No. S248702

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES E. WARD, ET AL., *Appellants and Petitioners*,

v.

UNITED AIRLINES, INC., *Defendant and Respondent.*

AFTER DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 16-16415
THE HONORABLE JUDGE WILLIAM ALSUP, CASE NO. 3:15-CV-02309-WHA

DEFENDANT AND RESPONDENT UNITED AIRLINES, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

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Attorneys for Defendant and Respondent United Airlines, Inc.

Pursuant to California Evidence Code §§ 451(a), 452(d)(1) and 459 and California Rules of Court 8.252, Defendant-Respondent United Airlines, Inc. ("United") requests that this Court take judicial notice of two legislative history documents relevant to the arguments in United's Answer Brief on the merits, submitted herewith: 1) The Assembly Committee on Labor & Employment, Report Re: AB 2509 (1999-2000 Legislative Session); and 2) the Statement of Findings by the Industrial Welfare Commission of the State of California in Connection with the Revision in 1976 of Its Orders Regulating Wages, Hours, and Working conditions (dated August 13, 1976). True and correct copies of these documents are attached hereto as Exhibits A and B.

United requested that the Ninth Circuit Court of Appeals take judicial notice of these documents in the *Ward* and *Vidrio* appeals, and that court granted United's request. The two legislative history documents are directly relevant to the matters discussed in United's Answer Brief, as they illustrate the animating purposes behind California Labor Code Section 226 and Wage Order 9, Section 1(E) (the RLA Exemption). Because the documents are true and correct copies of publicly-available records of the California Legislature and the Industrial Welfare Commission, United respectfully requests that this Court take judicial notice of these documents.

Dated: November 9, 2018

O'MELVENY & MYERS LLP

By: 

Adam P. KohSweeney
Attorneys for Defendant/Respondent
United Airlines, Inc.

EXHIBIT A

BILL ANALYSIS

Date of Hearing: April 12, 2000

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT
Darrell Steinberg, Chair
AB 2509 (Steinberg) - As Introduced: February 24, 2000

SUMMARY : Revises statutes relating to the administrative and civil enforcement of wage and hour laws including wage collection and enforcement procedures before the Labor Commissioner (Commissioner). Specifically, this bill :

1)Provides that in an administrative wage claim proceeding (Berman hearing) before the Commissioner, a notice for production of documents, which is served by mail, may be used in lieu of subpoena, which requires personal service.

2)Provides that the legal rate of interest on due and unpaid wages at a Berman hearing shall be at the rate established by Civil Code Section 3289(b), which is 10%.

3)Provides that following a Berman hearing, an employer filing an appeal shall post an undertaking in the amount of the Commissioner's final order, decision or award. Provides further that the requirement of judicial arbitration does not apply in such proceedings. Provides that in cases where the Commissioner represents the wage claimant in such proceedings, the Commissioner may be awarded attorneys fees in the same manner as private counsel representing a wage claimant.

4)Provides if the United States Department of Labor (Labor Department) determines that the Commissioner has erred in dismissing the complaint of an employee of unlawful retaliation, as specified, the Commissioner shall, within 15 days after receipt of the Labor Department's determination, either notify the parties of the ongoing of the investigation of the employees complaint, or shall issue a new determination in the matter.

Provides that an employee may file a civil action for unlawful retaliation, as specified, without first filing a discrimination claim before the Commissioner, and that the limitation periods for such administrative remedies do not apply in such a civil action.

5)Provides that the parent of and substantial shareholders in a

corporation are jointly and severally liable with the corporation for unpaid wages and penalties. Defines "substantial shareholder" as provided in Labor Code section 3717, as a shareholder who owns at least 15 percent of the total value of all classes of stock, or fifteen percent of the beneficial interests in the corporation.

6)Provides that a successor, as defined, to an employer who owes wages to his or her former employees is liable for those wages.

7)Provides that in cases where wages are paid with a check for which payment is refused due to insufficient funds, the imposition of up to 30 days' waiting time penalties applies to all employers, rather than employers only in the building and construction industry.

8)Clarifies that Labor Code Section 1194, which provides for an award of attorneys fees for an employee in cases involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorneys fees in other wage cases.

9)Provides that the legal rate of interest on due and unpaid wages in a civil action for unpaid wages shall be established by Civil Code Section 3289(b), which is 10%.

10)Provides that an employer's itemized wage statement shall include, among other information, the number of piecework units earned and any applicable piece rate if paid on a piecework basis, and for non-exempt employees, the applicable hourly rates in effect during the pay period and the hourly rate of pay and hours worked, where applicable.

Clarifies that the employer shall keep specified payroll records for employees paid in cash and by check.

Provides, in the case of a knowing and intentional failure by an employer to comply with the itemized wage statement requirements, for an employee to recover a penalty of up to $100 per payroll period up to a maximum of $10,000. Provides that an employee may bring a complaint before the Commissioner or file a civil action for damages or penalties, and attorney's fees.

11)Provides that in a case where an employer fails to maintain records that identify each employee to whom wages are paid, penalties shall be computed by multiplying the number of employees employed on the date the penalty for the preceding year, unless the employer affirmatively establishes evidence that supports a lesser penalty based upon proof of a lesser number of affected employees.

12)Provides for penalties for an employer who violates the requirement that no employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission (IWC). Provides for penalties of $50 per employee per pay period and payment of an amount equal to twice the average hourly rate of compensation for the employee for the full length of the meal or rest period. Provides that an employee may bring a complaint before the Commissioner or file a civil action or for damages or penalties, and attorney's fees.

13)Provides that the Commissioner may order an employer to post a bond if the employer fails to satisfy a final judgment for interest, penalties and other demands for compensation within the jurisdiction of the Commissioner, as well as unpaid wages. Provides that the bond shall cover such interest, penalties, or other demands, as well as unpaid wages.

