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The

Trickle-

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OSHA's

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Break

Regulation

Marc Linder

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The cartoon by Hekate, "Why Don't They Just Call In?" is reprinted on page 285 with the permission of Hekate.

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Precocious But Meager Enforcement for Bus Drivers: Washington

It's as if employers believe you can make your kidneys punch a time clock, too.¹

During the run-up to Federal OSHA's promulgation of its Memorandum in 1998, the spokesman for the Division of WISHA (Washington Industrial Safety and Health Act) Services of the Washington State Department of Labor and Industries told the Associated Press that the agency "mandates that employers make bathrooms available.... And although there is no requirement, the state consistently advises that workers be allowed to use them." Four years later, the Senior Program Manager for Policy and Technical Services at Washington OSHA reported that when his agency had received the April 6, 1998 Memorandum, the staff had all thought that OSHA was "finally coming to its senses," because WISHA had adopted the same position earlier with regard to complaints resolved informally by phone and fax and (he was not certain) perhaps in citations as well.³

³Telephone interview with Michael Wood, Sen. Prog. Mgr. Policy and Tech. Serv.,



¹Carrie Mason-Draffen, "Bad News: Bathroom Breaks Can Be Withheld," *Newsday*, Aug. 13, 2000, at F13 (Lexis).

²Maggie Jackson, "For Workers with Limited Toilet Breaks, Relief Is on the Way," Seattle Times, Mar. 22, 1998, at A13 (Westlaw) (quoting Bill Ripple). Almost five years after the fact, a former compliance officer and now program manager for the statistics section of New Mexico OSHA asserted, without offering any documentation, that that agency even before 1998 had always interpreted the standard requiring that toilets be provided as also requiring that workers be allowed to use them. He sought to buttress this regulatory interpretation by noting that New Mexico OSHA had adopted the same position with regard to other regulations that require employers to provide something, even though the logic of requirement was different when, as with hard hats, workers' use was mandatory rather than discretionary. Telephone interview with George Vigil, Albuquerque (Sept. 20, 2002). Ironically, however, since the promulgation of OSHA's Memorandum on April 6, 1998, New Mexico has failed to issue a single citation to an employer for failure to provide toilets, let alone for denying access to them.

And in fact at least once, in 1994, in the midst of a multi-year collective bargaining dispute over bathroom breaks between the Clark County Public Transportation Benefit Area Authority, or C-Tran, in Vancouver, Washington, and Amalgamated Transit Union (ATU) Local 757, which represented all 129 of the system's drivers, WISHA had issued a citation for denial of access.⁴ (And again in 1995, WISHA cited Ryder ATE Inc., which provided local passenger transportation, for having "failed to allow mobile employees adequate time for restroom breaks, exposing employees to possible health hazards and injury"; WISHA also imposed a monetary penalty of \$1,120, later reduced to \$785.)5 Two years earlier, in 1992, WISHA had issued a citation to the City of Yakima Transportation Department, proposing a penalty of \$4,500, because "toilet room facilities for transit drivers were not readily available on a timely basis and employees did not have transportation immediately available to nearby toilet facilities." As a result of this citation, the City of Yakima entered into a settlement agreement with the union (Washington State Council of County & City Employees Local 1122, AFSCME, AFL-CIO) representing the drivers, which had requested an inspection. According to the agreement:

The City recognizes the need for adequate time for breaks for transit drivers during the course of driving shifts. The transit manager will use his best effort to approve route scheduling that provides adequate time for breaks (including layovers) of approximately five to seven minutes per hour. The Employee Work Force Committee will have the opportunity to be involved in a variety of subjects, which can include route scheduling.... Consideration given to break time will be applicable when routes are extended, so that time points for such routes will also be extended to allow time for breaks. ... The City acknowledges the legitimate concern raised by the issue involved in the above referenced citation. The City will directly communicate its acknowledgment to the transit division drivers and express its regret for the inconvenience and impact they have experienced....⁷

⁷Settlement Agreement Between the City of Yakima and Washington State Council of County & City Employees Local 1122, AFSCME, AFL-CIO (June 9, 1993).



WISHA, Olympia (Oct. 21, 2002).

⁴Public Transportation Benefit Area dba C-Tran, Insp. 115470262 (1994).

⁵Ryder ATE, Inc., Insp. No. 115220816 (Aug. 2, 1995). Because the violation report had been destroyed, further details are no longer available. Fax from Barbara Harris-Williams, Public Disclosure, WISHA, to Marc Linder (Dec. 10, 2002).

