IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1684
Summary Calendar

KENNY BAREFOOT, ET AL.,

Plaintiffs-Appellants,

v.

MID-AMERICA DAIRYMEN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-1817-X)

(February 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Twenty-six plaintiffs brought suit against Mid-America Dairymen, Inc. (Mid-America) to recover overtime compensation, liquidated damages and attorney's fees and costs under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. (the "FLSA" or "Act"). The district court granted summary judgment in favor of Mid-America on the basis of the motor

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

carrier's exemption, FLSA § 13(b)(1), 29 U.S.C. § 213(b)(1). We affirm.

I. BACKGROUND

Mid-America is a cooperative marketing association owned by approximately 9,000 dairy farmers with milk production facilities located in fifteen states including Texas. It markets unprocessed milk from sources inside the State of Texas for use in the production of dairy products inside and outside the state. Between 1988 and 1992, Mid-America's Texas plants shipped several million pounds of unprocessed milk to plants located outside of Texas.

The twenty-six plaintiffs were truck drivers employed by Mid-America between 1988 and 1992. The plaintiffs transported unprocessed milk from dairy farms in the Stephensville, Texas area to receiving plants in Dallas, Sulfur Springs, and some locations outside the State of Texas. Milk transported by the plaintiffs to the Sulfur Springs plant awaited further shipment to locations outside of Texas. Although the truck drivers often worked more than forty hours each week, none was ever paid one and one-half times his regular rate of compensation for the overtime hours.

The twenty-six truck drivers filed suit under § 16(b) of the FLSA, claiming entitlement to recover overtime compensation under § 7 of the Act. 29 U.S.C. §§ 207, 216(b). Both the plaintiffs and Mid-America filed motions for summary

judgment on March 1, 1993. The district court denied the plaintiffs' motion and granted summary judgment in favor of Mid-America, holding that the plaintiffs fell within the exemption to the FLSA's overtime compensation requirements found at section 13(b)(1) of the Act. 29 U.S.C. § 213(b)(1). The truck drivers appealed arguing that they do not fall within the exemption and therefore they are entitled to recover overtime pay. The sole issue on appeal is the applicability to the truck drivers of the motor carrier's exemption, § 13(b)(1) of the FLSA. 29 U.S.C. § 213(b)(1).

II. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo, applying the same criteria used by the district court. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). We review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party. Id. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

III. DISCUSSION

Section 7 of the FLSA requires employers to compensate employees engaged in commerce for workweeks longer than forty hours at a rate not less than one and one-half times the employee's regular rate of compensation. 29 U.S.C. § 207(a)(1). Section 13(b)(1) of the Act, however, exempts from the overtime requirements of section 7 any employee over whom the Secretary of Transportation has power "to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49."[1] 29 U.S.C. § 213(b)(1). The Secretary of Transportation need only possess the power to regulate the employees at issue; it need not actually exercise that power for the exemption to apply. Levinson v. Spector Motor Serv., 330 U.S. 649, 678 (1947). Exemptions under section 13 are construed narrowly against the employer, and the employer bears the burden of proving the applicability of a claimed exemption. Smith v. City of Jackson, Miss., 954 F.2d 296, 298 (5th Cir. 1992); Dalheim v. KDFW-TV, 918 F.2d 1220, 1224 (5th Cir. 1990). If, as in this case, the underlying material facts are not in dispute, the ultimate determination of whether an employee is exempt is a question of law. Smith, 954 F.2d at 298; Dalheim, 918 F.2d at 1226.

The Secretary of Transportation has the power to establish qualifications and maximum hours of service for

[1] Congress has repealed section 304 and recodified the section without substantive change as 49 U.S.C. § 3102. See Friedrich v. U.S. Computer Servs., 974 F.2d 409, 412 (3d Cir. 1992); Baez v. Wells Fargo Armored Serv. Corp., 938 F.2d 180, 181 n.1 (11th Cir. 1991).

employees who (1) are employed by carriers whose transportation of passengers or property by motor vehicle is subject to the Secretary's jurisdiction under the Motor Carrier Act (MCA); and (2) engage in activities of a character directly affecting the safety of operation of motor vehicles in the transportation on the public highways of passengers or property in interstate or foreign commerce within the meaning of the MCA. 29 C.F.R. § 782.2(a); Baez v. Wells Fargo Armored Serv. Corp., 938 F.2d 180, 182 (11th Cir. 1991). For the motor carrier exemption to apply in the instant case, the truck drivers must meet both requirements.

