COURT OF APPEALS
DECISION
DATED AND RELEASED

February 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1946-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

State of Wisconsin, Department of Industry, Labor and Human Relations,

Plaintiff-Respondent,

v.

Bee Bus Line,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIS J. ZICK, Reserve Judge. *Affirmed*.

SCHUDSON, J.[1] Bee Bus Lines (Bee) appeals from the trial court order for judgment awarding $4,000 plus $100 costs and disbursements in favor of the Wisconsin Department of Industry, Labor and Human Relations. The trial court concluded that Bee had not complied with the overtime pay

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

provisions of the Fair Labor Standards Act. Bee argues that the trial court erred in concluding that it did not have a ***Belo*** agreement exempting it from the FLSA overtime pay requirements. This court rejects Bee's argument and, accordingly, affirms.

I. FACTUAL BACKGROUND

The factual background is undisputed. According to the trial evidence, during 1992-94, Bee provided bus services to Milwaukee Pubic Schools. Bee transported students on regular routes in the morning and afternoon and on other routes for extracurricular activities. Bee employed eighty to eighty-five bus drivers, most of whom were regular drivers who were paid hourly for the time they worked.

Pursuant to the terms of its contract with MPS, Bee also employed "stand-by" drivers for the A.M. and P.M. routes. Stand-by drivers, including Ira L. Harvey and Calvin McDade, filled in for any regular drivers who did not report to work. Bee paid stand-by drivers a guaranteed weekly salary for a regular forty-hour, five-day workweek, irrespective of the number of routes they actually drove. Bee provided this guarantee to ensure that its stand-by bus drivers would be available in order to comply with its MPS contract, which required Bee to have stand-by drivers.

As stand-by drivers, Harvey and McDade, frequently worked more than forty hours per week, but they never were paid time and one-half for their overtime hours. When Harvey or McDade drove any extracurricular activity routes, they were paid for all hours worked in addition to their guaranteed forty hours, but at the regular hourly rate.

In September 1995, the Wisconsin Department of Industry, Labor and Human Relations filed a small claims action against Bee on behalf of Harvey and McDade seeking $4,709.16 for hours worked in excess of 40 hours per week. In its answer, Bee claimed it was exempt from the state and federal overtime pay regulations because Harvey and McDade had entered into a contract encompassed by ***Walling v. A.H. Belo Corp.***, 316 U.S. 624 (1942); *see also* 29 U.S.C. § 207(f) (codifying the ***Belo*** exception). The trial court concluded,

however, that Bee had failed to establish the affirmative defense of a ***Belo*** agreement. The trial court was correct.

II. ANALYSIS

Where no material facts are in dispute, the issue of whether Bee owed any overtime wages to its stand-by drivers presents a question of law we review *de novo*. *See* ***State v. Williams***, 104 Wis.2d 17, 21-22, 310 N.W.2d 601, 604-05 (1981). Under federal and state law, employers are required to pay their non-exempt employees one and one-half times the employees' regular rate for all hours worked in excess of a forty hour workweek. *See* 29 U.S.C § 207(a)(1); WIS. ADM. CODE § ILHR 274.03. 29 U.S.C. § 7(a)(1) of the Fair Labor Standards Act provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek 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 the regular rate at which he is employed.

WIS. ADM. CODE § ILHR 274.03, provides:

> Except as provided in s. Ind 74.08, each employer subject to this chapter shall pay to each employe time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

The general rule does not apply, however, if employers and their employees have entered into an agreement that meets the statutory requirements of 29 U.S.C. § 207(f) of the FLSA. Contracts satisfying the § 207(f) requirements are referred to as "***Belo*** contracts." ***Belo*** contracts are exceptions

to the overtime requirements of the Fair Labor Standards Act. *See* 29 U.S.C. § 207(a), and 29 U.S.C. § 207(f).

> Under ... 29 U.S.C. §207(f), these plans qualify as an exception to the usual overtime pay requirements only if they meet each of the conditions specified in the statute. First, the duties of the employee must "necessitate irregular hours of work." Second, the employee must be employed pursuant to a bona fide individual contract or collective bargaining agreement. Third, [the] contract must "specif[y] a regular rate of pay" for hours up to forty and one and one-half times that rate for hours over forty. Finally, the contract must provide a weekly guarantee for not more than sixty hours, based on the specified rates.

