughton portion of the route, operated by team drivers. (TR at 2507-23). He discussed the length of time to drive the route, contending that the company based its pay calculations on 24 hours per day of driving, 8 hours per day of sleep time, and 3 hours per day of meal breaks or standing time. (TR at 2508-13).

Mr. Hicks also discussed the Dallas-to-Haughton segment of route 752LE. (TR at 2495). Mr. Hicks stated that the route took 10.5 hours, with 30 minutes deducted for lunch in Haughton. (TR at 2495-97). Mr. Hicks contended that 10 hours was plenty of time to complete the route. (TR at 2497).

Mr. Hicks never drove route 752LE, but he and his wife rode with Ron Jackson on the Dallas-to-Baton Rouge leg of the trip. (TR at 2446). Mr. Hicks testified that Mr. Jackson performed the driving portion of the route in 7 hours and 30 minutes, even though the scheduled time allowed for 8 hours and 40 minutes. (TR at 2446-48). Mr.

Hicks stated that he always erred on the side of caution in paying individuals. (TR at 2447). Therefore, even though Mr. Hicks believed that 9 hours was a sufficient amount of time for the route, Mr. Jackson wrote down 10, so that was what he was paid. *Id.* Mr. Hicks explained that in calculating the pay amount, 30 minutes of uninterrupted lunch time was deducted from each trip, as there was time to eat in Shreveport, Louisiana. (TR at 2479, 2490).

James Yochim, Assistant District Director, Wage and Hour Division

Mr. Yochim testified regarding his calculations of back wages owed on route 752LE. Mr. Yochim found wage violations for a total of 15 drivers on route 752LE. (AX 22-23).

Ten of the individuals were team drivers who hauled mail from Montgomery to Haughton. *Id.* Mr. Yochim testified that HHMT violated the SCA by paying those drivers only for hours spent in the driver's seat, instead of all on-duty hours. (TR at 1687, 1694, 1719, 1730, 1744, 1751, 1755, 1776, 1784, 1786). For two of the drivers, Mr. Yochim also stated that they were paid inadequately for fringe benefits and holiday pay. (TR at 1730, 1744). Mr. Yochim calculated the back wages due from payroll records, time sheets, and employee testimony. (TR at 1685, 1693-94, 1721, 1729-30, 1747, 1750-51, 1755, 1777, 1785-86, 1821). Based on this evidence, Mr. Yochim determined that the route from Montgomery to Haughton and back took between 23 hours and 24 hours to complete. If the record contained no time sheets for a particular driver, Mr. Yochim used a route length of 24 hours, based on the testimony of other employees. (TR at 1755, 1785-86). From the 24 hours of on-duty time, Mr. Yochim subtracted 8 hours of sleep time and 1.5 hours of bona fide meal breaks, to arrive at the total hours that the drivers should have been paid. (TR at 1953, 2000). Subtracting the actual wages paid to the drivers during those periods, Mr. Yochim arrived at the wages due.

Five of the drivers drove solo legs of the route, from Dallas to Haughton or Dallas to Baton Rouge, trips which took approximately 10 to 11 hours to complete. (AX 22-23). For those drivers, Mr. Yochim found violations of the SCA in that HHMT failed to pay the drivers for the total length of time that they were on duty. (TR at 1724, 1751, 1764, 1773, 1779). Mr. Yochim testified that because the drivers were never completely relieved from duty, no allowances for meal breaks were included. (TR at 1758, 1765, 1774). Also, because the on-duty time was less than 24 hours, sleep time was not deducted. Based on the payroll records, time sheets, and testimony, Mr. Yochim calculated the total trip length for each driver, and subtracted the amount that he or she was paid, to arrive at the back wages due. (TR at 1724, 1757, 1765-69, 1773, 1780, 1941-42). Mr. Yochim calculated a total of \$150,980 in unpaid back wages for all drivers on Contract 752LE. (AX 22-23).

Contract 62237

USPS Contract 62237 required mail to be hauled between St. Louis, Missouri, Nashville, Illinois, and Pinckneyville, Illinois. (AX 2; TR at 2437). Mr. Hicks was awarded the contract as a sole proprietor in 1978, and operated the route until 2005. (TR at 2431, 2647). This “box route” was driven by solo drivers using “straight trucks.” Under the contract, drivers were to be paid the wage determination rate of \$14.62 to \$15.45 per hour, plus \$2.68 to \$3.15 per hour in fringe benefits. (AX 9 at 19-20).

Billy Ash, Driver on Routes 62237, 98010, 752LE

Billy Ash testified about his experience driving a truck on route 62237. (TR at 1197-1300). Mr. Ash began driving route 62237 in May 2005; he drove the route seven days per week for approximately 30 days, and then filled in for other drivers as needed. (TR at 1197-1199). Mr. Ash last drove route 62237 in September 2008 for SLM Trans. (TR at 1199, 1298). Rick Dowty coordinated assignments for route 62237; the paychecks were issued by HHMT and later by SLM Trans. (TR at 1198, 1235).

Mr. Ash testified about the trip schedule for route 62237. He arrived at the post office in Pinckneyville, Illinois, between 4:00 and 4:15 p.m. After loading the mail and waiting for certified mail to be prepared, Mr. Ash would leave the Pinckneyville post office at 5:15 p.m. (TR at 1201). The next stop was the post office in Nashville, Illinois, where Mr. Ash loaded mail for 15 to 20 minutes. (TR at 1201-02). The last stop was the bulk mail center in St. Louis, Missouri; Mr. Ash arrived there between 6:45 and 7:15 p.m. (TR at 1202). Upon his arrival, Mr. Ash delivered the certified mail to the dispatcher and unloaded the rest of the mail from the truck. *Id.* This process took about 25 to 30 minutes, depending on how many trucks were in line at the time. *Id.* Mr. Ash testified that he unloaded, on average, eight crates of mail. (TR at 1202-03).

After unloading mail, Mr. Ash would sleep in the truck until approximately 3:30 a.m., when he would return to the St. Louis bulk mail center to begin the return trip. (TR at 1203-04). Mr. Ash would report back to the post office at 3:45 a.m. to sort the mail; this would take anywhere from 30 to 90 minutes, depending on the amount of mail. (TR at 1203-04). Mr. Ash would leave the St. Louis site around 5:15 a.m.; after a stop in Nashville, he generally arrived in Pinckneyville between 6:30 and 6:45 a.m. (TR at 1204-05). Mr. Ash testified that it took approximately 5.5 hours to drive to and from Pinckneyville, excluding sleeping time and the layover in St. Louis. (TR at 1205). He stated that, prior to April 2008, there was loading time or driving time for which he was not compensated. (TR at 1300).

Mr. Ash was also deposed on March 11, 2009. (HX 25). During his deposition, Mr. Ash stated that the trip from Pinckneyville to St. Louis took at least 3.5 hours, whereas the trip from St. Louis to Pinckneyville took 2.5 to 3 hours, for a total of 6 to 6.5 hours round trip. (HX 25 at 20-21). He stated that the trip usually took longer than the time provided in the post office schedule. (HX 25 at 23-25). Mr. Ash stated that he was paid only 4 hours per trip. (HX 25 at 21).