First, their employer, Mid-America, must be a motor vehicle carrier subject to the Secretary's jurisdiction--i.e., a carrier engaged in interstate or foreign commerce. 49 U.S.C. §§ 3102(a), 10521; see Foxworthy v. Hiland Dairy Co., 997 F.2d 670, 672 (10th Cir. 1993); Baez, 938 F.2d at 182; Shew v. Southland Corp. (Cabell's Dairy Div.), 370 F.2d 376 (5th Cir. 1966). A carrier engages in interstate commerce by either actually transporting goods across state lines or transporting within a single state goods that are in the flow of interstate commerce. Merchant's Fast Motor Lines, Inc. v. I.C.C., 528 F.2d 1042, 1044 (5th Cir. 1976). The evidence is undisputed that Mid-America was engaged in the transport of goods in interstate commerce. Between 1988 and 1992, Mid-America shipped millions of pounds of unprocessed milk from its Stephensville and Sulfur Springs facilities to locations in other states, including Alabama,

Arkansas, Minnesota, Mississippi, and Missouri. Therefore, the first requirement for jurisdiction under the MCA--that the employees work for an interstate carrier--is satisfied.

As noted above, the employee himself must also be engaged in interstate commerce before the Secretary of Transportation has jurisdiction over him, and his employment must directly affect the safety of operation of vehicles on the public highways. 29 C.F.R. § 782.2(a); Baez, 938 F.2d at 182; Galbreath v. Gulf Oil Corp., 413 F.2d 941, 944 (5th Cir. 1969). The plaintiffs, as truck drivers, clearly engaged in activities directly affecting the safety of operation of vehicles on public highways. See Shew, 370 F.2d at 380; Opelika Royal Crown Bottling Co. v. Goldberg, 299 F.2d 37, 42-43 (5th Cir. 1962). Therefore, the sole remaining question is whether the plaintiffs engaged in interstate transportation--i.e., the actual transport of goods across state lines or the intrastate transport of goods in the flow of interstate commerce. Merchant's Fast, 528 F.2d at 1044.

The truck drivers conceded that, among the twenty-six of them, at least twenty trips were made across state lines to deliver unprocessed milk. Although these twenty trips represent a small portion of the truck drivers' work for Mid-America, "it is the character of the activities, rather than the proportion of the employee's time or activities," that determines the jurisdiction of the Secretary under the MCA. Morris v. McComb,

332 U.S. 422, 431 (1947); Levinson v. Spector Motor Service, 330 U.S. 649, 674 (1946).

Moreover, even if the plaintiffs had not made these trips across state lines, they nevertheless would have transported Mid-America's unprocessed milk in interstate commerce. Transportation between two points in the same state remains interstate in nature if it is part of a "practical continuity of movement" of goods ultimately bound for destinations beyond the state. Merchant's Fast, 528 F.2d at 1044; Galbreath 413 F.2d at 944; Shew 370 F.2d at 380 (stating that the transport of goods originating out of state remains interstate if the interstate and intrastate legs of the journey form a continuous movement). The plaintiffs delivered unprocessed milk from the Stephensville area to the Sulfur Springs receiving plant, where it was temporarily stored until transported to plants located in states other than Texas. The movement of the milk from the farms near Stephensville to Sulfur Springs and to processing plants in different states constituted a continuous movement of goods in interstate commerce.

The plaintiffs argue that the halt of the unprocessed milk at Sulfur Springs interrupted the continuous interstate movement, thereby transforming their leg of the journey into purely intrastate transportation. However, the storage of goods for a short interval does not disrupt the continuity of an interstate movement if it is a "convenient intermediate step in the process of getting [the goods] to their final destination."

Opelika, 299 F.2d at 40. Also, the fact that the milk was neither processed at Sulfur Springs, nor commingled with milk from sources other than Mid-America, supports the conclusion that the Sulfur Springs halt did not change the interstate character of the shipment. See Galbreath, 413 F.2d at 947.

IV. CONCLUSION

The plaintiffs were subject to the jurisdiction of the Secretary of Transportation under the Motor Carriers Act because they were employed by an interstate motor carrier and their activities affected the safety of operation of vehicles in interstate commerce. Therefore, they are exempt from the overtime compensation requirements of the FLSA under the motor carrier's exemption, section 13(b)(1) of the Act. 29 U.S.C. § 207(a), 213(b)(1). The district court correctly granted summary judgment in favor of Mid-America based on the applicability of this exemption. Accordingly, we affirm.

AFFIRMED.