LEGALLY SPEAKING

by Lawrence Savell

Newspaper reporters and overtime

To paraphrase a classic Bachman-Turner Overdrive hit, "Takin' care of business [often requires] workin' overtime."

This is certainly true in the newspaper business, where reporters and other employees often have to go beyond a normal workday to get the job done.

The federal Fair Labor Standards Act provides that employees covered by the FLSA usually are entitled to overtime compensation when they work extra hours. However, the FLSA exempts "any employee employed in connection with the publication of any weekly, semiweekly or daily newspaper with a circulation of less than 4,000, the major part of which circulation is within the county where published or counties contiguous thereto."

On Jan. 6, the U.S. Court of Appeals for the 3rd Circuit became the first federal appellate court to examine this "small newspaper" exemption. In *Reich vs. Gateway Press Inc.*, the court ruled that related chain papers that share staff, management and content will have their circulations combined when determining whether they qualify for the exemption.

The court also ruled that none of Gateway's reporters came within the scope of the FLSA's additional "executive, administrative and professional employee" exemption. It thus held that all of the company's reporters were entitled to the protections of the FLSA.

According to the court, Gateway, a printing and publishing company based in Monroeville, Pa., publishes 19 weekly community newspapers serving the Pittsburgh suburbs. Although they are part of a chain and share many common features, each paper is local in orientation and outlook. Each is filled with information about the day-to-day events of its respective communities — such as marriages, births, deaths, school events, senior citizen and church activities, local crime reports and local political items — matters often not covered by the Pittsburgh metropolitan daily press.

Gateway maintains strict control over both the organization and content of each of the papers. Major decisions about administration and editorial policy, including all advertising sales and employment-related determinations, are made from the central office.

Gateway organized the 19 papers into five regional groups, comprising the basic administrative and editorial units of the chain. The newspapers in each group operate from the same office, have the same editor and have common operating budgets. Generally, the reporters and editors work on some or all of the papers within a group.

In addition, as reflected in its "Advertising Information and Rate Card," Gateway uses the circulation numbers of the group — as opposed to the individual papers — when selling advertising space.

The content of the papers within each group also is quite similar. A typical Gateway paper has three sections. The first contains the masthead and some local news specifically pertinent to the community the paper serves. Other pages in the first section contain features and editorials common to the other papers in the regional group. The other two sections, sports and classified ads, contain articles and ads identical to those appearing in the other papers in the regional group.

Secretary of Labor Robert Reich brought a lawsuit to enjoin Gateway from violating the FLSA's requirements and to recover unpaid wages and overtime pay for Gateway's reporters, photographers and other personnel.

Despite Gateway's official policy that reporters not work more than 40 hours a week, many routinely did. However, Reich said, Gateway did not always pay them for the additional hours they worked.

A U.S. District Court ruled that the "small newspaper" exemption applied to all Gateway papers except six, which had circulations of more than 4,000. It rejected the secretary's argument that the 19 different papers were, for all practical purposes, the same newspaper and their circulations should be combined. It also held that the reporters were not "professional" employees under the FLSA. Both sides appealed.

The Court of Appeals began its analysis by noting that the FLSA did not specifically indicate under what circumstances a court should combine the circulations of related publications when applying the "small newspaper" exemption.

The court, therefore, examined the history of the exemption and the general purposes of the FLSA. It observed that because the FLSA is a "remedial" statute, exemptions are to be construed narrowly against the employer. Gateway thus had the burden of proving that each of the exemptions clearly and unmistakably applied.

The court looked to the FLSA's concept of "enterprise" in determining whether a court should aggregate the circulation of different publications when applying the exemption. To be considered an enterprise, a business

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must (1) be engaged in related activities, (2) be under unified operation or common control and (3) have a "common business purpose." If a group of businesses has these characteristics, the businesses will be treated as a single entity under the FLSA.

The court emphasized that the "common business purpose" criterion required that the publications have a common publishing purpose, including both business and editorial operations. Newspapers run by a single publisher, which are in effect just different regional editions, would have their circulations aggregated, while those that are much more widely disparate would not.

Thus, in applying the "small newspaper" exemption to publishers of more than a single publication, the court will aggregate the circulation of those publications that are (1) related, (2) have a unified operation or control and (3) have a common publishing purpose.

In evaluating the first two factors, the focus is on the different business operations of the publications, including to what extent the publisher was taking advantage of economies of scale. Particularly important would be the use of the same editorial staff and reporters for the different publications.

Also significant would be the degree to which the publications are after the same market niche in the different communities, the centralization of publication decisions, and the centralization of advertising sales and other administrative functions of the publisher.

The focus of the third consideration is on the content of the papers — the extent to which the articles, ads and editorials differ among the publications. Minor variations among the publications — different stories on only one page, for example — would not be enough to require a court to measure their circulations separately.

Applying this approach to the facts of the case, the court concluded that at least some of the Gateway newspapers' circulations should have been aggregated.

First, Gateway newspapers clearly were engaged in related activities. The papers in the Gateway chain supply their different communities with local suburban news not supplied by major metropolitan newspapers. Their focus is on the local happenings in their communities.

Second, Gateway newspapers clearly satisfy the unified operation or common control requirement. Although the papers serve different communities, major decisions about administration and editorial policy are made from the central office; the publisher decides how many pages will be in each edition; all advertising is sold from that office; the managing editor oversees all editorial decisions for all the papers; all employment-related decisions (hiring, firing, payroll) occur at the central office; and all printing is done there.