Donovan v. Brown Equip. & Serv. Tools, Inc., 666 F.2d 148, 153 (5th Cir. 1982)(citations omitted).

As an exemption from federal and state overtime wage mandates, terms of ***Belo*** contracts are construed against the employer asserting them. ***Martin v. Saunders Constr. Co.***, 813 F. Supp. 893, 897-98 (Mass. 1992). Accordingly, Bee had the burden of establishing that its contract with the stand-by drivers satisfied all the ***Belo*** criteria. *See* ***Brown Equip. Serv. Tools, Inc.***, 666 F.2d 153. Clearly, Bee's contract satisfies none.

First, ***Belo*** contracts may only be used when the duties of the employee "necessitate irregular hours of work." ***Donovan v. Tierra Vista, Inc.***, 796 F.2d 1259, 1260 (10th Cir. 1986); *see also* 29 U.S.C. § 207(f). "Irregular work" is defined as significant variations in weekly hours of work both below and above the statutory weekly limit on nonovertime hours. *See* ***id.***; *see also* 29 C.F.R. § 778.405. In addition, "[f]or fluctuations [above] the statutory forty hours to be considered *irregular* within the meaning of the ***Belo*** exception, the employees must be required to work [more] than forty hours because of an unpredictable irregularity inherent in the nature of their duties." ***Donovan v. Welex***, 550 F. Supp. 855, 857 (Tex. 1982) (emphasis added). This irregularity must also be beyond the control of both the employer and employee. ***Id.*** at 858.

Bee argues that "it is undisputed that the stand-by drivers worked irregular hours, since they only worked if a regular driver did not show up for his or her route." This argument fails, however, because it does not comport with the statutory meaning of "work." The federal regulation interpreting 29 U.S.C. § 207, specifically defines "work" as: "All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed work place and ... all time during which an employee is suffered or permitted to work whether or not he is required to do so." 29 C.F.R. § 778.223.

Trial testimony established that Bee's stand-by drivers were required to be on the premises for eight hours each day. Although the drivers may not have had to drive any bus routes, they were "on duty" and thus were working within the statutory definition of "work" requiring regular rate of pay.

Testimony also established that Bee's stand-by drivers never had to work more than forty hours; rather, they could volunteer to work more than forty hours. Bee's president and the drivers testified that when extra routes were offered to Harvey and McDade, they were free to accept or decline the additional hours. Neither Harvey nor McDade was required to drive any extracurricular routes. These facts fail to meet the ***Belo*** requirement that the cause of the fluctuation in hours be "beyond the control of both the employer and the employee." ***Tierra Vista, Inc.***, 796 F.2d at 1260. Hence, the Bee/standby-driver agreement did not meet the first prong of the ***Belo*** exception to the FLSA. *See, e.g.*, ***Brown Equip. & Serv. Tools, Inc.***, 666 F.2d.

Second, to comply with ***Belo***, Bee had to establish that its employees were employed pursuant to a bona fide individual contract or collective bargaining agreement. *See* 29 U.S.C. § 207(f). Testimony established that Bee and its stand-by drivers had no written agreement, but Bee's president stated that they had an oral agreement. The trial court concluded, however, that while Bee and its stand-by drivers had an oral agreement concerning the guarantee of forty hours and the wages, they did not have an agreement or understanding concerning the ***Belo*** contract limit of sixty hours. Thus Bee failed to establish that, under ***Belo***, there was a bona fide agreement.

Third, the alleged oral contract never set forth a "regular rate of pay" and "compensation of not less than one and one-half time such rate" for

all hours worked in excess of such maximum workweek. *See* ***Saunders Constr. Co.***, 813 F. Supp. at 897. Bee's president testified that he told the stand-by drivers that should they accept any additional driving hours beyond the regular forty-hour guarantee, they would be compensated at their regular rate, not at time and one-half. Thus Bee failed to meet the requirement that the contract specify a regular rate of pay with time and one-half calculations for any hours in excess of the forty-hour workweek.

Finally, Bee failed to establish that the employees' hours would never exceed sixty in any workweek. Because the stand-by drivers were free to accept or reject any additional routes, they, in theory, could have exceeded the statutory limit of sixty hours. *See* 29 U.S.C. § 207(f). Thus the trial court correctly concluded that no contractual understanding limited the stand-by drivers to sixty hours and, therefore, no ***Belo*** agreement existed.

By the Court. – Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.