No. _____

IN THE
SUPREME COURT FOR THE UNITED STATES

Leonid Burlaka et al;
On behalf of Themselves and
all others similarly situated

v.

Contract Transport Services, LLC

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are drivers subject to the jurisdiction of the Secretary of Transportation, and therefore exempt under 29 U.S.C. §213(b)(1), because some of the products that they moved between two points within a single state were eventually moved out of the state, even though the shipper had not decided on whether to sell the products to an interstate or intrastate customer at the time of the intrastate transport?

PARTIES TO THE PROCEEDING

The Petitioner are Timothy Keuken, Leonid Burlaka, Travis Frischmann, and Roger Robinson.

The Respondent is Contract Transport Services, LLC ("hereinafter CTS").

LIST OF ALL RELATED PROCEEDINGS

United States Court of Appeals for the Seventh Circuit, Leonid Burlaka et al. v. Contract Transport Services, Inc., Appeal No. 19-1703, judgment entered August 21, 2020.

United States District Court for the Eastern District of Wisconsin, Leonid Burlaka et al v. Contract Transport Services, Inc., Case No. 17-CV-1126, judgment entered March 30, 2019.

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Burlaka et al. v. Contract Transport Services, Inc., 2019 WL 1440408 (E.D. WI. 2019) (March 30, 2019).

STATEMENT ON JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 21, 2020. Petitioners did not move for rehearing before the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED IN THE CASE

29 U.S.C. §213(b): The provisions of Section 207 of this title shall not apply with respect to:

(1) Any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 31502 of title 49....

29 C.F.R. §782.1(a): Section 13(b)(1) of the Fair Labor Standards Act provides an exemption from the maximum hours and overtime requirements of section 7 of the act, but not from the minimum wage requirements of section 6. The exemption is applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935, (part II of the Interstate Commerce Act, 49 Stat. 546, as amended; 49 U.S.C. 304, as amended by Pub.L. 89–670, section 8e which substituted "Secretary of Transportation" for "Interstate Commerce Commission"—Oct. 15, 1966) except that the exemption is not applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service solely by

virtue of section 204(a)(3a) of part II of the Interstate Commerce Act.

STATEMENT OF THE CASE

Each of the four plaintiffs were employed by CTS to perform spotting duties for a separate company called Green Bay Packaging. (Plaintiff Appendix (hereinafter "Appx") pg. 71, ¶2; pg. 77, ¶2; pg. 82, ¶2; pg. 87, ¶2) Plaintiffs Keuken, Burlaka, and Frischmann drove exclusively within Green Bay, while Plaintiff Robinson drove exclusively within De Pere while they were employed as CTS spotters at Green Bay Packaging (Id.). None of the driving assignments the Plaintiffs performed while employed as spotters at Green Bay Packaging required driving more than two miles on public roads. (Appx. pg. 129, ¶1)

Once products are manufactured at Green Bay Packaging Shipping Container, the products may be moved to loading dock areas on the east and west sides of the building, a drop lot across the street, Warehouse 6, Quincy Warehouse, or Warehouse 3. (Appx. pg. 8 ¶10) CTS stipulated that one need not travel on, or across any public roads in order to reach the East and West loading dock areas from Green Bay Packaging Shipping Container. (Appx. pg. 130, ¶28)

When the Plaintiffs worked as spotters at Green Bay Packaging Shipping Container, most of their work consisted of moving trailers containing finished boxes between the dock and parking spots at Shipping container or an overflow lot, although occasionally they would move a trailer loaded with finished boxes from Green Bay Packaging Shipping Container to a warehouse. (Appendix, pg. 73-74, ¶¶11-13; pg. 79, ¶¶8-10). Every trailer moved to a warehouse would be

moved to the dock, unloaded, and then moved away from the dock and into the warehouse's parking lot. (Appx pg. 84, ¶8) Similarly, while the vast majority of work for spotters at De Pere Shipping Container consisted of moving trailers into and out of the docks of that building, very occasionally the spotters would be responsible for moving a trailer from De Pere Shipping Container to De Pere Folding Carton. (Appx. pg. 89, ¶¶8-9) Delivered boxes needed to be grooved and printed on to become finished boxes that Green Bay Packaging can ship to its customers. (Appx. pg. 89, ¶9)

While CTS produced evidence that between 20% and 30% of the products manufactured at Green Bay Packaging Shipping Container and De Pere Shipping Container are shipped out of Wisconsin, and that interstate movements may originate from one of the warehouses, there is no evidence on how many of the interstate shipments were made directly from Green Bay Packaging Shipping Container or De Pere Shipping Container, rather than involved first a delivery to a warehouse, before the final interstate delivery was made from the warehouse. (Appendix, pg. 11, ¶25) Similarly, no evidence in the record shows whether at the time the Plaintiffs moved the boxes Green Bay Packaging had already intended to ship the boxes to interstate customers, or would not decide whether to ship the boxes to interstate or intrastate customers until after the boxes arrived at and came to a rest at the warehouse. Similarly, there is no evidence Green Bay Packaging had any final customer designated for the boxes that were moved from De Pere Shipping Container to De Pere Folding Carton, which had to be finished at De Pere Folding Carton before they could be shipped to customers. Indeed, Green Bay Packaging

did not appear on Defendant CTS' initial disclosures as individuals likely to have discoverable information that CTS may use to support its defenses. (Appx. pg. 68-69)

The record contains numerous Green Bay Packaging Bills of Lading. They show (if the handwritten on them are to be credited) deliveries from a warehouse to an out-of-state location. (Appx. pg. 22, 29). The only link between the Plaintiffs and the interstate delivery is that either that day, or a day or two previously, the Plaintiffs moved the same trailer from the manufacturing facility to the warehouse. (Appx. pg. 23-27, 31-33). Records CTS produced to the District Court show what was on the trailer during the final interstate movement, but not when the Plaintiffs moved the trailers entirely within Green Bay or De Pere. (Appx. 22-27, 29-33). Every trailer is unloaded, moved to the parking lot, and then moved back to the dock for loading on an as needed basis once it arrives at the warehouse. (Appx. pg. 84, ¶¶8-9) No evidence shows the same boxes were on the trailers both during the Plaintiffs' move and the later interstate movement.

ARGUMENT

1. Introduction.

This petition asks the Court to take up the issue of the appropriate standard for determining whether a wholly intrastate movement of goods is separate from, or constitutes the first leg of an interstate movement of goods, for the purpose of determining whether drivers who made such intrastate movements are subject to the power of the Secretary of Transportation for establishing qualifications and maximum hours, and is therefore exempt from the overtime requirements of the Fair Labor Standards Act under 29 U.S.C. §213(b)(1).