Ricky Dowty

Ricky Dowty, a supervisor for HHMT, testified about his experience with route 62237. (TR at 194-95). He dispatched drivers on the route, and drove it himself approximately 45 times. *Id.* Mr. Dowty explained that the drivers would pick up the truck approximately a mile from the Pinckneyville post office, perform a 10-minute pre-trip inspection, and drive to the post office. (TR at 195). They would then load mail and drive to St. Louis, Missouri, via Nashville, Illinois. (TR at 196). Mr. Dowty testified that the trip took 4.5 to 5 hours round trip, not including loading and unloading time. (TR at 199). Including “everything,” he testified that the trip took 5.5 to 6 hours. (TR at 199-200). He could not recall how many hours the drivers were actually paid, and could not recall if the drivers were paid for delays. (TR at 200).

Hal Hicks, Operator of Route 62237

Mr. Hicks testified that he began operation of route 62237 in July of 1978, as a sole proprietor. (TR at 2431, 2647). Mr. Hicks operated the route until 2005, when his daughter, Shelly Myles, took over its operation; the contract was transferred to Ms. Myles’s company, SLM Trans, in 2008. (TR at 2647). Mr. Hicks personally drove route 62237 approximately five to ten times per year, for a total of 75 to 100 trips. (TR at 2435-36). Mr. Hicks testified about the post office schedule for the route, alleging that it showed a shorter trip length than 6.5 hours. (TR at 2453-54). Mr. Hicks pointed out that the trip took 3 hours one way and 2.25 hours on the return. Adding 15 minutes for a pre-trip inspection, Mr. Hicks argued that the total on-duty time was 5.5 hours. (TR at 2454).

Mr. Hicks was asked about driver Curtis Jones. Mr. Jones recorded his hours in hundredths of an hour, according to the post office schedule. (TR at 2458). Although Mr. Hicks could not recall such an event occurring, he testified that Mr. Jones would have been paid for the extra time if, for instance, he had incurred a flat tire during the route. (TR at 2454-55). Mr. Hicks also testified that if Mr. Jones had arrived late at the post office, he would have been paid for the extra time, and would have received a “5500 incident report” to document the late arrival. (TR at 2456). Mr. Hicks stated that Mr. Jones never once complained about not being paid properly for his work. (TR at 2457).

James Yochim, Assistant District Director, Wage and Hour Division

Mr. Yochim testified regarding his calculations of back wages owed on route 62237. (TR at 1787-99). Mr. Yochim found wage violations for two drivers, Billy Ash and Curtis Jones, for a total of \$18,549.00. (AX 24-25).

Mr. Yochim testified that the drivers were not paid for all hours worked. (TR at 1788-89). Based on the testimony of Billy Ash, Mr. Yochim determined that the trip length for route 62237 was 6.5 hours. (AX 22 at 1-2; TR at 1788). Both men were solo drivers; therefore, Mr. Yochim did not subtract any time for meal breaks, as they were never completely relieved from duty. (TR at 1793).

Mr. Ash was paid for 5.5 hours per trip; therefore, Mr. Yochim determined that Mr. Ash was “shorted one hour per trip,” over a six week period. (AX 22 at 1). Mr. Jones was paid for approximately 5.25 hours per trip—specifically he was paid for 31.59 hours on a six-day work week, and 36.92 hours for a seven-day work week. (AX 22 at 2-23). Mr. Yochim calculated the underpayment based on a route length of 6.5 hours. (TR at 1789-90, 1892, 1902). Mr. Yochim also determined that Mr. Jones was also owed additional fees for unpaid fringe benefits. (TR at 1790). On cross examination, Mr. Yochim admitted that he placed more weight on the employee testimony than Mr. Jones’s time sheets, even though they were recorded to the hundredth of an hour. (TR at 2257-58).

Mr. Hicks questioned Mr. Yochim about the post office route schedules. (TR at 1882). Mr. Hicks asserted that based on the post office schedule and the mileage from St. Louis to Nashville, Illinois, that 5.5 hours was an accurate amount of time for the route. *Id.* Mr. Hicks also questioned Mr. Yochim about the health and wellness payments, asserting that health insurance was provided for Mr. Jones. (TR at 1905).

Contract 62836

USPS Contract 62836 was a contract to haul mail between Centralia, Illinois, and Mount Carmel, Illinois. (AX 3; TR at 1800). Mr. Hicks was awarded the contract in 1978, and operated the route until 2005, when his daughter Shelly Myles took over its operation; the contract was transferred to SLM Trans in 2008. (TR at 2647). This “box route” was driven by solo drivers using “straight trucks.” (TR at 1002A). Under the contract, drivers were to be paid the wage determination rate of \$14.62 to \$15.45 per hour, plus \$2.68 to \$3.15 per hour in fringe benefits. (AX 9 at 21-22).

Gary Yandell, Driver on Routes 98010, 62836

Gary Yandell was a driver on route 62836 for approximately one year. (TR at 1001A). He began each trip in Mt. Carmel, Illinois, where he would pick up a truck, perform a 15 to 20 minute pre-trip inspection, and drive approximately 20 minutes to the Mt. Carmel post office. (TR at 1002A). There, he loaded mail and drove to the main post office in Centralia, Illinois, where he would arrive at approximately 8:00 p.m. (TR at 1003A). A hotel room was provided in Centralia, where Mr. Yandell would sleep until he was required to return to the post office, at approximately 4:30 a.m. *Id.*

Mr. Yandell testified that the driving time for the route, according to the schedule, was approximately 6 to 6.5 hours. (TR at 1004A, 1017A-19A, 1034A). Mr. Yandell testified that he logged hours according to the scheduled time. (TR at 1148). He felt the schedule did not provide adequate time to complete the route, particularly for loading and unloading. (TR at 1036A, 1135).

Mr. Yandell was asked about entries on his time sheets for delays due to flat tires and closed roads; Mr. Yandell testified, based on his pay stubs, that he was paid minimum wage for those delays, instead of the wage determination rate. (TR at 1022A-26A). Mr. Yandell drove many routes for Mr. Hicks and did not feel that Mr. Hicks was intentionally trying to cheat him out of wages. (TR at 1044A).

Ricky Dowty

Ricky Dowty, a supervisor for HHMT, testified about his experience with route 62836. (TR at 202-208, 226-35). He drove the route approximately 50 times. (TR at 202). Mr. Dowty testified that the trip took approximately 6.5 to 7 hours to complete, based on 2.5 hours driving from Mt. Carmel to Centralia, approximately 1.5 hours sorting mail, and 3 hours returning. (TR at 207). Mr. Dowty could not recall how many hours the route paid. (TR at 208).

Hal Hicks, Operator of Route 62836

Mr. Hicks testified that he was awarded the contract for route 62836 in July of 1978, as a sole proprietor. (TR at 2431, 2647). Mr. Hicks operated the route until 2005, when his daughter, Shelly Myles, took over its operation; the contract was transferred to Myles in 2008. (TR at 2647). Mr. Hicks testified that he drove the route often, well over 100 times. (TR at 2438). He is very familiar with the route, and knows it "by heart." (TR at 2440).

Mr. Hicks reviewed the schedule for route 62836, and explained that the driving time plus time for a pre-trip inspection and driving the truck to and from the post office

amounted to less than 7 hours.⁷ (TR at 2462-65). Mr. Hicks was questioned about the time sheets of Brian Rowark, a driver on route 62836. Mr. Hicks testified that Mr. Rowark was paid 6.5 hours per run “no more, no less.” (TR at 2465). Mr. Hicks stated that if Mr. Rowark believed he was deserving of extra time, he would have written it down and would have been paid. (TR at 2465, 2467). Mr. Hicks believes that 6.5 hours was sufficient to complete the route, and based on Mr. Rowark’s time sheets, he stated that the driver also felt that it was sufficient. *Id.* Mr. Hicks disagreed with the computations by Mr. Yochim for this route. (TR at 2470-71).

