U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

J.N. MOSER TRUCKING, INC., d/b/a MOSER ENTERPRISES, DONALD H. SCHLEINING, and KIRSTY S. SCHLEINING, Individually and Jointly,

RESPONDENTS.

ARB CASE NO. 01-047

ALJ CASE NO. 1995-SCA-26

DATE: May 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Ellen R. Edmond, Esq.; Paul L. Frieden, Esq., Counsel for Appellate Litigation; Steven J. Mandel, Associate Solicitor, *U.S. Department of Labor, Washington, D.C.*

For the Respondents:

Donald S. Rothschild, Esq.; Seth D. Matus, Esq.; Goldstine, *Skrodzki, Russian, Nemec and Hoff, Ltd., Burr Ridge, Illinois*

FINAL DECISION AND ORDER

This dispute involves wages allegedly earned under federal services procurement contracts subject to the prevailing wage rate provisions of the McNamara-O'Hara Service Contract Act of 1965, as amended ("Act" or "SCA")[1] and its implementing regulations.[2] The Acting Administrator of the Wage and Hour Division, U. S. Department of Labor (DOL), asks this Board to review the Administrative Law Judge's (ALJ) decision to dismiss DOL's administrative complaint against J.N. Moser Trucking, Inc. and Donald and Kristy Schleining (collectively "Moser" unless otherwise noted). We reverse in part and affirm in part.

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[1] 41 U.S.C.A. §§ 351-358 (West 1987). The Act requires that contracts entered into by the United States or the District of Columbia, in excess of $2500, the principal purpose of which is to furnish services in the United States through the use of service employees, must specify certain minimum wages and fringe benefits to be paid to the service employees who perform the contract. The Secretary of Labor, or her authorized representative, determines the minimum wages and fringe benefits according to those prevailing in the locality for such employees.

[2] 29 C.F.R. Parts 4, 6, and 8 (2002).

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (Board) has jurisdiction to hear and decide appeals from ALJ recommended decisions involving the SCA.[3] The Board modifies or sets aside the ALJ's findings of fact only when it determines that those findings are not supported by a preponderance of the evidence.[4] However, we review conclusions of law de novo.[5]

BACKGROUND[6]

Moser is a corporation with offices in Illinois and Florida. Its Illinois business consists of hauling mail to various postal facilities pursuant to service contracts with the United States Postal Service (USPS). Moser is a contractor within the meaning of the SCA and, during the relevant 1992-93 period, employed truck drivers to haul the mail. Donald Schleining and his wife, Kristy, manage the Illinois operation. The company truck terminal and offices are in Montgomery, Illinois.

From September 1993 until March 1994, Gerald Becker, from DOL's Wage and Hour Division, investigated Moser's performance on 38 of its USPS contracts. Becker found that in 1992 and 1993 Moser did not pay 170 drivers for time spent at the beginning of their daily runs when they drove Moser trucks from the Montgomery terminal to a postal facility, their first stop of the day. There they hooked a trailer, loaded with mail, to the truck and continued their run, picking up and dropping off loads of mail at other postal facilities. Nor did Moser pay the drivers for time spent at the end of their route after they disconnected the trailer at the last post office stop of the day and drove the truck back to the Montgomery terminal. The time the drivers spent going from the terminal to the first facility on their run and later going from the last facility on their route back to the terminal is known as "bobtail time." Becker concluded, among other things, that Moser violated the SCA by not paying its drivers for bobtail time in 1992-93.

As a result, DOL filed an administrative complaint in 1995 alleging that Moser had failed and refused to pay the drivers the minimum wage and fringe benefits required by the USPS contracts and the SCA. The complaint also asserted that Moser was subject to the Act's three-year debarment provision. Moser answered the complaint and the ALJ scheduled a hearing. Prior to that hearing, the parties executed two stipulations. They agreed that in 1992-93 Moser did not pay the drivers for bobtail time and other related activities. Furthermore, they agreed that

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[3] 29 C.F.R. § 8.1(b) and Secretary's Order 1-2002, Fed. Reg. 64,272 (Oct. 17, 2002).