Whereas decisions from both the United States Supreme Court and every other Court of Appeals that has taken up the question has held that the intent of the shipper at the time the shipment commenced determines whether an intrastate movement is separate from the later interstate movement or the first leg of the interstate movement, the Seventh Circuit upheld the District Court's grant of summary judgment for CTS without making any findings on the intent of Green Bay Packaging as the shipper at the time the Plaintiffs transported boxes from a manufacturing facility to a warehouse or processing facility. Indeed, the word "intent" does not appear at all in the Seventh Circuit's opinion. Instead, the Seventh Circuit applied the following novel test:

> These facts plainly demonstrate that at least some spotters drove trailers carrying finalized goods destined for out-of-state delivery. Such a service, even if purely intrastate and interrupted briefly, would nevertheless constitute "driving in interstate commerce" because it would be part of the goods' continuous interstate journey. *See Collins*, 589 at 898; *see also Walling*, 317 U.S. at 568, 63 S.Ct. 332 (defining shipment in interstate commerce as the "practical continuity of movement of the goods").

See 971 F. 3d at 721. The Court based this conclusion on facts described in the previous paragraph of the opinion, which did not include any findings on the intent of Green Bay Packaging as the shipper at the time the Plaintiffs moved the products. *See Id.* Nor did the Seventh Circuit make any findings of fact on how

long the boxes would be stored at the warehouses after the Plaintiffs delivered them, and before they were again loaded into a trailer for intrastate or interstate shipment. See Appendix pg. 84, ¶8 (Every trailer delivered to a warehouse was unloaded there).[1]

The Seventh Circuit thus held whether an intrastate movement constituted the first leg of a continuous interstate journey depended on whether the goods involved in the intrastate movement were ultimately moved out of the state, rather than upon whether the shipper intended to move the goods out of state at the time of the intrastate movement. Because this holding by the Seventh Circuit is contrary to both the decisions of this Court and every other Court of Appeals that has considered the question, and because the question of the standard for determining exemption from the overtime requirements of the Fair Labor Standards Act is an important one, this writ for certiorari should be granted pursuant to Supreme Court Rule 10(a) and (c).

2. Writ of Certiorari Should be Granted Because the Seventh Circuit Decided an

[1] While the Seventh Circuit did find that the *trailers* spotted by the Plaintiffs may be used either on the same day, or a two or two later for an interstate movement. *See* 971 F.3 d at 721, CTS' shipping documents do not show what was on the trailers when the Plaintiffs moved them from the manufacturing facility to the warehouses or processing facility. (Appx. pg. 22-27, 29-33) Consequently, no evidence in the record shows the same boxes were in the trailers both when the Plaintiffs moved them, and during the subsequent interstate movement. The Seventh Circuit did not find, and CTS cannot demonstrate there was a continuous movement of trailers, when the spotter would decide which trailer, which had already come to rest at the warehouse, would be used for a subsequent delivery from the warehouse. Appendix, pg. 12, ¶9.

Important Question of Federal Law In a Manner Contrary to This Court's Controlling Precedent.

By focusing on the ultimate destination of the product rather than the shipper's intent at the time of the intrastate shipment, the Seventh Circuit's decision is directly contrary to United States Supreme Court precedent defining the limits of interstate commerce. In *Independent Warehouses v. Scheele*, 331 U.S. 70, 84, 67 S. Ct. 1062, 92 L Ed. 1346 (1947), the Supreme Court dealt with the legality of a New Jersey tax on coal that was transported from Pennsylvania mines to a storage location in New Jersey. The Supreme Court held that the local tax was lawful, and the coal had come to rest at the storage facility, precisely because the decision on whether to ultimately ship the stored coal to an interstate or intrastate customer is not made until after the coal is stored at the storage facility. The Supreme Court so held even though most of the coal after storage at the storage facility was shipped out of New Jersey. See 331 U.S. at 77. *Scheele* therefore held that if the shipper stored goods without knowing whether the goods would subsequently be transported to an interstate or intrastate customer, the shipper did not have an interstate intent beyond the storage point, so that the goods would come to rest at the storage point to interrupt any continuous interstate journey that they had been on.

By the exact same reasoning, if Green Bay Packaging did not decide on the ultimate customer for its boxes until a they arrived at the warehouse, or until after they arrived at De Pere Folding Carton for further processing, such storage/processing would interrupt the continuous journey of the boxes from the Green Bay Packaging's manufacturing facility to the ultimate

interstate or intrastate customer of Green Bay Packaging. Since the goods came to rest at the warehouse or processing facility, Plaintiffs' earlier transport of the boxes wholly within Green Bay or De Pere, Wisconsin constituted a wholly intrastate movements rather than the first leg of a continuous interstate movements.

Under United States Supreme Court precedents, wholly intrastate movements are beyond the power of regulation by the Interstate Commerce Commission. *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-568, 570, 63 S. Ct. 332, 87 L Ed. 460. (1943). (Motor carrier exemption extends federal control of driver overtime throughout the farthest reaches of interstate commerce; while Congress intended to leave local business to the control of the states). *See also Morris v. McComb*, 332 U.S. 422, 431-432, 68 S. Ct. 131, 92 L Ed. 44 (1947); *Levinson v. Specter Motor Service*, 330 U.S. 649, 673, 67 S. Ct. 931, 91 L Ed 1158 (1947) (Both holding motor carrier exemption only applied to employees who engaged in interstate or foreign commerce). The same limitation of authority applies to the Secretary of Transportation as the successor of the Interstate Commerce Commission. 29 C.F.R. §782.1 (Motor carrier exemption is applicable to any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act of 1935); P.L. 97–449, 96 Stat. 2413, 2438 (1983) (Describing transfer of authority from Interstate Commerce Commission to Department of Transportation).

Applying the correct *Scheele* standard focusing on the intent of the shipper, CTS' motion for summary

judgment should have been denied. Because CTS is asserting the applicability of the motor carrier exemption, it has the burden of proving the Plaintiffs were subject to the exemption as a result of their engagement in interstate commerce. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-197, 94 S. Ct. 2223, 41 L. Ed. 2nd 1 (1974). Plaintiffs, not CTS, would ultimately prevail at trial if CTS cannot present any evidence demonstrating Green Bay Packaging intended the boxes for interstate shipment at the time the Plaintiffs delivered them from the manufacturing facility to the warehouse or processing facility. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 207, 86 S. Ct. 737, 15 L. Ed. 2d 694 (1966) (Though it was unclear what percentage of the Defendant's sales was retail or non-retail, employer had failed to meet its burden of proving that a sufficient amount of its sales was retail to satisfy the exemption, so that its exemption defense failed); *Arnold v. Ben Kanowsky Inc.*, 361 U.S. 388, 393-394, 80 S. Ct. 453, 4 L. Ed. 2d 393 (1960). (Employer not exempt when it has failed to present any evidence showing that the sales activity that it engaged in was regarded as retail in the community). Because CTS failed to present any evidence on whether Green Bay Packaging intended the boxes for interstate shipment at the time the Plaintiffs moved the boxes over a distance of no more than two miles, and wholly within Green Bay or De Pere in Wisconsin, it has failed to prove the Plaintiffs' intrastate movements had any link to the subsequent interstate movement of products, so as to subject the Plaintiffs to the jurisdiction of the Secretary of Transportation.