James Yochim, Assistant District Director, Wage and Hour Division

Mr. Yochim testified about his calculations of back wages owed on route 62836. (TR at 1799-1814). Mr. Yochim found wage violations for two drivers, Brian Rowark and Gary Yandell, for a total of \$2,860.00. (AX 26-27).

Mr. Yochim determined that the route took 7 hours to complete, based on testimony and the post office route schedule. (TR at 205-07, 231-34, 1805). On cross-examination, Mr. Yochim was asked about postal schedules that showed the total trip time as less than 7 hours. (TR at 1849-61). He was also asked about Yandell’s testimony that the route took only 6.5 hours to complete. (TR at 1856). Mr. Yochim testified that he took those things into consideration, but nevertheless found that the route took 7 hours to complete on a round trip. (TR at 1861).

Mr. Yochim stated that Mr. Hicks violated the SCA by failing to pay the drivers for all hours worked. (TR at 1800-01). In arriving at back wages due, Mr. Yochim calculated wages based on 7 hours per trip and subtracted the wages actually paid. (AX 26 at 1, 12; TR at 1801). Mr. Yochim also calculated fringe benefits due where applicable. (TR at 1806).

Discussion

Service Contract Act Violations and Back Wages Due

The purpose of the SCA “is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment.” 29 C.F.R. § 4.104(b). To that end, the SCA requires that all service employees be paid

⁷ At one point, Mr. Hicks stated that the drive time equaled 5 hours and 45 minutes, to which he added 45 minutes for pre-trip inspection and drive time to and from the post office. (TR at 2463-64). He also stated, however, that 1 hour and 15 minutes was added, which would total 7 hours. *Id.*

certain minimum monetary wages and fringe benefits, as established in each contract. SCA § 2(a)(1)-(2); 29 C.F.R. § 4.165.

Payment for All Hours Worked

In addition to compensating employees at the wage determination rate, employers must also pay employees for each hour worked in performance of a contract.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked . . . is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in part 785 of this title which is incorporated herein by reference. In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace.

29 C.F.R. § 4.178.

The Fair Labor Standards Act, as implemented at 29 C.F.R. Part 785, includes several provisions regarding the calculation of hours worked. In general, the work week includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty[,] or at a prescribed work place." 29 C.F.R. § 785.7 (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). Generally, the workday includes principal activities, and does not include activities performed prior or subsequent to the workday "that are not made compensable by contract, custom, or practice." 29 C.F.R. § 785.9. However, if an activity is an integral part of the principal activity, such as preparing a piece of machinery, it is included in the work day. 29 C.F.R. § 785.24.

The regulations state that waiting time may be considered time worked, depending on the circumstances. 29 C.F.R. § 785.14. In cases where an employee is unable to use a period of time effectively for his or her own purposes, and the employee is engaged to wait, that time must be compensated. 29 C.F.R. § 785.15. However, "[p]eriods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. § 785.16(a). The regulations provide specific examples, which are instructive for this case:

A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job.

On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged.

29 C.F.R. § 785.16(b).

The regulations specify that an employee's time spent riding in a truck is also work time, even if the employee is not driving the vehicle. "An employee who drives a truck . . . is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer." 29 C.F.R. § 785.41.

Rest periods of short duration, from approximately 5 to 20 minutes, are customary and must also be paid as working time. 29 C.F.R. § 785.18. Rest periods include coffee breaks or time for snacks. 29 C.F.R. § 785.19(a). Longer, bona fide meal periods during which the employee is relieved from duty, however, are not work time. To constitute a bona fide meal period,

[t]he employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

Id.

Sleep time may also be deducted from an employee's working hours in certain circumstances. If an employee is required to be on duty for less than 24 hours, that employee is working even if permitted to sleep or engage in other personal activities when not busy. 29 C.F.R. § 785.21. If, however, an employee is on duty for 24 hours or more, up to 8 hours of sleep time per 24-hour period may be deducted from compensable working time:

the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

29 C.F.R. § 785.22(a). The regulations further provide that if an employee cannot sleep for at least five hours in a row, the entire time is working time. 29 C.F.R. § 785.22(b).

Back Wage Calculations – Burden of Proof

In an enforcement action brought by the Wage and Hour Administrator, the Administrator bears the burden of proving that employees performed work for which they were not compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946); *see also Thomas & Sons Building Contractors Inc.*, Order Denying Reconsideration, ARB No. 00-050, ALJ No. 96-DBA-37 (ARB Dec. 6, 2001). The Administrator must also establish the amount of back wages owed to the employees.

If the employer's records are proper and accurate, the Administrator may satisfy this burden by establishing that an employee was not paid for all hours worked, as shown on the time sheets and payroll records. *Anderson*, 328 U.S. at 687-88. If, on the other hand, an employer's records are inaccurate or inadequate, the Administrator must produce

sufficient evidence to show the amount and extent of [uncompensated] work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to [negate] the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Id. *See also United Kleenist Org. Corp.*, ARB No. 00-042, slip op. at 2-3 (ARB Jan. 25, 2002); *Star Brite Constr. Co. Inc.*, ARB No. 98-113, slip op. at 5-6 (ARB June 30, 2000).

The Administrator argues that Respondents violated the wage requirements of the SCA on Contracts 98010, 752LE, 62237, and 62836. Specifically, the Administrator contends that Respondents failed to pay team drivers on routes 98010 and 752LE for all

hours worked, instead paying the employees for driving hours only. Further, the Administrator argues that the drivers on all four routes were not properly compensated when the trip took longer than scheduled to complete. (Administrator's Brief at 11-12, 23, 32-33, 36, 38). On behalf of the Wage and Hour Division, Assistant District Director James Yochim calculated back wages for the drivers on each route. Mr. Yochim thoroughly explained his methodology during his testimony and on each revised set of calculations. (AX 20, 22, 24, 26). The violations and back wage computations for each contract are discussed below.

Contract 98010

The testimony of HHMT supervisor Ricky Dowty, drivers Gary Yandell, Todd Bennett, Patrick Muller, and Billy Ash, and payroll manager Paula Duncan establishes that team drivers on Contract 98010 were compensated for a set number of hours during each round trip. (TR at 183-88, 277, 281, 534-35, 989A, 1162, 1214). Each team driver was paid for approximately half of the time it took to complete the route; thus, these employees were compensated only for driving time and not all working time spent in the vehicle. (TR at 525-28, 532, 534-35, 1162). The testimony further establishes that if the route took longer to complete due to delays or inclement weather, the drivers were compensated at a rate less than the wage determination for the contract, or were not compensated at all. (TR at 190-91, 535, 1009A, 1011A-12A, 1162, 1164, 1324, 1349, 1356-57, 1173-74).

The regulations require that drivers be compensated for all working hours, including those spent riding in the truck. 29 C.F.R. §§ 4.178, 785.41. HHMT's compensation structure was based on driving hours, as opposed to working hours. Further, the drivers were not compensated at the proper wage determination rate when delays caused them to work more hours than expected. Because the drivers were not paid for all hours worked, as required by the SCA, I find that HHMT violated the wage provisions of the SCA in its performance of Contract 98010.

