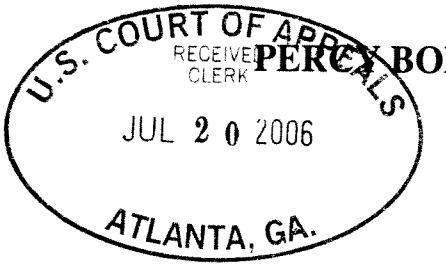
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No.: 06-12515-A
L.T. Case No.: 02-CV-23286-SIMONTON



PERCY BONILLA, ET. AL.

Appellants,

v.

BAKER CONCRETE CONSTRUCTION, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE FOR AFFIRMANCE OF THE DISTRICT COURT DECISION

Samuel Estreicher
Jones Day
222 East 41st Street
New York, New York 10017
(212) 326-3939

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Theresia Moser
(Georgia Bar No. 526514)
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
(404) 581-8576
tmoser@jonesday.com

Counsel for *Amici Curiae*

Case No.: 06-12515-A
L.T. Case No.: 02-CV-23286-SIMONTON

PERCY BONILLA, ET. AL.

Appellants,

v.

BAKER CONCRETE CONSTRUCTION, INC.

Appellee.

CERTIFICATE OF INTERESTED PERSONS AND DISCLOSURE STATEMENT

---

1. The Chamber of Commerce of the United States of America (*amicus curiae*).

2. Robin S. Conrad, Esq. (Counsel for the Chamber of Commerce of the United States of America and *amici curiae*).

3. Jones Day (Counsel to *amici curiae*).

4. Samuel Estreicher, Esq. (Counsel to *amici curiae*).

5. Theresia Moser, Esq. (Counsel to *amici curiae*).

6. Society for Human Resource Management (*amicus curiae*).

Pursuant to Eleventh Circuit Rule 26.1-1, this Certificate includes only persons and entities omitted from the Certificates contained in Appellants' Initial Brief, and Appellee's Answer Brief.

Society for Human Resource Management does not have a parent company and no publicly held corporation owns 10% or more of its stock.

The Chamber of Commerce of the United States of America does not have a parent company and no publicly held corporation owns 10% or more of its stock.

Dated: July 20, 2006

Theresia Moser
(Georgia Bar No. 526514)
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
(404) 581-8576
tmoser@jonesday.com

Counsel for *Amici Curiae*,
Society for Human Resource Management
The Chamber of Commerce
of the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is being filed on behalf of the Society for Human Resource Management and the Chamber of Commerce of the United States of America. It is filed pursuant to the accompanying application for leave of this Court. Appellee has consented to the filing of this brief, but Appellants have withheld their consent.

The Society for Human Resource Management ("SHRM" or the "Society") is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of human resource professionals by providing the most essential and comprehensive resources available. The Society's mission is also to advance the human resource profession to ensure that the human resource function within organizations is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries. This case is of particular interest to SHRM and its members because human resource professionals are often responsible for communicating FLSA policies to employees, serving as the bridge between employer and employee on FLSA issues.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

Both the Chamber and SHRM have appeared as *amicus curiae* in other cases relating to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (2002) ("FLSA") and its Portal-to-Portal Act amendments, 29 U.S.C. §§ 251 *et seq.* (2002) ("Portal Act"). SHRM and the Chamber, recently filed, for example, the principal *amicus* brief for the employer community in IBP, Inc. v. Alvarez, 126 S.Ct. 514 (2005).

The *amici* organizations ("*amici*") agree that all employers must comply with the duties imposed by the FLSA to compensate workers for all hours worked. However, lawsuits increasingly target activities excluded from compensation under the FLSA, seeking compensation for pre- and post-shift travel and activities that often promote employee convenience and are difficult for employers to monitor.

The Appellants in this case ask this Court to expand the scope of the pre-shift and post-shift travel for which employers can be forced to pay. *Amici* are

concerned that such an expansion will spur a tide of hours-worked litigation with wide-ranging, and negative, repercussions for U.S. employers and their employees.

This case implicates the core judgment of Congress in the 1947 Portal-to-Portal Act amendments to the FLSA that, as the District Court ruled below, travel between home and the actual place of performance of work is non-compensable under the FLSA. Such a rule is not only the one mandated by Congress, but provides essential predictability of compensation – enabling fruitful negotiations between employers and employees, without the overhanging prospect of unforeseeable liability and waste of resources from needless litigation.

A ruling of this Court entertaining liability for home-to-work travel would have especially undesirable consequences for U.S. workplaces today where security concerns require – in this case, government mandated – measures that are unavoidable but essential for the safety not only of employees but also the larger public. These safety concerns are obviously paramount in this case, involving construction worker access to the airport tarmac, but they are present in a great many employment settings. Such measures may often delay the employee's arrival to, or departure from, work. Congress clearly intended to preclude FLSA liability for such delays. Moreover, employers should be able to provide courtesy transportation to the worksite for their employees, as Appellee provided in this case, without fearing that such provision will provide a predicate for lawsuits.

Because *amici* believe that the District Court properly interpreted the Portal Act to reject as non-compensable Appellants' claims to be paid for travel time to and from their worksite, *amici* have filed this brief in support of affirmance of the decision below.

STATEMENT OF THE ISSUE

Whether the District Court properly ruled that the Portal-to-Portal Act bars Appellants' FLSA claims for compensation for travel time to and from work?