[4] 29 C.F.R. § 8.9(b). *See Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 71 (1st Cir. 1999).

[5] *United Kleenist Organization Corp. and Young Park*, ARB No. 00-042, ALJ No. 99-SCA-18, slip op. at 5 (ARB Jan. 25, 2002).

[6] The parties do not dispute the relevant background facts.

Becker correctly computed the amount of unpaid bobtail and other time (and fringe benefits) the drivers had allegedly accumulated. They stipulated that Becker's calculations would be used to determine the amount of Moser's liability, if any. Additionally, they agreed that USPS would withhold $1,242,180 owed to Moser under the contracts, the entire amount the Administrator alleged was due to the drivers. However, after stipulated adjustments, $830,393 for the bobtail time liability and $70,191 for allegedly unpaid fringe benefits remained at issue pending the March 1999 hearing.

Also by stipulation, the parties contested only two issues: (1) whether "bobtail time" is compensable under the SCA and, if so, how many hours were devoted to bobtail time;[7] and, (2) if the ALJ concluded that Moser had violated the SCA, whether "unusual circumstances" existed to relieve Moser from debarment.[8] The ALJ concluded that bobtail time was not compensable but that time spent at the initial postal facility hooking the trailer onto the truck and then inspecting the vehicles was compensable.[9] By a Supplemental Decision and Order of January 5, 2001, he ordered Moser to pay a total of $71,482.84 to the affected drivers for the trailer hookup and inspection time. Furthermore, he concluded that debarment was not warranted because unusual circumstances existed.[10]

ISSUE TO BE DECIDED

Whether bobtail time is compensable.

DISCUSSION

1. A Preponderance of the Evidence Does Not Support the ALJ's Finding that the Moser Drivers Had an "Option" in 1992-93

As discussed more fully below, the Act requires covered employers to pay service

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[7] As indicated above, however, the parties had earlier stipulated that Becker's calculations as to the amount of time spent bobtailing were correct.

[8] 41 U.S.C.A. § 354(a) reads in pertinent part: "The Comptroller General is directed to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary have found to have violated this chapter. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States shall be awarded to the persons or firms appearing on this list . . . until three years have elapsed from the date of publication of the list . . . ."

[9] R. D. & O. at 10-12.

[10] Though her Petition for Review requests that we examine the ALJ's findings and conclusions pertaining to the debarment issue, the Acting Administrator subsequently indicated that she "is not appealing the ALJ's decision on debarment." Administrator's Brief at 10 n.6.

employees for all "hours worked" unless certain exemptions apply. The Administrator contends that the drivers' bobtail time in 1992-93 constitutes "hours worked" and is therefore compensable. But the ALJ concluded that Moser did not have to compensate the drivers for bobtail time accrued in 1992-93 because bobtailing "is not required of Moser drivers and Moser receives no benefit of consequence from this practice."[11] His conclusion is based on a finding that the drivers had a choice: they could pick up the Moser truck at the Montgomery terminal and drive it ("bobtail") to the initial stop on their route; or, they could drive a personal vehicle (or be driven) to the first stop where the Moser truck was parked. In his words:

> Rather than requiring its drivers to pick up a truck at a particular location, Moser offered its drivers the option of either picking up a truck at its terminal or driving their own vehicles to or near the first postal facility where a truck could be parked waiting for them. . . . As the drivers had a genuine choice between picking up a Moser truck at the terminal and bobtailing to the first postal facility or driving their personal vehicle to the first postal facility, it can only be concluded that the drivers were acting for their own convenience and not under Moser's direction.[12]