Back Wages: Team Drivers

Mr. Yochim explained that he used the payroll records and employee time sheets to determine the hours worked by team drivers on route 98010. (TR at 1441). Mr. Yochim utilized the driver's actual start and stop times or the average trip length, as an alternative, to determine the total time spent completing the route. (AX 20; TR at 1505, 1577, 1580, 1592, 1600, 1605, 1613, 1616, 1621, 1650, 1654, 1657, 1667, 1673, 1678). Mr. Yochim then deducted the appropriate amount of sleep time using a chart provided in AX 30. He further deducted 1.5 hours of meal breaks per 24 hour period, based on

three 30-minute breaks. (TR at 1601, 2109). Using this methodology, Mr. Yochim arrived at the total amount of time that the team drivers should have been paid.

During the hearing, Mr. Hicks argued that the drivers were provided 2.5 hours of meal breaks per day, and that the total route length was less than Mr. Yochim assumed. (TR at 2571, 2602). The regulations require that for meal time to be deducted from hours worked, the employee must be relieved from duty and must have an express or implied agreement with the employer that those hours will not be paid. 29 C.F.R. § 785.22(a). Mr. Hicks provided insufficient evidence that the team drivers were entitled to 2.5 hours of bona fide meal breaks during each run, or that they actually took breaks of that magnitude. Further, the computations performed by Mr. Yochim for the average trip length are based on the available payroll information, and I find them reasonable and well-documented. Although Mr. Hicks disagreed with the computations during his testimony and cross-examination of Mr. Yochim, he did not make any further arguments regarding the revised calculations submitted post-hearing.

Mr. Yochim based his calculations of hours worked on the available payroll and time sheet records, and a reasonable amount of time for meal breaks; I find the methodology for the team drivers on route 98010 is based on documentary evidence, as well as just and reasonable inferences. After using the above methodology to determine the actual hours worked by each driver on each trip, Mr. Yochim calculated the underpayment. Mr. Yochim submitted back wage calculations for each pay period, subtracting the hours paid from the actual hours worked. I find that the calculations are thoroughly explained and documented. As Respondents have pointed to no inaccuracies in the calculations, I find that the Administrator has carried its burden of establishing the amount of underpayment for team drivers on route 98010.

Back Wages: Solo Drivers

Mr. Yochim also calculated back wages due to solo driver James London, who hauled mail from Greensboro, North Carolina, to Nitro, West Virginia, from July 12, 2002, to March 7, 2003. (AX 20 at 96-100). Mr. Yochim utilized the available check stubs and time sheets to determine the length of time that Mr. London spent completing the route. (TR at 1621-33). Subtracting the wages paid by HHMT, Mr. Yochim arrived at the back wages due. Noting that no specific objections have been launched regarding the calculations for this driver, I find that amount of back wages due to Mr. London are reasonable.

As the calculations for Contract 98010 are reasonable and accurate, I find that HHMT is liable for \$143,393.00 in back wages owed to the drivers employed on this contract.

Contract 752LE

Contract 752LE was composed of three route segments: Montgomery, Alabama, to Haughton, Louisiana (team drivers); Dallas, Texas, to Haughton, Louisiana (solo drivers); and Dallas, Texas, to Baton Rouge, Louisiana (solo drivers).

As with Contract 98010, the team drivers on Contract 752LE were compensated based on their driving hours, as opposed to their working hours. Although the Montgomery-to-Haughton segment of the route took approximately 24 hours to complete, the payroll records and testimony of Allen Anderson and David Bradley establish that drivers were paid only 10 to 11.5 hours per day. (TR at 423, 425-29, 498, 986, 1010, 1013-15, 1024, 1039, 1063). For drivers Dianne and David Bradley, the underpayment of wages resulted in an underpayment of fringe benefits as well. The testimony further establishes that when drivers incurred delays on the route, they were either not compensated, or were paid at less than the wage determination rate. (TR at 425-29, 534-35, 1051-52).

As detailed below, the evidence also shows that solo drivers on route 752LE were not paid for all hours worked. HHMT paid a set number of hours for each segment of the trip, but the hours were insufficient to cover the actual time spent by the drivers, including pre-trip inspections, loading, and unloading time.

Because the regulations require that drivers be compensated for all working hours, I find that HHMT violated the prevailing wage and fringe benefit provisions of the SCA in its performance of Contract 752LE.

Back Wages: Montgomery to Haughton

Mr. Yochim utilized payroll records, time sheets, and employee testimony to determine the total number of hours spent on the Montgomery-to-Haughton segment of the route, which averaged between 23 and 24 hours. (TR at 1685, 1693-94, 1721, 1729-30, 1747, 1750-51, 1755, 1777, 1785-86, 1821). If an employee's time sheets listed start and stop times for a given trip, those figures were used to determine the hours worked. If, however, the record did not contain time sheets for a particular driver, Mr. Yochim used a route length of 24 hours, based on the testimony of other employees.⁸ (TR at 1755, 1785-86). From the 24 hours of on-duty time, Mr. Yochim subtracted 8 hours of sleep

⁸ Mr. Yochim explained that he based the calculations on a 24-hour route length, because it allowed the contractor to receive an 8-hour credit for sleep time. If the calculations were based on 23 hours, the regulations would not allow for a deduction of sleep time; thus, the entire period, minus meal breaks, would have been compensable. *See* 29 C.F.R. § 785.21.

time, as provided in the regulations, and 1.5 hours of bona fide meal breaks, to arrive at the total working hours for which the drivers should have been paid. (TR at 1953, 2000). Subtracting the actual wages paid to the drivers during those periods, Mr. Yochim determined the back wages due. The Administrator submitted detailed calculations of back wages for each driver, located in AX 22.

Mr. Hicks argued that as many as 3 hours per day should have been deducted for meal breaks. (TR at 2508-13). Again, Mr. Hicks provided insufficient evidence to establish that the employees were entitled to, or took, 3 hours of bona fide meal breaks during which they were “completely relieved from duty.” 29 C.F.R. §§ 785.19, 785.22(a).

Because these back wage computations were based on the available evidence and reasonable inferences, I find that the calculations provided by the Administrator and Mr. Yochim are reasonable and accurate for the Montgomery-to-Haughton portion of Contract 752LE.

Back Wages: Dallas to Haughton

Two drivers, Tommy Bozeman and Rex Stafford, operated as solo drivers, hauling mail between Dallas and Haughton. Mr. Yochim initially determined that the average trip length was 11 hours for this route. At the hearing, Mr. Hicks testified that the route took 10.5 hours, with 30 minutes deducted for lunch in Haughton. (TR at 2495-97). After reviewing driver testimony, the testimony of Mr. Hicks, time sheets, and payroll records, Mr. Yochim reduced the average trip length to 10.5 hours. (AX 22 at 4, 121).

Mr. Yochim deducted no sleep time or meal credit, as solo drivers were never completely relieved from duty. Based on 10.5 working hours per trip, and deducting the gross wages actually paid to the drivers, Mr. Yochim determined the back wages due for Mr. Bozeman and Mr. Stafford. (AX 22 at 4-13, 121-30). Where appropriate, additional hourly pay for fringe benefits was calculated as well. *Id.*

I find that these calculations are based on the evidence of record and reasonable inferences; accordingly, I find that the Administrator has carried its burden of establishing the back wages and fringe benefits due to the drivers on this segment of Contract 752LE.

