

## Case Comments

# Going Overboard on Overtime: Bostain v. Food Express, Inc.

David M. Hyams\*

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\* J.D. Candidate, May 2008, University of Denver Sturm College of Law; M.A. Georgia State University; M.A. Denver Seminary; B.S. Colorado State University. The author would like to thank Mr. Robert Digges, senior attorney with the American Trucking Association, and Mr. James Hardman for their assistance with this topic.

## I. INTRODUCTION

In *Bostain v. Food Express, Inc.*,<sup>1</sup> the Washington Supreme Court held in a 5-4 decision<sup>2</sup> that employers must pay Washington-based interstate truck drivers overtime pay, even if their work week is comprised of less than forty hours of work actually performed within the State. The holding has the potential to impact employers of Washington-based interstate truck drivers, other employees of such companies, the economy of Washington State, and the motor carrier industry as a whole. In fact, now that the United States Supreme Court has denied Food Express's petition for certiorari, lest action is taken to rectify the decision, the death knell may have rung for the interstate motor carrier industry in Washington.

## II. FACTS AND PROCEDURAL HISTORY

For nearly a decade, Larie Bostain was an interstate truck driver for Food Express, Inc., a California corporation headquartered in Arcadia, California, that hauls food between destinations in several western states.<sup>3</sup> Food Express operates a terminal in Vancouver, Washington, out of which twenty-five trucks haul containers of bulk products brought by train into Washington to places in Washington, Oregon, and Idaho.<sup>4</sup> The company is subject to the Federal Motor Carrier Act ("FMCA").<sup>5</sup> Mr. Bostain was fired in 2002 for insubordination. In his final year of work, he worked an average of forty-eight hours per week, but never more than forty of those were within Washington, with sixty-three percent of his drive time occurring outside of the State.<sup>6</sup>

Mr. Bostain and his wife brought suit in December 2002, claiming unpaid overtime and wages, willful failure to pay wages, and also seeking attorney fees.<sup>7</sup> They argued that, under the Washington Minimum Wage Act (the "MWA"),<sup>8</sup> he was entitled to overtime pay or the reasonable equivalent thereof. Mr. Bostain never received overtime; he was paid an hourly wage and by the mile once he drove more than 200 miles.<sup>9</sup> The trial court granted summary judgment in favor of the Bostains, holding that MWA entitles truck drivers employed in Washington to overtime

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1. 153 P.3d 846 (Wash. 2007), *cert. denied*, 76 U.S.L.W. 3169 (U.S. Nov. 26, 2007) (No. 07-402).

2. J. Madsen penned the opinion, and was joined by C.J. Alexander and JJ. Chambers, Johnson, and Fairhurst. J. Johnson wrote a dissenting opinion, in which JJ. Owens, Sanders, and Bridge joined.

3. *Bostain*, 153 P.3d at 849.

4. *Id.*

5. *Id.*; 49 U.S.C. §§ 31501-31504 (2007).

6. *Bostain*, 153 P.3d at 849.

7. *Id.* at 849.

8. See WASH. REV. CODE ANN. §§ 49.46.005-.920 (2007).

9. *Bostain*, 153 P.3d at 849.

pay, even if some of their driving time takes place outside of the state.<sup>10</sup> The court awarded Mr. Bostain nearly \$10,000 in unpaid overtime wages.<sup>11</sup>

On appeal, the Court of Appeals of Washington held that the MWA applied only to hours worked within Washington and thus reversed the trial court's decision.<sup>12</sup> The Washington Supreme Court granted the Bostain's petition for discretionary review and reversed the appellate court.<sup>13</sup> The Washington Supreme Court held that under the MWA, an employer is liable for overtime hours based upon the total hours worked, irrespective of the state in which the work transpired.<sup>14</sup> It also held that administrative interpretations to the contrary are invalid,<sup>15</sup> and that its holding did not violate the commerce clause of the Constitution.<sup>16</sup>

*Amici* have been in no short supply, with numerous briefs having been filed. Among those who filed briefs: the American Trucking Associations, Inc., the Washington Trucking Associations,<sup>17</sup> Gordon Trucking, Inc.,<sup>18</sup> Washington's Department of Labor and Industries,<sup>19</sup> the Washington Employment Lawyers Association,<sup>20</sup> and Interstate Distributor Co.<sup>21</sup> Thus, because of the attention this case has received and its potential impact, it merits consideration.

### III. LEGAL BACKGROUND

The *Bostain* court confronted three substantial legal issues. First, the court had to determine whether the Washington Minimum Wage Act's overtime pay requirements applied only to hours worked within Washing-

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10. *Id.* at 852.

11. *Bostain v. Food Express, Inc.*, 111 P.3d 906, 910 (2005), *rev'd*, 153 P.3d 846 (Wash. 2007).