STATEMENT OF THE CASE[1]

This case below was referred to Andrea M. Simonton, U.S. Magistrate Judge, pursuant to the consent of the parties; see 28 U.S.C. § 636 (c) ("District Court"). This brief refers to the undisputed factual findings of the District Court in its Order dated March 28, 2006 ("Order").[2] The following are the relevant undisputed facts established in the Order:

- Appellants were employed as laborers, carpenters, and builders to work on a construction project (the "Project") at Miami International Airport (the "Airport" or "MIA"). (Order, pp. 5-6)

- "It is undisputed that the actual place of performance of the principal activity or activities for which Appellants were employed to perform was the Project job site at MIA's North Terminal." (the "Worksite"). (Order, p. 16)

- Appellants and other employees had the option to use *free* offsite parking (the "Parking Lot"),[3] alleviating the need to pay to park in the available private lot. (Order, p. 8)

- Employees had the option to take a *free* bus from the Parking Lot to the Airport security checkpoint (the "Security Gate") (Order, p. 7), or to use other means to arrive at the Security Gate. "In the immediate

---

[1] Although *amici* are not required to include a Statement of the Case under Eleventh Circuit Rule 29-2, one is included here for ease of reading as the uncontested facts stated in this section are referenced throughout this brief.

[2] The Order granted Defendant's motion for Summary Judgment, and denied Plaintiffs' motion for Partial Summary Judgment as to Liability. (Order, p. 1)

[3] Free parking was located approximately one-half mile from the Airport from 1990-2000; in 2000 it was changed to a lot approximately 3.2 miles from the Airport. (Order, p. 6-7) Because the difference between the two lots makes no difference to the legal analysis, both parking lots are referred to herein as the "Parking Lot."

vicinity of the security gate, there was a public bus stop and a taxi cab stand. Employees had been known to use alternative transportation to the security gate. Nothing prevented [Appellee's] employees from walking from the parking lot to the security gate ...." (Order, p. 8)

- The free bus from the Parking Lot to the Security Gate (the "Bus" or the "Courtesy Bus") did not leave at a set time; "[t]he buses left between 5:30 a.m. and 6:30 a.m. each day." (Order, p. 8)

- Federal Aviation Administration ("FAA") regulations required that all employees pass through the Security Gate. (Order, p. 7) These regulations further mandated that only authorized vehicles could travel from the Security Gate to the Worksite or elsewhere on the Airport tarmac. Employees were not permitted to use private vehicles or to walk from the Security Gate to the Worksite. The Courtesy Buses were authorized vehicles. (Order, p. 8)

- "[Appellee's] employees did not perform any labor or work either while they were waiting for the buses or while they were riding on the Bus, either before or after work. [Appellee's] employees did not receive any instructions from their foremen or their supervisors while they were waiting for or riding on the buses. [Appellee's] employees kept their tools in the tool box at the job site rather than carrying them back and forth each day. [Appellee's] employees carried nothing with them on the buses except their lunches." (Order, pp. 8-9)

- "[N]o work was performed until [Appellants] arrived at the job site and no work was performed after [Appellants] left the job site." (Order, p. 25)

- Employees did not sign-in until they arrived at the Worksite. Employees did not receive their work instructions until 7:00 a.m., after riding the Courtesy Bus. They signed out after completing their daily work, and before boarding the Courtesy Bus back to the Security Gate and/or Parking Lot. (Order, p. 9)

SUMMARY OF ARGUMENT

The instant case is a simple one. The relevant statute provides that employees are not entitled to compensation for time spent riding to and from their place of work. As the District Court ruled below, "the plain language of the Portal Act, 29 U.S.C. § 254[,] excludes from compensation [Appellants'] travel time to and from their job site." (Order, p. 25) Several grounds support affirmance of the decision of the District Court in this case.

1. Appellants' overarching difficulty is that they make no effort to explain why their claim for pay for the time spent riding a Courtesy Bus from the Parking Lot to the Worksite[4] is not barred by the plain language of § 4(a)(1) of the Portal-to-Portal Act amendments, 29 U.S.C. §§ 251 *et seq.* (2002) (the "Portal Act" or the "Act"), to the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* (2002) ("FLSA"). Section 4(a)(1) of the Portal Act states that the FLSA does not require compensation for time spent "riding ... to and from the actual place of performance of the principal activity or activities which such employee is employed to perform...." 29 U.S.C. § 254(a)(1).

---

[4] Appellants claim compensation for their entire travel time from the Parking Lot to the Worksite. Other than the fact that the travel from the Security Gate to the Worksite had to be in FAA-authorized vehicles, the travel from the Parking Lot to the Security Gate and from the latter to the Worksite were all part of the same home-to-work commute and should be analyzed together.

Since the District Court found that the Worksite was the "actual place of performance" of the principal activity, as carpenters, laborers and builders, Appellants were employed to perform (Order, p. 16), the time spent traveling from their homes to the Worksite was plainly non-compensable as a matter of law.