Back Wages: Dallas to Baton Rouge

Three drivers, Allen Davis, Ron Jackson, and Roland Jordan, operated as solo drivers, hauling mail between Dallas and Baton Rouge. HHMT paid the drivers varying amounts, from 8.5 to 10 hours per trip.

On Mr. Jordan's time sheets, 8.5 was pre-printed in the column "on duty driving hours"; Mr. Jordan consistently added an additional 1.5 hours below the pre-printed number, for a total of 10 hours. (AX 18, Group JJ at 2725-2872). Mr. Jackson's time sheets consistently listed 10 hours per trip as well. (HX 7). Mr. Davis, however, typically submitted 8.5 hours as his on-duty driving time. (AX 18, Group II at 2563-2699).

The post office schedule shows that from Dallas to Baton Rouge, the truck should leave Dallas at 11:00 p.m., and arrive in Baton Rouge at 7:40 a.m. for a total trip length of 8 hours and 40 minutes. (TR at 720-21; AX 4 supp. at 71). The return trip lists a departure time of 2:30 a.m. from Baton Rouge, and an arrival time in Dallas of 11:10 a.m., for a total of 8 hours and 40 minutes. *Id.* Ron Jackson testified that the route required loading and unloading time of approximately 30 minutes on each end of the trip. (TR at 726-28). He also testified that there was an initial 15-minute pre-trip inspection required and a 15-minute drive to the post office to begin the route. (TR at 728).

Based on the post office schedule, the testimony of Mr. Jackson, and the time sheets of the three drivers, it is evident that 8.5 hours encompassed only the driving time, and did not include the other on-duty time required to begin and end the route. Based on this evidence, I find that 10 hours is a reasonable estimation of the total trip length for the Dallas-to-Baton Rouge portion of the route.

Mr. Yochim calculated back wages due for Mr. Davis and Mr. Jordan, based on a trip length of 10 hours. (AX 22 at 82-99, 112-16). He did not subtract time for sleep or meal breaks, as the solo drivers were on duty for less than 24 hours and were never completely relieved from duty. Subtracting the wages actually paid, Mr. Yochim arrived at the compensation due. I find that these calculations of back wages and fringe benefits for Mr. Davis and Mr. Jordan are reasonable and accurate.

Although he based the back wages for Mr. Davis and Mr. Jordan on 10 hours per trip, Mr. Yochim calculated the back wages due for Mr. Jackson based on 11 to 11.5 hours per trip, for the period from October 5, 2002, to April 1, 2004. (AX 22 at 100; AX 23; TR at 1764-72). Although the evidence regarding the route time for Mr. Jackson is mixed, I find inadequate evidence to support the back wage calculations for Mr. Jackson.

In a January 2003 witness statement, Mr. Jackson stated that the trip took approximately 10 hours and 30 to 45 minutes, but that he worked "10 hours per trip." (HX 8). On April 7, 2004, Mr. Jackson stated that since October 2003, he has been paid "10 hours per leg, which is about right." (HX 6). He explained that the driving time

was 8.5 hours, plus one hour of loading and unloading, 15 minutes of pre-trip inspection, and 10 to 15 minutes to drive the truck to the post office. *Id.*

In later witness statements, Mr. Jackson stated that the trip took 10.5 to 11 hours. (HX 9-10). These later witness statements were taken in September 2004 and December 2004, after the period of violations identified by Mr. Yochim. *Id.* During the hearing, Mr. Jackson testified that a round trip took 11 to 11.5 hours to complete. (TR at 693-94, 696, 699, 803).

Despite Mr. Jackson's testimony that a trip between Dallas and Baton Rouge took 11 to 11.5 hours to complete, I have difficulty finding that this segment of the trip took Mr. Davis and Mr. Jordan only 10 hours, while it took Mr. Jackson at least one hour longer. Further, I am more persuaded by the breakdown of time explained by Mr. Jackson in 2003 and 2004, when the violations occurred, versus the later explanations of the route schedule. I note that the Administrator reasonably based its calculations regarding Mr. Jackson on his trial testimony. Nevertheless, considering all evidence regarding this segment of the route, I find that Mr. Jackson's back wages, like those of Mr. Davis and Mr. Jordan, should be calculated based on an average trip length of 10 hours. Mr. Jackson's pay stubs indicate that he was paid for 10 hours per trip, beginning in October 2002. (HX 7 at 17-19). Therefore, I find that no back wages are due for this driver.

Having found the remainder of the Administrator's calculations on this route well-supported and accurate, I find that HHMT is liable for a total of \$144,858.00 in back wages owed to team drivers and solo drivers on Contract 725LE.

Contract 62237

Contract 62237 required mail to be hauled between St. Louis, Missouri, and Pinckneyville, Illinois. Mr. Yochim identified underpayments for two drivers on Contract 62237: Curtis Jones and Billy Ash. (AX 24-25).

The payroll records and testimony establish that Mr. Hicks violated the SCA in his performance of Contract 62237 by failing to pay drivers for all hours worked. As explained in detail below, I find that the hours paid on route 62237 were insufficient and did not adequately compensate for time spent performing pre-trip inspections or driving to the post office. Because not all working hours were compensated, I find that Mr. Hicks violated the SCA's prevailing wage and fringe benefit provisions on Contract 62237.

Back Wages

The Administrator asserts that the drivers on route 62237, Curtis Jones and Billy Ash, should have been paid for 6.5 working hours per trip. (Administrator's Brief at 33-36). Based on this calculation, the Administrator argues that Mr. Hicks owes \$18,549.00 in back wages for this contract. Having reviewed the documentary evidence and hearing testimony, I find that a lesser amount of back wages are due on this contract.

The record contains extensive time sheets and payroll records for the nearly three years during which Curtis Jones was allegedly underpaid. (AX 18 Group NN at 3283-3457). Mr. Jones's time sheets were structured according to the post office schedule for the route. (*Id.*; TR at 2458; AX 2 supp. at 6-7). On weeks when Mr. Jones worked six days, he recorded 31.59 hours of on-duty time; on weeks when he worked seven days, he recorded 36.92 hours. (AX 18 at 3283-3457). For each trip, Mr. Jones was compensated for approximately 5.25 hours. In addition to these set hours, Mr. Jones listed additional time for "late slips," when his arrival or departure was delayed by the post office. These late slips added between 15 and 35 minutes to approximately half of Mr. Jones's trips. *Id.*

No time sheets were available for the six weeks during which Billy Ash drove on route 62237. (AX 24 at 1). Mr. Ash testified during a deposition (HX 25) and at the formal hearing. (TR at 1194-1328). During his deposition, Mr. Ash stated that the trip from Pinckneyville to St. Louis took at least 3.5 hours, whereas the trip from St. Louis to Pinckneyville took 2.5 to 3 hours, for a total of 6 to 6.5 hours round trip. (HX 25). He stated that the trip usually took longer than the time provided in the post office schedule. *Id.* During the hearing, Mr. Ash testified that the trip length was approximately 5.5 to 6 hours total. (TR at 1205). He could not recall what he was paid on the route. *Id.*

Ricky Dowty also testified regarding route 62237. He, too, estimated that a round trip for route 62237 trip took approximately 5.5 to 6 hours. (TR at 199-200). Mr. Hicks, who had driven the route 75 to 100 times, stated that the trip took 3 hours one way and 2.25 hours on the return. Adding 15 minutes for a pre-trip inspection, Mr. Hicks asserted that the total on-duty time was 5.5 hours. (TR at 2453-54).

