STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIMS OF JOHN P. HEALY, LYN A. GUSTAFSON, GARY J. GALETTI, ROBERTA J. DUAIME, KARL M. KRZAN, ALAN B. LIEBEL, GREGORY S. SHAW, MICHAEL K. SEMMENS, DONALD L. TAURMAN, AUTUMN M. MUELLER, RICHARD T. SHOLEY, KATHY A. JONES, RONALD G. ADAMS, ROBERTA J. ROBERTS, STEPHEN F. CARLSON, DANIEL T. WALSH,	)	Case Nos. 972-2009 through 987-2009
Claimants,	)	
vs.	)	
NORTHWESTERN CORPORATION, a Delaware corporation d/b/a NORTHWESTERN ENERGY,	)	
Respondent.	)	

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I. INTRODUCTION

The claimants are electric and gas transmission operators for NorthWestern Energy who are seeking unpaid wages for a 15-minute per shift preparatory period referred to as "shift-turnover" during which one operator ending his or her shift verbally updates the incoming operator as to status of those systems.

The NorthWestern Corporation, a Delaware corporation d/b/a NorthWestern Energy (NWE) appealed a determination of the Department of Labor, Wage and Hour Unit that found that claimants John P. Healy, Lyn A. Gustafson, Gary J. Galetti, Roberta J. Duaime, Karl M. Krzan, Alan B. Liebel, Gregory S. Shaw, Michael K. Semmens, Donald L. Taurman, Autumn M. Mueller, Richard T. Sholey, Kathy A. Jones, Ronald G. Adams, Roberta J. Roberts, Stephen F. Carlson, and Daniel T.

Walsh were entitled to overtime pay pursuant to the Fair Labor Standards Act, 29 U.S.C.A. §§201, et. seq. (hereinafter "FLSA"), for "shift turnover work" that was worked and not compensated from December 11, 2006 to May 1, 2008. The appeals were consolidated for purposes of hearing. Hearing Officer David A. Scrimm held a contested case hearing in this matter in Butte, Montana, on November 29 and 30, 2010. Rick Anderson, attorney at law, represented the claimants. Patrick Fleming, attorney at law, represented NWE. Larry Colvin, Scott McIntosh, Casey Johnston, Julie Reichle, and all of the claimants, except for Alan B. Liebel, who is now deceased, provided sworn testimony.

Claimants' Exhibits 2, 20, 21, 22, 23, 27, 30, 31, 35 (first five pages), 37, 38, 39 and Respondent's Exhibit 1 were admitted into the hearing record. The hearing officer reserved ruling on Exhibit 29 which is now admitted. Claimants also designated and submitted the following depositions, which the parties stipulated that the hearing officer could consider in their entirety: Mike McGowan, Laurie Stagnoli (NWE's Rule 30(b)(6) witness), Mike O'Neil, Julie Reichle, Tom Vivian, and Casey Johnston.

Based on the evidence and argument presented at the hearing and in the parties' post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

II. SUMMARY JUDGMENT

On November 3, 2010, the claimants filed a motion for partial summary judgment with respect to the following four issues:

1. The Fair Labor Standards Act, 29 U.S.C.A. §§201, et. seq. ("FLSA"), has applied to the claimants from at least December 11, 2005 to the present time;

2. The fact that the claimants were working under a collective bargaining agreement with the respondent from December 11, 2005 to May 1, 2008 is not a defense to an overtime claim under the FLSA;

3. Claimants are not precluded from recovery under the FLSA simply because they made no request for overtime payment on their time tickets prior to April 1, 2008; and

4. Claimants are not precluded from recovering remedies under the FLSA because they did not file a grievance or a request for arbitration under the collective bargaining agreement.

NWE conceded issue one. NWE essentially conceded issues two, three, and four, as well, stating "standing alone . . . a collective bargaining agreement . . . claimants' wholesale failure to file time tickets requesting overtime, . . . and claimants' failure to file a grievance . . . do[es] not, as a matter of law, preclude recovery under the FLSA." NWE instead argued that collectively these facts did, however, form the basis for an estoppel defense based on NWE's lack of knowledge of the claimants' working overtime. The hearing officer granted summary judgment to claimants with respect to issues two and four and denied summary judgment on issue three.

A. *The Collective Bargaining Agreement.*

A collective bargaining agreement may not be used to avoid the purpose underlying the FLSA or regulations promulgated thereunder (*see, Beck v. City of Cleveland, Ohio*, 390 F.3d 912 (6th Cir. 2004, cir. denied, 545 US 1128, 125 S.Ct. 2930, 162 L.Ed.2d 867 (2005)).

The right to receive overtime compensation under the FLSA cannot be abridged by contract. *Bearrentine v. Arkansas Best Freight Systems, Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). The U.S. Supreme Court has consistently held that the protections under the FLSA cannot be abridged by contract or otherwise waived because this would "nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Bearrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 782, 101 S.Ct. 1437 (1981); *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697, 707, 65 S.Ct. 895, 902, 89 L.Ed. 1296 (1945); *CDA Schulte, Inc. v. Gangi*, 328 U.S. 108, 114-116, 66 S.Ct. 925, 928, 929, 990 L.Ed. 1114 (1946); *Walling v. Helmrick and Payne, Inc.*, 323 U.S. 37, 42, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Overnight Motor Transportation Co. v. Missile, Supra*, at 577, 62 S.Ct. at 1219, C. 29 C.F.R. §75.8 (1974). The Supreme Court has also held that Congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargained compensation arrangement. *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173, 177-178, 66 S.Ct. 379, 381-382, 90 L.Ed. 603 (1946); *Walling v. Harnishfeger Corp.*, 325 U.S. 427, 430-432, 65 S.Ct. 1246, 1248-1249, 89 L.Ed. 1711 (1945); *Jewel Ridge Coal Corp. v. Mine Workers*, 325 U.S. 161, 166-167, 170, 65 S.Ct. 1063, 1066-1068, 89 L.Ed. 1534 (1945).

There is no dispute of material fact with respect to this issue and therefore summary judgment is granted as a matter of law.

B. *Whether the absence of overtime claims from claimants' time sheets bars the recovery herein is not suitable for summary judgment.*

The purpose of summary judgment is to encourage economy through the elimination of unnecessary trial, delay, and expense, but the procedure is never to be a substitute for a trial if a material factual controversy exists. *Byrd v. Bennett*, 193 Mont. 237, 238 (1981) (citing *Engebretson v. Putnam* (1977), 174 Mont. 409, 571 P.2d 368.

Claimants' proof of overtime worked, NWE's estoppel defense (based in part on the time sheets), and claimants' rebuttal to that argument all necessarily involve significant testimony about the time sheets in question. Granting summary judgment on this very narrow part of an issue would not promote judicial economy. As discussed more fully in the decision that follows, the claimants put on significant amounts of evidence to rebut NWE's estoppel argument and the time sheet issue was a significant part of that rebuttal. Thus, summary judgment on this specific issue is denied.