12. *See id.* at 908.

13. *See Bostain*, 153 P.3d at 848-49.

14. *Id.* at 852.

15. *Id.*

16. *Id.* at 854. The court also addressed issues concerning attorney fees, damages, and pre-judgment interests. A summary and analysis of these issues will not be conducted.

17. Brief of the American Trucking Associations, Inc. and the Washington Trucking Associations as *Amici Curiae* in Support of the Petitioner, *Food Express, Inc. v. Bostain*, 128 S.Ct. 661, 2007 WL 2787692 (No. 07-402), 2007 WL 2962918.

18. Brief of Gordon Trucking, Inc. as *Amicus Curiae* in Support of Petitioner, *Food Express*, (No. 07-402), 2007 WL 3196728.

19. Brief of *Amicus Curiae* Department of Labor and Industries, *Bostain v. Food Express, Inc.*, 153 P.3d 846 (Wash. 2007) (No. 77201-1), 2005 WL 3937004.

20. *Amicus Curiae* Memorandum of the Washington Employment Lawyers Association, *Bostain*, (No. 77201-1), 2005 WL 4158301.

21. Brief of *Amicus Curiae* Interstate Distributor Co., *Bostain*, (No. 77201-1), Appendix to Motion for Leave to File *Amicus Curiae* Brief in Re: Respondent Food Express, Inc.'s Motion for Reconsideration (March 27, 2007).

ton State, and thus, whether Mr. Bostain was entitled to such pay.<sup>22</sup> Second, the court considered the enforceability of interpretive rules promulgated by Washington's Department of Labor and Industries that seemed to conflict with the court's rendering of the MWA.<sup>23</sup> Finally, the court examined whether its interpretation violated the commerce clause of the Constitution.<sup>24</sup>

#### A. MOTOR CARRIER LIABILITY UNDER WASHINGTON MINIMUM WAGE ACT

The Washington Minimum Wage Act, though not identical, is "patterned after the federal Fair Labor Standards Act."<sup>25</sup> The MWA requires employers to compensate certain employees for time worked in excess of forty hours per week. This statute provides that,

[e]xcept as otherwise provided in this section, no employer shall employ any of his employees for a work week longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.<sup>26</sup>

Furthermore, the MWA adds that,

[a]n individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act (49 U.S.C. Sec. 3101 et seq. and 49 U.S.C. Sec. 10101 et seq.), if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week[.]<sup>27</sup>

Although, most states follow the Fair Labor Standards Act's maximum hour requirements exemption for employees – subject to standards set by the Secretary of Transportation via the Motor Carrier Act,<sup>28</sup> the Federal Motor Carrier Act rules pertaining to maximum hours and overtime pay *do not* preempt state law on the subject.<sup>29</sup> Therefore, the MWA is free to set its rules as it sees proper.

22. See *Bostain*, 153 P.3d at 850-52.

23. See *id.* at 852-54.

24. See *id.* at 854-57.

25. Cornelius J. Peck, *Washington Minimum Wage and Hour Act*, 34 WASH. L. REV. & ST. B. J. 316, 317 (1959); see 29 U.S.C. §§ 201-219 (2007).

26. WASH. REV. CODE § 49.46.130(1) (2007).

27. *Id.* at § 49.46.130(2)(f).

28. 29 U.S.C. § 213(b)(1). However, a handful of jurisdictions, like Washington, require their motor carriers to be compensated for overtime hours. There are two jurisdictions in addition to Washington that have similar overtime provisions: Maine and the District of Columbia.

29. Dep't of Labor & Indus. v. Common Carriers, Inc., 762 P.2d 348, 349 (Wash. 1988); 48B AM. JUR. 2D *Labor and Labor Relations* § 3111 (2007).

## B. ADMINISTRATIVE REGULATIONS

Washington's Department of Labor and Industries is vested with the powers and duties to administer and enforce laws relating to employment, hours of work, and wages.<sup>30</sup> WAC 296-128-011 and WAC 296-128-012 were promulgated "to address the unique circumstances presented by interstate truck drivers who, by the very nature of their jobs, may travel far beyond Washington's boundaries."<sup>31</sup> Those rules only require overtime pay for hours worked within Washington.<sup>32</sup>

Washington recognizes a distinction between interpretive and legislative rules, each having a different effect on the courts.<sup>33</sup> "Legislative rules bind the court if they are within the agency's delegated authority, are reasonable, and were adopted using the proper procedure."<sup>34</sup> Interpretive rules, however, are simply notice of an agency's position and are not binding on the courts, having only persuasive power.<sup>35</sup> Nevertheless, an agency's interpretation of a statute is given deference by the court when the agency is empowered to administer and enforce the statute, and the statute is ambiguous.<sup>36</sup> Ambiguity lies when a statute bears "more than one reasonable interpretation."<sup>37</sup> However, if the statute is not ambiguous, the agency's expertise is not needed and its interpretation enjoys lesser deference.<sup>38</sup> If the agency's interpretation conflicts with the statute, there will be no deference at all.<sup>39</sup>