The ALJ found that in 1992-93 Moser was "permitted to park its trucks" in parking lots at some of the postal facilities it served. Thus, the drivers had the "option" and "convenience" of bobtailing rather than having to use their own vehicle, with the attendant expense and depreciation, to get to the first stop of their route. To support this finding he relied, in part, on the testimony of Kristy and Donald Schleining.[13] The Schleinings are co-Respondents here and, respectively, Moser's Secretary-Treasurer and Vice-President. They oversaw the day-to-day operation of the firm's Illinois facility.[14] Therefore, their testimony about parking areas at USPS facilities in 1992-93 should have been similar. However, it was materially inconsistent. *Compare* Transcript (TR) 578 (Kristy testifying that in 1992-93 Moser had parking lots at the South Suburban and Rock Island facilities and permission to park at Fox Valley) *with* TR 650 (Donald testifying that in 1992-93 parking was available at the BMC, St. Charles, and Fox Valley facilities). Thus, we find that the Schleinings' testimony about parking availability at the USPS facilities in 1992-93 is very unreliable.

Furthermore, we find that a preponderance of the evidence clearly indicates that in 1992-93, the relevant period, Moser drivers did not have the "option" to park at or near most, if any, of the USPS facilities. *See* TR 39-40 (dispatcher Dale Augustine testifying that in "about" 1996, Moser rented lots close to the Carol Stream, Palatine, and Aurora facilities); TR 91, 145 (driver

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[11] R. D. & O. at 11.

[12] *Id.* at 10.

[13] *Id*. at 4-5.

[14] *See* TR 555-784.

Junior Smith testifying that he was "not aware" of parking availability at either the Carol Stream or Palatine facilities in 1992-93); TR 219 (driver Harry French testifying that shortly before he left Moser in 1994, parking at Carol Stream became available); TR 267-68 (driver Thomas Hendrickson testifying that a parking lot was established at Carol Stream in mid-1994); TR 352 (Jerry Nelson testifying that during his employment from 1991 until February or March 1993, trucks were parked only at the Moser terminal); TR 545-47 (Gerald Becker, the Wage and Hour investigator, testifying: "At the time I did the investigation [implying the relevant 1992-1993 period though Becker actually conducted his investigation from 9/93 to 3/94], except for vehicles that may have been at employees' homes, all the trucks – all the tractors were in Montgomery. There were no outlying lots, so there was no option to drive your own personal vehicle to Palatine and get a Moser tractor and begin the run, because all the tractors were in Montgomery."); TR 653, 733 (Donald Schleining testifying that Moser did not obtain parking at Carol Stream (and Palatine) until 1994).

Moreover, testimony that conceivably supports the ALJ's "option" finding is mostly equivocal. *See* TR 189-90 (Angel Hernandez testifying that he "thinks" Moser was parking trucks at Carol Stream at some time between 1992 and 1994, though he was not given the option to park there); TR 271 (Hendrickson, a Moser driver from July 1993 until December 1994, testifying that Moser parked tractors at the Fox Valley facility but does not know when the company began doing so); TR 295 (driver James Hansford testifying he was not sure when parking at Carol Stream began: "'93 or '94, something like that"). *But see* TR 807 (according to driver George Nilo, parking was available at South Suburban in 1992-93).

The ALJ's critical finding that Moser drivers had the "option" of bobtailing to their initial facility in 1992-93 is not supported by a preponderance of the evidence. Therefore, we set it aside.[15] Consequently, the ALJ's conclusion that bobtail time is not compensable is error because it is based on the unsupported finding about the drivers' "option."

2. Bobtail Time is Compensable.

The ALJ employed what might be termed a "benefits test" in concluding that bobtail time is not compensable: "Whether time is compensable under the FLSA [and therefore the SCA] turns on whether the employee's time is spent predominantly for the employer's benefit or for the employee's."[16] He posits that since the drivers had a choice ("option") of how they could travel to their initial postal facility, they acted for their own "convenience" and not "under Moser's direction" when they chose to bobtail. Therefore, according to the ALJ, this convenience was a "benefit" to the drivers.

