

MEMO

To: Ron Otero and Plaintiffs
From: Paul Livingston, Attorney
Date: March 11, 2005
Re: FLSA Consolidated Cases

Background and History

The first overtime pay case was initiated by the Union, then the UTU, Local 1745, starting near the end of 1995 with the filing of a Prohibited Labor Practice complaint with the City's Labor Board. That Complaint was filed after the Union's attempts to negotiate the City's removal of shuttle van service were unsuccessful. In addition to using the vans provided by the City, many drivers had used their own vehicles to get to and from relief points. By the time the case was heard, on November 21, 1995, drivers were being forced to spend a significant amount of uncompensated time riding Motor-coaches to and from their relief points around the City.

Although attorney fees and expenses were requested from the UTU, the International Union initially refused that request. Nonetheless, the Local was successful in its Prohibited Practice Claim. By the start of 1996, the Labor Board had ordered the City to return to "the status quo" and the case resulted in the full restoration of the shuttle relief service. When the issue of pay for travel time and split shift time was brought up, the Labor Board (which then included Paul Broome and Justin Pennington) said the Fair Labor Standards Act matters would not be addressed by the Board but could be the subject of a subsequent lawsuit. At that time the City took the position that the shuttles were provided for the convenience of the bus drivers and that the only time that would be paid was time actually spent driving the bus.

After further negotiations and return to the Labor Board for enforcement of its orders, the International Union eventually agreed to go ahead with the FLSA case, and authorized Paul Livingston to file the case. The UTU agreed to pay expenses of the lawsuit and attorney's fees of \$100.00 per hour and it was agreed that the Local's attorney would receive a contingency fee of 15% of the recovery. Through the initial stages of the litigation, covering the filing of consent forms by about 155 drivers, responses to interrogatories, a series of depositions, and cross motions for summary judgment, the UTU was billed and paid the attorney fees and expenses (the cost of transcripts for depositions we took as well as about a dozen depositions taken by the City amounted to \$4,215).

Following the district court's decision on summary judgment motions in September, 1997, awarding travel pay for mid-day travel between the garage and relief points and split shift time of under an hour, but refusing to pay for other claimed time, the City appealed to the 10th Circuit Court of Appeals in Denver. At the end of 1997, the drivers filed a cross appeal. Also at that time, even though the City claimed to have corrected the overtime pay problems in accordance with the judge's rulings, concerns about the overtime pay continued, more drivers wanted to be included, and a second lawsuit, encompassing the claims of about 75 additional drivers, was filed in State Court.

After the City removed the case to the Federal Court, the U.S. district court stayed proceedings pending the decision of the 10th Circuit on the cross appeals. Soon thereafter the 10th Circuit, in a long written decision, affirmed the district court's rulings. Judge Hansen then consolidated the two cases, ordering that his rulings in the first case would apply to the plaintiffs in the second case. Throughout that time, and for several years thereafter, calculations were made by Don Marquez. However, the City refused to pay even what it calculated it owed, insisting that it would not pay anything until all the claims had been resolved. At one point, in 1999, the City made offers to the plaintiffs in the first case. These offers were for minimal amounts relating to the travel time only. Thirty-nine drivers accepted the City's settlement offers and were dismissed from the cases over arguments and objections by plaintiffs' counsel.

At the request of the plaintiffs, the court eventually ordered the cases sent to a "special master" to make and provide the Court with the calculations necessary to secure payment of the owed overtime pay. This process wound up being frustrating and unsuccessful, as the special master was unable to make independent calculations, but relied instead on the numbers provided by Don Marquez from City records. The City's records were inadequate to document the time spent so that the special master could properly calculate the amounts owed. The special master eventually added 10% to the City's travel time numbers to make up for the City's underestimation of the amounts owed.

Finally, in 2004, with the special master's reports nearly complete, and following preliminary approval by the district judge, a second appeal was filed, contending that plaintiffs were entitled to a trial by jury and challenging the calculations and many of the rulings of the judge (most significantly the ruling consolidating the two cases and the ruling that plaintiffs were not entitled to "liquidated damages"). On that second appeal, filed at the end of 2004, the Notice of Appeal was filed, the appeal was docketed, and a brief was written. Counsel was prepared to file the opening appeal brief, but he realized that it would not necessarily be in the interest of the plaintiffs to prolong the cases for additional years and months.