## C. COMMERCE CLAUSE

The United States Constitution gives Congress the power to regulate commerce among the states.<sup>40</sup> This power granted to the federal government has long been understood as an implicit power to circumscribe the states' ability to enact laws that impact interstate commerce. Though not explicitly stated in the Constitution, the "dormant Commerce Clause" prohibits states, *sans* Congressional consent, from engaging in regulation that "restrict[s], obstruct[s], burden[s], impede[s], or interfere[s] with interstate or foreign commerce."<sup>41</sup> A balancing test is used when evaluat-

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30. WASH. REV. CODE § 43.22.270(4) (2007).

31. Department, *supra* note 19, at \*2.

32. *Id.*

33. Ass'n of Wash. Bus. v. Dep't of Rev., 120 P.3d 46, 53 (Wash. 2005).

34. Dot Foods, Inc. v. Dep't of Rev., 173 P.3d 309, 315 (Wash. 2007).

35. *Wash. Bus.*, 120 P.3d at 54.

36. Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 869 P.2d 1034, 1038 (Wash. 1994) (en banc).

37. *Dot Foods*, 173 P.3d at 315.

38. *Waste Mgmt.*, 869 P.2d at 1038.

39. *Id.*

40. U.S. CONST. art. I, § 8, cl. 3.

41. 15 C.J.S. *Commerce* § 11 (2007).

ing whether certain state statutes run afoul of the commerce clause.

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>42</sup>

Thus, although a state is prohibited from directly regulating, forbidding, or burdening interstate commerce, if, in the legitimate, reasonable exercise of its police power, it incidentally or indirectly affects such commerce, no violation will be found.<sup>43</sup>

#### IV. THE COURT'S DECISION

The court set forth its opinion in seven parts of varying length. First, the court concluded that the MWA unambiguously requires all hours worked by a Washington-based employee, no matter what state those hours happened to be earned in, be considered when compensating the employee for overtime; thus, Mr. Bostain was entitled to overtime wages.<sup>44</sup>

Second, the court held that the Department of Labor and Industries' rules stating overtime under the MWA was to be calculated on the basis of hours worked within Washington State did not warrant judicial deference because the statute was not ambiguous and because the rules were in violation of the statute's purpose.<sup>45</sup>

Third, the court found that any burden that might be placed upon interstate commerce by requiring employers of Washington employees to pay them overtime for all hours worked was of no great consequence, especially in light of the local benefits; thus, the court-interpreted version of the MWA was in accord with the commerce clause.<sup>46</sup>

Fourth, the court awarded attorneys fees to the Bostains for their appeal and the court's discretionary review.<sup>47</sup>

Fifth, because the law concerning out-of-state hours under the MWA was unsettled, the court denied the award of double damages to the Bostains provided under the MWA for an employer failing to compensate its

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42. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted).

43. 15 C.J.S. *Commerce* § 11 (2007).

44. *Bostain*, 153 P.3d at 852.

45. *Id.* at 854.

46. *Id.* at 856-57.

47. *Id.* at 857.

employees for overtime.<sup>48</sup>

Sixth, the court upheld the trial court's award of prejudgment interest because the overtime wages claim was a liquidated one.<sup>49</sup>

Finally, citing a paucity of evidence to hold otherwise, the court denied Food Express's contention that the trial court erred in dismissing its affirmative defense that Bostain should be estopped from pursuing his claim because he went ten years without receiving overtime and only complained out of retaliation when he was terminated.<sup>50</sup> Because of the important impact of the first three findings of the court, a more detailed review of these areas is presented below.

#### A. MOTOR CARRIER LIABILITY UNDER WASHINGTON MINIMUM WAGE ACT

The court first addressed whether the overtime provision of the MWA applies only to work conducted within Washington.<sup>51</sup> Prior to analyzing the issue, the court set forth its hermeneutical goals and methodology: to effectuate legislative intent and to give effect to the plain meaning of a statute by considering it within its statutory context.<sup>52</sup>

Upon a prima facie reading of RCW 49.46.130(1) and (2)(f), the court determined that the statute does not require overtime pay to be restricted to hours worked within Washington, and actually anticipates that interstate truck drivers will be paid overtime.<sup>53</sup> Because of the way RCW 49.46.130(2)(f) is written, truck drivers subject to the Federal Motor Carrier Act are assured compensation for working in excess of 40 hours per week, whether under the MWA or by some other "reasonably equivalent" compensation.<sup>54</sup> This is because RCW 49.46.130(2)(f)'s exclusion to RCW 49.46.130(1)'s mandate to provide overtime compensation is conditioned upon the truck or bus driver being compensated under a reasonably equivalent system; thus, there is no ambiguity in the statute that truck drivers will receive overtime compensation.