The question on the standard for deciding whether an intrastate movement is one leg of an interstate movement, i.e. whether the analysis depends on the shipper's intent or on whether the transported products were ultimately shipped out of the state, presents an important question of federal law that affects both the overtime pay eligibility of thousands if not tens of thousands of spotters and local drivers, as well as the limits of the Secretary of Transportation's power to define qualifications and maximum hour requirements for drivers. The Seventh Circuit's decision, if allowed to stand, would expand the jurisdiction of the Secretary of Transportation to all drivers who handle any products that are eventually shipped out of State, in violation of *Walling*'s teaching that Congress intended to leave the regulation of local commerce to the states. *See* 317 U.S. at 568. This writ for certiorari therefore should be granted pursuant to Supreme Court Rule 10(c).

3. **Writ of Certiorari Should be Granted Because the Seventh Circuit's Decision is Contrary to the Decisions of Every Other Court of Appeals, Which Focus on the Intent of the Shipper When Determining Whether an Intrastate Trip is One Leg of a Continuous Interstate Journey**.

Because only interstate or foreign drivers who are subject to the jurisdiction of the Secretary of Transportation are subject to the motor carrier exemption, and because the identical power to regulate maximum hours for drivers was transferred from the Interstate Commerce Commission to the Department of Transportation, cases from other circuits that discuss the outer limits of the Interstate Commerce

Commission's jurisdiction directly address the applicability of the motor carrier exemption. *See Levinson*, 330 U.S. at 651 (Applicability of motor carrier exemption depended on whether Interstate Commerce Commission had jurisdiction to establish qualification and maximum hours of service for the employees in question); P.L. 97–449, 96 Stat. 2413, 2438 (1983) (Describing transfer of authority from Interstate Commerce Commission to Department of Transportation).

The Seventh Circuit's decision in this case that the Secretary of Transportation has jurisdiction to regulate maximum hours for the Plaintiffs because they moved some products that were eventually moved out of Wisconsin is directly contrary to the Ninth Circuit's decision in *Southern Pac. Transp Co. v. I.C.C.*, 565 F. 2d 615, 617-618 (9th Cir. 1977), which presented the question of whether the Interstate Commerce Commission had jurisdiction over the transportation of canned fruit from a canning facility in California to warehouses also located in California. The Ninth Circuit answered this question in the negative, holding that because the decision on where to ultimately sell the canned fruit to an intrastate, interstate, or foreign customer was not made until the fruit came to rest at the warehouse, the shipper's only intent when the fruit was on its way from the canning facility to the warehouse was to ship the fruit to an unknown destination, whether intrastate, interstate, or foreign. The Ninth Circuit thus concluded the I.C.C. did not have jurisdiction over the transport of the canned fruit from the canning facility to the warehouse because at the time of said transport there was no fixed and persistent interstate intent, even though most of the

fruit stored at the warehouse was ultimately shipped to an interstate or foreign destination.

The Fifth Circuit confronted the same issue of the Interstate Commerce Commission's jurisdiction in *I.C.C. v. Columbus & G Ry Co.*, 153 F. 2d 193, 194 (5th Cir. 1946), a case that dealt with whether the I.C.C.'s jurisdiction extended to the intrastate transportation of cotton from the gin to the warehouse. The Fifth Circuit held that where a buyer is not sought until the cotton is stored at the warehouse, so that a new bill of lading was generated when the cotton was actually moved out of the state, the I.C.C. did not have jurisdiction over the intrastate transportation of cotton from the gin to the warehouse. Similarly, in this case CTS' bills of lading for the interstate movement do not reference the earlier movement of trailers or products by spotters. (Appendix, pg. 22, 29)

The decisions by the Fifth and Ninth Circuits are consistent with statements by other circuits that focus on the intent of the shipper when determining whether an intrastate trip constituted one leg of a continuous interstate trip. *Mazzarella v. Fast Rig Support, LLC*, 823 F. 3d 786, 793 (3rd Cir. 16) (Whether movement of water from retention ponds in Pennsylvania to fracking sites in Pennsylvania and then to disposal sites in Ohio constitute a continuous interstate movement may depend on intent of the shipper at the time that the shipment commenced); *Project Hope v. MV/IBN SINA*, 250 F. 3d 67, 74 (2nd Cir. 2001) ("Where multiple carriers are responsible for different legs of a generally continuous shipment, whether either § 13501(1)(A) or (E) is satisfied to trigger application of the Carmack Amendment is determined by reference to the intended final destination of the shipment as that intent existed

when the shipment commenced"); *Foxworthy v. Hiland Dairy Co.*, 997 F. 2d 670, 672 (10th Cir. 1993) ("Crucial to a determination of the essential character of a shipment is the shipper's fixed and persisting intent at the time of shipment."); *Roberts v. Levine*, 921 F. 2d 804, 810 (8th Cir. 1990) (Transport of raw soybeans was intrastate in nature where the shipper intended for the raw soybeans to be processed, rather than transported in interstate commerce without processing). One district court within the Seventh Circuit has similarly held that where manufactured products were earmarked for specific customers, but those customers had the option of designating the products for interstate or intrastate delivery after the products had been stored at the warehouse, delivery from the manufacturing facility to the warehouse was an intrastate trip rather than one leg of an interstate trip because no intention to ship the products out of Illinois had been formed at the time of the delivery to the warehouse. *Sedrick v. All Pro Logistics, LLC*, 2009 WL 1607556 *2, 4 (N.D. IL. 2009).

Each time a court outside the Seventh Circuit considered whether an intrastate trip was one leg of a continuous interstate journey, the Court focused on the intent of the shipper at the time the shipment commenced. If the shipper did not know at the time of the intrastate movement whether the moved goods would ultimately be shipped to interstate or intrastate customers, no persistent interstate intent had been formed at the time of the intrastate movement, so that the intrastate movement is separate from rather than one leg of a continuous interstate movement. *Southern Pac. Transp Co*, 565 F. 2d at 617-618; *Columbus & G Ry Co.*, 153 F. 2d at 194.