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[15] As noted above, "The Board shall modify or set aside finding of fact [in SCA cases] only when it determines that those findings are not supported by a preponderance of the evidence." 29 C.F.R. § 8.9(b).

[16] R. D. & O. at 8.

On the other hand, as DOL argued to the ALJ, Moser, too, benefited from bobtailing. After all, the mail could not be hauled unless the drivers brought the trucks to the postal facility where the trailers full of mail were located. But the ALJ found that Moser did not benefit because the drivers had an "option," thus did not have to bobtail. "Moser could leave its trucks at parking facilities on or near the postal facilities it services."[17] Therefore, he concludes, "as bobtail driving is not required of Moser drivers and Moser receives no benefit of consequence from this practice, I find that Moser is not required to compensate its drivers for this bobtail time."[18]

However, even assuming that the ALJ's findings were supported by a preponderance of the evidence and did not involve curious logic, we hold that using a "benefits" analysis to determine compensability under the SCA was error. As authority for his benefits test approach, the ALJ points to "standards"[19] he claims are found in a 1944 United States Supreme Court decision, *Armour & Co. v. Wantock*,[20] and a 1976 Fifth Circuit case, *Dunlop v. City Elec., Inc.*[21] However, as we discuss below, the appropriate standard for determining compensability under the SCA is whether the activity is a "principal activity" as defined in the Secretary's regulations and interpreted in case law.

The Fair Labor Standards and Portal-to-Portal Acts

In the relevant 1992-93 period Moser was a contractor and its drivers were service employees within the meaning of the Act and its implementing regulations. Moser was therefore required to pay its drivers minimum hourly wages that the Secretary had determined

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[17] *Id.* at 10.

[18] *Id.* at 11.

[19] *Id.* at 9.

[20] 323 U.S. 126 (1944).

[21] 527 F.2d 394 (5th Cir. 1976). We are puzzled by the ALJ's reliance on *Armour* and *Dunlop*. Neither decision holds or otherwise approves a theory that compensability depends upon who benefits from the activity or whether the activity is convenient for employee or employer. True, the *Dunlop* court, in the process of surveying decisions construing the Portal-to-Portal Act's exceptions to FLSA coverage, wrote that, "The activities must be undertaken 'for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.'" But this language, from *Mitchell v. Southeastern Carbon Paper*, 228 F.2d 934, 939 (5th Cir. 1955), which the ALJ cites and relies upon, cannot be characterized as the *Dunlop* "standard." In fact, the language is merely part of the trial court's findings of fact that the *Mitchell* court was examining. *Id. See also Sec'y of Labor v. E. R. Field, Inc.*, 495 F.2d 749 (1st Cir. 1974) where the court deemed "irrelevant" the fact that an employee may have benefited from the activity in question. "The activity is employment under the [FLSA] if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee." *Id.* at 751.

were in accordance with those prevailing in the locality for such drivers.[22] Therefore, since the drivers are entitled to (at least the minimum) compensation for each hour worked, the amount of unpaid wages that might be owed to Moser drivers depends upon a computation of each driver's hours worked during the 1992-93 period.

As a starting point, we note that the Secretary's regulations that interpret The Fair Labor Standards Act of 1938 (FLSA)[23] are used to determine "hours worked" in SCA cases.[24] Furthermore, in another 1944 decision, the United States Supreme Court held that employees covered by the FLSA (and thus SCA service employees as well) are entitled to receive compensation for *all* "hours worked."[25]

But The Portal-to-Portal Act of 1947 (the Portal Act)[26] created narrow exemptions from the FLSA's broad mandate that covered employees must be compensated for all hours worked. A covered employer, like Moser, does not have to compensate employees for certain walking, riding, and traveling time, or time spent performing similar "preliminary" and "postliminary" activities that occur before or after the "workday" unless this time is compensable by contract, custom, or practice.[27]

The DOL Regulations

Thus, time spent bobtailing is compensable unless bobtailing is an activity covered by the Portal Act exemptions. Bobtailing does not involve the activity specified under the first category

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[22] *See* Respondent's Exhibit 1 (Stipulation), para. 1; 41 U.S.C.A. § 351(a)(1); 29 C.F.R. §§ 4.3, 4.166.