By that time thirty-nine (39) of the plaintiffs had settled with the City. Those drivers received considerably less than they would have if they had remained in the case, because the City paid them only for travel time, and not split shift time. Also, John Barnes and others engaged in efforts to cut the litigation short and compel “settlement” of the cases for the amounts offered by the City. It was apparent that many of the drivers were anxious to end the case, and that few wanted to prolong the process.

Acknowledging also that the appeals court was likely to reject the appeal because it was by then so close to the end of the case, with only final approval by the Judge and the tying up of some loose ends by the judge and special master remaining, plaintiffs’ attorney then proposed to the City that the appeal could be withdrawn “without prejudice” to refile it after the parties entered into settlement negotiations and, if those negotiations were unsuccessful, after the judge issued his final rulings on the amounts of back overtime pay the drivers were entitled to.

In order to ensure that the mediation efforts would be taken seriously, plaintiffs’ counsel proposed (and the City’s attorneys accepted) that former New Mexico Supreme Court Chief Justice Gene Franchini be the settlement facilitator. The services of attorney Justin Pennington, who had engaged in a partial settlement involving only Extra Board drivers about a year before, were requested and secured.

The Settlement Committee

With a limited time remaining before the settlement talks were to begin, the two attorneys, Paul Livingston and Justin Pennington, decided that a fair and neutral Settlement/Negotiation Committee would be the best way to ensure that everyone would be represented in that process and a fair settlement would be reached. It was decided, because of previous disputes, that the Committee should include several members not directly connected with Union leadership. The Committee was initially to have included Ron Otero (and he was to be allowed one additional selection) and Frederick Garcia, but when Fred refused to serve John Bazan suggested that Ron should be asked to name another member in his place. At that time, Ron selected John Barnes, as well as the previously-selected John Bazan. Robert selected himself, Dale Padilla, and Dave Lovato, and it was agreed that Mike Toya would represent the Extra Board drivers and that Victor Vega would be a fair representative even though he was a management employee. As a last minute addition, Smiley Montanez was added to the Committee, at least in part because he was one of the 39 drivers who accepted the City’s first settlement offer.

The Negotiations

The day before the negotiations began, Robert and the two attorneys met with the City's attorneys to discuss preliminary matters. At that time the City presented the same spreadsheets that it had previously used to calculate the amounts it claimed it owed in back pay.

The next day, October 12, 2004, the negotiations began, with the City including attorney fees in the amount of \$65,000.00 in their first offers. The negotiations that first day ended up about \$60-70,000 above the City's starting point, but with the inclusion of attorney fees that resulted in no real net gain over the City's prior "offers." As a result of the City's inclusion of attorney fees, the drivers would have received little more than the amounts of back pay approved by the special master and the judge. At a breakfast meeting the next morning, prior to the start of the second day of negotiations, the Settlement Committee decided that as a last ditch effort before breaking off negotiations, they would insist that attorney fees must be separated from the back pay negotiations.

With the assistance of the mediator, Justice Franchini, that demand was accepted and the \$65,000 was then included in the amount offered to the drivers in back pay. Tough negotiations that day resulted in a settlement in the amount of \$450,000.00 exclusive of the attorneys' fees and chargeable expenses, which were to be sought from the City through the court. In order to secure a settlement that would be fair to the drivers, Paul Livingston agreed to compromise his 15% contingency fee at \$25,000.00, which was slightly more than 5% of the settlement amount. The other provisions were that the City would pay the amounts it claimed were owed (the amounts previously approved by the judge) plus the difference between those amounts and the settlement amount of \$450,000.00. It should be noted that drivers who had previously settled with the City and been dismissed from the cases had received a total of around \$50,000.00, bringing the total to be paid by the City to about \$500,000.00.

Significantly, the amounts owed directly by the City and the settlement amounts would have been far higher if the City had not corrected most of the FLSA violations. For example, in 1997, the City included travel time in the drivers' regular work runs. And the City subsequently started paying the drivers for split shift time of under an hour, in accordance with the Judge's rulings.