C. *Failure of the claimants to file any grievances or requests for arbitration under the CBA during the period of their claims does not bar their FLSA wage claims, but can be admissible regarding NWE's knowledge of claimed overtime work.*

Claimants also sought summary judgment to preclude NWE from defending their claims based on the fact that claimants did not file any grievances or requests for arbitration under the CBA during the period of their claims. The United States Supreme Court addressed the issue of whether employees covered by a CBA who failed to file a grievance could bring an FLSA claim in district court. *Bearrentine v. Arkansas Best Freight Systems, Inc.*, *supra,* and held that the petitioners' wage claims under the FLSA were separate and distinct from their grievance to the contractual dispute resolution procedures. *Id*. The Court further explained that the FLSA rights the petitioners sought to assert are independent of the collective bargaining process and their FLSA rights "devolve on petitioners as individual workers, not as members of the union, and are not waivable." *Id*.

Based on *Bearrentine*, the hearing officer grants summary judgment without precluding evidence regarding the lack of pursuit of collective bargaining remedies,

should that evidence be relevant to the question of whether NWE knew or should have known that claimants were working overtime.

III. ISSUE

The issue in this case is whether NWE owes wages for work performed, specifically overtime, as alleged in the complaints filed by claimants, and owes liquidated damages, as provided by law.

IV. FINDINGS AND STIPULATED FACTS

1. Claimants are transmission operators who were employed by NWE for a number of years, including the time from November 24, 2005 through May 1, 2008, at the NWE System Operations Control Center (SOCC Center) located in Butte, Montana, with the exception of claimant Daniel Walsh who was a transmission operator only from September 23, 2006 to March 21, 2008, and claimant Kathy Jones who was a transmission operator only from February 3, 2007 through May 1, 2008. The transmission operator positions were previously referred to as "dispatchers." These positions have always existed at NWE and its predecessor, the Montana Power Company (MPC). Many of the claimants and the claimants' supervisors worked in their same capacities for MPC before NWE purchased MPC in 2002.

2. The claimants and NWE, by and through their counsel of record, stipulate and agree that claimant Alan Liebel is deceased and that the Estate of Alan Liebel is bound by all the stipulations agreed to by the parties and is bound by, and can rely on, the testimony entered in this matter by the other claimants in all respects.

3. Claimants' job activities include controlling, scheduling, and monitoring flows on NWE's electric and natural gas transmission systems, including transmission ties with other utilities in neighboring states, and their job activities have regular contact with commerce. Claimants work 12 hour shifts that require a smooth transition between shifts and 24 hour/7 day per week coverage for NWE's electric and natural gas distribution systems.

4. NWE's business is engaged in interstate commerce and NWE was an employer subject to the requirements of the FLSA from November 24, 2005 through May 1, 2008.

5. Claimants were "non-exempt" employees under the FLSA from November 24, 2005 through May 1, 2008, and claimants' overtime claims are governed by the FLSA. When the claimants worked for MPC, they were "lumped in with other union employees" and classified as non-exempt. NWE did not change their classification.

6. On November 24, 2008, claimants filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry seeking overtime compensation owed prior to May 1, 2008 for the shift turnover work they performed. NWE was notified of the claim by the Department of Labor on December 11, 2008.

7. The transmission operators (hereinafter "operators" or "claimants") were housed at the SOCC Center and ran four desks: the lead/scheduler desk, the low-voltage desk, the high-voltage desk, and the gas desk.

8. The operator at the lead desk is the foreman of the crew and is responsible for scheduling of power to maintain the integrity of the system. This operator also has responsibility for resolving issues that come up on the line side (the low-voltage and high-voltage desks).

9. The low-voltage desk has responsibility for the 69kV and 50 kV lines. The lead and the high-voltage desk operators can also perform checkouts, but as a rule, it is the responsibility of the operator on the low-voltage desk. The operator at the low-voltage desk also acknowledges any alarms; examines any alarms that come in during the shift; and communicates verbally with employees and contractors in the field who are performing work that relates to their part of the system. The operator responds to any outages that arise during their shift. At night and on the weekends, the operator on the low-voltage desk has similar responsibilities for the South Dakota electric system.

10. The high-voltage desk is responsible for power lines 100kV and above. Except for the higher voltage of the lines, the high voltage operator has the same duties as the operator at the low-voltage desk. This operator is also responsible for voltage control and maintaining the voltage on the lines within the established parameters. Operators at the high-voltage desk conduct checkouts or low-voltage switching if the person on the low-voltage desk is unavailable.

11. Both the low and high-voltage desks are involved in the training of the new operators. NWE management expected operators to learn all of the job requirements from their fellow transmission operators.

12. The gas desk operates the gas transmission system for Montana, South Dakota, Nebraska, and Cheyenne, Wyoming. In Montana, the operators of the gas desk have extensive control of compressor pressure and flow regulators, and communicate with employees and contractors in the field making changes to the system. In South Dakota, Nebraska, and Cheyenne, the operators primarily monitor their systems, watching numerous alarms that come in, and evaluating how NWE should react to these alarms. The gas desk has 12 computer screens that require constant monitoring. When the gas desk operator is also monitoring the electric side, there are additional screens to watch. If the operators on the electric side are busy, the gas desk operator will also assist them with phone calls and other responses.

13. NWE has a number of very reliable information systems that are used to depict and track the status of the electric and gas systems:

The "board," mounted on the wall of the SOCC Center, consists of a system of interconnected small tiles which depict various elements of the electric transmission system including line voltages, substations, and breakers. Operators are required to update the board as the status of the system changes. Lights on the board indicate whether a breaker is in the opened or closed position. Tags indicate whether a clearance is out or if there's something wrong with that portion of the system.

The board is updated by the individual operators. A number of events such as alarms, high pressure concerns, and incomplete switching orders may preclude them from keeping the board and the SCADA systems from being updated to the minute. When events happen close to shift change, the status of the board will not show the incoming operator the current status of the electrical system.

The "SCADA" database for the electric systems monitors and displays what is taking place on the electric power lines. It has information about voltages, alarms, and other information about the electric system that is not displayed on the board. The "SCADA" database for the gas systems performs a similar function for that aspect of the transmission system. This system shows what compressors are on, the pressures on the lines, various set points, and which controllers are open.

There is often a gap between the time when modifications or improvements are made to the gas and electric transmission systems and the time when those elements are loaded into or added to the SCADA systems or indicated on the board.

"Logbooks" are maintained daily by the operators at each desk. On the electric side, the operators' entries into their logbook include any alarms that happen,

any changes to the system configuration, and switching actions and clearances that have been taken and released.

A "turnover sheet" is also produced indicating the status of the system at the time the system was turned over to the next operator. It provides very limited information about the status of reactors, capacitors, phase shifters, and any abnormal changes on the system. The turnover sheet also lists who required or is responsible for certain actions.

Operators have access to email but don't use it as a primary communication method for sending system status information, other than to send the turnover sheet to their co-workers and supervisors. The email system is not 100% reliable as operators are sometimes unable to log on when they begin their shifts and it can take from several minutes to several hours for computer support staff to correct the problems.