Moreover, the location of the work performed is irrelevant, according to the court, because, by definition, a worker subject to the FMCA performs a portion of his or her work out of state.<sup>55</sup> The FMCA applies to motor carriers transporting people or property between states or

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48. *Id.*

49. *Id.*

50. *Id.* at 858.

51. *Id.* at 850.

52. *Id.*

53. *Id.* at 851.

54. *Id.*

55. *Id.*

within a state if the route traverses another.<sup>56</sup> Therefore, the plain language requires compensating interstate truck drivers for overtime, regardless of where the hours were worked.<sup>57</sup>

In order to understand the statute in its proper context, the court looked to RCW 49.46.005, which sets forth the purpose of the MWA: “to establish minimum standards of employment within the state of Washington . . . and to encourage employment opportunities within the state.”<sup>58</sup> *Contra* the Court of Appeals, the court found that this statement of purpose did not mean that only work conducted within the Washington’s borders was subject to overtime compensation, but that the MWA was intended to protect Washington employees and thereby enhance employment opportunities.<sup>59</sup> This purpose would be contravened if Washington-based employees were excluded just because they work outside the State.<sup>60</sup> Furthermore, reading the declaration too restrictively would frustrate the intended purpose of protecting employees – an outcome to be avoided in statutory interpretation.<sup>61</sup>

Also, because remedial exemptions are to be construed narrowly and applied only in a manner that is clearly consistent with the legislative spirit, and interpreting “hours” to mean “hours worked in Washington State” would not be an interpretive decision possessing such clarity, the court could not so interpret it.<sup>62</sup> Finally, such a construction would violate the rule of liberal construction requiring MWA provision to be construed in favor of employees.<sup>63</sup> Therefore, the court concluded that, under the plain language of the statute, the trial court was correct in its determination that when determining the overtime due a Washington-based employee, all hours worked, regardless of where worked, must be considered.<sup>64</sup>

Because Mr. Bostain was a Washington-based employee, the court held he was entitled to overtime; thus, the trial court’s award of unpaid overtime wages was upheld.<sup>65</sup> Conceding that it would normally have ceased its analysis at this point, the court pressed forward to consider

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56. 49 U.S.C. §§ 31502(a)(1), 13501(1)(A)-(B) (2005).

57. *Bostain*, 153 P.3d at 851.

58. WASH. REV. CODE § 49.46.005 (2007); *Bostain*, 153 P.3d at 851.

59. *Bostain*, 153 P.3d at 851.

60. *Id.* at 852.

61. *Id.* (citing *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 940 (Wash. 1994) (holding that “statutes should be interpreted to further, not frustrate their intended purpose”)).

62. *Id.* at 852.

63. *See id.* (citing *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 42 P.3d 1265, 1267 (Wash. 2002)).

64. *Id.*

65. *See id.*



whether its decision conflicted with administrative rules.<sup>66</sup>

## B. ADMINISTRATIVE REGULATIONS

The court considered two administrative rules that seemed to challenge its holding: WAC 296-128-011 and WAC 296-128-012.<sup>67</sup> These rules were promulgated in response to the Washington Supreme Court's 1988 ruling that the FMCA does not preempt the MWA and that the MWA overtime provisions apply to interstate trucking company employees.<sup>68</sup> WAC 296-128-011 requires employers of interstate truck drivers to maintain records of their work hours, including overtime hours, and to indicate how payments are calculated.<sup>69</sup> Of consequence is the rule's definition of "overtime rate of pay," which reads "the amount of compensation paid for hours worked within the state of Washington in excess of forty hours per week."<sup>70</sup> Thus, the rule indicates that overtime compensation is based upon work performed within Washington.

WAC 296-128-012 sets forth a method of calculating overtime pay for interstate truck drivers that is reasonably equivalent to that required by the MWA, so that the employee is compensated for "hours worked within the state of Washington in excess of forty hours per week at an overtime rate of pay."<sup>71</sup> Thus, the manner of calculating compensation that is rea-

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66. *Id.*

67. *See id.*; *see also* Wash. Admin. Code 296-128-011, 012 (2007).

68. *See Bostain*, 153 P.3d at 852 (citing Dep't of Labor & Indus. v. Common Carriers, Inc., 762 P.2d 348 (Wash. 1998)).

69. *Id.* at 853; *see also* WASH. ADMIN. CODE 296-128, 011 (2007).