It was understood that the City would be responsible for issuing checks to cover its portion of the back wages, and that the distribution of the difference between what the

City paid and the settlement amount of \$450,000.00 would be handled under the auspices of the plaintiffs' Settlement Committee. At that time the City agreed to conclude the payment process by the end of the year.

Settlement Committee Meetings

The day before the start of negotiations Plaintiffs' Settlement Committee met for the first time on, October 11, 2004, at the Quarters on Yale Blvd. On October 12 and 13, 2004, the negotiations were conducted at the Alvarado Transit Center, between 8:30 a.m. and 5:00 p.m. As described above, the Committee consisted of Robert Gutierrez, Dave Lovato, Dale Padilla, John Barnes, John Bazan, Mike Toya, Smiley Montanez, and Victor Vega. The Committee worked with the attorneys for two full days in order to negotiate a settlement. With the exception of John Barnes and Smiley, the Committee members were paid for their two days of lost time from Union funds.

The City agreed to expedite matters so the settlement payments could be concluded by the end of the calendar year. However, it was not until November 11, 2004, that the City provided its final settlement spreadsheets. The first post-negotiation meeting of the Settlement Committee was then held on November 18, 2004, at the Quarters on Yale. By vote of the Committee, it was decided that those who were dismissed from the case because they "settled" their claims would not be entitled to any additional payments. It was also decided that the Settlement Committee would allocate a minimum payment of \$300.00 to each plaintiff who remained in the case. This was intended to compensate those who were awarded nothing or a nominal amount as a result of the use of Don Marquez's numbers. It was also decided to compensate the initial ten plaintiffs, the so-called drivers' steering committee, because they had been involved in the case from its inception in 1995.

Accordingly, at that first meeting the settlement committee voted to reserve from distribution and allocate the following funds: 1) payment to the members of the initial drivers' "steering committee" of \$300.00 each ($10 \times \$300 = \$3,000$); 2) payment to the present Settlement Committee of \$600.00 each ($8 \times \$600 = \$4,800$) for the time and effort they were expending; 3) payment of \$2,000 to Robert Gutierrez; \$500 to John Barnes and \$500 to Mike Toya, primarily for the time and effort they had previously expended in the cases without compensation; 4) an estimated reimbursement to NMTU of \$12,000 for prior costs and expenditures and for the future expenses connected with the distribution of funds. The total of such allocations was an estimated \$22,800.00 and that amount was used in calculating the disbursement rate. Although various percentages were discussed, it was estimated at the time of that first meeting that the pro rated disbursements to plaintiffs would be around 55%

It was also discussed that the Union had advanced funds both at the time of the settlement negotiations and before then. Prior to the start of the negotiations, the Union paid the settlement facilitator, Judge Franchini, \$1,600 as the plaintiffs' share of the mediation fee. The NMTU also advanced the payments for lost time of the Committee members. In addition, payment will be made for the cost of contacting plaintiffs and distributing the proceeds. In total, the Union has now accounted for \$8,352.86 in reimbursable expenses, going back only two years to 2003. A chart listing those expenses, with date, check number, recipient, purpose, and amount is attached hereto. The costs of distribution of the settlement funds will add approximately three to four thousand to the expenditures, all of this falling within the preliminary estimate of \$12,000.00 as reimbursement of expenses.

The second meeting of the Settlement Committee was a meeting of part of the Committee. The meeting was held at Robert Gutierrez's house. Robert, Dave Lovato, John Barnes, and John Bazan, as well as Paul Livingston discussed changing the payments to the members of the first and second committees, but it was decided not to make any changes to what the full committee had decided. Among the matters discussed were the issuance of Notice of the court hearing and the need to attempt to contact each of the 176 plaintiffs remaining in the lawsuits at the time of the settlement. It was agreed that John Barnes would be paid at the rate of \$15.00 per hour for his time spent contacting plaintiffs, notifying them of their right to raise objections and attend the hearing, and correcting addresses and telephone numbers.