Operators make handwritten notes about a number of events that aren't typically stored in the other systems. They use them as reminders to update SCADA or the board and to update incoming operators of events not yet put into other systems or not stored at all in those media. Operators use handwritten notes when they are issuing orders, working with relay people and substation people, when monitoring tree trimmers on transmission lines, and when air patrols are operating along the lines and when lineman are in the field.

14. The systems that NWE provides in order safely to operate its electric and gas transmission systems are quite reliable. Face-to-face shift turnover is an integral and indispensable method of bringing together all the information those systems provide. The shift turnover is used to fill in any missing information. It gives the incoming operator (who may have been away from the SOCC Center for several days or more) the opportunity to clarify the information, to ask questions about why something was done, or to learn what may be happening during the next shift. Because field work and maintenance happens less at night and on the weekends, one operator might be relieving two or more outgoing operators. The shift turnover ensures the safe transfer of system responsibility from one operator to the next.

15. The 2004 Collective Bargaining Agreement (CBA) called for shifts to be scheduled from 6:00 a.m. to 6:00 p.m. and from 6:00 p.m to 6:00 a.m. However, the shift change generally occurred at 5:30 a.m. and 5:30 p.m. due to the fact that ramp up happened at the top of the hour and it was safer to do the change at 5:30.

16. In the CBA effective May 1, 2008, the claimants and NWE agreed that the claimants would be paid a minimum of .25 hours of overtime (double time) for "shift turnover" work for each and every shift worked by the claimants. The CBA also recognizes the importance of informing oncoming operators of the status of the system.

17. Claimants historically performed shift turnover work whether they were employed by NWE or MPC. The exact origins of the shift turnover are not known, but it has been the practice of the operators of the SOCC Center for at least 30 years.

18. Prior to the beginning and at the end of each shift worked by claimants from December 11, 2005 through May 1, 2008, claimants performed shift turnover work which was not compensated as overtime.

19. The claimants' testimony, standards for similar positions in the industry as well as the 2008 collective bargaining agreement between the parties, shows that 0.25 hours per shift is a reasonable approximation of the time each claimant worked performing "shift turnover" from December 11, 2005 to May 1, 2008.

20. In 2002, NWE concluded its purchase of MPC. Since that time neither the company policies toward the operators nor their duties changed in any significant way. O'Neil testified in his deposition that he thought of MPC and NWE "as one anymore."

21. It was important that each operator know the status of the system they operated so that the safety of workers in the field could be maintained, so that NWE did not get fined by NERC for letting the grid get out of balance, so that expensive equipment was not damaged, so that NWE's industrial customers were not financially impacted, and so that customers had heat and electricity. NWE could also be charged more for a ratcheting fee with Bonneville Power Administration if the operators send too much power across the lines.

22. There must be a seamless transition from one shift to the next to ensure safe operation of the electric and gas systems 24 hours per day, 365 days per year.

23. Another financial benefit to NWE that results from the system operators having a full working knowledge of the situation with the distribution systems when they take over a shift is to avoid any financial liability for either injuries or deaths caused to employees in the field or a customer losing service because of decisions made by less than fully-informed operators.

24. The transmission and distribution systems are not static. Reliance upon email, SCADA systems, and the log or shift turnover sheets without full and complete face-to-face communication between the incoming and outgoing operators would create safety and financial risks for NWE.

25. If the claimants relied only upon the SCADA systems, the board, the logbooks, and other materials available to them, it would take at least as much time to prepare and read through the information as it does to communicate that information and information not included in those materials during a shift turnover.

26. McGowan, the claimants' supervisor when MPC operated the SOCC Center, agreed that turnover is done for safety reasons and it is an integral and indispensable part of the job.

27. Tom Vivian sent an email to at least four of the claimants on November 21, 2001 to give them guidance as to what he believed the duties of a system operator were with respect to the gas desk that he managed. This message was also conveyed to other operators including the claimants. Most of the message addressed responses to alarms, but it emphasized that "your first responsibility is to make certain gas transmission and storage integrity is not compromised. You must communicate changes, problems, questions, concerns, etc. with me, the field personnel and with one another. Shift Changes are to be used to summarize your shift and the previous shift with the person relieving you." Exhibit 31.

28. In 2010, Vivian and Beth Stimatz met with other NWE supervisors on various safety issues. Healy believed that Vivian left him a copy of a memo that came out of that meeting and confirmed with Stimatz that the document did, indeed, come from that meeting. The document stresses communications between employees and discusses turnover and states "A good turnover helps every individual understand where things stand at that point in time and what are the next steps going forward." Exhibit 29. The document also states that the turnover is to be done "in a manner that limits interruption of work, and promotes safe and efficient work completion." Id.

29. The shift turnover work performed by the claimants was an integral, indispensable, and necessary preparatory and concluding activity, which enabled claimants properly to begin and end their day of work as part of their employment with NWE and efficiently and safely to perform their duties of protecting other NWE employees and the financial interests of NWE.

30. NWE considered the claimants to be a group of competent guys and gals, honest, truthful, and trusted professionals.

31. The importance of face-to-face communication at shift change was imbedded in the claimants from over 30 years of doing so with MPC and NWE. When NWE took over MPC and the SOCC Center, it made no meaningful changes to the procedures that had been in place for many, many years. It was a seamless transition to new ownership that had little if any affect on the operators. Had NWE wished to change procedures at the SOCC Center, management could have spent time with the operators to learn what they do throughout their day, but it never did.

32. The claimants did not hide the fact that they were conducting shift turnovers. They did not ask for extra time because they believed it was just part of the job and they did not know they could claim the time until they took the FLSA training in March or April 2008.

33. In March 2008, the transmission operators received an email requiring them to participate in on-line training about the Fair Labor Standards Act. That training included information about the effect of exempt/non-exempt status; explaining that time spent by non-exempt employees staying late to get caught up was compensable, and that preparatory time was generally compensable. The material also included several admonitions: that supervisors should not refuse to pay overtime that was worked by a non-exempt employee even if it was not pre-approved; and that upon learning of a potential violation of the FLSA, there should be an immediate report to the HR department.

34. Johnston received some training on the FLSA before 2008 and knew that the claimants were non-exempt employees under the FLSA, but had not been trained to understand that under the FLSA, preparatory time that is an integral and necessary part of the job is compensable. Except for Johnston, the 2008 training was the only FLSA training that NWE's SOCC supervisors received.

35. Steve Carlson told Reichle that based on their newly acquired understanding, the FLSA required payment for time spent performing in the shift turnover, and that the claimants would be adding the 1/4 hour to their time sheets.

36. After the operators started adding the shift turnover time to their time sheets, the time administrator informed Reichle about this extra time and Reichle directed the claimants to stop putting the time on their time sheets. Reichle directed the time administrator to remove the time from the claimants' time sheets.

37. The claimants' shift turnover time prior to May 1, 2008 was never paid by NWE.

38. The claimants did not seek payment for shift turnover time from NWE or through union officials until after they received the FLSA training in March/April 2008.

39. At about the same time, Healy brought the issue of payment for the shift turnover to the negotiators for the 2008-2012 collective bargaining agreement.