2. Appellants also misapply the "integral and indispensable" test articulated in Steiner v. Mitchell, 350 U.S. 247, 256, 76 S.Ct. 330, 335 (1956), which covers only activities "not specifically excluded by Section 4(a)(1)." Even if the analysis were to proceed under § 4(a)(2) of the Portal Act, to which Steiner applies, compensability requires a showing that the travel time is an "integral and indispensable part of the principal activities," Steiner, 350 U.S. at 256, 76 S.Ct. at 335, that Appellants were employed to perform. Since the District Court found that Appellants engaged in no work-related activity while riding on the Courtesy Bus to the Worksite, their travel time to and from the Worksite was *not* "integral and indispensable" for purposes of § 4(a)(2) and Steiner.

3. Appellants' sole contention seems to be that they should be compensated for time spent riding a Courtesy Bus from the Parking Lot to the Worksite because it was, in some sense, "necessary" to their being able to start their principal activities at the Worksite. (Appellants' Br., p. 33) This argument of mere but-for "necessity," however, has been flatly rejected by the Supreme Court, most recently in IBP, Inc. v. Alvarez, 126 S.Ct. 514 (2005):

> Walking from a time clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the [Portal Act] evinces Congress' intent to repudiate ... that such time was compensable under the FLSA.

There is no substantive difference between such walking and Appellants' ride on the Courtesy Bus, especially where the Portal Act includes "walking, *riding* or traveling." § 254(a)(1) (emphasis added).

4. Appellants' claim ignores the manifest intent of Congress in the Portal Act to exclude FLSA compensation for travel time to and from the actual place of performance of the work the Appellants were employed to perform. Acceptance of their position would raise many of the problems Congress sought to forestall through the Portal Act amendments and would create distorting incentives undermining efficiency and workplace security.

ARGUMENT

I. THE PORTAL ACT RENDERS NON-COMPENSABLE APPELLANTS' TRAVEL TIME "RIDING ... TO AND FROM THE ACTUAL PLACE OF PERFORMANCE"

A. Appellants' Travel Time Is Not Compensable Under § 4(a)(1) Of The Portal Act

The language of the Portal Act leaves no doubt that Appellants' time spent riding an employer-provided Courtesy Bus to and from the Worksite is *not* compensable. Section 4(a)(1) of the Portal Act provides that employers are not required to compensate employees for time spent:

> walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform ....

29 U.S.C. § 254(a)(1) (2002). Section 4(a)(1) provides sufficient grounds, standing alone, to affirm the District Court's judgment that Appellants' time riding on the free Buses provided by Appellee from the Parking Lot to the Worksite and back is not compensable.

The District Court found, and Appellants do not dispute, that the actual place of performance of Appellants' principal activities was the Worksite at the Airport's North Terminal, not the Parking Lot, Security Gate, or Bus. (Order, p. 16) The lower court also found, and Appellants do not dispute, that they did *not* perform any work for their employer waiting for or riding on the Bus. (Order, p. 8-9, 16, 25) These undisputed facts lead to the conclusion that Appellants' time "riding ...

to and from the actual place of performance" was mere home-to-work travel time rendered non-compensable by the Portal Act.

The fact that the FAA required Appellants to ride in authorized vehicles for a portion of this trip – from the Security Gate to the Worksite – does not change the Portal Act analysis. A showing of mere but-for "necessity" – that an activity must be engaged in before work can begin – is not a sufficient basis for compensability when it comes to travel time to and from the "actual place of performance." As the Supreme Court recently explained:

> Walking from a time clock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the [Portal Act] evinces Congress' intent to repudiate [Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187 (1946)]'s holding that such time was compensable under the FLSA.

IBP, 126 S.Ct. at 527. There is no substantive difference between such walking and Appellants' ride, especially where the Act specifically includes "riding" as not compensable. 29 U.S.C. § 254(a)(1) (2002).

Section 4(a)(1)'s preclusion of FLSA-mandated compensation for travel "to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" fully applies even though Appellants are provided a Bus from the Parking Lot to the Worksite, which FAA regulations require they must use between the Security Gate and the Worksite (instead of having a multitude of vehicles and pedestrians wandering about the

Airport tarmac). The Supreme Court has been clear, in the passage quoted above (discussing Anderson), that if Appellants had to walk from the Security Gate to the Worksite they would not be entitled to compensation; the mere fact that they rode in a Courtesy Bus does not change the analysis.

Federal case law interpreting § 4(a)(1) of the Portal Act makes clear that Appellants' Bus rides are not compensable. For example, in Vega v. Gasper, 36 F.3d 417 (5th Cir. 1994), the court held that farm workers were not entitled to compensation for time spent riding their employer's buses from their community to the job site. The Vega court identified several factors, which are also present here:

- "[T]he workers ... performed no work prior to or while riding on Gasper's buses. They did not load tools or engage in activities that prepared them or their equipment for [their work] before or while riding the buses." Vega, 36 F.3d at 425. As the District Court found below, "no work was performed until [Appellants] arrived at the job site and no work was performed after [Appellants] left the job site." (Order, p. 25)

- "The workers were told on the bus which field they would pick and what the pay rate would be each day. Merely receiving this information is not enough instruction ... to render the time compensable." Vega, 36 F.3d at 425 (citing 29 C.F.R. § 785.38 (1990)). As the District Court found below, Appellants did *not* receive *any* instructions or information from foremen or supervisors on the Bus. (Order, p. 9)

Based on these factors, the Vega court held that "[t]he travel time was just an extended home-to-work-and-back commute[,]"36 F.3d at 425, and the facts at hand indicate this Court should do the same. See also Dolan v. Project Constr.