All other decisions apparently were made on a group-by-group basis: newspapers in each group operate from the same office and have the same editor, they have common operating budgets and papers within each group use the same reporters. In addition, Gateway uses the circulation numbers of the groups — not the individual papers — when selling advertising space.

Third, Gateway newspapers within each geographic group have a common publishing purpose. Although the papers within each of the five regional groups have some different local news items, they are otherwise identical. The first section has a few articles of local flavor, but other pages in the first section and the other two sections contain features, editorials and advertisements common to the other papers in the regional group. The papers within each group are just slight variations of each other, in much the same way major metropolitan daily papers have different regional editions.

Thus, the court concluded that each geographic group of newspapers clearly constituted one newspaper under the three-part test it adopted. Therefore, the circulation figures of the papers within each geographic group should have been aggregated. (The court did not reach the question whether, under that test, all 19 papers had a common publishing purpose and should have their circulations aggregated.) Because it was undisputed that the circulation within each group was more than 4,000, none of the Gateway papers qualified as "small newspapers."

The court also examined whether the FLSA's "executive, administrative and professional employee" exemption applied. It agreed with the District Court that none of the Gateway reporters were "professional" employees within the meaning of the statute; thus, once again, it found that the overtime protections of the FLSA applied to them.

Regulations of the Department of Labor outline three types of professionals: "learned," "artistic" and "teachers."

The "learned" exemption traditionally covered professions that have specified educational requirements, such as law or medicine; courts have ruled that reporters do not come within its scope. Similarly, journalists had not been considered "teachers."

Thus, the court concluded, if newspaper reporters were professionals under the FLSA, they must come within the scope of the definition of "artistic" professionals.

Labor Department regulations provide two tests for "artistic" professional status. The "long test" applies to employees paid less than $250 a week (a figure that, ignoring economic reality, has not changed since it was set in 1949). It requires, among other things, that (1) the primary duty of the employee be "work that is original and creative in character in a recognized field of artistic endeavor" and (2) "the result of which depends primarily on the invention, imagination or talent of the employee."

The "short test" applies to employees paid more than $250 a week. This is a simpler and more inclusive test, which requires only that the employee's primary duty consists of "work requiring invention, imagination or talent in a recognized field of artistic endeavor."

Any employee who is not a professional under the "short test" would not be one under the "long test."

The court concluded that under the "short test," Gateway's reporters were not "artistic" professionals.

Examining first the "primary duty" of the reporters, the court followed a Labor Department definition that this is a duty at which employees spend the major part, or more than 50%, of their time. Time is not the sole factor considered; others include the importance of the duties when compared with other types of duties, the frequency with which employees exercise discretionary powers, freedom from supervision and pay relative to other employees.

The evidence indicated that the reporters spent more than 50% of their time rewriting press releases; attending municipal, school board and city council meetings; interviewing people; answering phones; and typing wedding announcements, school lunch menus, business reviews, real estate transac-

tions and church news.

The lower court found that most articles were either recast press releases issued under headings such as "What's happening," "Church news," "School lunch menus" and "Military news" or information taken from the police blotter, obituaries or real estate transaction reports.

It therefore concluded, and the appellate court upheld, that a Gateway reporter's job "was predominantly to fill pages by gathering facts about routine community events and reporting them in a standard format."

The appellate court also rejected the statement that Gateway reporters' primary duty required "invention, imagination or talent" as such terms were used in the regulations. According to the Labor Department, only a minority of reporters engage in such work.

The court concluded that Gateway reporters were like the "majority" of reporters: although their fact-gathering duties required intelligence, diligence and accuracy, they did not require invention, imagination or talent.

The court observed that the bread-and-butter work of Gateway reporters — even those making more than $250 a week — was to collect information that was by and large already in the community and just needed to be combined into a single source.

Reporters' work in following up press releases, attending meetings, interviewing local officials and recording in their articles what they found did not require special imagination or skill at making a complicated thing seem simple or at developing an entirely fresh angle on a complicated topic.

Such tasks, the appeals court reasoned, did not require invention or even a unique talent in finding informants or sources that may give access to difficult-to-obtain information. Thus, it agreed with the lower court that although occasionally the reporters may have done creative work, their day-to-day duties were routine fact-gathering work that could be done with "general manual or intellectual ability and training."

The court emphasized that while it described Gateway reporters' duties as fact-gathering, it did not mean that all gathering of facts is necessarily nonexempt work. It simply believed that "the type of fact-gathering done by the Gateway reporters was not the type of fact-gathering that demands the skill or expertise of an investigative journalist for the *Philadelphia Inquirer* or *Washington Post* or a bureau chief for the *New York Times*."

It concluded that were it to find that Gateway reporters were in the "minority" of reporters whose primary duty requires imagination and talent, it would be hard to see what reporters would be left in the majority.

It also pointed out that the determination of whether a reporter is a "professional" does not depend on the title a paper gives a reporter. Rather, it depends on the specific characteristics of a particular reporter's job.

The court noted, "[T]here is a difference in duties between reporters writing for the *Washington Post* and those who write for a local weekly newspaper" and it "would defeat the purposes of the exemption to lump them into the same category merely because their employers called them professionals."

The *Gateway* decision, particularly if followed by other courts, obviously and significantly narrows the number of papers that will be able to qualify for the "small newspaper" exemption.

Although the appeals court did not find Gateway's reporters to be "professionals" under the FLSA, the language and criteria set forth by the court actually may make an affirmative finding more likely with regard to investigative journalists at larger newspapers of the type specifically mentioned in the opinion.