40. Reichle told the claimants that although NWE had agreed to pay the operators for the shift turnover under the new contract which would become effective on May 1, 2008, she would not allow the claimants to claim the time prior to that date. Reichle's denial was a violation of the FLSA. Reichle told the claimants that there would be no payment of overtime, pursuant to the collective bargaining agreement, unless and until the 2008 CBA was fully ratified and executed by the union and NWE and there was a time code for the overtime. Mueller discussed the pay code matter with Reichle and then contacted Lisa Hanson in the SAP Human Resources Group, who set up the pay code that day.

41. Reichle did not question that the claimants worked the additional time. In removing the time from the April 2008 time cards, Reichle, especially in light of the very recent FLSA training, knew or should have known NWE was violating the FLSA.

42. NWE required the claimants to submit electronic time sheets which accurately reflected the time they had expended on behalf of NWE.

43. Except for April 2008, NWE put no restrictions on the time that could be claimed by the individual claimants on their individual time sheets.

44. Except for April 2008, NWE relied upon the submitted time sheets and paid the claimants consistent with the time sheets submitted by the claimants.

45. NWE required the claimants to submit accurate, electronic time sheets to generate their paychecks.

46. Commencing November 24, 2005 and ending on April 1, 2008, the claimants did not claim .25 hours of overtime on the time tickets they individually submitted to NWE to obtain their wage payment from NWE.

47. Scott McIntosh was the claimants' direct supervisor from January 1, 2000 to September 1, 2000. Casey Johnston served as the claimants' supervisor from September 2, 2000 to August 31, 2004. Joseph Piazzola supervised the claimants from September 1, 2004 to December 31, 2005. Dan Pfeiffer served as the claimants' next supervisor, serving in that position from January 1, 2006 to April 7, 2006. Larry Colvin supervised the claimants from April 8, 2006 to March 31, 2007. Johnston returned to the position for a few days in early April 2007. Johnston was succeeded by Julie Reichle who served as the claimants' supervisor from April 7, 2007 to June 15, 2008. Reichle was promoted to Director of SOCC Operations in April 2008.

48. Neither Piazzola nor Pfieffer testified and no deposition testimony from them was offered into the record. There was no significant testimony about what Piazzola or Pfieffer knew or did not know about the operators' shift turnover. Neither Johnston or Reichle ever spent a shift with the operators to learn what they did during their shifts. Neither of them ever participated in a shift turnover. All the supervisors worked a schedule so that unless they stayed late or came in early it would have been impossible for them to witness a shift turnover.

49. Tom Vivian was the Manager of Gas Operations for MPC in 2001. In 2008, he became the Manager of SOCC Operations for NWE. In those positions he had significant interaction with most of the claimants, especially those that worked in the gas transmission side of the operation. Vivian was not the claimants' direct supervisor but provided significant technical assistance to the operators. Vivian believed it was important for the operators to pass along information, especially unusual or abnormal activities from one shift to the next. He believed much of that could be done by writing things down for the next operator. Vivian was a strong advocate of thorough communication and understood that failures to do so could have safety and financial consequences.

50. Commencing on November 24, 2005 and ending on May 1, 2008, the claimants herein were covered and bound by a collective bargaining agreement which covered their terms and conditions of employment; the collective bargaining agreement contained a binding grievance and arbitration provision.

51. Commencing on November 24, 2005 and ending on May 1, 2008, the claimants did not file a grievance or a request for arbitration claiming that they had been improperly paid by NWE for the hours they worked.

52. Ken Erickson, Carlson's supervisor with MPC, told him to come in 15-20 minutes early to conduct a shift turnover. Scott McIntosh, Julie Reichle, Mike McGowan, and Casey Johnston all were present for at least one shift turnover.

53. Gustafson was instructed in no uncertain terms by his supervisor for MPC, Ken Erickson, that he must perform a shift turnover.

54. Larry Colvin worked as a dispatcher, or system operator, for both MPC and NWE from 1972 to March 2006. Colvin worked not only the same position as the claimants, but also worked as their NWE manager from April 2006 to March 2007.

55. Colvin was fully familiar with the term "shift turnover," and stated that it is the communication between the incoming system operator and the outgoing system operator in order to make certain that the incoming system operator has a full working knowledge of the electric and gas distribution systems.

56. Colvin instructed the claimants to conduct the shift turnover while he was management of NWE. He also knew and expected that the claimants would arrive early to work to put in the extra time to perform the shift turnovers.

57. Johnston reviewed Exhibit 29 and agreed with the statement in the document that "a good turnover helps every individual understand where things stand at that point in time and what are the next job steps going forward."

58. The operators are required to use a key card to gain access to the building. NWE keeps track of the times that employees enter and leave the SOCC Center.

59. Neither the MPC nor NWE have ever used a time clock to keep track of exactly when the system operators begin their shifts and when they conclude their shifts.

60. Members of NWE's management team responsible for supervising the claimants worked in management capacities for both NWE and its predecessor, MPC, and had actual and/or constructive knowledge of the "shift turnover" work being performed by claimants from December 11, 2005 through May 1, 2008.

61. The MPC and NWE managers who supervised the operators had an office with a picture window that looks into the control room where the operators

performed their work. The window provides the supervisor or manager with an opportunity to observe the work that is being done by the operators.

62. At hire, Johnston told Duaime that the only time one would put in for overtime for the shift turnover is if it went over one-half hour.

63. When the shift turnover work was brought to the attention of NWE management in 2008, no one from NWE told any of the claimants to discontinue conducting shift turnover work.

64. After Colvin left NWE management, none of the subsequent managers had any experience at being transmission operators.

65. Johnston believes that Colvin knows more about the shift turnover than he does.

66. Reichle testified on direct examination that she had never physically been present during a shift change, but on cross-examination testified that she actually had witnessed a shift change and that she knew what a shift change meant, and that it meant when one operator was coming on and the other was leaving, although she never sat down with them.

67. When Reichle became the claimants' supervisor, she was "handed an org chart and a list of direct reports," but received no supervisory training. The only training Reichle received with regard to the FLSA was the same training the claimants received in March/April 2008.

68. NWE never requested Reichle, as a manager of the claimants or as the manager of SOCC Operations, to monitor or determine what work was being done during a shift change by the operators, and she never made any effort to do so on her own. Reichle believed it was "not her job to monitor what [the operators] were doing." NWE never gave Reichle an opportunity to talk with Colvin, her predecessor.