The Seventh Circuit's decision represents a clear departure from this line of precedents when the Seventh Circuit upheld the grant of summary judgment for CTS without ever referencing the intent of Green Bay Packaging as the shipper. The Seventh Circuit instead found the Plaintiffs' trips wholly within Green Bay or De Pere in Wisconsin were the first leg of interstate journeys, regardless of whether Green Bay Packaging intended the boxes for an interstate customer at the time the Plaintiffs' moved them, because some of the boxes they moved were destined to, i.e. were eventually moved out of Wisconsin. The Seventh Circuit's decision contradicted the decision of every other court of appeals by relying on whether the products were eventually shipped out of state, rather than on the shipper's intended to ship the goods to an interstate customer at the time of the intrastate transport, to determine whether an intrastate trip was one leg of a continuous interstate journey.

The applicable standard for determining whether spotters and local drivers are exempt from the overtime pay provisions of the FLSA, or are subject to regulation by the Secretary of Transportation is an important matter that affects both the Secretary of Transportation's power to regulate qualifications and maximum hours of service for seemingly local drivers, and the overtime eligibility of thousands if not tens of thousands of spotters and local drivers. The Supreme Court should grant this writ of certiorari pursuant to its Rule 10(a) when the conflict between the Seventh Circuit and every other circuit over whether the intent of the shipper or the ultimate shipment of the product is determinative of whether an intrastate transport is

one leg of a continuous interstate journey concerns this important matter.

4. Conclusion.

For the above stated reasons, this writ of certiorari should be granted.

Dated this 19th day of November, 2020.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1703

LEONID BURLAKA, *et al.*,

Plaintiffs-Appellants,

v.

CONTRACT TRANSPORT SERVICES LLC,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 1:17-cv-1126 — **William C. Griesbach**, *Judge.*

ARGUED SEPTEMBER 18, 2019 — DECIDED AUGUST 21, 2020

Before KANNE, HAMILTON, and BARRETT, *Circuit Judges.*

BARRETT, *Circuit Judge.* Leonid Burlaka, Timothy Keuken, Travis Frischmann, and Roger Robinson are truck drivers who brought individual, collective, and class action claims against Contract Transport Services (CTS), their former employer, for failing to provide overtime pay in violation of the Fair Labor Standards Act (FLSA), which requires overtime pay for any employee who works more than forty hours in a workweek. 29 U.S.C. § 207(a)(1). The entitlement to overtime

pay, however, is not absolute: as relevant here, the statute exempts employees who are subject to the Secretary of Transportation's jurisdiction under the Motor Carrier Act (MCA). 29 U.S.C. § 213(b)(1). This carveout is known as the "MCA exemption," and its rationale is safety. It is dangerous for drivers to spend too many hours behind the wheel, and "a requirement of pay that is higher for overtime service than for regular service tends to ... encourage employees to seek" overtime work. *Levinson v. Spector Motor Serv.*, 330 U.S. 649, 657 (1947).[1]

The viability of these claims therefore depends on whether the plaintiffs are subject to the jurisdiction of the Secretary of Transportation, which extends "over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both[] are transported by motor carrier ... between a place in ... a State and a place in another State." 49 U.S.C. § 13501(1)(A). Importantly, drivers need not actually drive in interstate commerce to fall within the Secretary's jurisdiction. As the Department of Transportation has explained through a notice of interpretation, the MCA exemption applies even to drivers who have not driven in interstate commerce so long as they are employed by a carrier that "has engaged in interstate commerce and that the driver could reasonably have been expected to make one of the carrier's interstate runs." Application of the Federal Motor Carrier Safety Regulations, 46 Fed. Reg. 37,902, 37,903 (July 23, 1981).

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[1] The plaintiffs also asserted claims under Wisconsin law, which tracks both the federal overtime pay requirement and the MCA exemption. *See* WIS. ADMIN. CODE DWD § 274.04(4). We will focus on the federal law claims because the same analysis applies to both.

The scope of an interstate commerce run under the MCA is generous. It includes a purely intrastate run so long as it is a part of a continuous interstate journey. *See Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895, 898 (7th Cir. 2009). This continuity is not broken by routine interruptions that "are no more than the normal stops or stages that are common in interstate sales." *Id.* As the Court explained in *Walling v. Jacksonville Paper Co.*, "if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points." 317 U.S. 564, 568 (1943).

With the statutory scheme in mind, we turn to the facts. CTS is a Wisconsin-based motor carrier company that provides truckload transportation services for client companies primarily in Wisconsin, Minnesota, Iowa, Illinois, and Michigan. It employs drivers that provide both over-the-road services—transportation of clients' goods over long distances (up to 500 miles) within and across state lines—as well as yard management and spotting services—transportation of loaded and empty trailers over short distances among and within clients' facilities.

CTS contends that the scope of the plaintiffs' employment included over-the-road driving—which matters because merely being subject to over-the-road assignments would be enough to render the plaintiffs subject to the MCA exemption. According to CTS, all of its drivers are hired for the same position, and although some are assigned to spotting duties, all drivers can be called on to perform any driving assignment. That is why, CTS explains, it requires all drivers to hold commercial driver's licenses and to comply with the same Federal Motor Carrier Safety Regulation requirements. The plaintiffs,

on the other hand, insist that they asked to be assigned only to spotting duties and that CTS, respecting that request, did not reprimand them for turning down over-the-road assignments. Thus, they say, longer hauls were not actually within the scope of their employment.

If CTS is right, the case ends there. But the factual dispute about whether the plaintiffs were reasonably expected to drive across state lines makes that question one for a jury. So we will focus instead on the connection between the plaintiffs' spotting duties and the interstate shipment of the goods they carried. If the undisputed facts establish that the plaintiffs could be reasonably expected to drive intrastate routes that were part of a continuous interstate journey, then the MCA exemption applies.

During the relevant period, all of the plaintiffs performed spotting duties for Green Bay Packaging, one of CTS's clients. The plaintiffs were assigned to two of Green Bay Packaging's Wisconsin-based corrugated box manufacturing facilities: Green Bay Shipping Container and De Pere Shipping Container. As spotters, the plaintiffs drove loaded and empty trailers either within these facilities (to loading docks) or to nearby locations, where they drove short routes on public roads. The public route at the De Pere location connected the De Pere Container to the De Pere Folding Carton, and the public routes at the Green Bay location connected the Green Bay Container to three warehouses (Warehouse 3, Warehouse 6, and Quincy Warehouse) and a drop lot across the street from the Green Bay Container. The plaintiffs were assigned to these routes indiscriminately—in other words, they could be expected to drive any of the routes.

After the spotters dropped off their trailers at these drop-off locations, the trailers were picked up by different drivers for delivery either within or outside Wisconsin. To show that the trailers driven by the plaintiffs were among those used to make out-of-state deliveries, CTS introduced Green Bay Packaging's bills of lading. These bills—which track the trailers' identification numbers, pick-up locations at Green Bay Packaging facilities, out-of-state delivery locations, and delivery dates—show that some of the trailers dropped off by the plaintiffs were used shortly thereafter (usually within a few days) to deliver goods across state lines. The record reflects that approximately 20% of the goods that passed through Green Bay were either coming from or destined for a different state. At De Pere, the same was true for between 24% and 54% of the goods. And the handwritten notes on the bills of lading show that at least some of these interstate goods passed through the relevant warehouses.