Corp., 558 F.Supp. 1308, 1309-11 (D.Colo. 1983) (holding that employees' 30 minute bus ride was not compensable even though (a) the bus ride was *required* due to safety concerns; (b) employees received their paychecks on the bus; and (c) employees intermittently received work-related information on the bus (Factors (b) and (c) are, of course, not present here)).

In Spencer v. Auditor of Pub. Accounts, Etc., Civil Action No. 88-54, 1990 WL 8034, at *1 (E.D. Ky. Jan. 30, 1990), the court held that plaintiff-auditor, hired to "travel to various county offices throughout the state to conduct audits[,]" was not entitled to compensation for time spent traveling to and from the job site under the Portal Act § 4(a)(1). But even unlike the plaintiff in Spencer, for whom traveling to various locations was part of his job, Appellants here are seeking compensation for "what they would have to do anyway – get[] themselves to work." Bolick v. Brevard County Sheriff's Dep't, 937 F.Supp. 1560, 1565 (M.D.Fla. 1996) (holding that plaintiffs were not entitled to compensation for travel time to and from work transporting police dogs).

B. Appellants' Travel Time Is Not Compensable Under The Department of Labor's Regulations

The Department of Labor ("DOL") provides instructive guidance for deciding the instant case. See IBP, 126 S.Ct. at 520-21 & 524-25. The agency entrusted with administration of the FLSA and its Portal Act amendments has consistently stated that "[a]n employee who travels from home before his regular

workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment ... Normal travel from home to work is not worktime." 29 C.F.R. § 785.35 (2005).

Appellants' travel from the Parking Lot to the Worksite, the "actual place" of work (Order, p. 16), is part of ordinary home-to-work travel. This does not change whether Appellants were able to park right at the Worksite, park across the street and walk to the Worksite, park just down the road and take a free bus to the Worksite, or park on shore and take a boat to the Worksite. See, e.g., Ralph v. Tidewater Constr. Corp., 361 F.2d 806, 808 (4th Cir. 1966) (holding that plaintiffs' 15 minute to one hour boat ride from point of embarkation to jobsite was not compensable under the Portal Act). As DOL has further explained, "the 'walking, riding or traveling' to which section 4(a) refers, [and renders non-compensable,] is that which occurs, *whether on or off the employer's premises*, in the course of an employee's ordinary daily trips between his home ... and the actual place where he does what he is employed to do." 29 C.F.R. § 790.7(c) (2005) (emphasis added) Thus, the fact that a portion of Appellants' time was spent traveling on Airport property from the Security Gate to the Worksite is legally irrelevant for Portal Act purposes.

The regulations go even further to provide that "riding on buses between a town and an outlying mine or factory where the employee is employed, and riding

on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted" is *not* compensable. 29 C.F.R. §§ 790.7(f)(2), (3) (2005). This example plainly encompasses Appellants' time spent "riding on buses" between the Parking Lot and Security Gate. Id.

Furthermore, under the Portal Act § 4(a)(1) "walking *or riding* by an employee *between the plant gate and the employee's lathe*, workbench or other actual place of performance of his principal activity or activities" is also *not* compensable. 29 C.F.R. § 790.7(f)(1) (2005) (emphasis added). This example also encompasses Appellants' riding on the Bus between the Security Gate and the Worksite.

II. BECAUSE APPELLANTS PERFORMED NO WORK-RELATED ACTIVITY WHILE RIDING ON THE COURTESY BUS TO AND FROM THE WORKSITE, THEY ENGAGED IN NO ACTIVITY THAT WAS AN "INTEGRAL AND INDISPENSABLE PART OF THE PRINCIPAL ACTIVITIES" UNDER THE PORTAL ACT

Without squarely making the argument, Appellants seemingly suggest that their travel time to and from the Worksite is compensable as an "integral and indispensable part of [their] principal activities" as construction workers at the Worksite. This contention, apparently predicated on § 4(a)(2) of the Portal Act, as interpreted by the Supreme Court in Steiner v. Mitchell, 350 U.S. 247, 76 S.Ct. 330 (1956), fails for two reasons: (1) § 4(a)(2) is inapplicable where, as here, compensability is foreclosed by § 4(a)(1); and (2) as the District Court found,

Appellants performed no work-related activity while riding the Courtesy Bus to and from the Worksite.

A. *Steiner*'s "Integral And Indispensable Part Of The Principal Activities" Test For § 4(a)(2) Of The Portal Act Is Inapplicable To Travel Time Excluded By § 4(a)(1)

Steiner's "integral and indispensable part of the principal activities" test applies only to activities for which compensability is not already precluded under § 4(a)(1) of the Portal Act.[5] As the Steiner Court plainly stated: "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed *and are not specifically excluded by Section 4(a)(1).*" 350 U.S. at 256, 76 S.Ct. at 335 (emphasis added). Under Steiner, Appellants are not entitled to compensation because riding on the Courtesy Bus to and from the Worksite *is* "specifically excluded by Section (4)(a)(1)." Id. Appellants' invocation of the "integral and indispensable" test is a weak attempt to divert attention from the relevant statutory provision and case law. See Spencer, 1990 WL 8034 at *4 (Plaintiff's "argument must be rejected because the exception

[5] Travel to and from the worksite would also be excluded from compensability as "preliminary" and "postliminary" to the principal activity or activities employees are engaged to perform, which is one reason why § 4(a)(2) does not apply where § 4(a)(1) applies.

for 'integral and indispensable' activities is applicable only to § 254(a)(2), not § 254(a)(1).").