Based on the deposition testimony of Mr. Ash and the start and stop times listed by Mr. Dowty, Mr. Yochim determined that the true trip length for route 62237 was 6.5 hours. Although there is some evidence that the route could take 6.5 hours to complete, Mr. Ash, Mr. Dowty, and Mr. Hicks also testified that the trip could take just 5.5 hours.

Curtis Jones based his time sheets on the post office schedule, and consistently listed 5.25 hours as the on-duty time. The post office schedule included loading and

unloading time, but as Mr. Hicks conceded, the post office schedule did not provide for a 15-minute pre-trip inspection of the truck prior to arrival at the post office. Under the Fair Labor Standards Act, a pre-trip inspection is compensable working time. 29 C.F.R. § 785.24. Based on the route schedule and hearing testimony, I find that the actual on-duty time for route 62237 was at least 5.5 hours, not including delays.

Although Mr. Jones's on-duty hours remained constant on his time sheets, he meticulously documented times when he received a late slip from the post office. Mr. Jones's payroll records reflect that he was compensated for this additional time at the proper wage determination rate. Therefore, despite the credible testimony the route could take longer than 5.5 hours, the evidence supports a finding that Mr. Jones was properly compensated for instances when he was delayed from meeting the route schedule.

Using the basic formulas employed by the Administrator, I have revised the back wage calculations for Mr. Jones.⁹ The calculations assume a minimum trip length of 5.5 hours; late slip payments were disregarded for purposes of determining the back wages due. Based on these revised calculations, I find that Mr. Jones is owed back wages and fringe benefits in the amount of \$5,810.00.¹⁰

Billy Ash's time sheets and payroll records were not available. The back wage calculations by Mr. Yochim assumed that Mr. Ash was paid 5.5 hours per trip, with no additional compensation for delays. Based on Mr. Ash's testimony that the route took 5.5 to 6.5 hours, and Mr. Jones's frequent inclusion of late slips on his time sheets, I find it reasonable to base Mr. Ash's back wage computations on an average trip length of 6 hours. Accordingly, I find that Mr. Ash is owed back wages in the amount of \$232.00 for his work on route 62237.

⁹ Electronic copies of the back wage calculation spreadsheets were provided by the Administrator's counsel on July 23, 2010. Printed copies of the revised calculations for Mr. Jones and Mr. Ash have been added to the formal record.

¹⁰ The parties disagree as to whether Mr. Jones is owed additional fringe benefits, beyond what Mr. Hicks paid. Mr. Hicks asserts that Mr. Jones received employee health insurance, and thus was properly paid a reduced rate for health and welfare benefits. (TR at 1905). In support of this assertion, Mr. Hicks questioned fleet manager John Fulk, asking whether Curtis Jones was in his "health insurance group." (TR at 2318). Mr. Fulk stated that he was "pretty sure he was." *Id.* Despite this testimony, there remains no documentary evidence that Mr. Jones was provided such a benefit and no evidence to establish the value of that benefit. Accordingly, these revised calculations continue to include additional payments of health and welfare benefits at the wage determination rate.

In sum, I find that Mr. Hicks is liable for \$6,042.00 in back wages for violations of the SCA in his performance of Contract 62237.

Contract 62836

Contract 62836 required mail to be hauled between Centralia, Illinois, and Mount Carmel, Illinois. Mr. Yochim identified underpayments for two drivers on Contract 62836: Brian Rowark and Gary Yandell. (AX 26-27).

The payroll records and testimony establish that Mr. Hicks violated the SCA in his performance of Contract 62836 by failing to pay drivers for all hours worked. Mr. Hicks paid drivers 6.5 hours of wages for each trip on route 62836, “no more, no less.” (TR at 2465). Gary Yandell testified that the route schedule did not provide adequate time to load and unload the mail. (TR at 1036A, 1135). Mr. Yandell’s testimony and payroll records also establish that he was paid only minimum wage for driving delays, as opposed to the full wage determination rate. (TR at 1022A-26A).

Because the drivers on this route were not properly compensated for times when the trip took longer than scheduled, I find that Mr. Hicks violated the SCA’s prevailing wage and fringe benefit provisions on Contract 62836.

Back Wages

Mr. Yochim testified that back wages due to Mr. Yandell and Brian Rowark were calculated based on their payroll records, time sheets, testimony of Ricky Dowty and Mr. Yandell, and the route schedule for 62836. (TR at 1801). Based on this evidence, Mr. Yochim determined that the route took 7 hours to complete, while the drivers were paid only 6.5 hours per trip. *Id.* Subtracting the hours actually paid from those earned, Mr. Yochim determined the wages due to both drivers. For the reasons that follow, I find these calculations reasonable and accurate.

The time sheets for Brian Rowark and Gary Yandell include pre-printed amounts of time for on-duty driving hours: 2 hours and 45 minutes from Mt. Carmel to Centralia, and 3 hours and 45 minutes from Centralia to Mt. Carmel. (AX 18 Group MM; HX 19). On rare occasion, Mr. Rowark noted that he received late slips from the post office (*See e.g.* AX 18 at 3132, 3137, 1341); Mr. Yandell never included hours beyond the pre-printed times. (HX 19). Mr. Yandell testified at the hearing that he completed his time sheets according to the scheduled time for the route. (TR at 1148). Nevertheless, Mr. Yandell felt that the scheduled amount of time was inadequate to complete the loading and unloading portions of his duties. (TR at 1036A, 1135). Ricky Dowty testified that the route took approximately 6.5 to 7 hours total. (TR at 205-07). He also testified that

the route could be completed in 6 hours and 55 minutes if everything went perfectly. (TR at 231-34).

Based on the evidence available, I find that Mr. Yochim made a reasonable inference that the route took 7 hours to operate. The back wage calculations are thoroughly documented, and I find the results reasonable and accurate. Therefore, I find that Mr. Hicks is liable for \$2,860.00 in back wages for underpayments to the drivers on Contract 62836.

Summary of Back Wages Owed

In sum, I find that HHMT and Mr. Hicks violated the wage and fringe benefit provisions of the SCA on Contracts 98010, 752LE, 62237, and 62836. I also find that Respondents owe the drivers on these routes a total of \$297,153.00 in back wages: \$143,393.00 on Contract 98010; \$144,858.00 on Contract 752LE; \$6,042.00 on Contract 62237; and \$2,860.00 on Contract 62836.

Party Responsible:

Violations of the SCA shall render the “party responsible” liable for any underpayment of compensation to employees who engaged in the performance of a contract. 41 U.S.C. § 352(a); 29 C.F.R. § 4187(a). The regulations state that:

In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

29 C.F.R. § 4187(e)(3). Personal liability is not limited to those who are officially officers of a business or signatories to a government contract. Instead, the term party responsible “includes all persons irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached.” 29 C.F.R. § 4187(e)(4).

The Administrative Review Board (“ARB”) has held that an individual in *de facto* control of a company’s day-to-day responsibilities is a party responsible. *Rasputin Inc.*, ARB No. 03-059, ALJ No. 97-SCA-32 (ARB May 28, 2004) *aff’d in relevant part sub nom. Johnson v. U.S. Dep’t of Labor*, 2005 WL 197072 (S.D. Ohio, Aug. 16, 2005), *aff’d* No. 05-4355 (6th Cir. Aug. 16, 2006). In *Rasputin*, company employee William Johnson was not

officially an officer of the company, but hired and fired employees, provided guidance on the hiring of key personnel, made payroll decisions, and had final authority on all equipment decisions. *Id.* slip op. at 4-6. The ARB determined that Johnson's control over the company's operations made him a party responsible for the SCA violations. *Id.*

After January 1, 2002, Mr. Hicks was no longer the official owner of HHMT; nevertheless, I find that he is a party responsible for the company's subsequent SCA violations, for the following reasons.