These facts plainly demonstrate that at least some spotters drove trailers carrying finalized goods destined for out-of-state delivery. Such a service, even if purely intrastate and interrupted briefly, would nevertheless constitute "driving in interstate commerce" because it would be part of the goods' continuous interstate journey. *See Collins*, 589 at 898; *see also Walling*, 317 U.S. at 568 (defining shipment in interstate commerce as the "practical continuity of movement of the goods"). And while some of the plaintiffs' runs may have been purely local, the sheer volume of the interstate commerce through these facilities, combined with the fact that the plaintiffs were assigned to their spotting duties indiscriminately, demonstrates that the plaintiffs had a reasonable chance of being called upon to make some drives that were part of a continuous interstate journey. *See Morris v. McComb*,

332 U.S. 422, 423 (1947) (holding that the exemption applies to drivers of a carrier that only devoted approximately 4% of its total services to interstate commerce and distributed its interstate assignments indiscriminately).

The plaintiffs make several weak attempts to undermine this conclusion. First, they argue that as spotters, they were not likely to be given over-the-road assignments. Thus, they claim, there was only a "remote" chance that they'd be sent on interstate runs. *See Johnson v. Hix Wrecker Serv., Inc.*, 651 F.3d 658, 663 (7th Cir. 2011). This argument is wholly unpersuasive. As we have already explained, the plaintiffs can fall within the MCA exemption even if they were not expected to take over-the-road assignments. The question is whether the plaintiffs' spotting duties were part of the interstate journey of the goods. If they were, the MCA exemption applies. When both over-the-road drivers and spotters take part in the interstate journey of the goods, both services affect "safety of operation of an interstate motor carrier." *Levinson*, 330 U.S. at 668.

The plaintiffs also argue that any link between their spotting services and the interstate shipment is too attenuated to form a continuous interstate journey. They emphasize that the interstate shipment process entailed several steps between the initial spotting and the eventual delivery of the goods across state lines. These steps included rotation among the drivers, stops at different locations such as warehouses, and potential unloading and reloading. But the existence of intermediary steps does not sever the connection between the plaintiffs' driving and the ultimate interstate movement of the goods. None amounted to anything other than "interruptions in the journey that ... are no more than the normal stops or stages

that are common in interstate sales." *Collins*, 589 F.3d at 898.[2] The plaintiffs seem to imagine that a continuous journey must resemble a relay race, in which the next driver immediately picks up exactly where the other left off. But that is neither how interstate shipments work nor what the MCA requires.

Because the evidence establishes that plaintiffs were subject to performing spotting duties that comprised one leg of a continuous interstate journey, the district court's grant of summary judgment is AFFIRMED.

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[2] Plaintiffs also try to sever this link by noting that sometimes the trailers driven by Robinson contained cardboard that needed to be processed into finished boxes prior to being shipped to customers. They argue that this process of transforming the cardboard into the finalized products interrupted the continuous interstate journey. *See Goldberg v. Faber Indus., Inc.*, 291 F.2d 232, 234 (7th Cir. 1961). As CTS correctly points out, the plaintiffs did not raise this argument before the district court. Thus, this argument is forfeited.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LEONID BURLAKA et al.,
Plaintiff,
v. Case No. 17-C-1126

CONTRACT TRANSPORT SERVICES LLC,
Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Leonid Burlaka, Travis Frischmann, Tim Keuken, and Roger Robinson filed this individual, collective, and Rule 23 class action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*, against Defendant Contract Transport Services LLC (CTS), alleging that CTS violated the FLSA and Wisconsin wage statutes by failing to pay them overtime premium pay for work they performed in excess of forty hours per week. The court has subject matter jurisdiction under 29 U.S.C. § 216(b)

and 28 U.S.C. § 1331. The case is before the court on CTS's motion for summary judgment. CTS claims that the undisputed evidence establishes that Plaintiffs are subject to the Federal Motor Carrier Safety Act (FMCSA) and therefore exempt from the FLSA, as well as Wisconsin's overtime laws. For the reasons set forth below, CTS's motion for summary judgment will be granted.

BACKGROUND

CTS is a motor carrier registered with the FMCSA that signs contracts with customers to provide for the transport of goods across state lines. CTS employs approximately 171 driversqualified under the FMCSA regulations to drive motor vehicles in interstate commerce. At all times relevant hereto, Green Bay Packaging, Inc. (Green Bay Packaging) was one of CTS's customers. CTS contracted with Green Bay Packaging to facilitate the transport of its products in and out of Green Bay Packaging facilities to locations within and without the State. Two of CTS's operation sites were located at Green Bay Packaging facilities in Green Bay (GB Shipping Container) and De Pere (De

Pere Shipping Container). From April 19, 2015 to June 8, 2018, CTS transported loaded trailers for over 17,226 customer orders through GB Shipping Container, 19.9% of which involved movement across state lines. CTS also transported loaded trailers for over 8,882 customer orders through De Pere Shipping Container, 26.9% of which involved movement across state lines. Def.'s Proposed Findings of Fact (DPFOF), ECF No. 23, at ¶¶ 5–6.

To serve its customers, CTS offers a variety of services, including over-the-road transportation, trailer spotting, and yard-management services. Burlaka, Frischmann, Keuken, and Robinson performed yard-spotting duties while employed at CTS. These duties required the plaintiffs to move trailers that were sometimes loaded with product, sometimes filled with corrugated cardboard that needed to be further processed to become finished boxes, and sometimes empty within and between Green Bay Packaging facilities. The plaintiffs received instructions as to which trailers to move and where to move them from a Green Packaging employee. The plaintiffs sometimes communicated

directly with a CTS dispatcher. As spotters, the plaintiffs only moved trailers within or between Green Bay Packaging facilities, although Robinson sometimes moved trailers from other CTS accounts to a Green Bay Packaging location. When the plaintiffs delivered trailers to a drop lot, the trailers would be stored briefly and then subsequently moved to another facility and then possibly out of state. When trailers were pulled from GB Shipping Container, they could be parked at concrete pads next to the docks or at an overflow lot, and these movements would not be recorded. Trailer movements that were recorded were written on spot sheets. In the course of performing their yard-spotting duties, the plaintiffs would at times cross public roads.