69. NWE knew or reasonably should have known that the claimants were working overtime to conduct the shift turnover.

70. NWE's violations of the FLSA were not in good faith or on reasonable grounds.

71. Utilizing the amounts stipulated to by the parties, NWE owes the claimants the following amounts representing unpaid overtime wages and liquidated damages for the time December 11, 2005 to May 1, 2008:

Claimant	Two-year Overtime	Third year	Unpaid wages	Liquidated Damages	Total
John Healy	$3,246.24	$2,236.68	$5,482.92	$5,482.92	$10,965.84
Lyn Gustafson	$3,012.80	$2,086.06	$5,098.86	$5,098.86	$10,197.72
Gary Galetti	$4,010.04	$2,653.85	$6,663.89	$6,663.89	$13,327.78
Roberta Duaime*	$1,915.43	N/A	$1,915.43	$1,915.43	$3,830.86
Karl (Mike) Krzan	$3,105.12	$2,158.07	$5,263.19	$5,263.19	$10,526.38
Alan Liebel-Estate	$2,061.24	$1,967.02	$4,028.26	$4,028.26	$8,056.52
Gregory Shaw	$3,332.11	$2,220.05	$5,552.16	$5,552.16	$11,104.32
Michael Semmens	$3,429.58	$1,987.62	$5,417.20	$5,417.20	$10,834.40
Donald Taurman	$2,877.10	$2,066.77	$4,943.87	$4,943.87	$9,887.74
Autumn Mueller	$2,147.72	$1,832.95	$3,980.67	$3,980.67	$7,961.34
Richard Sholey	$4,110.04	$2,346.54	$6,456.58	$6,456.58	$12,913.16
Kathy Jones*	$2,702.50	N/A	$2,702.50	$2,702.50	$5,405.00
Ronald Adams*	$3,078.13	N/A	$3,078.13	$3,078.13	$6,156.26
Roberta Roberts	$3,057.79	3,580.67	$6,638.46	$6,638.46	$13,276.92
Stephen Carlson	$3,001.00	$2,190.17	$5,191.17	$5,191.17	$10,382.34
Daniel Walsh*	$2,383.66	N/A	$2,383.66	$2,383.66	$4,767.32
TOTALS	$47,470.50	$27,326.45	$74,796.95	$74,796.95	$149,593.90

Claimants marked with "*" were not present for a third year and are only awarded two years overtime.

V. DISCUSSION[1]

A. *Burden of Proof*

The claimants contend that NWE owes them unpaid overtime wages and liquidated damages pursuant to the Fair Labor Standards Act (FLSA). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

An employee seeking unpaid wages has the initial burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable inference." ***Id. at*** 189, 562 P.2d at 476-77, ***citing*** *Anderson,* 328 U.S. ***at*** 687, ***and*** *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; ***see also,*** *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495.

Once an employee has shown as a matter of just and reasonable inference that he or she is owed wages, "'the burden shifts to the employer to come forward with evidence of the precise amount of the work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee, and if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation' . . . ." *Garsjo,* 172 Mont. ***at*** 189, 562 P.2d ***at*** 477, ***quoting*** *Purcell v. Keegan*, ***supra,*** 359 Mich. ***at*** 576, 103 N.W. 2d ***at*** 497.

The claimants provided substantial and credible evidence of the overtime hours they worked. NWE argues that the shift turnover was preparatory activity which was not integral and indispensable and therefore not compensable. NWE further argues that the claimants should be estopped from asserting their claims because NWE had no knowledge that claimants were working the extra time, that NWE did not require the work to be done, and even if it was done, it was *de minimis*. NWE failed to show that claimants did not actually work the additional shift turnover time. The claimants did not have documentation of the extra 15 minutes per day that they claim is a reasonable estimate of the additional time they worked

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[1] Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

during shift turnover. However, claimants are allowed to make their proof through testimony. The claimants all testified that they worked additional time performing the shift turnover at the beginning and end of every shift and that 15 minutes was a reasonable estimate if not an underestimate of the time they spent at the beginning and the end of their shifts sharing information about the electric and gas systems that ensured that the next operator was fully informed of the status of those systems. Additionally, neither Johnston, Colvin, or Reichle, the claimants' supervisors during or prior to the claim period, ever asserted that claimants did not conduct the shift turnover or that it took some time other than that asserted by claimants.

B. *The Portal-to Portal Act*

Preliminary and postliminary activities are compensable if they are "an integral and indispensable part of the [employee's] principal activities." *Steiner v. Mitchell, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956)*; *Dunlop v. City Electric, Inc., 527 F.2d 394, 399 (5th Cir. 1976)*. By contrast, an employer is not required to pay employees for otherwise compensable activities if the time spent performing those activities is *de minimis*. *See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946), superseded by statute on other grounds as stated in Carter v. Panama Canal Co., 150 U.S. App. D.C. 198, 463 F.2d 1289, 1293 (D.C. Cir. 1972)*; *Dunlop v. City Electric, Inc., 527 F.2d 394 (5th Cir. 1976)*.

In *Dunlop*, supra, the 5th Circuit explained that "the excepting language of *[§ 254*] was intended to exclude from FLSA coverage only those activities predominantly spent in the employees' own interests." *Id.* (internal citations and quotation marks omitted). In other words, where the activities at issue are "undertaken for the employees' own convenience," "not being required by the employer," and "not being necessary for the performance of the [employees'] duties" to the employer, they are fairly construed as non-compensable. *Id.* However, when an employer derives "significant benefit" from the activity at issue, that activity is principal to the performance of the work for which the plaintiffs are employed, and is therefore compensable. *Id. at 399*. Put simply, where the activity is "an integral and indispensable part of the principal activities for which [the employees] are employed," the Portal-to-Portal exemption does not apply. *Id.* (quoting *Steiner v. Mitchell, 350 U.S. 247, 256, 76 S. Ct. 330, 100 L. Ed. 267 (1956))*.

Claimants' principal activities include controlling, scheduling, and monitoring flows on NWE's electric and natural gas transmission systems, including transmission ties with other utilities in neighboring states. Because the electric and transmission systems were almost constantly changing, the claimants could not control, schedule,

and monitor them without having all the information available. Without the shift turnover, the claimants lacked some of that information

NWE made little argument that the shift turnover did not occur, but argued that it was not integral and indispensable to their principal activities given the other systems guiding the operators in managing the gas and electric systems. NWE relied heavily on Johnston and Reichle's testimony to support their arguments although neither one of them ever worked as an operator and neither one ever sat through a shift turnover. The more credible testimony about the necessity of conducting a shift turnover and how it complemented their principal activities was given by witnesses who had worked as a transmission operator, the claimants, their former NWE manager Colvin, and McIntosh.

Testimony at hearing also proved that the shift turnover provided a significant benefit for the employer and was integral to its principal activities. The shift turnover provided no meaningful benefit for the claimants.

The shift turnover work was clearly for the benefit of NWE. NWE's electrical transmission and gas distribution systems must operate 24 hours a day and 365 days a year. If no shift turnover was performed, there was a significant risk that the oncoming operators would not be fully up to date on the status of the electrical transmission and gas distribution systems which could result in significant safety and financial impacts. As an example, the non-verbal information provided to the operators would not tell the operators whether a lineman was on his way to a station or whether he might be held up due to weather.

While NWE argues that it did not require the shift turnover work to be done, it is clear that NWE manager Colvin expected the work to be done. Moreover, it is the duty of "management to exercise its control and see that the work is not performed if it does not want it to be performed." 29 CFR § 785.13. NWE also argues that the shift turnover was a practice developed and required by IBEW union members. However, even if the procedure was a result of one IBEW employee informing another that this was the procedure, NWE required its operators to train new workers in their job duties. NWE cannot therefore deny that shift turnover was integral and indispensable to the principal duties of the operators. NWE cannot rely on its after the fact assertion that it did not want the work to be done to show that the work was not compensable. It had to act affirmatively to inform the operators it did not want them to perform the shift turnover. 29 CFR § 785.13, *Lindow* at 1060. Further, Reichle, armed with knowledge that the claimants were working overtime to

perform the shift turnover in April 2008 and had told them not to record the time, did not tell them to stop the practice.