[23] 29 U.S.C.A. § 206, *et seq.*

[24] 29 C.F.R. § 4.178. 29 C.F.R. Part 785, entitled "Hours Worked" interprets the minimum wage provisions of the Fair Labor Standards Act.

[25] *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123***,** 321 U.S. 590, 597 (1944) ("[W]e view Sections 7(a), 3(g) and 3(j) of the [FLSA] as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment.").

[26] 29 U.S.C.A. §§ 251-262.

[27] 29 U.S.C.A. §§ 254(a), (b). The Portal Act itself does not apply to the SCA. However, because the Portal Act and the FLSA are "interrelated parts of the entire statutory scheme for the establishment of basic fair labor standards," 29 C.F.R. § 790.2(a), the interpreting regulations of the Portal Act, found in 29 C.F.R. Part 790, interrelate with the FLSA regulations in Part 785. Therefore, because the FLSA regulations are incorporated into the SCA regulations (29 C.F.R. Part 4), *see* 29 C.F.R. § 4.178, the Portal Act regulations necessarily apply in determining compensability under the SCA.

of exemption; that is, it is not "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities" which the Moser drivers were employed to perform.[28] The Secretary's regulations that explain and interpret the Portal Act unequivocally contradict Moser's contention that bobtailing is transportation to the place of the principal activity and thus within the exemption:

> The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) [29 U.S.C.A. § 254(a)(1)] refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another . . . .[29]

The second Portal Act exemption pertains to "activities which are preliminary to or postliminary to said principal activity or activities."[30] Again, the Secretary's regulations provide guidance, suggesting that before we decide whether bobtailing is a "preliminary" or "postliminary" activity to the drivers' "principal" activities", we first must determine what the Moser drivers' "principal activities" are.[31]

"Principal activities" are those that the employee is "employed to perform."[32] We find that Moser drivers were principally employed to haul mail to postal facilities by means of trailers towed by trucks.[33] And though bobtailing from, and returning to, the Moser terminal does not involve hauling mail, nevertheless it too qualifies as a "principal activity."[34] Activities that are

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[28] 29 U.S.C.A. § 254(a)(1).

[29] 29 C.F.R. § 790.7(c). Moser argues at p. 14 of its Brief that the exemption applies. 29 C.F.R. Part 790 is entitled "General Statement As To The Effect Of The Portal-to-Portal Act of 1947 On The Fair Labor Standards Act Of 1938." Its purpose is to "outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act." 29 C.F.R. § 790.1(b). The Secretary's interpretations of federal statutes, such as those set out in Part 790, are entitled to great weight. *See United States v. American Trucking Ass'ns, Inc*, 310 U.S. 534, 549 (1940).

[30] 29 U.S.C.A. § 254(a)(2).

[31] 29 C.F.R. § 790.8(a).

[32] *Id.* citing *Cf. Armour & Co. v. Wantock*, 323 U.S. 126, 132-134 (1944); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136-137 (1944).

[33] Respondent's Exhibit 1, para. 3, 4.

[34] "The use by Congress of the plural form 'activities' in the statute makes it clear that in order

an "integral part" of a principal activity and "indispensable to its performance" are themselves principal activities.[35] Driving the truck from the Moser terminal to the first postal facility in order to hook the trailer loaded with mail onto the truck (and then proceeding to the other facilities on his route) is certainly an "integral part" of hauling mail. Bobtailing is integral to hauling the mail, therefore a principal activity, because it is so closely related to mail hauling as to be indispensable to its performance. Likewise, since drivers pick up the trucks at the terminal the next day to begin their routes, the return bobtail to the terminal after disconnecting the trailer at his last stop is integral and indispensable to performing the driver's job.