According to Green Bay Packaging bills of lading and CTS spot and trip sheets, though the plaintiffs did not themselves drive loaded trailers across state lines, each plaintiff transported trailers that were subsequently driven across state lines. According to these documents: (1) between February 24, 2016 and August 25, 2017, Burlaka hauled at least sixty-eight trailers that were later driven out of state, DPFOF at ¶ 22; Pls.' Response to Def.'s Proposed

Findings of Fact (PRDPFOF), ECF No. 32, at ¶ 22; ECF No. 24 App. Parts 1–2; (2) between August 12, 2014 and March 11, 2016, Frischmann hauled no fewer than thirteen trailers that were later driven out of state, DPFOF at ¶ 55; ECF No. 24 App. Part 3; (3) between August 24, 2015 and November 14, 2017, Keuken hauled no fewer than forty-one trailers that were later driven out of state, DPFOF at ¶ 37; PRDPFOF at ¶ 37; ECF No. 24 App. Parts 2–3; and (4) between September 9, 2014 and July 18, 2017, Robinson hauled no fewer than seven trailers that were later driven out of state, DPFOF at ¶ 86; ECF No. 24 App. Parts 3–4. The delay between when the plaintiffs moved these trailers and when the trailers were moved across state lines was typically one or two days. *See* ECF No. 24.

The plaintiffs experienced similar hiring processes and minimum expectations of employment at CTS. The hiring process involved consenting to a background check, as required under FMCSA safety regulation 49 C.F.R. § 391.23, providing alcohol and controlled substance training and testing records in compliance with 49 C.F.R. §§ 382.405(f)–(h) and 382.413(a)–(g), providing

background information from previous employers, obtaining a medical certificate, passing a pre-employment screening, certifying completion of a driver evaluation, and providing a statement of available on-duty hours. The plaintiffs each received a CTS driver handbook and agreed to follow its guidelines. During employment at CTS, the plaintiffs, like all CTS drivers, maintained commercial driver's licenses (CDLs), remained part of the drug and alcohol testing pool mandated under FMCSA safety regulations, and generally complied with the FMCSA driver application and qualification process as well as other FMCSA safety regulations. DPFOF at ¶ 16; *see generally* 49 C.F.R. §§ 40, 391.23–31, 391.41–43, 395. Although the plaintiffs generally complied with FMCSA regulations, CTS did not achieve full compliance. CTS did not conduct an inquiry and record of violations for the plaintiffs each year, as required under 49 C.F.R. §§ 391.25 and 391.27, and did not require the plaintiffs to complete their road tests on a public road with traffic, as required under 49 C.F.R. § 391.31(c)(5). PRDPFOF at ¶ 16. Regarding work assignments, CTS maintains a policy and practice that allows it to call on any of

its drivers, including yard spotters, to transport product on public roads, including transport over state lines, although whether CTS drivers are required to accept the over-state-lines leg of interstate trips is unclear. *See* Aaron Cunningham Decl., ECF No. 22, at ¶¶ 3–4, 30, 33.

On August 14, 2017, Burlaka, Keuken, and Robinson filed this action, alleging that CTS failed to pay premium overtime pay to them for work they performed in excess of forty hours per week in their roles as CTS drivers performing yard-spotting duties, in violation of the FLSA and Wisconsin law. On March 15, 2018, Frischmann was added as a plaintiff in an amended complaint, along with individual and Rule 23 class action claims for violation of the Wisconsin wage statute.

LEGAL STANDARD

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v.* 4*Catrett*, 477 U.S. 317, 322 (1986). A dispute is genuine if a reasonable trier of fact could find in favor of the nonmoving party. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986); *Wollenburg v. Comtech Mfg. Co.*, 201 F.3d 973, 975 (7th Cir. 2000). A fact is material only if it might affect the outcome of the case under governing law. *Anweiler v. Am. Elec. Power Serv. Corp.*, 3 F.3d 986, 990 (7th Cir. 1993). The standard for summary judgment mirrors the standard for directed verdict under Federal Rule of Civil Procedure 50(a), which requires that a verdict not be directed where reasonable minds could differ as to the import of the evidence. *Anderson*, 477 U.S. at 250–51. The "genuine issue" summary judgment standard is very close to the "reasonable jury" directed verdict standard, the small difference being procedural timing. *Id.* at 251. "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. A court faced with a motion for summary judgment must construe the facts and draw all reasonable inferences in the light most

favorable to the nonmoving party. *Foley v. City of Lafayette, Ind.*, 359 F.3d 925, 928 (7th Cir. 2004).

ANALYSIS

The FLSA requires employers to pay overtime pay to employees who work in excess of forty hours per week. 29 U.S.C. § 207(a)(1); *Johnson v. Hix Wrecker Serv., Inc.*, 651 F.3d 658, 660 (7th Cir. 2011). As a general rule, employees of a motor carrier that engages wholly in intrastate commerce are subject to the Secretary of Labor's jurisdiction, and consequently to the overtime and maximum hours provisions of the FLSA. *Johnson*, 651 F.3d at 660 (citing *Reich v. Am. Driver Serv., Inc.*, 33 F.3d 1153, 1155 (9th Cir. 1994)). "In contrast, the employees of a motor carrier that engages in interstate commerce may come under the Secretary of Transportation's jurisdiction under the Motor Carrier Act." *Id.* at 650–51; 49 U.S.C. § 31502; 29 U.S.C. § 213(b)(1) (Motor Carrier Act (MCA) Exemption). Employees covered by the MCA exemption are also exempt from the state wage and overtime laws. Wis. Admin. Code DWD § 274.04(4). The reason for this

exemption in the MCA, like similar exemptions in legislation regulating railroad and maritime employees, is public safety:

> In comparable fields, Congress previously had prescribed safety equipment, limited maximum hours of service and imposed penalties for violations of its requirements. In those Acts, Congress did not rely upon increases in rates of pay for overtime service to enforce the limitations it set upon hours of service. While a requirement of pay that is higher for overtime service than for regular service tends to deter employers from permitting such service, it tends also to encourage employees to seek it. The requirement of such increased pay is a remedial measure adapted to the needs of an economic and social program rather than a police regulation adapted to the rigid enforcement required in a safety program.

Levinson v. Spector Motor Serv., 330 U.S. 649, 657 (1947) (footnote omitted) (citing *Overnight Motor Co. v. Missel*, 316 U.S. 572, 577 (1942)).

The Department of Transportation (DOT) set forth the standard for applying the MCA exemption to employees in a

notice of interpretation the Federal Highway Administration promulgated in 46 Fed. Reg. 37902. *See Johnson*, 651 F.3d at 661–64 (analyzing the DOT's interpretation to apply the exemption). The notice of interpretation provides in pertinent part:

> If jurisdiction is claimed over a driver who has not driven in interstate commerce, evidence must be presented that the carrier has engaged in interstate commerce and that the driver could reasonably have been expected to make one of the carrier's interstate runs. Satisfactory evidence would be statements from drivers or carriers and any employment agreements. Evidence of driving in interstate commerce or being subject to being used in interstate commerce should be accepted as proof that the driver is subject to [the Secretary of Transportation's] jurisdiction for a 4-month period from the date of the proof.