Mr. Hicks testified that he gave up operational control and ownership of HHMT on January 1, 2002, but continued to serve as the company's consultant. (TR at 2433-34).¹¹ The evidence establishes that Mr. Hicks had more authority in the company than that of a consultant. For instance, Mr. Hicks made key hiring decisions after January 2002. In July 2002, Mr. Hicks hired Ricky Dowty, the supervisor and dispatcher for Contract 98010. (TR at 67). In March 2003, Mr. Hicks interviewed and hired Paula Duncan, HHMT's payroll manager. (TR at 513-17).

Mr. Hicks also made decisions regarding employee compensation. Ms. Duncan testified that Mr. Hicks and Mr. Dowty instructed her on how many hours were to be paid for each route. (TR at 534, 536). Mr. Dowty testified that Mr. Hicks instructed him on how many hours route 98010 would pay, including "bonus hours." (TR at 180-81). Pam Mason and Ricky Dowty also testified that Mr. Hicks helped prepare contract bids. (TR at 57, 209-12, 237, 371).

Employees of HHMT viewed Mr. Hicks as their boss and the head of the company. Several of the witnesses routinely observed Mr. Hicks in the HHMT offices. (TR at 209-12, 237, 371, 540-41, 1207, 1368). John Fulk was the HHMT fleet manager, in charge of the equipment, parts, and the shop; Mr. Fulk testified that Mr. Hicks was his boss. (TR at 2351). Several other employee witnesses, including Ricky Dowty, Gary Yandell, Todd Bennett, and Patrick Muller, also identified Mr. Hicks as the boss of the HHMT. (TR at 167, 1104, 1167, 1368, 2351). The testimony reveals that employees approached Mr. Hicks for authorization to repair trucks and equipment. (TR at 57, 987, 700-02). Moreover, Mr. Hicks continued to act as the head of the company, sending a May 21, 2003, memo to all drivers, instructing them to turn in vehicle inspection reports. (AX 40). The memo stated that failure to follow the procedure would result in non-payment or possible dismissal. *Id.*

¹¹ Stock ownership was transferred to Pam Mason, Shelly Myles, and Mr. Hicks's three sons. Neither Ms. Mason nor Ms. Myles purchased the stock, attended any shareholder or board of director meetings, or received any stock certificates. (TR at 63-64; DX 19 at 19-22, 32-34).

Although many day-to-day questions were fielded by Pam Mason and Ricky Dowty, employees also turned to Mr. Hicks with requests regarding route assignments and compensation. In 2002, Gary Yandell requested that he be transferred from route 62836 to route 98010; Ricky Dowty initially refused, but Mr. Hicks approved the request. (TR at 1141-42). Billy Ash obtained Mr. Hicks's permission for his wife to serve as a team driver on route 752LE in 2004; he also spoke with Mr. Hicks regarding pay. (TR at 1220-22). Ron Jackson spoke with Mr. Hicks on several occasions regarding compensation on route 752LE. (TR at 699, 708). Mr. Jackson was also sent notes, asking him to phone Mr. Hicks regarding irregularity notices from the post office. (TR at 707-15; AX 41).

Mr. Hicks emphasized the difference between the routes that he held as an individual, versus those in the name of HHMT. In practice, the separation of the two entities is less clear. All drivers were paid by HHMT, even those on routes 62237 and 62836, which were operated by Mr. Hicks as a sole proprietor. (TR at 1198, 1235; AX 18 Groups DD, MM, NN). Paula Duncan, who performed payroll duties for all routes, was also paid only by HHMT. (TR at 520).

Based on the witness testimony regarding Mr. Hicks's role in HHMT and the documentary evidence showing a continued role by Hicks in HHMT's management, I find that the overwhelming weight of the evidence establishes that Mr. Hicks remained in *de facto* control of HHMT's operations and compensation policy, even after he officially relinquished control of the company in 2002. Therefore, I find that in addition to his responsibility for the violations on Contracts 62237 and 62836, Mr. Hicks is also a party responsible for the SCA violations on Contracts 98010 and 752LE, which were operated by HHMT.

Debarment:

Section 5 of the Act provides that if an employer has violated the SCA, it shall be debarred from receiving any federal contract for a period of three years:

Unless the Secretary otherwise recommends *because of unusual circumstances*, no contract of the United States shall be awarded to the persons or firms appearing on [the list of those who have violated the Act] or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms.

41 U.S.C. § 354(a)

Although it may constitute a severe penalty, Congress intended debarment to be the norm, not the exception. *Summitt Investigative Service Inc. v. Herman*, 34 F. Supp. 2d 16, 19 (D.C.Cir. 1998). Under the SCA, debarment is presumed once a violation of the Act has been found; relief from the sanction can only be granted if the respondent can show the existence of unusual circumstances. *Hugo Reforestation Inc.*, ARB Case No. 99-003, slip op. at 8-9 (ARB Apr. 30, 2001); 29 C.F.R. § 4.188(a) and (b). Unusual circumstances exist in situations where the violation was minor or inadvertent, or where the sanction of debarment would be “wholly disproportionate to the offense.” *Herman*, 34 F. Supp. 2d at 20 (quoting 29 C.F.R. § 4.188).

The regulations establish a three-part test to assess factors that may constitute unusual circumstances.

- I. Relief from debarment can only be granted if the contractor establishes that its violations were not willful, deliberate, or of an aggravated nature, and that the violations were not the result of culpable conduct, such as culpable neglect to ascertain whether practices are in violation or culpable disregard of whether they were in violation or not. 29 C.F.R. § 4.188(b)(3)(i).
- II. The contractor must also show that it has a good compliance history, and that it cooperated in the investigation, repaid the moneys due, and has made sufficient assurances of future compliance. 29 C.F.R. § 4.188(b)(3)(ii).
- III. If the contractor can establish the criteria in Parts I and II, the judge must also consider a variety of factors bearing on the contractor’s good faith, including whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations which impeded the Department’s investigation, whether determination of liability under the SCA was dependent upon resolution of bona fide legal issues of doubtful certainty, the contractor’s efforts to ensure compliance, and the nature, extent, and seriousness of past or present violations. *Id.*

Respondents bear the burden of proving that unusual circumstances exist in order to be relieved from debarment. 29 C.F.R. § 4.188(b)(1). As previously mentioned, neither Mr. Hicks nor HHMT filed a closing brief in this case; thus, Respondents have provided no formal argument to prove that unusual circumstances exist in this case.