The Case Law

Two Fifth Circuit Court of Appeals decisions further buttress our conclusion that bobtailing is a principal activity. The *Dunlop* court emphasized the necessity of broadly interpreting "principal activities" and narrowly construing the Portal Act's "preliminary"-"postliminary" exemption. After surveying numerous Circuit Court of Appeals decisions construing the interaction of the FLSA and Portal Act, the court concluded that the cases "support the liberal construction of the terms 'principal activity or activities' urged by Congress, the President, and the Secretary of Labor in his Interpretative Bulletin, thus providing broad coverage under the F.L.S.A. and limiting application of the Portal-to-Portal exemptions to those employee activities 'which in no way enter into the production of goods.'"[36]

Dunlop involved electricians and their helpers who came to the company shop 15-20 minutes prior to departing on their daily rounds. During this period they filled out forms, checked on job locations, cleaned out, loaded, and fueled their trucks, and picked up the electrical plans for the jobs.

The trial court concluded that since most of these activities were not "directly related" to the workers' principal activity of installing electric wiring, they were not integral and indispensable to the principal activity. Therefore, they were not principal activities. In reversing, the *Dunlop* court held that the electricians' activities were principal and compensable. The court did not employ a "benefits test," as the ALJ mistakenly characterized the court's "standard." Rather, the court enunciated a straightforward, practical approach for determining compensability:

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for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job; rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several 'principal' activities during the workday." 29 C.F.R. § 790.8(a).

[35] 29 C.F.R. § 790.8(b), (c).

[36] *Dunlop,* 527 F. 2d. at 399.

> The test, therefore, to determine which activities are 'principal' and which are 'an integral and indispensable part' of such activities, is not whether the activities in question are uniquely related to the predominant activity of the business, but whether they are performed as part of the regular work of the employees in the ordinary course of business. It is thus irrelevant whether fueling and unloading trucks is 'directly related' to the business of electrical wiring; what is important is that such work is necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business.[37]

Under the *Dunlop* test, bobtailing is a principal activity. Bobtailing was certainly necessary to Moser's mail hauling business. The mail would not be hauled unless the drivers drove the trucks to the first facility to pick up the trailer. Bobtailing primarily benefited Moser. Without bobtailing, Moser would lose its USPS contracts, its only business.[38] And bobtailing was not just the ordinary course of activity for Moser drivers. It was the *only* way most of the drivers could begin to carry out their daily mail hauling duties in 1992-93.[39]

An earlier Fifth Circuit decision also dictates the conclusion that bobtailing is a principal activity. Bobtailing is a principal activity because, in effect, *Mitchell v. Mitchell Truck Line, Inc.*[40] says it is. The facts in *Mitchell* are very similar to those here, and the court's reasoning persuades us to adopt its conclusion.

The Secretary of Labor sued under the FLSA on behalf of eight Mitchell Truck Line drivers who sought unpaid wages for activities related to truck driving. These drivers picked up loads of sand, gravel, and similar highway construction materials at various plants, hauled the load to a construction site, and dumped the material. They continued this process throughout the day. The drivers were paid for the time between picking up the first load of the day until

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[37] *Id.* at 400-401.

[38] TR 616.

[39] The ALJ found that a "significant number" of drivers "were allowed to take their assigned trucks home and did so on a regular basis." R. D. & O. at 4. From home they drove the truck directly to their first route stop and hooked up the trailer. Then, from the last stop of the day, they drove the truck back to their home. However, the record is not clear that a "significant number" drove trucks from and back to their homes in 1992-93. Furthermore, because these drivers did not bobtail, that is, drive the truck from and back to the Moser terminal, the ALJ's finding is irrelevant.