B. Appellants Performed No Work-Related Activities On The Courtesy Bus

In any event, Appellants have no claim under Steiner in view of the District Court's undisputed finding that Appellants (a) "did not perform *any* labor or work either while they were waiting for the buses or while they were riding on the Bus, either before or after work[;]" (b) "did not receive any instructions from their foremen or their supervisors while they were waiting for or riding on the buses[;]" (c) "kept their tools in the tool box at the job site rather than carrying them back and forth each day[;]" and (d) "carried nothing with them on the buses except their lunches." (Order, pp. 8-9) There simply are no activities to which this Court can apply the "integral and indispensable" test.

1. The "Integral And Indispensable" Test Is Not A But-For Test

The "integral and indispensable" test is not a mere but-for test; it requires that the activity in question is closely connected to the productive activity the employees are engaged to perform. See IBP, 126 S.Ct. at 527 ("[T]he fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under Steiner."). Thus, the IBP Court held that although time spent donning safety gear is compensable and the locker room

where safety gear is donned was a "place of performance" of the principal activity for which the butcher workers were employed, "[w]alking to that place before starting work is excluded from FLSA coverage." Id. at 524. Moreover, the time spent waiting for the required safety gear was not compensable because the Court was "not persuaded that [pre-donning] waiting – ... two steps removed from the productive activity ... – is 'integral and indispensable' to a 'principal activity' that identifies the time when the continuous workday begins." Id. at 528. The Court's obvious concern was not extending the line at which the "continuous workday" begins and ends to absurd lengths based on what "necessarily" must be done before an employee can begin actual productive work for the employer.

Here, too, the mere fact that it was "necessary" for Appellants to ride in an authorized vehicle between the Security Gate and the Worksite does not make such commutation travel an "integral and indispensable part of the principal activities for which [employees] are employed ...." See Steiner, 350 U.S. at 256, 76 S.Ct. at 335; IBP, 126 S.Ct. at 527. All employees must pass through some portal or perform some act to get to their worksite. Appellants' required Bus ride is no different, in principle, from any employee's time at a required security checkpoint, punching a time clock, taking an elevator or stairs, riding a boat, or walking across a shopping mall to get to his or her office at the other end. All of these examples, like the travel time in the instant case, involve travel to and from work; they are not

an "integral and indispensable part of the principal activity" for which these employees were employed.

2. "Integral And Indispensable" Travel Requires Engaging In Work-Related Activity Other Than Riding A Free Bus To And From The Worksite

Cases that find an employee's travel is an "integral and indispensable part of the principal activities" for § 4(a)(2) purposes involve some work-related activity other than mere travel to and from work. Where, as in the instant case, the transportation is "used *solely for the transportation of employees* to and from their principal place of work, then ... the drivers are 'riding or traveling' within the exclusion of Section 4 of the Act." D A & S Oil Well Servicing, Inc. v. Mitchell, 262 F.2d 552, 555 (10th Cir. 1958).

In Dunlop v. City Elec., Inc., 527 F.2d 394, 400-01 (5th Cir. 1976), plaintiff-employees were found entitled to compensation for time spent filling out paperwork and maintaining trucks, on the basis that such tasks were "primarily for the benefit of the employer." Appellants' attempt to argue that their Bus ride was for the benefit of Appellee (Appellant Br., pp. 25-26) is contrary to the undisputed facts.

While riding the Bus, Appellants performed no work, and did nothing remotely beneficial to Appellee's business. (Order, pp. 8-9) As to the portion of the Bus ride from the Parking Lot to the Security Gate, the provision of the Bus

ride directly benefited Appellants because they did not have to pay to park, walk from the Parking Lot, or arrange some other method of transportation. Moreover, this portion of the Bus ride was *not* required, and employees did use alternative transportation to the Security Gate. (Order, p. 8)

The Bus ride from the Security Gate to the Worksite was due to an FAA requirement, not a requirement of Appellee. (Order, p. 7) FAA regulations required the use of authorized vehicles to prevent a multitude of vehicles and pedestrians from wandering about the Airport tarmac which would pose obvious safety and security concerns. (Order, pp. 7-8) The Appellee's benefit was not an underlying reason.

Appellants claim that Appellee derived benefit from the Bus requirement because it allowed the workers to more efficiently be transported at the same time and same hour. (Appellants' Br., p. 26) But employers always derive some benefit from facilitating commutation travel for their employees. The case law is clear that if all that occurs is travel to and from work, compensability is barred by § 4(a)(1) of the Portal Act, unless employees engage in work-related activity during their travel. See, e.g., Vega, 36 F.3d at 424-425; Smith v. Aztec Well Servicing Co., 321 F.Supp. 2d 1234, 1237 (D.N.M. 2004) ("There must ... be some indication that the [employees] were *performing compensable work*

activities ... in order for the Defendant to be liable to compensate them for that time.") (emphasis added).