70. WASH. ADMIN. CODE 296-128-011(1); *see also Bostain*, 153 P.3d at 853.

71. WASH. ADMIN. CODE 296-128-012(1)(a); *see also Bostain*, 159 P.3d at 853. The administrative rule prescribes the following method to calculate pay that is reasonably equivalent to 1 1/2 the worker's hourly wage (the required rate under the MWA):

The following formula is recommended for establishing a uniform rate of pay to compensate work that is not paid on an hourly basis and for which compensation for overtime is included:

1. Define work unit first. E.g., miles, loading, unloading, other.

2. Average number of work units per hour = Average number of work units accomplished per week divided by Average number of hours projected to be worked per week

3. Weekly Base Rate = Number of units per hour x 40 hours x base rate of pay

4. Weekly Overtimerate = Number of units per hour x number of hours over 40 x overtime rate of pay

5. Total weekly pay = Weekly base rate plus weekly overtime rate

6. Uniform rate of pay = Total weekly pay divided by Total work units

Example: A truck driver is paid on a mileage basis for a two hundred thirty mile trip performed about ten times a week. The base rate of pay is twenty cents a mile. The overtime rate of pay is thirty cents a mile. The average length of the trip is four and one-half hours.

1. 2300 mi. per week divided by 45 hours per week = 51.1 miles per hour

2. (a) 51.1 miles/hour times 40 hours times .20/mile = \$408.80

(b) 51.1 miles/hour times 5 hours = 255.5 miles

(c) 255.5 miles times .30/mile = \$76.65

sonably equivalent to overtime presumes the hours are worked within Washington. Therefore, the two rules are clearly at odds with the court's holding. The court recognized as much, declaring the rules to be inconsistent with the MWA's plain language and stated purpose, as well as "with the principles that apply to interpretation of remedial legislation governing payment of wages."<sup>72</sup>

Declaring itself as possessing the ultimate authority to interpret statutes, the court stated that an agency's interpretation of a statute should only be granted deference if "(1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise."<sup>73</sup> Finding that the statute is not ambiguous, the court refused to defer to the Department of Labor and Industries' interpretive rule.<sup>74</sup> The court further stated that deference is never appropriate whenever an agency's interpretation runs counter to a statutory mandate.<sup>75</sup> Thus, because the administrative rules would not benefit Washington employees and would discourage employment opportunities within the State, deference cannot be granted and the rules are invalid.<sup>76</sup>

### C. COMMERCE CLAUSE

Having established that the MWA "unambiguously requires that overtime be paid to a Washington employee based on all hours worked,"<sup>77</sup> the court then addressed the challenge that its holding is unconstitutional because it violates the commerce clause. The court determined that its interpretation of "RCW 49.46.130 is not facially discriminatory because it does not openly discriminate against interstate commerce in favor of intrastate economic interests," and that it does not "have a direct effect of favoring in-state interests."<sup>78</sup> Thus, it next considered its holding in light of the *Pike* balancing test.

The court found that there was no burden on interstate commerce

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(d) \$408.80 plus \$76.65 = \$485.45 divided by 2300 miles = 21.1 cents mile

(b) In using a formula to determine a rate of pay, the average number of hours projected to be worked and the average number of work units accomplished per week shall reflect the actual number of hours worked and work units projected to be accomplished by persons performing the same type of work over a representative time period within the past two years consisting of at least twenty-six consecutive weeks.

WASH. ADMIN. CODE 296-128-012(1)(a)-(b).

72. *Bostain*, 153 P.3d at 853.

73. *Id.* at 854 (citing *Edelman v. State ex. re Pub. Disclosure Comm'n* 99 P.3d 386, 388 (Wash. 2004)).

74. *See id.*

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.* at 855.

that outweighed the legitimate local purpose served by its holding – assuring Washington employees are properly compensated.<sup>79</sup> The only regulatory burdens demanded by the statute are upon employers that hire Washington-based employees and do business in Washington: they must identify the workers subject to the MWA and maintain records of their hours.<sup>80</sup> Such requirements do not rise to the level of impermissible burdens on interstate commerce.<sup>81</sup>

Continuing with its *Pike* analysis, the court addressed whether the MWA, as interpreted by the court, creates inconsistency among the states.<sup>82</sup> Additional obligations created by a law that are reconcilable are not inconsistent under the dormant commerce clause.<sup>83</sup> As to whether the compliance costs would outweigh the local benefits, the court reasoned that, under a choice of law analysis, an employer whose employee is subject to the MWA would not have to comply with another jurisdiction's law for that employee.<sup>84</sup>

Statutes regulating conduct occurring in another state have been found unconstitutional.<sup>85</sup> But the court did not believe this is the case with the MWA, as it applies only to employers who have Washington-based employees; thus, there would be no attempt to apply the law to transactions unrelated to the State.<sup>86</sup> The court concluded that not only would there be no broad extraterritorial impact that would outweigh MWA's local benefits (e.g., compensating Washington-based drivers for working overtime and encouraging employers to hire more employees to avoid the high costs of overtime wages) but, given the importance of the local public interest, any burden there on interstate commerce is permissible.<sup>87</sup> Therefore, the court reasoned its interpretation was constitutional.<sup>88</sup>

## V. THE DISSENT

In a firm dissent, Justice Johnson argued against each of the majority's substantive conclusions.<sup>89</sup> He and the other three dissenting justices believed the MWA requires overtime compensation only for hours

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79. *See id.*

80. *See id.*

81. *Id.*

82. *See id.*

83. *See id.* (citing *State v. Heckel*, 143 Wash.2d 824, 838 (Wash. 2001)).