The shift turnover was integral and indispensable to the operators' principal activities and NWE suffered or permitted the operators to conduct the shift turnover work. It is therefore compensable.

C. *The de minimis exemptions provided by the Portal-to-Portal Act are inapplicable*.

The respondent argues that even if the hearing officer finds that the claimants worked an average of 15 minutes of time during shift turnover, it is not compensable under the FLSA because it is *de minimis.*

The Supreme Court has held that certain *de minimis* employee activities are exempt from the overtime provisions of the Fair Labor Standards Act (FLSA) exception. *See Anderson v. Mt. Clemens Pottery Co., supra*.

The Supreme Court in *Anderson* explained the *de minimis* rule as follows:

> When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved.

Anderson, 328 U.S. at 692. When applying the *de minimis* rule to otherwise compensable time, the following considerations are appropriate: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States, 738 F.2d 1057, 1063 (9th Cir. 1984)*.

While the courts have determined that the amount of time spent on the preparatory activity alone is not determinative of whether the *de minimis* exception is applicable, periods less than 10 minutes have generally been held to not be compensable. *Lindow* at 1062. In *Lindow*, the claimants alleged "that the Corps required them to report to work 15 minutes before the start of their scheduled shifts to (1) review the log book regarding previous shift activities and plant conditions; (2) exchange information and clarify log entries with the employees leaving their shifts; (3) be available to relieve an outgoing employee who was operating the

navigational locks at the time of the shift change; and (4) open and close project gates to gain entry to the dam projects. The district court found that the claimants only spent 7 to 8 minutes in these activities and that the rest of the time was spent in social activities. *Lindow* at 1060-1061. Accordingly, the district court found, and the circuit court upheld, that the time while preparatory was not compensable because it was *de minimis*.

In this case, NWE did not provide any substantial evidence that the claimants were engaged in social activities that would reduce the claimed time below 15 minutes. NWE would have had no administrative difficulty in recording the additional time. The claimants could easily add their time to their time sheets generated by the SAP program. Mueller's unrebutted testimony showed that when an issue arose about the claimants submitting shift turnover after the 2008 CBA was ratified, she went to Lisa Hanson, SAP HR Business Analyst, who set it up the day that Mueller contacted her. Clearly, modifying the system to charge the time appropriately would have been a minor issue for a company as large and sophisticated as NWE. NWE could also have added a time clock or modified its key pass system to augment the information in its timekeeping system.

The aggregate amount of compensable time here is not a trifle. Here, the claimants assert an average of 15 minutes a day for every day they worked for almost three years. The aggregate amount for each claim adds up to several thousand dollars for each claimant and tens of thousands of dollars for the group.

The claimants' time spent sharing integral and indispensable information with the oncoming operators was a regular part of their everyday work schedule. Thus, the claimants' time spent in the preparatory shift turnover activities is not *de minimis* and is therefore compensable under the test in *Lindow*.

D. *The claimants are not estopped from asserting their claims under Section 207 of the FLSA.*

NWE also asserts that claimants should be estopped from bringing their claims because the time sheets they submitted for most of the claim period did not indicate any time above their normal 12-hour shift was being worked.

As defined in 29 U.S.C. § 203(g), "'employ' includes to suffer or permit to work." "[T]he words 'suffer' and 'permit' as used in the statute mean 'with the knowledge of the employer.'" *Fox v. Summit King Mines,* 143 F.2d 926 (9th Cir. 1944).

> [A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of § 207. An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation. However, where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of § 207.

Forrester v. Roth's I.G.A. Foodliner, Inc., 646 F.2d 413, 414-415 (9th Cir. Or. 1981).

See also Chao v. Gotham Registry, Inc., 514 F.3d 280, 288 (2nd Cir. N.Y. 2008), in which the court stated:

> We regard Gotham's knowledge as sufficient to afford it the opportunity to comply with the Act. See *Forrester*, 646 F.2d at 414. An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance. *Reich v. Stewart*, 121 F.3d 400, 407 (8th Cir. 1997); *Forrester*, 646 F.2d at 414 ("An employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation . . . ."); *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) ("The employer who wishes no such work to be done has a duty to see it is not performed."); 29 C.F.R. § 785.13. This duty arises even where the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours. *See Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 718 (2d Cir. 2001); *Holzapfel*, 145 F.3d at 524; 29 C.F.R. §§ 785.11-.12.

An employer can show that it did not suffer or permit work to be done if it was not on notice of an employee's overtime work. *Forrester, supra.* However, this is not a case where the employer had no knowledge. Johnston obviously had some knowledge or he would not have told at least some of the claimants to put down the shift turnover as overtime only if they worked more than 30 minutes. Colvin and Reichle had direct knowledge the claimants were working overtime to conduct the shift turnover. Colvin not only knew the claimants were working overtime to conduct the

shift turnover, he expected the claimants to do so. The only reason he did not require them to put the time on their time sheets was that he, himself, as a former operator for many years, did not know that the shift turnover was compensable. Like the claimants, he thought the shift turnover was just part of the job. If NWE had provided Colvin with training on the FLSA to know that the shift turnover was compensable, he could have put a stop to it or presumably his superiors, aware of the shift turnover through Colvin's knowledge, could have made that decision. NWE also could have earlier decided, as they ultimately did in 2008, that the activity was important to the overall safety of the system and its workers and begun paying for the time pursuant to the FLSA and their collective bargaining agreement.

Reichle knew the claimants were working overtime because she was informed that the operators were going to start, and did in fact start, putting the time down on their time sheets after they attended a company-mandated webinar on the FLSA and learned that the shift turnover was compensable as preparatory activity. Reichle also should have known that the claimants were working overtime conducting shift turnovers because on more than one occasion operators had to interrupt their conversations with her to conduct their shift turnover. Critically, Reichle never told the operators to stop doing the shift turnover, she simply told them not to put it on their time sheets.

Even without Colvin's and Reichle's direct knowledge that the claimants were working overtime to conduct the shift turnover, NWE should have known they were. Reichle should have known that the claimants were conducting a shift turnover at the beginning and end of every shift they worked. Reichle was the claimants' supervisor, but never worked a shift with the claimants. She never learned what the claimants did during their shift. NWE never trained her in her supervisory duties except to give her an organizational chart and a list of direct reports. NWE also never provided Reichle with any training in the FLSA prior to April 2008. NWE also scheduled the claimants' supervisors in such a way that unless they worked late or came in early, they wouldn't observe a shift turnover.

Like the employers in *Forrester* and *Chao*, NWE should have known that the claimants were working additional hours. NWE relies heavily on *Brumbelow v. Quality Mills, Inc*, 462 F. 2d 1324 (5th cir. 1972) to support its argument that because the claimants did not submit time sheets showing the shift turnover time on them that they should be estopped from pursuing their claims. NWE's reliance on *Brumbelow* is misplaced. The facts of *Brumbelow* are very different than the facts of this case and that court pointed out that their decision may not be broadly applicable:

> On the very narrow facts of this case, the court correctly granted a directed verdict on the basis that the appellant was estopped and could not profit from her own wrong in furnishing false data to the employer . . . . the result may differ with other facts . . .