The Administrator, on the other hand, has filed a comprehensive and thorough argument in support of debarment in its closing brief. (Administrator’s Brief at 63-71). The Administrator argues that the nature and seriousness of the violations in this case preclude a finding of unusual circumstances. *Id.* at 65. The Administrator points to two

of Mr. Hicks's and HHMT's compensation practices: paying employees only for driving time instead of all on duty hours and reducing the rate of pay for drivers who were delayed by weather, traffic, or breakdowns. *Id.* at 66. The Administrator argues that these practices do not constitute minor or inadvertent violations. *Id.* at 67. Because the rules regarding such circumstances are clear, the Administrator argues that Respondent's payment practices did "not involve an issue of doubtful certainty to warrant relief from debarment." *Id.*

The Administrator also points to Mr. Hicks's history of prior violations as an operator and officer of Midwest Transit. (Administrator's Brief at 67-70). Midwest Transit was investigated in 1990, 1999, and 2002 for SCA violations. *Id.* at 68. The 1990 investigation was resolved with a \$40,000.00 payment of back wages and consent findings, to which Mr. Hicks was a signatory. The 2002 investigation involved Contract 98010, and the investigators found that Midwest Transit violated the SCA by paying employees only for driving time and not all hours worked. *Id.*

Finally, the Administrator asserts that Mr. Hicks attempted to impede the Wage and Hour Division investigation by instructing Paula Duncan to remove names from a list of employees and by removing files from the HHMT offices. (Administrator's Brief at 69-70). Based on these facts, the Administrator argues that the SCA violations were the result of culpable conduct and that Respondents cannot meet the first prong of the test. (Administrator's Brief at 70-71). The Administrator further argues that Mr. Hicks's history of prior violations and his lack of cooperation in the investigation preclude a finding of unusual circumstances. *Id.*

Debarment in SCA cases is presumed and it is the burden of the respondent to prove that unusual circumstances exist to merit relief from the sanction of debarment. In this case, Respondents paid inadequate wages to more than 40 drivers. Respondents have failed to establish that the SCA violations in this case were the type of minor or inadvertent mistakes that would make debarment a disproportional sanction. Based on the severity and extent of the violations, Mr. Hicks's considerable experience with government mail-hauling contracts, the clarity of the law in this area, and the prior investigations by the Wage and Hour Division, I find, at a minimum, culpable disregard of whether the payment practices of Mr. Hicks and HHMT were in violation of the SCA. Accordingly, I find that Respondents cannot meet even the first part of the three-part test for unusual circumstances.

As Respondents have provided no compelling argument to rebut the presumption of debarment, I find that they do not meet the unusual circumstances exception. Therefore, Respondents must be declared ineligible to receive Federal contracts or subcontracts for a period of three years.

Payment of Back Wages:

I have found that Respondents owe \$297,153.00 in back wages for their violations of the SCA. The record reflects that by request of the Wage and Hour Division in February 2006, USPS withheld \$295,293.00 from payment to Respondents on Contracts 752LE, 98010, 62237, 62836, and 62233. (AX 2 at 71-75; AX 3 at 12-15).

The regulations provide that such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees. 29 C.F.R. § 4.187. The Act further provides that if the withheld funds are insufficient to repay all back wages due, the contractor is liable for the remainder.

If the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to this chapter, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments.

41 U.S.C. § 354(b).

The funds withheld in this case are insufficient to reimburse the employees for all unpaid wages; therefore, I find that Respondents are liable for the remaining \$1,860.00.

ORDER

IT IS HEREBY ORDERED that:

1. Respondents Hal D. Hicks and HHMT Inc. are liable for back wages in the amount of \$297,153.00, which are owed to the following employees in the amounts indicated:

a. Contract 98010

1.	Adams, Linda	\$ 3,894.00
2.	Altizer, James	4,701.00
3.	Ash, Billy	2,688.00
4.	Bailey, Steve	3,803.00
5.	Benefield, Dan	1,477.00
6.	Bennett, Todd	20,608.00
7.	Chalabian, Michael	3,484.00

8.	Dagg, Dale	1,791.00
9.	Ellsworth, Tom	405.00
10.	Ford, Patrick	1,516.00
11.	Giulietti, Michael	2,029.00
12.	Greene, Randall	9,433.00
13.	Greenwood, Alan	2,688.00
14.	Hancock, Jerry	3,132.00
15.	Heyer, David	4,342.00
16.	Hockley, Michael	3,911.00
17.	Kuhlman, Timothy	8,051.00
18.	London, James	1,421.00
19.	Marvel, Bert	10,338.00
20.	Muller, Patrick	10,706.00
21.	Muller, Richard	5,236.00
22.	Schultz, Jeffrey	9,361.00
23.	Shelton, Tim	999.00
24.	Smith, Timothy	2,645.00
25.	Spencer, Donald	3,941.00
26.	Stephenson, Sophie	2,938.00
27.	Titzer, Randall	1,964.00
28.	Tracy, Brent	2,249.00
29.	<u>Yandell, Gary</u>	<u>13,642.00</u>
	98010 Total	\$ 143,393.00

b. *Contract 752LE*

1.	Anderson, Allen	\$ 15,931.00
2.	Ash, Billy	496.00
3.	Blankenship, Jimmy	8,098.00
4.	Bozeman, Tommy	6,460.00
5.	Bradley, David	26,949.00
6.	Bradley, Dianne	26,363.00
7.	Cook, Robert	7,035.00
8.	Crum, Rodney	7,932.00
9.	Davis, Allen	12,696.00
10.	Jackson, Ronald	0.00

11.	Jordan, Roland	2,723.00
12.	Robinson, LaVaughn	4,537.00
13.	Stafford, Rex	1,222.00
14.	Traywick, Kendal	12,696.00
15.	<u>Vining, James</u>	<u>11,720.00</u>
	752LE Total	\$ 144,858.00

c. *Contract 62237*

1.	Ash, Billy	\$ 232.00
2.	<u>Jones, Curtis</u>	<u>5,810.00</u>
	62237 Total	\$ 6,042.00

d. *Contract 62836*

1.	Rowark, Brian	\$ 2,421.00
2.	<u>Yandell, Gary</u>	<u>439.00</u>
	62836 Total	\$ 2,860.00

2. The amount of \$295,293.00, which has been withheld by the United States Postal Service from the contracts of Respondents, shall be released to the Department of Labor for payment of employees' back wages.
3. Respondents Hal D. Hicks and HHMT Inc. shall pay an additional amount of \$1,860.00 for unpaid wages not covered by the withheld funds.
4. Respondents Hal D. Hicks and HHMT Inc. shall be debarred and declared ineligible to receive any contracts or subcontracts with the United States for a period of three years, commencing on the date of publication by the Comptroller General of their names on the ineligibility list, as provided in 41 U.S.C. § 354.

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LARRY S. MERCK
Administrative Law Judge

NOTICE: To appeal, you must file a written petition for review with the Administrative Review Board ("ARB") within 40 days after the date of this Decision and Order (or such additional time that the ARB may grant). *See* 29 C.F.R. § 6.20. The

Board's address is: Administrative Review Board, United States Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210

A copy of any petition must also be provided to: the Chief Administrative Law Judge, Office of Administrative Law Judges, 800 K Street, NW, Washington, DC 20001-8002; the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210; the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210; the Federal contracting agency involved; and all other interested parties. 29 C.F.R. § 8.10(e).

Your petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the unusual circumstances or lack thereof under the Service Contract Act, and/or the aggravated or willful violations of the Contract Work Hours and Safety Standards Act or lack thereof, as appropriate.

The ARB's Rules of Practice further require that the petitioner provide to the ARB an original and four copies of the petition and any other papers submitted to the ARB. 29 C.F.R. § 8.10(b). Service must be in person or by mail. 29 C.F.R. § 8.10(c). Service by mail is complete on mailing, and the petition is considered filed upon the day of service by mail. 29 C.F.R. § 8.10(c). The petition must contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and the manner of service and the names of the person or persons served, certified by the person who made service. 29 C.F.R. § 8.10(d).