[40] 286 F. 2d 721 (5th Cir. 1961).

delivering the last load to the construction site.[41] However, the court found that Mitchell had not paid for time spent (a) checking the truck's oil, grease, water, and tires at Mitchell's truck yard each morning, (b) driving from the Mitchell truck yard, or another temporary yard, to the materials plant for loading, (c) waiting in line for the first load at the materials plant, (d) returning to the Mitchell truck yard after dumping the last load of the day, and (e) cleaning, refueling, and finally parking the truck at the yard before going home.[42]

The court did not struggle to conclude that these were principal activities for which compensation was due. It rejected as "artful" Mitchell's contention that the drivers' only principal activity was hauling the materials from the plants to the construction sites. "[T]here can be no serious question about coverage and hence a liability . . . ." The drivers' "sole, only, and principal activity" was driving trucks.[43] The court concluded that the contested activities were outside the Portal Act exemptions, reasoning:

> The trucks, to be sure, were to haul particular kinds of things, but they could not do so unless the truck was driven. For the truck to be operated, it first had to be . . . serviced, then . . . driven from the truck yard to the material plant, . . . placed under a load and loaded, deliver its lead [sic] and . . . return to the truck yard for clean up and . . . refueling at night. These activities were *certainly* such an integral part and so indispensable to the employees' main job as to be outside of the Portal-to-Portal exemption.[44]

Mitchell stands on all fours with this case. That fact, along with the holding in *Dunlop,* and the clear direction in the Secretary's regulations interpreting the Portal Act, compel us to conclude that bobtailing is a principal activity, not a preliminary or postliminary activity qualifying as a Portal Act exemption. Accordingly, Moser must compensate the drivers for bobtail time accrued in 1992-93.

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41 *Id.* at 723-724.

42 *Id.*

43 *Id.* at 724-725.

44 *Id.* at 725 (emphasis added).

3. The Inspection Time is Compensable[45]

The Moser drivers performed three inspections. Before driving the truck to their first destination, they made a "pre-trip" inspection of the truck's lights, fluids, brakes, and tires. Upon arriving at the first postal facility and hooking the trailer onto the truck, they inspected the trailer's lights and brakes and made sure it was secured to the truck (the so-called "108 point inspection"). And back at the terminal near the end of their workday, they inspected the truck for damage that might have occurred that day (the "post-trip inspection").[46]

The ALJ concluded that time spent performing the pre-trip and post-trip inspections was not compensable.[47] This was error because the ALJ based this conclusion on the same faulty factual premise he used in analyzing bobtail time. He determined, in effect, that because the drivers did not have to pick up the trucks at the Moser terminal, any activity occurring at the terminal, before or after their runs, was not integral or indispensable to their principal activity of hauling mail.[48] This conclusion cannot stand because, as we found *supra*, the record clearly indicates that in 1992-93 the drivers did not have an "option" whether to begin and end their workday at the terminal.

However, the ALJ did find that both Moser policy and a United States Department of Transportation regulation required the drivers to inspect the trailer–the "108 point inspection"–when they hooked it to the truck after arriving at their first scheduled stop. The pertinent part of the regulation states:

> Before driving a motor vehicle, the driver shall: (a) Be satisfied that the motor vehicle is in safe operating condition; (b) Review the last driver vehicle inspection report; and (c) Sign the report, only if the defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to

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[45] Though "bobtailing" and debarment were the only issues the ALJ was asked to decide, he also made findings and conclusions about the compensability of the inspection activities. R. D. & O. 3-4, 11-12. The Acting Administrator informs us that "necessarily included" within the stipulated issue of bobtail time is the time spent performing the inspections. Acting Administrator's Brief at 3 n.3.

[46] R. D. & O. 3-4; Acting Administrator's Brief at 3 n.3. The drivers' testimony differs as to whether they inspected, what they actually did as far as inspecting, and how long it took them to inspect. *See* TR 72, 158, 195, 215, 267, 716-717, 732, 733, 850-53.

[47] R. D. & O. at 11.