Brumbelow, at 1327.

In *Brumbelow*, a homeworker who assembled electric light pull cords *in her home* reported that she completed the requisite units in eight hours when it actually took her longer. Brumbelow was paid on a piece rate, not an hourly rate, and had an incentive to lie about her hours – she wanted to keep her job. Brumbelow had little evidence to support her claim and did not have supervisors who could have seen that she was not completing the pull cords in the eight-hour time period. The claimants here did not work at home and had supervisors who easily could have seen that they were working more than 12 hours as a result of performing the shift turnover work. Moreover, there is no evidence that the claimants were lying about the time because they were afraid of losing their jobs or that they hid the fact they were working overtime in any manner. To the contrary, the respondent's own witnesses established that the claimants were honest, hardworking and dedicated professionals. It is very believable that the claimants conducted shift turnover because they had a sense of duty to their job and to ensure the safety of the electrical and gas transmission systems and the equipment and employees that run it.

If NWE had simply been diligent and had their supervisors observe for one shift what the claimants did during their workday, they would have known that the operators came in early and stayed late to conduct the shift turnover. NWE could also have trained its supervisors in the rudiments of the FLSA long before 2008. They chose not to do either of these things. It is surprising that a company that recently purchased Montana's primary electric and gas transmission distribution company would not have its supervisors do so in order to know how its workers do their jobs and to protect it from liability for similar claims from other employees. NWE knew or should have known that the claimants were working overtime.

Claimants here admit they did not add the 15 minutes of shift turnover to their time sheets during the claim period. Claimants also admit that they did not file a grievance regarding the unpaid overtime work. Further, claimants did not ask their supervisors if they could work overtime to conduct the shift turnover until April 2008. Additionally, NWE did not prevent them from adding the shift turnover time to their time sheets until Reichle told them not to do so in April 2008. These

facts do not, however, bar the claimants from prevailing on their claims. NWE had more than sufficient direct knowledge of the claimants' overtime work.

The claimants bear the burden of proof in this matter to show by a preponderance of the evidence that they are entitled to the wages they claim to be due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. In this matter, the claimants carried their burdens to show that they are owed the wages identified in Finding of Fact Number 71.

VI. LIMITATION PERIOD

The claimants argue that because NWE's violation of the FLSA was willful, they are entitled to unpaid overtime wages for the three-year period prior to the filing of their claims. The claimants bear the burden of proving that NWE's violations were willful. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (U.S. 1988).

The FLSA limitation provision states:

> Any action commenced on or after the date of the enactment of this Act [enacted May 14, 1947] to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act--
> (a) if the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued*;

29 U.S.C. § 255 (emphasis added).

In interpreting the willfulness requirement necessary to impose a three-year statute of limitations, the Supreme Court held, in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (U.S. 1988):

> The standard of willfulness that was adopted in *Thurston* -- that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute -- is surely a fair reading of the plain language of the Act.

The Court also further clarified the standard when it stated that the "word willful . . . is generally understood to refer to conduct that is not merely negligent." *Id*.

In applying the *Richland Shoe* test, the Circuit Courts of Appeal, in finding an employer to have committed a willful violation, have considered evidence where the employer knew that its conduct could result in a FLSA violation; where it undertook affirmative acts to cover up violations; where it knew that there could be a violation and was indifferent to the possibility; and where prior violations or Department of Labor investigations put it on notice of potential violations and the employer continued the suspect practices. See *Baystate Alternative Staffing v. Herman*, 163 F.3d 668 (1st Cir. Mass. 1998); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26 (1st Cir. P.R. 2007); *Reich v. Waldbaum, Inc.*, 52 F.3d 35 (2d Cir. N.Y. 1995); *Herman v. RSR Sec. Servs*., 172 F.3d 132 (2d Cir. N.Y. 1999); *Martin v. Selker Bros., Inc.*, 949 F.2d 1286 (3d Cir. Pa. 1991); *Reich v. Bay, Inc.*, 23 F.3d 110 (5th Cir. Tex. 1994); *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468 (6th Cir. Mich. 1999); *Jarrett v. ERC Props.*, 211 F.3d 1078 (8th Cir. Ark. 2000); *Chao v. A-One Med. Servs.*, 346 F.3d 908 (9th Cir. Wash. 2003); *Alvarez v. IBP, Inc*., 339 F.3d 894, 909 (9th Cir. Wash. 2003); *Reich v. Monfort, Inc.*,144 F.3d 1329 (10th Cir. Colo. 1998).

This is a case involving NWE's reckless disregard of whether its conduct was prohibited by the statute. In *Reich v. Bay, supra,* the Fifth Circuit Court found the employer had recklessly disregarded whether its conduct was in violation of the FLSA after a local director for the Wage and Hour office contacted one of the defendants' representatives and informed him that its overtime payment practices violated the FLSA and it continued its practices without further investigation into the alleged violation.

In March 2008, NWE instructed its supervisors and its employees to take an on-line course in the FLSA that included specific instruction to supervisors that overtime worked by non-exempt employees on preparatory activities was compensable even if they hadn't approved it in advance. The same course instructed the supervisors to contact human resources if they had concerns or questions. After receiving that same FLSA training, the operators started adding the shift turnover time to their time sheets in April 2008. The FLSA training and the claimants put NWE on notice that its conduct in not paying overtime for the shift turnover was a violation of the FLSA (NWE's management already knew that the claimants were working overtime to conduct the shift turnover). NWE, like the employer in *Bay*, failed to consider the possibility that it might be in violation of the FLSA, but simply told the claimants to take the time off their time sheets because it was considering

including the time as compensable under the 2008 CBA. It also declined to stop the operators from conducting the shift turnover. In making those decisions and in failing to ensure compliance with the FLSA, NWE displayed a reckless disregard for whether it was in compliance with the FLSA. It simply didn't matter that a new CBA was in the works at the time or that it would have included shift turnover as compensable overtime under the CBA, it was compensable in April 2008 under the FLSA. NWE's failure to determine that the claimants' overtime earned in April 2008 was compensable under the FLSA was reckless.

Moreover, for 20 and more years, NWE and its predecessor, MPC, relied on these operators to run the electrical transmission and gas distribution systems. Regardless of who originally came up with the idea of conducting shift turnovers, the operators implemented it to ensure that those systems were safely and effectively operated. Moreover, NWE expected its operators to learn the job from their co-workers. If the co-workers instructed the new operators that shift turnover was part of the job, NWE cannot now argue that it was not. When NWE purchased MPC between 2000 and 2002, it changed nothing about how the SOCC Center was operated or the duties of the operators. As O'Neil testified, "we thought of MPC and NWE as one."