84. *See id.* at 855-56.

85. *See id.* at 856 (referring to *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (finding an Illinois law that regulated the purchase of stock beyond its borders unconstitutional)).

86. *See id.*

87. *See id.*

88. *Id.* at 857.

89. *See id.* at 858-64 (Johnson, J., dissenting).

worked in excess of forty per week within Washington; therefore, Bostain was not entitled to overtime wages.<sup>90</sup> To begin with, RCW 49.46.130(1) is silent as to whether the hours to be factored into overtime calculations are limited to hours worked within Washington.<sup>91</sup> Moreover, the fact that the trial court and the court of appeals came to opposite conclusions on this issue is evidence enough that there is ambiguity. Thus, administrative rules and legislative history should be consulted for interpretive guidance.<sup>92</sup>

The dissent noted the repeated references in RCW 49.46.005 to impacting employment matters within the State for Washington employees.<sup>93</sup> The majority's attempt to minimize the language by suggesting it would contravene the statute's purpose to limit overtime hours to those worked within the State was unconvincing to the dissent. Interpreting "hours" to mean "hours worked within Washington" is consistent with the plain language of the statute and does not require stretching the statute beyond its intended purpose.<sup>94</sup>

Additionally, the rule promulgated by the Department of Labor and Industries, WAC 296-128-011, provides further justification for why the legislature intended to focus the benefits of the MWA's overtime provisions on employees working in Washington.<sup>95</sup> As noted above, the rule "confirms that to receive overtime under RCW 49.46.130(1), an employee must work more than 40 hours per week within the state of Washington."<sup>96</sup> The majority did not give this rule proper attention, dismissing it because the statute was not ambiguous and because the rule was inconsistent with the MWA's purpose.<sup>97</sup> However, given that the courts below split on the issue and that the Department of Labor and Industries ("DLI") undisputedly had the power to enforce the MWA, which fell within its expertise, the elements for deferring to an agency rule were satisfied.<sup>98</sup>

As for the majority's view that the administrative rule was in conflict with the statute's intent, the dissent argues that the rule and the MWA are not in conflict, but the rule simply provides a definition for an undefined term in the statute – the very thing administrative rules are in-

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90. *See id.* at 863 (Johnson, J., dissenting).

91. *See id.* at 859 (Johnson, J., dissenting).

92. *See id.* (citing *City of Pasco v. Pub. Employment Relations Comm'n*, 833 P.2d 381 (Wash. 1992)).

93. *See id.* at 860.

94. *Id.*

95. *Id.*

96. *Id.* at 861.

97. *Id.*

98. *See id.* at 861-62.

tended to do.<sup>99</sup> The dissent also found it significant, although the majority did not, that the Washington legislature had not objected to the DLI's interpretation in fifteen years, for courts should give weight to agency construction when there is legislative acquiescence to it.<sup>100</sup>

Finally, the dissent argued that "the majority's interpretation of RCW 49.46.130(1) likely runs afoul of the Commerce Clause."<sup>101</sup> The majority's interpretation fails the *Pike* balancing test, for the burden it would impose on interstate commerce – requiring employers to track hours worked by interstate truck drivers in numerous states in addition to Washington, forcing employers to research the laws of multiple states and perform complex conflict of laws analysis, and risking that employers may move their operations altogether – greatly exceeds and is unrelated to the putative local benefit of encouraging "employment and compensating employees within the state of Washington."<sup>102</sup>

The dissent concludes by observing that the majority's ruling leaves the trucking industry in a sea of uncertainty. Whether an employer must pay overtime to a Washington-based employee will depend upon a choice of law analysis – something the average employer or truck driver is not equipped to perform.<sup>103</sup> Thus, instead of bringing clarity and insight, the majority's "solution" . . . will result in only more confusion and litigation regarding whether or not a given interstate trucker is entitled to overtime pay."<sup>104</sup>

## VI. ANALYSIS OF THE DECISION

The holding of *Bostain* could result in events that would make it one of the most ironic decisions in modern jurisprudential history.<sup>105</sup> The majority repeatedly stated that the Court of Appeals and DLI's interpretation of RCW 49.46.130(1) was not consistent with the MWA's stated purpose, i.e., to encourage employment opportunities and to protect employees in Washington.<sup>106</sup> Thus, the court apparently believed that by granting Washington-based interstate truck drivers overtime pay for working more than forty hours, some or all of which may or may not have been within Washington, the court was furthering the legislative intent. Although the court couched its opinion in textualist language, it seems to

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99. *Id.* at 862.