Here, the District Court found, and it is uncontested, that Appellants performed no work-related tasks while traveling to and from the Parking Lot and Worksite. In any event, performance of minor tasks or receipt of work-related information while employees travel – not present here – are insufficient to make their travel an "integral and indispensable part of a principal activity" under Steiner. See, e.g., Dolan, 558 F.Supp. at 1309-11 (holding that employees were not entitled to compensation for a 30 minute bus ride even where the ride was required and employees received paychecks and other work-related information on the bus); Smith v. Aztec Well Servicing Co., 321 F.Supp. 2d 1234, 1237 (D.N.M. 2004) (even though the plaintiffs were *required* to travel with their employer to and from the worksite, carrying paperwork and engaging in work-related discussions, the travel was not "integral and indispensable" because these tasks were not the principal activities for which the plaintiffs were employed). Here, it is uncontested that Appellants performed no work-related tasks, engaged in no work-related discussions, and performed no compensable work activities during their travel. (Order, pp. 8-9)

3. Burton v. Hillsborough County Is Readily Distinguishable

Appellants rely heavily on Burton v. Hillsborough County, Florida, No. 05-10247, 2006 WL 1374493 (11th Cir. May 18, 2006) (unpublished). Appellants' reliance is misguided for several reasons. First, Burton is an unpublished opinion, and under Eleventh Circuit Rule 36-2, unpublished opinions are not considered binding precedent, only persuasive authority. Furthermore, Internal Operating Procedure 6 of 11th Cir. R. 36-2 notes that reliance on unpublished opinions is not favored by this Court.

Second, the facts and circumstances of Burton are readily distinguishable. In Burton:

- The plaintiffs' "*duties consisted of driving* to public works job sites throughout the County and inspecting the work of subcontractors at those sites." Burton, 2006 WL 1374493 at *1 (emphasis added). By contrast, Appellants here are carpenters, laborers, and builders – driving (or riding) was *not* part of their duties. (Order, p. 6)

- "The vehicles also served as *satellite offices* for the employees where they could perform work at the job sites." Burton, 2006 WL 1374493 at *1 (emphasis added). Here, the Buses served one purpose: to transport employees from the Security Gate across the Airport tarmac as required by FAA regulations. (Order, p. 7)

- "[T]he county *vehicles contained various tools* the employees needed to perform their inspections at each worksite." Burton, 2006 WL 1374493 at *6 (emphasis added). "The employees were required to leave those tools and equipment locked in the county vehicles at the parking sites at the end of their workdays." Id. at *1. Appellants carried nothing work-related on the Bus with them, only their lunches. (Order, p. 9)

- The drivers were required to store the county vehicle at a designated parking lot, and could not drive the vehicle home. Burton, 2006 WL 1374493 at *6. In effect, travel to the designated parking lot was travel to their actual place of performance. Here, it is undisputed that the Worksite was Appellants' actual place of performance. (Order, p. 16)

In sum, "[t]he crucial question" in Burton was "whether the (employee) was in fact performing services for the benefit of the employer with the knowledge and approval of the employer." Burton, 2006 WL 1374493 at*7 (quoting Sec'y of Labor v. E.R. Fields, Inc., 495 F.2d 749, 751 (1st Cir. 1974)). Here, as the District Court found, Appellants engaged in no work-related tasks while driving to and from the Parking Lot and the Worksite. (Order, pp. 8-9)

III. LEGISLATIVE HISTORY AND POLICY CONSIDERATIONS CONFIRM THAT APPELLANTS' TRAVEL IS NOT COMPENSABLE

Appellants attempt to muddle the case law and blatantly ignore the dispositive section of the Portal Act (§ 254(a)(1)). Appellants' claim – parallel to the claim in Anderson v. Mt. Clemens Pottery Co, 328 U.S. 680 66 S.Ct. 1187 (1946) – is precisely the type of claim Congress intended to preclude by passing the Portal Act. See IBP, 126 S.Ct. at 527. A ruling for Appellants is likely to revisit many of the problems Congress sought to forestall by enacting the Portal Act amendments.

A. Early Supreme Court Cases Broadly Defined "Work" For FLSA Purposes

Early Supreme Court cases broadly defined the terms "work" and "workweek" under the FLSA. See IBP, 126 S.Ct. at 518-19 (citing cases). In both Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 64 S.Ct. 698 (1944), and Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 65 S.Ct. 1063 (1945), the Court held that mine workers' travel time from the mine portal to the underground working area was compensable.[6]

In Anderson, 328 U.S. 680, 66 S.Ct. 1187, the Court held that employees were entitled to compensation for time spent walking from the time clock to the workstation. As the Supreme Court noted in IBP:

> "The year after [the Court's] decision in Anderson, Congress passed the Portal-to-Portal Act" which "distinguish[es] between working time ... and time that was found compensable under [the] Court's expansive reading of the FLSA ...."

IBP, 126 S.Ct. at 519.

---

[6] The travel conditions the mine workers faced were much more extreme than Appellants' bus ride. See Jewell Ridge, 325 U.S. at 166, 65 S.Ct. at 1066 (Miners "are subjected to constant hazards and dangers; they are left begrimed and exhausted ....").