Application of the Federal Motor Carrier Safety Regulations, 46 Fed. Reg. 37902, 37903 (July 17, 1981).

Here, there is no dispute that CTS is engaged in interstate commerce. The MCA exemption thus applies to plaintiffs if (1)

they have driven in interstate commerce or (2) could reasonably have been expected to make an interstate run. *Id.* An employee need not actually drive across state lines to have "driven in interstate commerce" under the MCA exemption. *See Collins v. Heritage Wine Cellars, Ltd.*, 589 F.3d 895, 896–97 (7th Cir. 2009) (holding that truck drivers who transport wine from warehouse in Chicago owned by wholesale importer and distributor to Chicago retailers are engaged in interstate commerce within meaning of MCA and therefore exempt from FLSA where one quarter of wine shipped to warehouse was ordered in advance by retailers); *Mazzarella v. Fast Rig Support, LLC*, 823 F.3d 786, 791 (3d Cir. 2016) (holding that when transportation performed by employee takes place within a single state, the interstate commerce requirement for falling within the MCA exemption to the FLSA overtime requirements may still be met by demonstrating that the employee's work involves a practical continuity of movement across state lines).

Here, it is undisputed that (1) CTS is an interstate motor carrier; (2) CTS transports interstate freight; (3) the plaintiffs operated commercial motor vehicles; and (4) the plaintiffs were

subject to transport the interstate freight as part of their spotter driving assignments. While it is true that the plaintiffs did not personally drive across state lines in their role as spotters, that doesn't mean they do not fall within the MCA exemption. The question is whether they were called upon or subject to being called upon to transport one leg of those interstate movements by taking the Green Bay Packaging orders placed on loaded trailers from the yard to drop yards or warehouses for another driver to pick up and continue the freight movement.

The undisputed evidence demonstrates that the plaintiffs were subject to being called upon to transport loaded trailers as part of larger interstate movements. When the plaintiffs moved trailers around Green Bay Packaging facilities, the trailers were sometimes loaded, sometimes filled 7with cardboard that required further processing, and sometimes empty. Plaintiffs' yard-spotting duties consisted of facilitating the movement of customer freight around several facilities, and part of these duties included moving trailers loaded with boxes manufactured at GB Shipping Container and De Pere Shipping Container to other docks at GB Shipping

Container or De Pere Shipping Container, to several other Green Bay Packaging warehouses, or to a drop lot across the street from GB Shipping Container. *See* ECF No. 22 at ¶¶ 4, 8–10, 13–15, 30. Once dropped at one of these locations, either CTS drivers assigned to regional over-the-road work or another motor carrier's driver would pick up the loaded trailers and transport them to their final destination inside or outside Wisconsin. *Id.* at ¶¶ 11, 16. A significant percentage of CTS orders that flowed through GB Shipping Container and De Pere Shipping Container from 2015 to 2018 were interstate in nature, with outbound and inbound orders ranging from 18% to 23% and 14% to 23% at GB Shipping Container and 24% to 28% and 15% to 54% at De Pere Shipping Container. *See id.* at ¶¶ 21–25.

Given the interstate nature of CTS's operations and the fact that CTS could call upon any of its drivers, including those performing yard-spotting duties, to participate in one leg of the interstate transport of product, the plaintiffs fall squarely within the MCA exemption. *See* ECF No. 22 at ¶¶ 3–4, 30, 33; 46 Fed. Reg. 37903; *Morris*, 332 U.S. at 431 (holding that MCA exemption

applied to drivers where "3% to 4% of the carrier's total services" involved interstate commerce and performance of such services was indiscriminately shared by drivers); *Resch v. Krapf's Coaches, Inc.*, 785 F.3d 869, 874 (3d Cir. 2015) (holding that the MCA exemption applied where 6.9% of all trips drivers took were interstate, as much as 9.7% of the motor carrier's transit division's annual revenue derived from interstate routes, and the motor carrier operated at least one interstate route per month); *Leipolt v. All-ways Contractors, Inc.*, No. 15-C-628, 2016 WL 2599125, at *4 (E.D. Wis. May 5, 2016) (holding that the MCA exemption applied to drivers who would randomly be assigned to interstate work and who worked for a motor carrier that derived 30% of its gross revenue from interstate work); *see also* 46 Fed. Reg. 37903 (explaining that carrier statements constitute satisfactory evidence to demonstrate DOL's jurisdiction). The undisputed interstate character of the plaintiffs' work, including compliance with applicable federal regulations, rather than the frequency or proportion of work that is interstate, requires this result. *See Morris*, 332 U.S. at 431–32; *Levinson*, 330 U.S. at 674–75; *see*

also Resch, 785 F.3d at 875 ("[E]vidence of carrier's efforts to comply with DOT regulations . . . reinforce the drivers' reasonable expectation of driving in interstate commerce."); *Songer v. Dillon Res., Inc.*, 636 F. Supp. 2d 516, 526 (N.D. Tex. 2009), *aff'd*, 618 F.3d 467 (5th Cir. 2010) (same).

Plaintiffs argue that CTS did not require that they accept interstate assignments. In support of this argument, the plaintiffs principally rely on *Mason v. Quality Transport Services, Inc.*, 2005 WL 5395338 (S.D. Fla. Aug. 29, 2005). In *Mason*, the court denied summary judgment because the plaintiff bus driver's deposition testimony raised a genuine dispute of material fact as to whether the driver was subject to driving an interstate bus route. *Id.* at *1–3. The *Mason* court noted that the plaintiff driver never drove any route other than the local, intrastate route and that the driver's employer apparently allowed him to permanently drive that route. *Id.* at *3. Plaintiffs cite Burlaka's declaration in analogizing their case to *Mason*. In the referenced portion of Burlaka's declaration, he attests that he applied for a spotter position because he did not wish to perform any interstate work, that he was offered but declined to

accept over-the-road driving assignments, that CTS did not discipline him for so declining, and that CTS never told him that he was expected or required to accept over-the-road assignments. ECF No. 29 at ¶ 6. Plaintiffs' reliance on *Mason* is misplaced because bus routes are distinguishable from the multi-leg transport of customer freight. Whereas the bus driver in *Mason* testified that his route was entirely intrastate and therefore he was not subject to participate in an interstate trip, here, the plaintiffs did not themselves cross state lines but were nevertheless subject to transporting freight in fulfillment of CTS's interstate customer orders. Burlaka's declaration is unclear as to whether the over-the-road assignments he declined to accept meant that he did not drive the leg of the transport that involved crossing state boundaries or that he did not drive on public roads at all. If Burlaka meant the former, then his statement does not mean that he was not called upon in his intrastate work to transport freight for interstate customers. If he meant the latter, then he contradicts his own declaration, which acknowledges that he crossed public roads. *Id.* at ¶ 9. Either way, neither Burlaka nor any of the other plaintiffs

has disputed the interstate nature of the freight that CTS transports or that they can be called upon to transport that freight in satisfaction of interstate orders, even if their legs of the transport are entirely intrastate. *Mason* is therefore unpersuasive.