The most recent meeting of the full Committee was held at Mac's LaSierra on Central near Coors. At that time additional payments were discussed and it was decided to limit any additional payment to \$300.00 each to Ron Otero and Frederick Garcia, for their past work and services in the litigation. The additional \$600.00 will be taken from the estimated reimbursement of \$12,000.00 resulting in remaining reimbursement of \$11,400.00. The Committee also discussed and agreed to the hiring of a certified accountant or other qualified fiduciary to manage the distribution of the plaintiffs' share of the settlement proceeds. Drivers are advised that the City will deduct withholding taxes and make other payments in accordance with law from the portions of the settlement paid directly by the City. The share distributed by the plaintiffs' fund, however, will not include any such withholding, and plaintiffs are advised to seek and act on their own advice concerning such matters.

In addition to the payments described above, the sole and major remaining expense will be the expense of hiring an appropriate fiduciary, setting up the necessary trust account(s), writing the checks, and paying other expenses connected with the distribution

of the settlement proceeds. Any funds remaining will either be placed in a Union hardship or beneficial account.

Contacting Plaintiffs

To this date 145 drivers and former drivers or their families have been contacted. All except 31 of the plaintiffs have been contacted directly and their addresses and telephone numbers have been corrected. It believed that a number of these plaintiffs are aware of the settlement of the litigation, but have not yet responded to the calls and inquiries that have gone out.

The drivers who have still not been contacted are listed below, in the hope that other drivers will recognize their names and provide updated addresses or phone numbers or contact the missing drivers directly. The City is also working on locating many of these “missing” drivers. Their names are:

Juan S. Armijo	John Ginan	Rumaldo Ramirez
Betty Jo Brooks	Mary Houghton	Buddy L. Rivera
Shelly Burlingame	Edward Joiner	Joe A. Rodarte
August C. Chavez	Michael J. Lopez	David A. Sanchez
Augustine E. Chavez	Leo Lucero	Anthony Simoes
Sandra Clark-Lucero	Daniel Maez	Robert Stubbs, Sr.
Tony Corriz	Paul Magnana	Scott Swanson
Eric Gandy	Jose I. Miera	Michael Tegeda
Earl Garcia	Anthony Don Millet	Margarita Trevino
Tina Garcia	Rueben Montoya	George Walker
Jeff Garcia		

Objections to Settlement

Only two objections to the settlement have been filed with the Court. The first, filed by Ron Otero, simply asks for an accounting of the amounts to be reimbursed to the Union, to ensure that the Union (UTU, Local 1745) has not already paid once for the amounts claimed. This memo, in part, responds to Ron Otero’s contention and provides notice and clarification to the plaintiffs.

The second motion objecting to the settlement proposal was filed by Michael Paul Froomjian. According to Paul, a “conspiracy” between the attorneys for the plaintiffs and the Settlement Committee resulted in his being left off the City’s listing of drivers. Ignoring the fact that he never filed or signed a “consent form” authorizing his appear-

ance in the matter, Paul contends that he should be included in the case anyway. This objection will be responded to by advising the Court that Paul Froomjian never submitted or filed a consent form to be in either of the two overtime pay cases, and thus lacks standing to object to the distribution of the proceeds.

Final Notice of Hearing

The hearing to approve the settlement and the distribution of settlement funds will be held at the old courthouse at 421 Gold S.E. at 10:00 a.m. on Wednesday, March 16, 2005. It is expected that U.S. District Judge Conway will hear the Motion to Approve Settlement and Distribution at that time, as Judge Hansen is reportedly in the hospital.

The plan presented to the court provides that the City will attempt to distribute the back pay checks for 90 days. At the end of that time, the money owed to missing drivers will be turned over to be placed in the plaintiffs' trust fund, where it must be held for a year while efforts are made to locate missing plaintiffs. The money remaining after a year will be placed in a fund to provide hardship benefits to ABQ-Ride and Mini-Ride drivers if the amount is less than \$5,000.00 or distributed to Plaintiffs on a pro-rated basis if the amount is over \$5,000.00.

With respect to the objection raised by Ron Otero, he and all Plaintiffs in these cases are assured that all money disbursed will be strictly accounted for and that there will be no duplication of payments, undisclosed transactions, payments for things already paid by UTU, or personal enrichment as a result of the effort to conclude the settlement process and distribute the settlement funds properly and fairly.