100. *Id.*

101. *Id.*

102. *Id.* at 862-63 (citing *Pike*, 397 U.S. at 142).

103. *Bostain*, 153 P.3d at 863.

104. *Id.*

105. The problems the dissent pointed out with the majority's argument will not be repeated here, although an analysis of the holding would certainly incorporate the arguments made by the dissent.

106. See *Bostain*, 153 P.3d at 851-55.

have been informed just as much by, if not more so, policy considerations. After all, "Washington has a 'long and proud history of being a pioneer in the protection of employee rights.'"<sup>107</sup> However, an analysis of what is ultimately beneficial to overall employment opportunities for Washington and its employees must encompass more than simply enabling a slightly larger percentage of the working population to obtain overtime compensation. If it could be demonstrated that the court's decision would actually harm local interests, then, by the court's own lights, it is incompatible with the purpose of the MWA and thus, incorrect.

Although the court refers to it many times, it never once defines what a "Washington-based" employee is. Must the employee be a resident of Washington? How many days of the year must a Washington-based employee actually reside in Washington? It is not uncommon for interstate truck drivers to be away from their homes for weeks at a time on a trip cycle that chains multiple pick ups and deliveries in numerous states together.<sup>108</sup> Would a Washington resident that drove for a company located in another state and earned all of his hours outside of Washington still be entitled to overtime under the MWA? Must the employer actually have a facility in Washington in order to be the sort of employer liable to Washington-based employees? The court gives no guidance on this issue. What can be inferred, however, is that Mr. Bostain qualifies.

Mr. Bostain lived in Washington, worked out of Food Express's Vancouver terminal where he also began and ended his routes, picked up his Arcadia-issued paychecks at the terminal, and drove with a Washington driver's license.<sup>109</sup> Food Express, however, is a California Corporation that has an Arcadia office and a terminal in Vancouver.<sup>110</sup> None of these seem to be necessary conditions, however.

Suppose A, an interstate truck driver, moves to Washington. On her first day in the state, before she has time to get a new license or to even set up a mailing address, she meets B, the owner of a trucking company that is headquartered in Oregon, just across the Washington-Oregon border; the company is incorporated in Delaware and occasionally makes a delivery to Washington. B hires A to begin work that day. She immediately drives across the border, picks up her load in Oregon, and does not return to Washington until her chain trip is completed four weeks later. While she was away, two pay cycles transpired, with the funds being

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107. *Id.* at 852 (quoting *Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582, 586 (Wash. 2000)).

108. American Trucking Associations, Inc. and the Washington Trucking Associations, *supra* note 17, at \*2-3.

109. *Bostain*, 153 P.3d at 849.

110. *Id.*

wired electronically from the company's Oregon bank to her New York-based credit union.

This concededly far-fetched example removes all the obvious characteristics that seemed to qualify Bostain as a "Washington-based" employee, or her employer as a Washington employer, but it is not evident from the court's opinion that B would not be required to pay A for overtime under Washington's Minimum Wage Act. In order to apply the MWA, there need only be a "substantial relationship between the subject matter, the parties, and the forum state."<sup>111</sup> This nebulous standard does little to assuage the tremendous level of uncertainty created by the court's decision for employers and employees. This would hardly seem to be the outcome of a decision that encourages employment opportunities and protects employees.<sup>112</sup>

The court's ruling also seems to ignore the realities of the motor carrier industry and the potential impact its decision could have on the industry in Washington. The interstate trucking business is one of high competition and low profits.<sup>113</sup> This requires motor carriers to maximize their equipment and drivers, often keeping both on the road weeks at a time, traversing multiple states.<sup>114</sup> To conduct a conflict of laws analysis for every driver for every route for every pay period, is incredibly discouraging to employers, and thus, employment opportunities. Interstate Distributor Company ("IDC"), a Washington-based truckload carrier, employs 520 Washington-based interstate drivers.<sup>115</sup> IDC speculates, however, that the court's decision will impose such an enormous burden that it will be forced to shut down.

Already taxed by federal regulations imposed on the industry, IDC has managed to survive as a company, in part by relying on the hereto-

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111. *Id.* at 856 (quoting *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1054 (Wash. 1987)).

112. Obviously, the typical case will involve a Washington resident and an employer that operates within state borders.

113. *Interstate Distributor Co.*, *supra* note 21, at \*4.