14)Provides that the Commissioner shall, under specified circumstances, order the employer to post a workplace notice

describing the nature of a violation and related information.

15) Provides that any amounts paid directly by a patron to a dancer employed by an employer subject to IWC Order No. 5 or 10 shall be deemed a gratuity.

16) Prohibits an employer from deducting from a gratuity indicated by a patron on a credit card slip any credit card payment processing fee or cost. Requires payment of gratuities made by credit card to be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.

17) Provides that an employer shall maintain payroll records showing the number of piece-rate units earned by and any applicable piece rate paid to employees.

18) Provides that the civil penalty for an employer who willfully fails to maintain specified payroll records includes, in addition to records required by statute, records required by any applicable wage orders of the IWC. Revises the penalty for a violation of this section from $500 to $100 per employee for each payroll period up to a maximum period of three years.

19) Provides that the liquidated damages for a violation of minimum wage laws may be awarded in a hearing before the Commissioner in the same manner as a civil action under current law.

20) Provides that with respect to a claim for a failure to pay minimum wages, the Commissioner may, in the same proceeding, order both payment of wages owed, interest thereon, statutory liquidated damages and civil penalties.

EXISTING LAW :

1) Provides in a Berman hearing for documents to be obtained by subpoena served by personal service, but not a notice delivered by mail.

2) Establishes the rate of interest on unpaid wages a Berman hearing based on a statute which has been repealed.

3) Provides for the appeal to and a de novo review in court of the Commissioner's order, decision, or award following a Berman hearing.

4) Provides for an appeal to the Labor Department of a dismissal of an employee's complaint of unlawful discrimination.

5) Provides under Labor Code section 2717 for a civil action to hold substantial shareholders of a corporation without workers' compensation insurance liable for reimbursement of the Uninsured Employers Fund.

6) Provides under Labor Code section 2684 that in garment manufacturing, a business which is a successor to an employer who owes wages to the former employees is liable for those wages if the successor meets specified criteria.

7) Provides a penalty of up to 30 days' wages for an employer in

the building and construction trades who intentionally pays wages with a check for which payment is refused due to insufficient funds.

8)Provides for an employee to recover in a civil action for a failure to pay minimum wage or overtime compensation reasonable attorney's fees, and costs of suit.

9)Provides under Civil Code Section 3289(b) for recovery of interest at a rate of 10% in a civil action for a breach of contract, as specified.

10)Provides that when wages are paid, an employer shall issue an itemized wage statement including specified information including net and gross wages earned; total hours worked; the dates of the period covered; and all deductions.

Provides, in the case of a knowing and intentional failure by an employer to comply with the itemized wage statement requirements, an employee may recover a penalty of actual damages or $100, whichever is greater, plus costs and reasonable attorneys fees.

11)Provides that an employer who violates the itemized wage statement requirements is subject to a civil penalty in the amount of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation. Provides that the Commissioner shall take into consideration whether the violation was inadvertent, and may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.

12)Provides, under Wages Orders of the IWC for meal periods and rest periods. Provide under the Wage Orders for an "on duty" meal period when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to.

13)Provides that the Commissioner may order an employer to post a bond to ensure future payment of wages in cases where the employer has failed to satisfy a final judgment for nonpayment of wages.

14)Provides for employers to post specified information including applicable wage orders of the IWC, information on safety and health, harassment and discrimination in employment, and rights under the Family and Medical Leave Act.

15) Defines "gratuity" to mean any tip, gratuity, money or part thereof, which has been paid or given to or left for an employee by a patron of a business over and above the actual amount due for services rendered or for goods, food, drink, or articles sold or served to the patron.

16) Provides that no employer shall collect, take or receive any gratuity or part thereof paid, given or left for an employee by a patron, or deduct any amount form wages due an employee on account of such gratuity. Provides that this prohibition does not apply under specified circumstances.

17) Requires an employer to keep payroll records containing specified information including the names, addresses and hours worked daily by employees.

18) Provides a civil penalty of $500 for an employer who fails to keep specified payroll records.

19)Provides that the liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon for a violation of minimum wage laws may be awarded in a civil action.

20)Provides for the Commissioner to issue a civil penalty citation of $50 for an initial violation of minimum wages and $250 for subsequent violations, and establishes a proceeding to contest such a penalty citation.

Provides for the Commissioner to order payment of minimum wages owed to an employee in a separate proceeding before the Commissioner under Labor Code section 98.

FISCAL EFFECT : Unknown

COMMENTS :

1)Current statutes, regulations, and wage orders of the IWC establish requirements for the payment of wages including

minimum wages and overtime, hours of work, and a framework of administrative and civil remedies for violations of wage and hour laws. This bill revises the administrative and civil procedures, remedies and record keeping requirements for the stated purpose of strengthening enforcement of existing wage and hour standards. It does not increase minimum wages or revise overtime requirements.

2)Revisions in the administrative procedures for wage claims before the Commissioner and appeals of the Commissioner's decision include:

a)Allowing records to be obtained through a notice, rather than a subpoena. A subpoena, which is allowed under current law requires personal service. A notice may be mailed.

b)Allowing the commissioner to combine two separate proceedings established under current law, one for payment of minimum wages owed, and another for civil penalties for failure to pay minimum wage, into a single proceeding.

c)Providing that the Commissioner may award liquidated damages for a minimum wage violation instead of requiring the Commissioner or employee to file a civil suit to recover such damages. Under current law such damages may be recovered in a civil action by the Commissioner or the wage claimant, but not in an administrative hearing before the Commissioner.

d)Establishing the rate of interest on unpaid wages at 10% in both administrative and civil court cases. Current law cites a repealed section and is confusing.

e)Requiring an employer appealing a Commissioner's order following a hearing to post an undertaking and waiving the requirement for judicial arbitration in such cases. The judicial arbitration hearing may be viewed as redundant to the Berman hearing in these cases.