B. Congress Enacted The Portal Act In Part To Preclude Compensation For Commutation Travel To And From The Worksite

"The Portal-to-Portal Act of 1947 narrowed the definition of 'work' in the FLSA to exclude time spent by employees traveling to their jobs." McCormick v. City of Miami Beach, No. 91-1941-CIV-MOORE, 1994 U.S. Dist. LEXIS 20980, at *7-8 (S.D. Fla. May 12, 1994). "The Act was passed in response to the proliferation of sprawling manufacturing plants after World War II, that forced employees to walk greater distances from the factory gates to their work stations. This change in working conditions spawned lawsuits under the FLSA seeking compensation for workers' transportation time." Id. (citation omitted).

In light of these suits, Congress found that the FLSA had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees ... creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers ...." 29 U.S.C. § 251(a) (2002). Moreover, "the payment of such liabilities" would have undesirable financial consequences for employers and employees "resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees[.]" Id. § 251(a)(1).

Like the post-World War II factory employees forced to walk greater distances across sprawling manufacturing plants to their workstations, many of today's employees face greater burdens on the entry to and exit from their work

place due to increased security concerns post-September 11. Airports, serving as places of ingress and egress between states and nations, are places of profound security concern in light of recent world events. The basic workings of an airport dictate that only authorized vehicles traverse airport tarmacs for obvious reasons of safety and efficiency. Where, as here, the FAA or other government agencies mandate employees travel in authorized vehicles due to such concerns, to hold employers liable to compensate employees for such travel time undermines the purpose of the Portal Act: Employers should not be held financially responsible for the time employees spend traveling to and from the actual place of performance of the work they are engaged to perform.

Moreover, Appellants did not request compensation for the time spent riding the Courtesy Bus, (Order, p. 9), nor did they perform any labor or work, (Order, pp. 8-9); in the words of lead plaintiff Bonilla, they "didn't do anything." (Appellee Br. p. 8 (quoting Docket No. 75, Bonilla depo. p. 25)). To compensate Appellants for time spent on the Bus, where neither party contemplated compensation, would "creat[e] both an extended and continuous uncertainty on the party of industry," and confer on Appellants "windfall payments" like those that prompted Congress to pass the Portal Act. See 29 U.S.C. § 251(a)(3), (4).

The likely results of a finding that Appellants' time riding on a free bus from the Parking Lot to the Worksite would implicate many of the concerns that

prompted Congress to put a stop to the courts' expansive reading of the FLSA. See IBP, 126 S.Ct. at 519; see also 29 U.S.C. § 251(a) (2002). The Supreme Court acknowledged that "it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate Anderson's holding that ... walking time [from the factory gate to a work station] was compensable under the FLSA." IBP, 126 S.Ct. at 527. There is simply no substantive difference between the "walking" in Anderson and the "riding" from the Parking Lot to the Worksite here – both are part of the normal home-to-work station commute and neither is compensable under the Portal Act.

C. Underlying Policy Concerns Argue For Affirmance Of The District Court's Decision

Although Congress articulated several policy concerns underlying the passage of the Portal Act, all of which weaken Appellants' claim, *amici* wish to point out additional policy consideration implicated in this case. These issues directly affect *amici*, as representatives of employers and human resource professionals charged with implementing FLSA policy in the workplace.

1. Appellants' Theory Admits Of No Logical Stopping Point

There is no logical stopping point to Appellants' theory that they should be compensated for travel to and from the Worksite because such travel was necessary for them to get to work. In effect, they are seeking a repeal of the Portal Act – which they should address to Congress, not this Court.

At its most basic, Appellants' claim is that they are entitled to pay for sitting on a free bus because it was necessary to do so to get to the Worksite. An employee who works in a high-rise office building must wait for and ride an elevator in order to get to his or her office. This time can take several minutes and is clearly "necessary" to begin any productive work. Yet, under Appellants' view, this employee is entitled to compensation for the elevator ride.

Further, imagine a shopping mall employee forced to park on the other side of the mall from his place of employment during the holiday season due to the number of holiday shoppers. Under Appellants' view, this employee is entitled to compensation for time spent traversing the parking lot and shopping mall simply because it was necessary in order to get to work.

Employees who work in places subject to greater risk of terrorist threats must now endure increased security on entering and exiting the workplace. Under Appellants' theory, these employees are entitled to compensation for the time spent passing through metal detectors and presenting security badges, simply because they now spend more time getting to work. Public school teachers in high-crime neighborhoods face these security measures daily. No defensible line can be drawn between Appellants' claim for compensation and a similar one that may be mounted by many other employees having to grapple with security measures delaying their getting to work.

2. Compensation For Travel Time On A Courtesy Bus Would Create Distorting Incentives And Anomalies

The transportation that Appellee provided from the Parking Lot to the Security Gate was a courtesy to employees. (Order, p. 8) Employees were not required to take the Bus, but doing so relieved the employees of several burdens: walking from the free Parking Lot; paying to park in a private parking lot; arranging for some other transportation to the Security Gate. Moreover, employees were not required to pay or engage in additional effort in order to take the Courtesy Bus, nor did they. Surely, Appellants reaped the benefits of the Bus ride without any additional burden. A ruling imposing compensation for provision of courtesy transportation might lead employers to stop providing such transportation.

Moreover, a ruling requiring compensation for Appellants could lead to unfair treatment of other employees who used alternative transportation to the Security Gate. (Order, p. 8) Should those employees be compensated for actual travel time or the time that would have been spent on the free Bus? Should they be reimbursed for costs incurred from alternate transportation, or does the option of free transportation foreclose such pay? These are questions that this Court need not answer, and administrative burdens that employers should not bear. But they would arise if this Court were to rule that Appellants are entitled to compensation for taking a free ride to and from their Worksite.