114. On pages 3 and 4 of its *amicus curiae* brief, Interstate Distributor gives this example of a schedule of just one of its Washington-based drivers from January 25, 2007 through February 11, 2007:

- a. Load picked up in Olympia WA, delivered to Commerce, CA;
- b. Load picked up in Lancaster, CA, delivered to Hazleton, PA;
- c. Load picked up in Fishkill, NY, delivered to Eagan, MN;
- d. Load picked up in Fridley, MN, delivered to Phoenix, AZ;
- e. Load picked up in Phoenix, AZ, delivered to Flagstaff, AZ;
- f. Load picked up in Flagstaff, AZ, delivered to Montebella, CA;
- g. Load picked up in Ontario, CA, delivered to Hagerstown, MD;
- h. Load picked up in Myersville, MD, delivered to Swedesboro, NJ;
- i. Load picked up in Jamesburg, NJ, delivered to Denver, CO; and
- j. Load picked up in Cheyenne, WY, delivered to Tacoma, WA.

Brief of Amicus Curiae Department of Labor and Industries, *supra* note 19, at \*3-4.

115. *Id.* at \*1, 3.

fore recognized proposition that overtime only need be paid to interstate drivers working more than forty hours a week in Washington.<sup>116</sup> Under this overtime structure, it was able to “employ thousands of Washington-based drivers for almost three decades.”<sup>117</sup> However, the financial demands the court’s rendering will place upon IDC will force it to either close its operations, or to increase its rates and adjust its drivers’ schedules.<sup>118</sup> Either option would have the same result, as IDC could not remain competitive with those companies not bound by Washington’s laws. “IDC’s most reasonable option, therefore, is to: (a) relocate its headquarters and trucking operations outside of Washington and (b) no longer employ or hire Washington-based drivers.”<sup>119</sup> This would obviously have a negative impact on both the employment opportunities in Washington, as well the compensation and security of Washington employees.

IDC’s seemingly dire predictions of what will be the result of the court’s decision are not isolated. Many of the *amici* echo the same. Gordon Trucking noted that, due to the unique nature of interstate trucking, multi-state trucking companies can hire drivers based in other states “to serve the Washington market.”<sup>120</sup> As stated above, profit margins in the industry are low, typically ranging from three to five percent.<sup>121</sup> To pay a Washington-based interstate driver would increase labor costs by more than sixteen percent, a cost that would eliminate any profit and could not be offset by price increases.<sup>122</sup>

Thus, the Washington Supreme Court’s attempt to encourage employment opportunities and to protect employees in Washington by interpreting RCW 49.46.130(1) and (2)(f) according to their plain, “unambiguous” meaning, could spell the end for an entire segment of the State’s economy. One can only hope that legislative or administrative steps will be taken before it is too late.<sup>123</sup>

Of course, some would consider the picture painted here of the

116. *See id.* at \*5.

117. *Id.*

118. *See id.* at \*5-6.

119. *Id.* at \*6.

120. Gordon Trucking, Inc., *supra* note 18, at \*6.

121. *Id.* at \*18.

122. *Id.* at \*18-19; Gordon derives this percentage from the following calculation:

Federal regulations permit interstate drivers to work 60 hours per workweek. Paying time-and-a-half (the WMWA’s overtime rate) for hours worked between 40 and 60 in a workweek increases costs by 16% before additional payroll taxes. (At a straight-time rate of \$20/hour, 60 hours at straight time is \$1,200. Forty hours of straight time plus 20 hours at time-and-a-half (\$30/hour) is \$1,400, which is 116% of \$1,200.)

123. In a December 2007 e-mail correspondence with a representative of the American Trucking Association, the author learned that administrative remedies are being pursued, rather than legislative. Email from Robert Digges, representative, American Trucking Association, to David Hyams, author (Dec. 3, 2007, 07:17 MST).



court's holding as rather bleak and unfair. The decision could have the potential to force motor carriers to be more efficient in managing their drivers' schedules, and would provide the drivers with a shorter work week and greater compensation – benefits lacking in an industry rife with turnover.<sup>124</sup> Time will tell.

### VIII. CONCLUSION

The court in *Bostain* attempted to do the citizens of its state a service by faithfully interpreting an overtime wage statute. The court's decision was favorable for Mr. Bostain, but not so for Food Express. Unfortunately, because of the disastrous implications of the holding, Mr. Bostain may be the only Washington-based interstate truck driver to ever so benefit.

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124. See *Washington Truckers Win Overtime Case*, LANDLINE MAGAZINE: THE BUSINESS MAGAZINE FOR PROFESSIONAL TRUCKERS, [http://www.landlinemag.com/todays\\_news/Daily/2007/Nov07/112607/113007-07.htm](http://www.landlinemag.com/todays_news/Daily/2007/Nov07/112607/113007-07.htm) (last visited Dec. 31, 2007).