3)Revisions related to wage and payroll records include:

a)Providing that itemized wage statements and central payroll records include piece rate and hourly pay rate information for piece rate and hourly workers.

b)Increasing the penalties for violation of itemized wage statement and central payroll records requirements.

c)Shifting the burden of proof concerning the number of workers at an establishment where payroll records are missing.

4)Revisions related to penalties for violations of other wage and hour standards include:

a)Applying penalties for intentionally issuance of a bad (insufficient funds) payroll check applies to all employers rather than construction employers only. Under current law, the penalty is limited to construction employers.

b)Requiring an employer determined by the Commissioner to have engaged in a pattern and practice of wage law violations to post a workplace notice of findings and the Commissioner's telephone number to report further violations.

5)Revisions for the purpose of clarifying existing law include:

a)Clarifying that an employee may bring a civil action for unlawful retaliation without exhausting administrative remedies, as specified, with the Commissioner.

b)Clarifying that Labor Code Section 1194, which provides for an award of attorneys fees for an employee in cases involving failure to pay minimum wage and overtime wages, is separate from, and not controlled by Labor Code Section 218.5, which provides for prevailing party attorneys fees in other wage cases.

6)This bill also provides for unpaid wages to be collected from substantial shareholders and successor entities under specified circumstances. The substantial shareholders provision is based on substantial shareholder liability for corporations which lack workers' compensation insurance. The successor entity provision is based on the existing provision related to successor liability for unpaid wages in the garment manufacturing industry.

7) Last year the supporters sponsored similar legislation in AB 633 and AB 1652, which passed and were vetoed. This bill does not contain a number of controversial provisions proposed in last year's legislation. For example, it does not establish a private right of action to recover and share in a portion of the state's civil penalties for wage violations, and for minimum wage and overtime violations. It does not carry forward a proposal to establish liquidated damages for overtime violations. It does not prescribe the Commissioner's required efforts to collect wage judgements.

8) Supporters state that California has a large and growing "underground economy" of employers who are chronic violators of wage and hour, safety, and tax laws. Such employers pay cash under the table or with checks that bounce, fail to report and pay employment taxes, work their employees long hours without rest breaks, and avoid paying wage judgments issued against them. They cheat workers out of billions of dollars in wages owed to them under minimum wage and overtime laws. California's underground economy supplants an estimated $60 billion in legal business transactions. According to executive orders concerning the expanding underground economy issued by Governor's Deukmejian and Wilson, the state's loss of income taxes alone increased from $2 billion in 1986 to $3 billion in 1993.

They state that this bill streamlines the Commissioner process by allowing document requests by mail; by allowing the commissioner to re-open a discrimination case on remand from the Department of Labor; and providing for a "one-stop" civil penalty system where both wages and penalties can be recovered at one time; ensures that workers are provided adequate record keeping information, ensures that employers cannot easily escape wage liability, and that this bill clarifies areas of the law.

9) Opponents state that they have serious concerns regarding nearly all of the twenty-nine changes proposed by this bill and their impact on California's employers who even inadvertently violate a wage and hour law. These include: authorizing the Commissioner to create new, different rules of evidence and subpoenas process for wage and hour claims; eliminating judicial discretion to require non-binding arbitration on appeals; reopening of previously dismissed claims when letters criticizing a state program are filed with

the U.S. Department of Labor; establishment of joint, and several liabilities for substantial shareholders, parent corporations and successors for unpaid wages and penalties; mandated private taxpayer payment of civil servant attorneys; wage and hour claims permitted in civil court prior to exhaustion of administrative remedies; new commissioner authority to assess civil damages, including liquidated damages; and new mandated payment of restitution plus civil penalties for failure to pay minimum wage consisting of all underpaid wages, any interest owed and statutory liquidated damages.

REGISTERED SUPPORT / OPPOSITION :

Support

American Federation of State, County and Municipal Employees
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Labor Federation, AFL-CIO
Employment Law Center, Legal Aid Society of San Francisco
Engineers and Scientists of California
Exotic Dancers Alliance
Hotel Employees, Restaurant Employees International Union
Mexican American Legal Defense and Educational Fund
Region 8 States Council of the United Food & Commercial Workers
Service Employees International Union
Transport Workers Union of America

Opposition

Associated General Contractors
California Chamber of Commerce
California Manufacturers and Technology Association
California Retailers Association
Civil Justice Association of California
Western Growers Association

Analysis Prepared by : Ralph Lightstone / L. & E. /
(916)319-2091

EXHIBIT B

Adopted Sept 7, 1976

STATEMENT OF FINDINGS

BY THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA

IN CONNECTION WITH THE REVISION IN 1976 OF ITS ORDERS REGULATING WAGES, HOURS, AND WORKING CONDITIONS

August 13, 1976

INDUSTRIAL WELFARE COMMISSION

Howard Alan Carver, Chairperson
Joyce Valdez
Mike Elorduy
Jackie Walsh
Yvonne P. Aguilar

Division of Labor Standards Enforcement
James L. Quillin, Chief

Department of Industrial Relations

Agriculture and
Services Agency

State of California

STATEMENT OF FINDINGS
BY THE INDUSTRIAL WELFARE COMMISSION OF THE
STATE OF CALIFORNIA
IN CONNECTION WITH THE REVISION IN 1976 OF ITS
ORDERS REGULATING WAGES, HOURS AND WORKING CONDITIONS

Introduction

The legislature of this state created the Industrial Welfare Commission 63 years ago when it was persuaded that women and minors employed in California often had to work under inhumane conditions and for inadequate pay because they had no power to secure more reasonable treatment.