3. Compensation For Travel Time Would Negatively Affect Overarching Safety Concerns

A ruling finding compensable Appellants' time on the Bus from the Parking Lot to the Security Gate presents negative implications for employee safety not present in the instant case. In other situations, an employer may provide transportation to its employees, where it was not otherwise required to do so, out of concern for employee safety. See, e.g., Vega, 36 F.3d at 423 (employer scheduled a bus for employees "[b]ased on the workers' desire to avoid the dangers of El Paso streets in the early morning ...."); Dolan, 558 F.Supp. at 1309 (employer required employees to take its bus service because of "safety and traffic problems on the narrow, winding roads leading to the project."). If employers are required to compensate employees for riding on employer-provided transportation to and from work, many employers are likely to dispense with such provision, possibly risking employee safety.

In this case, FAA regulations required all employees to pass through the Security Gate and to ride in authorized vehicles to the Worksite. (Order, p. 7) The reasons for the FAA requirement are obvious in light of September 11 and the state of world affairs since then. It is simply an unreasonable risk to permit various and sundry vehicles and persons to meander about airport tarmacs. The FAA requirement is not for the Appellee's benefit, but for the safety of *all*: Appellants, other construction workers, airport employees, travelers, and most of all national

security. These interests substantially outweigh any interest an employee may have in being compensated for time riding a free shuttle bus. Congress was plainly aware that national security could be negatively impacted if employees were entitled to compensation for basic home to work travel time. See 29 U.S.C. § 251 (a) ("[I]t is ... essential to national defense ... that [the Portal Act] be enacted."); see also Lasater v. Hercules Powder Co., 73. F.Supp. 264, 270-71 (E.D.Tenn. 1947), aff'd, 171 F.2d 263 (6th Cir. 1948) (holding that employees of a dynamite plant were not entitled to compensation for travel time on an employer-provided bus from outlying areas to the plant gate, and travel time from the plant gate to various worksites, and reverse trips, because: (a) Section 252 precluded compensation where there was no agreement providing for such compensation;[7] (b) the "world situation" during World War II required a protective barrier around the plant; and (c) "[s]uch a condition could not be said to be the spending of time for the primary benefit of the employer.").

4. The Portal Act Envisions Parties Contracting For Travel Time Compensation, Not Judicially Mandated Compensation

Finally, a finding that Appellants' are entitled for their time spent riding the Courtesy Bus would have far reaching detrimental effects on the negotiations and bargaining between employer and employee. Section 254(b) provides that

[7] Although Lasater deals with § 252 of the Portal Act, which governs claims arising prior to May 14, 1947, the similarity of the facts to the instant case make the court's reasoning persuasive.

employees are entitled to compensation where "[a]n express provision of a written or nonwritten contract" or "[a] custom or practice in effect" provides the employees are entitled to compensation. 29 U.S.C. § 254(b)(1), (2) (2002). Appellants had the opportunity to negotiate the compensability of their travel time but they did not do so. (Order, p. 9)

To hold that employees are *de jure* entitled to compensation for travel time would preclude parties from negotiating the compensability of such time because, while the parties can contract for additional rights under the FLSA and Portal Act, they cannot contract away the rights provided therein. See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 740, 101 S.Ct. 1437, 1445 (1981). Removing the availability of negotiations would subject all parties to the same compensation, precluding parties from contracting for appropriate compensation based on the particular facts and circumstances of the employment or particular administrative burdens and costs.

IV. CONCLUSION

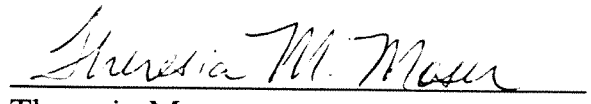
For the foregoing reasons of law and policy, *amici* respectfully submit that this Court affirm the decision of the district court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. The undersigned counsel certifies that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B) and Fed.R.App.P. 29(d) because the brief contains 6,827 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared on a proportionally spaced type style using Microsoft Word in 14 point font Times New Roman type style.

Dated: July 20, 2006

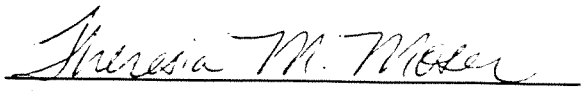


Theresia Moser
(Georgia Bar No. 526514)
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
(404) 581-8576
tmoser@jonesday.com

Counsel for *Amici Curiae,*
Society for Human Resource Management
The Chamber of Commerce
of the United States of America

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of July, 2006, I filed the foregoing with the Clerk of the Court and served by U.S. Mail on J. H. Zidell, Esquire, Attorney for Appellants, 300 71st Street, #605, Miami Beach, Florida 33141, and Andrew S. Hament, Gray Robinson, P.A., Attorneys for Appellee 1800 W. Hibiscus Blvd., Suite 138, Melbourne, Florida 32901.



Theresia Moser
(Georgia Bar No. 526514)
Jones Day
1420 Peachtree Street, N.E., Suite 800
Atlanta, Georgia 30309
(404) 581-8576
tmoser@jonesday.com

Counsel for *Amici Curiae,*
Society for Human Resource Management
The Chamber of Commerce
of the United States of America