[48] *Id.*

> listed defects on a towed unit which is no longer part of the vehicle combination.[49]

Therefore, he concluded that the time spent performing this inspection was an integral or indispensable part of their principal activity and thus compensable.[50] We concur.

But we also conclude that this regulation required the Moser drivers to inspect their trucks before driving them from the terminal to pick up the trailer. The regulation demands that a driver, *before driving a motor vehicle*, perform the various tasks. "Motor vehicle" includes the trucks as well as the trailers.[51] Time spent performing pre-trip safety inspections required by federal regulations is compensable.[52]

Furthermore, we conclude that Moser drivers were required to carry out safety related activities after they returned to the terminal. DOT safety regulation 49 C.F.R. § 396.11(a) mandates that motor vehicle drivers "prepare a report in writing at the completion of each day's work on each vehicle operated and the report shall cover at least the following parts and accessories: [brakes, steering, lights, tires, horn, wipers, couplings, mirrors, wheels, rims, and emergency equipment]." The report also "shall identify the vehicle and list any defect or deficiency discovered by or reported to the driver which would affect the safety of operation of the vehicle or result in its mechanical breakdown."[53] Mandated post-trip safety inspections, therefore, are also integral and indispensable to driving commercial motor vehicles.[54]

Thus, time spent performing the pre-trip inspection, the trailer inspection, and the post-trip inspection is compensable because those activities are also principal activities. They are integral and indispensable to the drivers' job of hauling mail to the postal facilities and are therefore not exempted by the Portal Act. We reiterate that the record does not clearly indicate the exact nature of the drivers' pre-trip and post-trip activities. *See supra* note 46. Time spent

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[49] 49 C.F.R. § 396.13 (2002).

[50] R. D. & O. at 11-12. The ALJ also concluded that the time spent hooking the trailer onto the truck was compensable. We concur with this conclusion too.

[51] "*Motor vehicle* means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, ..." 49 C.F.R. § 390.5.

[52] *Barrentine v. Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50-51 (8th Cir. 1984).

[53] 49 C.F.R. § 396.11(b).

[54] *Cf. Barrentine, supra*. We also note that the Moser employee manual requires drivers to remove debris from the trucks at the end of their shift. Respondent's Exhibit 9 at 4. Time spent performing this activity is therefore compensable and has been included as part of the stipulated calculation of "post-trip" inspection activity. *See* Administrator's Brief at 3 n.3.

performing the DOT mandated safety procedures would, of course, be compensable only to the extent that the drivers actually performed the required safety inspections. Nevertheless, the parties have stipulated that time spent performing "DOT required safety checks" has been correctly calculated.[55] We therefore find that the drivers actually performed the safety requirements.

CONCLUSION

Time spent bobtailing and inspecting the trucks and trailers is compensable because those activities are principal activities. Moser did not compensate specified drivers for bobtail time and pre-trip and post-trip inspection time, thereby violating the Act. Therefore, we reverse that portion of the ALJ's December 1, 2000 Decision and Order pertaining to liability for bobtail time and pre-trip and post-trip inspection time. Since the Administrator does not appeal the debarment issue, we affirm the ALJ's conclusion that because unusual circumstances existed, the names of the Respondents shall not be placed on the Comptroller General's list of persons found to have violated the Act. We also affirm the ALJ's January 5, 2001 Supplemental Decision and Order.

Consequently, pursuant to 41 U.S.C.A. § 352(a), Donald H. Schleining and Kristy S. Schleining are **ORDERED** to compensate the designated J.N. Moser Trucking, Inc. drivers, according to the stipulated calculations, for time spent bobtailing and performing pre-trip and post-trip inspections in 1992-93.[56]

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Administrative Appeals Judge

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[55] Respondent's Exhibit 1, para. 13.

[56] By stipulation, the Schleinings are the "parties responsible" under § 352(a). Respondent's Exhibit 1, para. 2.