At 16 cents an hour or ten dollars for a 60-hour week, the first minimum wage that the Commission set in the canning industry in 1916, was more than what the majority of the affected workers were then earning.

Appointed by the Governor for staggered four year terms, the Commission usually consisted of two representatives for the employees, two for employers, and one for the public, but the only legal requirement was that one Commissioner be a woman. At first that women was Katherine Edson, who had fought for creation of the commission and then served as its primary enforcement officer. There was no Division of Industrial Welfare in those days to enforce Industrial Welfare Commission regulations.

Those early commissioners were brave. In 1920 they found that women and minors were being overworked and underpaid in agriculture. They issued an order requiring premium pay for overtime work in the fields--one and one quarter times the minimum wage after eight hours in a day and on Sunday and forty-eight hours in a week and double time after twelve hours a day, with two and a half times the minimum after the first eight hours of work on Sunday. But, without an administrative arm, the Commission had to rely on warnings in capital letters that a violation would be a misdemeanor, and, that failing, the Industrial Welfare Commission cancelled the order two years later, explaining that it was unable to enforce the law.

"I.W.C." -- that was what the Industrial Welfare Commission came to be called as it issued orders protecting women and minors working in one industry after the other. They are now known as: Order 1, Manufacturing Industry; Order 2, Personal Service Industry; Order 3, Canning, Freezing and Preserving Industry; Order 4, Professional, Technical, Clerical, Mechanical and Similar Occupations; Order 5, Public Housekeeping Industry; Order 6, Laundry, Linen Supply and Dry Cleaning Industry; Order 7, Mercantile Industry; Order 8, Handling Products After Harvest (covering commercial packing sheds); Order 9, Transportation Industry; Order 10, Amusement and Recreation Industry; Order 11, Broadcasting Industry; Order 12, Motion Picture Industry; Order 13, Preparing Agricultural Products for Market (on the farm); Order 14, Agricultural Occupations; Order 15, Household Occupations.

On-site construction, on-site drilling and mining, and on-site logging operations are not covered by I.W.C. orders because wage boards representing those activities have not been called.

The legislature itself passed the basic law controlling the hours of women--the Eight Hour Law--about the time that it created the I.W.C., and listed the relatively few industries in which women were employed and to which it applied. Industries that were exempted, such as canning and agriculture, and industries into which women moved later, were regulated by the Commission. Other labor legislation was also adopted in the belief that a prospering economy and a stable social structure required fair play for employees and dependable ground rules for the conduct of business. On the whole, the legislature was content to let the Commission do the prolonged work of investigating conditions industry by industry and of increasing the minimum wage as it became necessary.

Whenever the Commission proposed to raise the minimum wage or make other significant changes, it was told that business would collapse or move out of the state. The Commission finds the contrary. The decades since the advent of the I.W.C.

have seen California emerge as one of the most populous and prosperous states in the nation. Although unemployment is worrisome, it is general throughout the country. Automation, mechanization of agriculture, and migration of plants are general phenomena that have taken place with little or no connection to the I.W.C.'s regulations. Indeed, judging from the public response to this revision of the I.W.C. orders, large sections of industry seem not to have been aware of the Commission's existence at all.

Doubtless that is due to the fact that the Commission's orders covered only women and minors. True, it often happened that men also benefited from them. When an exhaust fan is installed to expel intolerable steam, every worker in the room feels the result. But in many plants and occupations there were no women at all. As pressure for laws guaranteeing equal employment of women developed, the charge often was made that legislation especially protecting women was also keeping them out of jobs. In California, women had to be paid overtime; men did not. They had to have rest periods and duty-free meal periods; men did not. There was a limit on how much a woman could be required to lift, but no limit for men.

In 1970 the people of California amended Article 20 of the state constitution to permit the legislature to give the I.W.C. authority to regulate for all employees. In June 1971 a court rules in the Rosenberg case that the ceiling on hours that could be worked by women was invalid, and that the maximum lift also was discriminatory and not valid. Hence, other I.W.C. regulations also were under a cloud.

Then in 1972 the legislature amended section 1171 of the Labor Code to give the Industrial Welfare Commission authority to set a minimum wage for all employees in the state, some eight and one-half million. Of these, about one and one-half million were working for pay close to the minimum wage and sometimes below, since they were not among those covered by federal standards. In the following year, AB 478 was passed to give the Commission the job of regulating hours and working conditions for men as well as for women and minors and to forestall any conflict in jurisdiction with the Occupational Safety and Health Standards Board, generally known as Cal/OSHA.

The timing was awkward for the Commission. It had been able in 1973 to appoint wage boards and to go through the process required to set minimum wage without any problem, but its procedures in hurrying to get out orders on working conditions at the same time left it open to a successful court challenge by the AFL-CIO. The 1974 minimum wage order went into effect, but the other orders did not.

This Commission, then faced the monumental task of revising orders which were eight years old and which had been made obsolete both by civil rights laws prohibiting inequality in employment practices based on sex and by the regulation of some working conditions by Cal/OSHA. It was further pressed by a U. S. Supreme Court decision last January which sustained a ruling that the requirement for overtime for women was in conflict with the Civil Rights Act.

The I.W.C. began its task last August by asking employers and their associations and employee organizations to recommend people to serve on fifteen wage boards--one for each industry or occupational group covered by an order. In November, the Commission appointed the wage boards, each with an equal number of members representing employers and employees. Impartial chairpersons with professional backgrounds in economics and mediation were selected to represent the commission. Altogether 185 people contributed their expertise in a series of meetings early this year. Employer and labor groups submitted much written material for study by the boards. The Commission carefully considered the wage board recommendations when it drew up its proposals. It sought and received further information in eight days of public hearings in three cities early in June. More than 450 persons spoke, at least 1500 attended, and 680 written statements were submitted before the Commission went into executive session this month to revise its proposals. The Commissioners listened attentively and read carefully, always mindful of the intent of the legislature expressed in Section 11 of Chapter 1007 of the Statutes of 1973 that the I.W.C. interpret its "duty and authority . . . in a manner which does not cause undue hardship and loss of employment opportunities in any segment of industry in California".