Plaintiffs also challenge the import of testimony from Aaron Cunningham, CTS's Director of Operations, in establishing that they are subject to being called upon to drive in interstate commerce. Specifically, Plaintiffs point to the Seventh Circuit's opinion in *Johnson v. Hix Wrecker Service, Inc.*, 651 F.3d 658 (7th Cir. 2011) to argue that Cunningham's declaration is too vague to establish that they could be called upon to transport products out of state. Plaintiffs' reliance on *Johnson* is similarly unpersuasive. The *Johnson* court reversed a grant of summary judgment under the MCA exemption where the only evidence that the plaintiff tow truck driver was subject to being assigned an out-of-state run was an affidavit from the carrier's corporate secretary that stated that the carrier "routinely" provided out-of-state services for its customers and that the driver was subject to being assigned an out-of-state run at all times. *Id.* at 660, 663–64. The *Johnson* court noted that

"routinely" is "simply too vague" for the court to determine whether the period the affiant had in mind was "reasonable" within the meaning of 46 Fed. Reg. 37902. *Id.* at 663. Here, in contrast,CTS has exceeded the *Johnson* burden by providing undisputed evidence that freight flowing through GB and De Pere Shipping Containers serviced interstate customers approximately 20% of the time, if not greater. *See* ECF No. 22 at ¶¶ 21–25. Because CTS provides more than "only an inconclusive and ambiguous affidavit," *Johnson*, 651 F.3d at 663, Plaintiffs find no support in *Johnson*.

Plaintiffs likewise find no relief in the *de minimis* exception, 29 C.F.R. § 782.2(b)(3), which provides that the MCA exemption does not apply where the safety-affecting activities of an employee's job "are so trivial, casual, and insignificant as to be de minimis." *See Pyramid Motor Freight Corp. v. Ispass*, 330 U.S. 695, 708–09 (1947). Courts have generally held that the *de minimis* exception does not exempt drivers from DOT jurisdiction because any number of interstate deliveries by a carrier, no matter how trivial, implicates safety. *Edwards v. Aramark Uniform & Career*

Apparel, LLC, No. 14C8482, 2016 WL 236241, at *12 (N.D. Ill. Jan. 19, 2016) (citing *Turk v. Buffets, Inc.*, 940 F. Supp. 1255, 1261–62 (N.D. Ill. 1996)); *Resch*, 785 F.3d at 875 ("Although the Supreme Court has recognized a *de minimis* exception to the application of the [Motor Carrier Act], we have noted that [a] number of courts have held that drivers should seldom, if ever, fall within [it]." (internal citations and quotations marks omitted)); 46 Fed. Reg. 37903 ("The courts that have applied this [*de minimis*] principle find that it should seldom, if ever, be applied to drivers because of the direct effect of driving on the safety of motor vehicle operations.").

As an initial matter, the *de minimis* exception is not applicable here where the court has already determined that the plaintiffs' work activities involved interstate activity and concerned motor safety. *See Antemate v. Estenson Logistics, LLC*, No. CV14-5255DSF(RAOx), 2017 WL 5159613, at *7 n.9 (C.D. Cal. Nov. 7, 2017) ("Courts that have found the de minimis exception to apply generally have done so only after concluding that the employees did not have a reasonable expectation of being

assigned interstate commerce work." (emphasis in original)); *Flowers v. Regency Transp., Inc.*, 535 F. Supp. 2d 765, 770 n.4 (S.D. Miss. 2008) (observing that "numerous courts" have found that employees "were engaged in activities of a character directly affecting the safety of operation of motor vehicles in interstate commerce . . . where an employer's drivers could reasonably expect to be called upon to drive in interstate commerce"); *see also Edwards*, 2016 WL 236241, at *13 ("Arguably, the *de minimis* exception is not applicable at all because the Court has already concluded that Plaintiff's job activities involved interstate activity and thus concern motor safety.").

Even were the court to consider the applicability of the exception, the undisputed interstate nature of CTS's business and the safety concerns attendant to drivers like the plaintiffs who operate commercial motor vehicles on public roads do not call for its application. *See* ECF No. 22 at ¶¶ 21–25; *Resch*, 785 F.3d at 874–76 (declining to apply the *de minimis* exception where the carrier's interstate operations accounted for 1% to 9.7% of its transit division's revenue and the plaintiff drivers were subject to being

assigned to interstate work); *Crooker v. Sexton Motors, Inc.*, 469 F.2d 206, 210 (1st Cir. 1972) ("The activities of one who drives in interstate commerce, however frequently or infrequently, are not trivial. Such activities directly affect the safety of motor vehicle operations."). Plaintiffs argue that less than 0.1% of Frischmann and Keuken's total trips were possible (as opposed to proven) interstate trips, making application of the *de minimis* rule appropriate. But Plaintiffs' calculation does not account for trips where the plaintiffs made the first leg of broader interstate movements, that the records to which the plaintiffs cite only reflect loads hauled to their destination by CTS for its customers and not loads hauled for those customers by carriers other than CTS, and that not all of the plaintiffs' trailer movements were recorded. In anyevent, even if the plaintiffs minimally or infrequently drove in interstate commerce, such driving implicates safety concerns that are hardly trivial. *See Edwards*, 2016 WL 236241, at *12; *Walton v. La. Compressor Maint., Inc.*, No. 96-2156, 1997 WL 129393, at *3 (E.D. La. 1997) ("By definition, [t]he activities of one who drives in interstate commerce, however frequently or

infrequently, are not trivial. Thus, by virtue of his participation as a driver in interstate commerce, [the plaintiff] is not entitled to the *de minimis* exception to the overtime exemption." (internal citations and quotation marks omitted)).

Because the court finds that the plaintiffs, as CTS drivers performing yard-spotting duties, were subject to being called upon to transport one leg of interstate movements, the MCA exemption applies and CTS is entitled to summary judgment on the plaintiffs' FLSA and Wisconsin overtime claims. *See* 29 U.S.C. § 213(b)(1); Wis. Admin. Code DWD § 274.04(4).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for leave to file sur-reply (ECF No. 40) is **GRANTED** and CTS's motion for summary judgment (ECF No. 20) is **GRANTED**. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 30th day of March, 2019.

s/ William C. Griesbach

William C. Griesbach, Chief Judge United States District Court