NWE did not even attempt to observe how the claimants did their jobs. The claimants worked 24 hours a day, 365 days a year. Their supervisors worked 8:00-5:00, Monday through Friday. Whether it was out of trust in the operators' abilities to do their jobs or a greater interest in other aspects of the corporation, NWE failed to ensure that it was in compliance with the FLSA. They knew, or thought they knew, that because the operators were members of the union, they were non-exempt employees under the FLSA[2] and therefore entitled to overtime pay for work outside their regular work week. That was, however, the limit of their knowledge of whether the way they paid the claimants was in compliance with the FLSA.

Had NWE made an effort to learn what the claimants were doing during and at the end of their shifts for a few months or a year because it had to focus on some other critical business need, its failure to ensure its compliance with the FLSA might be understandable, but here there is no evidence of what, if anything, distracted

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[2] NWE's 30(b)(6) witness testified while she worked in the human resources department for MPC the operators were "lumped in with other union members" and classified as non-exempt. She further testified that NWE made no changes to this determination. Stagnoli has the same duties and responsibilities at NWE that she did with MPC. Union membership is not a criteria for determining whether an employee is non-exempt from the overtime requirements of the FLSA.

NWE for over six years from taking the minimal time necessary to determine whether it was in compliance with the FLSA. On the other hand, there is a vast amount of evidence that NWE knew that the operators were conducting shift turnover and that they worked overtime to perform it. Those supervisors and managers who did not have direct knowledge of the shift turnover chose to avoid that knowledge by never spending the time to learn.

The appropriate limitation period is therefore three years.

VII. LIQUIDATED DAMAGES

The FLSA entitles employees owed wages to liquidated damages for an employer's failure to pay overtime premium.

> Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

For a number of years, the Portal to Portal Act has altered the liquidated damages provision of the FLSA, pursuant to 29 U.S.C. § 260:

> In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

Therefore, the claimants are entitled to liquidated damages unless the employer demonstrates it acted reasonably and in good faith. To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]." *Brock v. Shirk* (9th Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective

components. *Id*. Good faith requires an honest intention *and* a lack of knowledge of circumstances which might have put the employer on notice of FLSA problems. Id. See also *Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

A finding of good faith is plainly inconsistent with a finding of willfulness. *See Bothell v. Phase Metrics, Inc*., 299 F.3d 1120, 1130 (9th Cir. 2002); *Chao v. A-One Med. Servs.*, 346 F.3d 908, 920 (9th Cir. Wash. 2003). The same facts that demonstrate an employer acted willfully can serve to show that an employer did not act in good faith. *Bull v. United States*, 479 F.3d 1365, 1380 (Fed. Cir. 2007).

NWE knew that the claimants as union transmission operators were subject to the overtime requirements of the FLSA. It knew or should have known that the claimants were working the extra time. Larry Colvin knew that operators were doing shift turnover when he was the SOCC supervisor. Casey Johnston should have known that the operators he called "honest professionals" were working the time, but he failed to find out what the people he was supervising were doing especially at shift change, when he admittedly was not there to know one way or the other. He further admitted that Colvin would know more about shift turnover, presumably because Colvin, unlike Johnston, had been an operator before he became a supervisor.

Reichle testified similarly to Johnston in that her schedule prevented her from knowing what took place at shift change. If NWE did not want shift turnover to take place and thought it unnecessary because of the other tools that operators could use as information resources, then they should have put their managers in a position to know what was going on so that they could prevent it from occurring in the future. Colvin, as a former operator without knowledge of the requirements of the FLSA, may not have told his superiors that shift turnover was occurring and that overtime work was involved because he thought it was just part of the job. He nonetheless was a manager for NWE who had knowledge that this work was going on. NWE as a business had knowledge of the FLSA requirements and could have trained Colvin in the FLSA prior to 2008 or sent those with knowledge of the FLSA to its departments to ensure compliance with the act. It did not. Furthermore, there was no evidence that NWE, when faced with the knowledge that the operators were working overtime to conduct the shift turnover, enlisted its legal staff to provide an opinion on whether not paying the claimants was a violation of the FLSA. It was unreasonable for NWE to put itself in a position not to know if it had FLSA problems.

The employer bears a substantial burden "in demonstrating good faith and reasonable grounds." *Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir. 1991)

(citation omitted); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). "Good faith" exists when the employer has "an honest intention to ascertain and follow the dictates of the Act." *Renfro*, 948 F.2d at 1540 (citation omitted). "Reasonable grounds" is an objective standard by which to evaluate the employer's behavior. *Id.* Prior to a showing of good faith and reasonable grounds, "the district court has no discretion to mitigate an employer's statutory liability for liquidated damages." *Marshall*, 668 F.2d at 753. Only after the employer carries its burden may a district court "in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260. *Tacke v. Energy West, Inc.*, 2010 MT 39, P27 (Mont. 2010).

For the reasons cited here and in the willfulness section of this decision, the hearing officer finds that the claimants are entitled to liquidated damages in an amount equal to the amount of their unpaid overtime pay.

VIII. ATTORNEYS' FEES

Claimants seek attorneys' fees and cost pursuant to the FLSA. They point out that under the Montana Wage Payment Act an administrative law judge does not have jurisdiction to award such fees and costs. *Chagnon v. Hardy*, 208 Mont. 420, 424, 680 P. 2d 932,934 (1980). While Mont Code Ann. § 39-3-408 vests the hearing officer with jurisdiction to hear claims under the FLSA, the FLSA does not provide that an administrative hearing officer can award attorneys' fees and cost. Section 29 USCA 216 provides that the "court . . . allow a reasonable attorney's fee." The hearing officer is not a court and claimants' reference to the "court" being something other than a trial judge is not convincing. A Montana District Court has held that "under FLSA an employee may only be awarded attorney's fees and costs when claims are brought in federal or state court, and in this case, the petitioner's chose the administrative route for redress." *In the Matter of the Wage Claim of Julia Caruana v. PRINTINGFORLESS.COM, INC.*, Case No. DV-08-150 (6th Jud. Dist. 2009).

Accordingly, the hearing officer has no power to extend his jurisdiction outside the established boundaries and will not award attorneys' fees and costs in this matter.

IX. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. State v. Holman Aviation (1978), 176 Mont. 31, 575 P.2d 925.

2. The claimants were engaged in interstate commerce in the performance of their work at NWE and their employment was therefore subject to the provisions of the Fair Labor Standards Act. 29 U.S.C. § 207(1).

3. NWE's violation of the Fair Labor Standards Act was willful, entitling the claimants to recover three years of back wages.

4. Between December 11, 2005 and May 1, 2008, the claimants worked overtime as defined by the Fair Labor Standards Act. The NWE therefore owes the claimants unpaid overtime premium in the amounts listed in Finding of Fact Number 71.

5. The failure of the NWE to pay overtime premium to the claimants was not in good faith or based on reasonable grounds. The NWE therefore owes the claimants liquidated damages in the amounts listed in Finding of Fact Number 71.

X. ORDER

The NWE is hereby ORDERED to tender cashier's checks or money orders in a total amount of $149,593.90, representing $74,796.95 in unpaid overtime premium pay and $74,796.95 in liquidated damages, made payable to the claimants according to the table in Finding of Fact Number 71. NWE may deduct applicable withholding taxes from the portion representing wages, but not from the portion representing liquidated damages.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision.

DATED this 1st day of June, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.