The Commission must conclude from the facts that legislature intended for it to establish reasonable standards for minimum wages, hours and working conditions for men as well as for women, and that it must have known that any such standards would have some impact on some sections of business and industry. Much testimony pointed to potentia effects of which the Commissioners had not been fully aware, and the final orders reflect changes made in response to such information.

In making its regulation of hours more flexible, in recognizing the force of collective bargaining agreements, in exempting certain employees from certain provisions, in deleting its proposed requirement for resilient flooring, in recognizing the tradition that some persons engaged in crafts provide their own tools, and in many other respects, the Commission has minimized the impact of its orders to the degree that it deemed to be justified by the facts. If experience demonstrates that other changes need to be made, the opportunity to correct these I.W.C. Orders of 1976 will come in 1978, since the law now requires the Commission to review its regulations every two years.

Reviewing its 1976 Orders section by section, the Industrial Welfare Commission makes these statements on its findings.

1. APPLICABILITY

Industry representatives asked that "primarily" be substituted for "predominantly" intellectual, etc. in subsection (1), because they were used to working with the exemption of supervisory employees in the federal Fair Labor Standards Act. The best objective standard of "primary duty", an FLSA bulletin declares, is that over 50 percent of the employee's time be spent on supervisory duties, and is related to the frequency with which the employee exercises discretionary powers and the relative extent to which the employee is free from supervision. This and the relationship of the wage of the supervisorial employee to that of the non-exempt employee were deemed adequate protection against abuse.

Certain employees were exempted in the Applicability section from provisions of Order 9-76, Transportation. The Commission found that it would be difficult to enforce standards for employees crossing state lines and that the exempted employees were better protected by their collective bargaining agreements pursuant to the Railway Labor Act.

Ride operators who assemble and disassemble and move ride equipment in travelling carnivals have unusual arrangements for hours and wages which justify their exemption from the wage and hours sections of Order 10, the Commission found.

Requests by hospital management that health care facilities be separated out from Order 5, Public Housekeeping, will be further considered by the Commission before it appoints wage boards for its next review of the orders.

Sheepherders were exempted from provisions of Order 14, Agricultural Occupations, in response to descriptions in the hearings of how sheepherders travel to pasture and camp with their flocks. The Commission intends only such sheepherders to be exempt, and does not include shearers or employees who tend sheep as part of their duties on a farm.

In Order 15, the Commission did not include the specific exemption of government employees, deeming it to be unnecessary, but such exemption is implicit. The Order states that it applies only to persons employed by private householders.

Employees of agencies which dispatch workers to households are covered by Order 5, Public Housekeeping.

The Commission found that household occupations, including baby sitters employed more than 8 hours a week, have been covered by the federal minimum wage law since May 1974, and by the state minimum wage law since March 1974. Certain payroll records also are required for Social Security. Consequently the attempt to give household employees some of the standard protections accorded to other employees would not be unreasonably burdensome, especially considering the fact that household employees

have long suffered disproportionately from unequal treatment.

The Commission decided to drop its proposal to cover baby sitters and to let federal law prevail when it became apparent that many of the low-paid workers it is obligated to protect would have to pay out more for baby-sitting than they could earn in a day.

2. DEFINITIONS

"Workday" and "workweek" were added in response to frequent requests, since it is reasonable that all parties should be clear about the rules. The definitions adopted are flexible enough to allow for many kinds of scheduling, restrictive enough to prevent abuses in scheduling, and in harmony with the Walsh-Healey law on which many industries base their practice.

An expanded definition of "employee" was used in Orders 2, Personal Service; 5, Public Housekeeping; and 7, Mercantile; because of the problem of determining whether booth renters in beauty shops are covered by the Order. The wording was carefully developed and unanimously approved by members of Wage Board #2.

The definition of "hours worked" was expanded in Order 5, Public Housekeeping, to deal with the difficulty that resident managers of apartment houses and motels have in keeping track of hours actually worked. The language allows for recognition of agreements which would realistically reflect hours worked, without requiring detailed record-keeping . Any estimate of hours worked incorporated in such an agreement must bear a reasonable relationship to the duties required, the size of the establishment, and the amount of time on the premises that the employee is free to devote to his or her own uses.

The definition of "Broadcasting Industry" was changed to include "taping for broadcast", in response to a reasonable request by the industry.

3. HOURS AND DAYS OF WORK

The Commission continues to find, as it has for decades, that certain employers overwork employees who are in a weak position to refuse to work long hours, and that premium pay for overtime is a means of deterring such practices, while permitting occasional longer days when peak work loads require them.

At the same time it is mindful of the economic impact imposing overtime regulations on industries which have made other arrangements with their employees through collective bargaining. The Commission is aware that such agreements do not always represent strong bargaining power by the employees and that minimal overtime provisions cannot always be presumed to represent a trade-off for other benefits. It has found that its primary responsibility for protecting employees against overwork extends to those without adequate collective bargaining protection. Based on the adequacy of collective bargaining, the Commission has included in Orders 1, 4, 6, 7, 9, 11, and 12 a provision directing that the premium pay and hours provisions of collective bargaining agreements shall prevail over the provisions of basic I.W.C. regulations on Hours and Days of Work. This served to ameliorate the impact on industries in which non-conforming work schedules were balanced by contract provisions improving the welfare of employees in other ways. The Commission did not deem it necessary to include this provision in Order 3, since the collective bargaining contracts in the canning, freezing and preserving industry have long conformed to the I.W.C. pattern, the wage board for the industry was in general agreement on hours, and the small number of employees who are not covered by collective bargaining agreements continue to need the protection of the order.

The Commission also found that there is a growing movement among employees, as well as among employers, toward more flexibility in the hours and days of work. In allowing for a week of four ten-hour days without overtime, a majority of the Commissioners found that the welfare of employees was served by reducing the amount of travel to and from work, and by having the option of a schedule providing three days

off in the week. It dropped its proposals in subsection (B) that they be four consecutive days and allowed four days within five, with the intent of assuring employees at least two consecutive days off. Several drivers of laundry trucks had testified that they work such a schedule and find it advantageous to themselves as well as necessary to their employers.

Public testimony persuaded the Commission that it was unreasonable to allow one employee to refuse to work such a schedule and thus disrupt an otherwise acceptable arrangement. It therefore provided that two-thirds of the affected employees must agree to such a schedule, and it deleted a paragraph which said an employee could not be disciplined for refusing to work the schedule.

Many industry representatives described situations in which it would be impractical to insist upon a 12 hour span between an employee's shifts. The Commission found that the provision was a confusing and unnecessary holdover related to previous regulations and therefore deleted the requirement.

It is implicit in the requirement for premium pay on the seventh day that the seventh day of work is intended.

Representatives of long haul drivers, both on the wage board and in the public hearing, testified that their basic wage rates, sometimes based on mileage, incorporate premium pay for anticipated overtime. They asked that drivers whose hours of service are regulated by the U. S. Department of Transportation be exempted. The Commission found that these federal regulations provide daily and cumulative limits on the number of hours that can be worked without time off and exempted such drivers from the section on Hours and Days of Work.

Irrigators were exempted from overtime provisions of Order 14-76, Agricultural Occupations, because employers described their work as intermittent, with long rests between operations. The Commission found that such an exemption probably is realistic. It noted, however, that many irrigators are employed at other tasks in their workdays, and calls attention to the requirement that irrigators are exempted only in the weeks during which more than half their time is spent at duties described in standard job classificatio of irrigators.

4. WAGES

The charge of the IWC is to estimate a "minimum wage adequate to supply the necessary cost of proper living". This charge implies that the minimum wage is not a poverty level figure.

The $2.50 minimum wage must be viewed in the context of purchasing power which takes account of increases that have occurred in the cost of living.

In considering the new minimum wage, the Commission noted that the $2.00 minimum established in March 1974 meant that the worker could purchase $1.45 worth of goods in terms of 1967 dollars. By setting the new minimum at $2.50, the value in 1967 dollars is estimated at $1.46. Hence, even though in nominal terms the minimum wage increase is 25 percent between March 1974 and October 1976, there is no increase in the minimum wage when it is converted into the 1967 dollar purchasing power.

The Commission noted further that the $2.50 minimum is 46 percent of straight-time average hourly earnings in manufacturing, which is the same percentage that existed in March 1974.

The lesser rate for minors and learners of $2.15 per hour is the same 85 percent of the full minimum wage that it was in the 1974 wage order.

The provision for a lesser rate for students, which appeared for the first time in the 1968 orders, was deleted because a majority of the commissioners found that it had been ill used and that fully mature college students had been underpaid for work equal to that of any other employee. The minority felt that deletion of the provision would contribute to the serious unemployment of youth. High school students, however, can still be employed at the lesser rate for minors. The Commission found that their opportunities for jobs would be increased by removing the restriction on the number who could be employed during school vacations. The Commission meant for these to be extended vacations, for summer recess, Christmas and Easter, and not long weekends.

The lesser rate for Leaners of any age allows beginners about one month to try out on a new job at a lesser rate.

Many requests were received from the hotel and restaurant industry for a special, lower wage rate for tipped employees. Impressive statements were submitted and studied. The Commission denied the request, however, for two reasons. First, and most important, the Legislature specifically revoked the authority it had earlier given the I.W.C. to allow credit for tips against the minimum wage, when it amended Section 351 of the Labor Code this year. Second, some Commissioners concluded from testimony about the sharing of tips that, if a special rate were allowed, most classifications of restaurant employees would be made vulnerable to such deductions, and those actually receiving tips from customers for personal service would be subsidizing wages of other employees even more than at present.

5. REPORTING TIME PAY

The majority of the Commissioners concluded that the language of the 1968 orders was more flexible than that in the proposed order with regard to variations in the length of the workday. It deemed a maximum of four hours' pay adequate to encourage proper notice and scheduling, and found that employers do have a responsibility to notify employees in advance when changes in hours are necessary. It also found that while some firms foresaw problems with the language in the proposal, they had lived with the 1968 language, and that language had provided adequate protection for employees. Requested language that employees be required to be fit to work and to report on time was not included because these requirements are implicit in the present wording.

6. PERMITS AND LICENSES FOR HANDICAPPED WORKERS

Testimony indicated that this section sometimes is misunderstood. The I.W.C. found, again, that most handicapped persons can be fully productive in some way and that they should be paid no less than others doing similar work. This section, long a part of the orders, is intended to allow a lesser rate only for those so seriously incapacitated, that they cannot be normally productive in any sense. It is a restatement of a Labor Code section which allows the Division of Labor Standards Enforcement to issue licenses to sheltered workshops and permits to employers of a

few individuals to pay token wages for token work, which is primarily therapeutic activity. The Division has investigated each request for such a permit very carefully.

7. RECORDS

If wages, hours, and working conditions such as meal periods and rest periods are to be regulated at all, it is necessary that accurate records be kept. The provisions of this section are reasonable. Notwithstanding a flurry of reports to the contrary, NOTHING was EVER said about time clocks. There are many ways of keeping accurate records, and certain changes have been made in the proposals to clarify the Commission's intent.

With regard to the meaning of "central" location, the Commission will allow required records to be kept together at any single location within California, provided that they are available to the Division. Enforcement experience has proved this requirement to be necessary.

Record keeping requirements were considerably simplified in Order 15 to avoid unduly burdening the householder. They are basically the same as those in Section 1174 of the Labor Code, governing every person employing labor in this State.

8. CASH SHORTAGE AND BREAKAGE

The special provision for employees with exclusive and personal control of cash responds constructively to fears expressed in public hearing that the Commission's proposal would encourage misuse of such funds. At the same time, it requires reasonable accounting procedures that will protect employees from unwarranted demands for reimbursement. Such demands are sometimes made, the Commission found, without giving the employee a chance to check the accuracy of the amount credited. Employees held responsible for cash of an employer have a right to know meter readings, register readings, and other information needed to account as required. In the absence of a satisfactory method of cash handling, the Commission cannot permit employers to require reimbursement from employees in any manner. The Commission also finds that it is inappropriate for the employee to be made the insurer of the employer's normal business losses, as sometime happens, for example, in catering

truck operations.

9. UNIFORMS AND EQUIPMENT

The Commission found that pay rates for crafts and trades often have been set with the expectation that those employees will provide and maintain their tools. Selection and maintenance of tools is often an important part of the skill. Tools are accumulated in the process of learning the craft, and if the employer were suddenly to be required to provide those tools customarily provided by employees in crafts and were to charge the large deposits authorized, employees would be required to lay out large sums in order to get a job. This section was amended to permit employers to require persons engaged in the crafts to provide their own tools as customary, on condition that their pay is adequate.

With regard to color and design of uniforms, the Commission found that nurses can wear their white uniforms wherever they work, and the employer need not pay for them. Pastel uniforms required by a hospital for other personnel, however, are not generally useful in other hospitals because of different color codes for departments, and therefore must be provided. Similarly, the Commission finds that where black and white uniforms can generally be used by waitresses as they move from one employer to another, the employer need not be required to pay for them, but if any other color is specified, the employer must bear the expense. The Commission finds it reasonable to require employees to maintain uniforms made of fabrics requiring minimal care.

10. MEALS AND LODGING

The provision for a voluntary written agreement reflects a court decision this month that such a prior agreement is necessary before deductions can be made.

The majority of the Commissioners found that the dollar amounts listed should not be raised above what they were in the 1974 orders. At that time the daily maximum allowance for meals of $3.80 amounted to 24 percent of the minimum wage

for eight hours. The majority deemed that to be too high and the present proportion of 19 percent more in keeping with the situation of an employee earning the minimum wage. Further, the usual rule of thumb budget allowance for rent is one week's pay. An apartment at the $140 allowed still is far more than the $100 earned at the new minimum wage in one week.

A variation in the 1968 order for agriculture, which did not allow any deduction for meals and lodging, was based on a lower minimum wage for agricultural workers. Since the wage has been equalized, the variation in this section has not been continued.

11. MEALS PERIODS

The Commission sees no reason to change its earlier findings that a "duty free" meal period is necessary for the welfare for employees, and that 30 minutes is the minimum time that will serve the purpose. The section is sufficiently flexible to allow for situations in which such an arrangement is not possible. The Commission also finds that many sorts of places may be deemed suitable places for eating on the premises and allows room for the Division to make such a judgment when a question on the matter arises. In addition the Commission has provided for exemptions from this and subsequent sections.

12. REST PERIODS

The Commission sees no reason to change its earlier findings that the general health and welfare of employees requires periods of rest during long stretches of physical and/or mental exertion. The provisions of this section have proved to be reasonable and minimal.

13. CHANGE ROOMS AND RESTING FACILITIES

Many employers who opposed this requirement in public hearing were needlessly apprehensive. It is not rare that a good worker may suffer a migraine headache or some other discomfort of brief duration which makes it difficult for the time to continue work but which can be overcome with a short rest. In such cases it may be to

the advantage of the employer as well as a matter of humane treatment of the employee to provide a place where the employee can temporarily recline, whether on a couch, a reclining chair, or a padded table. Similarly, an employee who is too ill to return to work needs some place to rest while awaiting transportation home or to a medical facility. This is not a matter of occupational health but one of reasonable consideration for an employee who is temporarily unwell for whatever reason.

The Commission found that the requirement was an impractical one in agricultural occupations and an unnecessary one for household occupations.

14. SEATS

The requirement for "suitable" seats "where the nature of the work permits" has long been a provision of I.W.C. orders and has proved to be useful and workable as the Division has reasonably enforced it. Testimony in public hearing made it clear that some kinds of work places would be covered by the new orders that were not covered by previous orders, and the Commission has made its requirement more flexible and more subject to administrative judgment as to what is reasonable. It continues to find that humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations when it is feasible for them to do so.

The section is not included in Order 15 because the Commission finds it to be unnecessary to require the provision of seats for household employees.

**FLOORS AND OTHER SECTIONS DELETED FROM ORDERS

Wet and slippery floors now are regulated by the Occupational Safety and Health Standards Board (Cal/Osha). Enforcement experience has shown that the problem of providing flooring resilient enough to help an employee who stands at work is very difficult to resolve and testimony indicated that it would be greatly complicated in extending the orders to certain workplaces not previously covered. The IWC concludes that the best protection for employees who must stand long periods on hard floors is resilient foot covering.

The Commission also is deleting those sections in the 1968 orders which dealt with matters regulated by Cal/Osha. They were headed: Drinking Water and Washing Facilities, Toilet Rooms, First Aid, Cleanliness and Upkeep, Lighting, Ventilation and Exits.

15. TEMPERATURE

The Commission is aware that some processes require extremes of temperature and accords recognition to "industry-wide standards". It finds, however, that management has responsibility to make working conditions tolerable for employees and to take all feasible measures to ameliorate discomforting conditions caused by the process. The requirements of this section are reasonable and in accord with energy conservation guidelines. Its basic provisions have long been part of I.W.C. orders and have provide to be useful and workable.

The section has been omitted from Orders 14 and 15 as inappropriate to field operations in agriculture and to private homes.

16. ELEVATORS

The Commission continues to find that requiring employees regularly to climb and decend more than three flights of steps could be detrimental to the general health and welfare and reasonable comfort of employees, that it could exhaust energy needed for their work, and that it might discriminate against persons who could do the work but not climb the stairs. It deleted a reference in the proposal to operating and processing equipment as unnecessary and confusing. The Commission has never intended that this section should apply to tanks, towers, shafts, dams, and similar equipment which employees may sometimes have to climb to service the equipment or promote the process, but it does not intend to exempt buildings in which workers are employed at any process four floors above or below ground level.

17. LIFTING

The Commission found:

(A) Requiring an employee to lift weights or move bulky objects when the employee is not accustomed to it is not only a frequent cause of serious discomfort, and sometimes of injury, but also has been used as a means of discriminating against an employee who was not physically capable of performing the task.

(B) In the past, the I.W.C. primarily has concerned itself with the health of women and restricted the number of pounds that a woman might be required to lift. As a result, some employers restricted the kinds of jobs for which women would be hired. A court found that the regulation discriminated against women in conflict with Title 7 of the Civil Rights Act. of 1964

(C) The I.W.C. looked at it another way. It considered whether lifting was an issue of occupational health and safety and asked Cal/OSHA about it. The Occupational Safety and Health Standards Board said it had no plans to regulate in this area.

(D) Employee representatives, both women and men, wanted some protection to be continued. The problem was how to prevent unreasonable demands on employees not big

enough or strong enough to perform lifts which were not regularly a part of their jobs.

(E) The Commission found that writing enforceable language was extremely difficult. It also found that if it did not try, there would be no regulation at all in this area.

(F) The language in the proposal was attacked as vague, and it certainly was. The language appearing in all the 1976 orders is more enforceable, and it relaxes the restriction for jobs in which heavy lifting is usual. Instead of "individual's capability", the section speaks of "physical capability". Each situation is subject to administrative judgment.

(G) Aware that objective standards still are needed, the Commission proposes to ask the legislature to provide funds and staff for a study leading to a regulation based on fair and enforceable standards. Meanwhile, it is retaining the section.

(H) If the legislature should decide that this is the work of OSHA, or if the OSHA board should decide on its own to regulate in this area, Section 1173 of the Labor Code provides that in case of overlapping jurisdiction "rules, regulations, or policies of the commission on the same subject have no force or effect".

18. EXEMPTIONS

Although the Commission has attempted to foresee as many circumstances as it could in drafting its regulations, unforseen circumstances occasionally justify exemptions after careful investigation and in the exercise of the best judgment of the Division.

The Commission found the request of the broadcasting industry for exemption "on location", without need for a written permit, to be a reasonable one and granted it. It specified, however, that, if the employer does not do what is feasible to make conditions tolerable for employees, the blanket exemption of that employer may be revoked.

No need for this section in Order 15-76, Household Occupations, was foreseen.

19. FILING REPORTS

It should be noted that the Commission does not regularly require employers to file reports but is authorized to gather information when and if it is needed to carry out the purpose of the order.

This section has proved to be useful and not unduly burdensome.

20. INSPECTION

The Commission finds that the California Constitution always has required that the inspections provided for be "reasonable" and that the Division has never inspected records other than those that were "relevant". However, much anxiety on this matter was expressed in public hearing and the Commission has made its language more explicit in order to clarify its intent.

Since no requirements affecting the premises of private households have been adopted, the Inspection section in Order 15 provides only for the inspection of records.

21. PENALTIES

22. SEPARABILITY

23. POSTING OF ORDER

These sections have proved to be workable and necessary.

In Order 15, the posting requirement is simplified to avoid interfering with the premises of private households.

No. S248702

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES E. WARD, ET AL., *Appellants and Petitioners,*

v.

UNITED AIRLINES, INC., *Defendant and Respondent.*

AFTER DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 16-16415
THE HONORABLE JUDGE WILLIAM ALSUP, CASE NO. 3:15-CV-02309-WHA

[PROPOSED] ORDER GRANTING DEFENDANT-RESPONDENT UNITED AIRLINES, INC.'S REQUEST FOR JUDICIAL NOTICE

On application of Defendant-Respondent United Airlines, Inc. ("United") and good cause appearing, it is hereby ordered that United's Request for Judicial Notice is GRANTED.

Dated: _____

_____
Chief Justice

PROOF OF SERVICE

I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. On November 9, 2018, I served the following:

DEFENDANT/RESPONDENT UNITED AIRLINES, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

[PROPOSED] ORDER GRANTING DEFENDANT/RESPONDENT UNITED AIRLINES, INC.'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ANSWER BRIEF ON THE MERITS

☒ **BY ELECTRONIC SERVICE VIA FILE & SERVEXPRESS:** Based on a court order, I caused the above-entitled document(s) to be served through File & ServeXpress at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above-entitled case. The service transmission was reported as complete and a copy of the File & ServeXpress Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

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☒ **BY US MAIL**: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Molly Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Appellate Court (via U.S. Mail)

Hon. William Alsup
United States District Court, Northern District of California
San Francisco Courthouse
Courtroom 12-19th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

Trial Court (via U.S. Mail)

Hon. Philip S. Gutierrez
United States District Court, Central District of California
First Street Courthouse
350 West 1st Street
Courtroom 6A
Los Angeles, CA 90012

Trial Court (via U.S. Mail)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 9, 2018, at San Francisco, California.

Marlin El Fondevilla