⁶City of Yakima - Transit Dept., Insp. No. 111218012 (Oct. 19, 1992) (copy furnished by Wash. Dept. of Labor & Industries). Although the second part of this violation description quotes verbatim the mobile crew exception to the toilet standard, that language is contained in a separate code provision that WISHA did not cite. Wash. Adm. Code sect. 296-24-12007(1)(b) (1995).

After the union and the employer had entered into this agreement, the Department of Labor and Industries and the employer reached their own agreement concerning the latter's appeal from the citation. As a result, the penalty was reduced from \$4,500 to \$1,350 because the Department determined that "there is no substantial probability that serious physical harm or death could have resulted from the violation."

In contrast, the later citation against C-Tran, in addition to including the failure to provide toilet facilities or "reasonable access" to them, creatively applied the general duty clause of the Washington state occupational health and safety regulations9: "The employer did not adopt and use practices which adequately rendered the employment and the place of employment safe in that...schedules did not allow sufficient time for drivers to use the toilets during extended blocks of time...." WISHA also assessed C-Tran a penalty of \$1,125 and ordered it to abate the problem.¹⁰ In the language of a contemporaneous local newspaper account, the agency charged that "[n]ot enough time for toilet stops is unsafe for drivers and passengers...." Although C-Tran claimed that drivers could "take a bathroom break whenever they need one, even if it makes the bus late," "no C-Tran runs have time scheduled specifically for driver breaks. ... C-Tran drivers must radio in for permission to stop, tipping off riders about what the unscheduled delay is for," and thus embarrassing the driver.¹¹

In response to C-Tran's appeal, a hearing was held in Vancouver, Washington on January 31, 1995, at which a large volume of evidence was presented concerning the lack of bathroom breaks. On some routes drivers went for as long as three, four, five, and even eight hours without urinating.¹² Female drivers were "mortified" to have to "tie their jackets or whatever they could find around them because they haven't been able to get to the bathroom in time." The union

¹³In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of



⁸Board of Industrial Insurance Appeals, Washington Industrial Safety Health Act, In re City of Yakima - Transit Dept, Safety Report No. 111218012, Docket No. 93W056, Notice to Employees of Proposed Agreement to Settle Appeal (Aug. 24, 1993).

⁹Wash. Adm. Code sect. 296-24-073(2) (1995).

¹⁰Public Transportation Benefit Area dba C-Tran, Insp. 115470262 (citation issued Nov. 18, 1994), citation item 1, No. 1a; Corrective Notice of Redetermination (Feb. 14, 1995) (issued by the hearing officer). Because the case was archived and more than six years old, WISHA destroyed the paper file. Telephone interview with Deanna Jackson, Public Disclosure, WISHA (Oct. 23, 2002).

¹¹Jeanette Steele, "On the Go," *The Columbian* (Vancouver), Mar. 8, 1995, at A1 (Lexis).

¹²In the Matter of Informal Conference on Citations Issued to C-Tran, Employer, of Vancouver, Washington, by the Washington State Department of Labor, Health and Safety Division, Transcript of Proceedings 23 (Jan. 31, 1995) (statement of Mr. Wasela).

insisted that drivers who stopped to urinate were either late and were disciplined or had to drive over the speed limit (to make up the time).¹⁴ To be sure, on certain eight-hour runs no breaks at all were scheduled:

Some operators just forego eating for eight hours. And we're not pleading their case, because they do that because they actually don't want to have an extra half-hour in there. They'd rather get home sooner. But there are other operators who want to eat, and there's a real question of whether it's safe and what the district's liability would be if there's an accident and the operator's reason is, well, I wasn't thinking very clearly, I hadn't eaten in seven hours.

And we believe that the evidence will show that C-Tran's handling of the break issue has created a medical hazard for the employees and safety hazard for the employees and passengers and the general public. [A] driver who is forced to hold it or who has not eaten for eight hours is in no condition to maneuver a bus through urban traffic. If you've been holding it for eight hours and you've got to go, you are distracted and can't concentrate.¹⁵

Although C-Tran argued that drivers "can use...the restrooms and even be late on their run, and they are not disciplined," it also claimed that it was "pure supposition, speculation, that there are these connections" between urine retention and urinary tract infections. And even if drivers were not sanctioned for lateness, the union argued, "the idea that you've managed to hold it for eight hours, you get overtime because your run is late, the end of your day is late, that isn't proper compensation. That isn't solving the problem, and it isn't removing the safety hazard." Since other bus systems for which the union's members drove did add time to their schedules so that drivers were able to go void, the problem was created and could be solved by C-Tran's management, which "certainly...doesn't have to ask to go to the bathroom." In any event, management failed to respond to the union's suggestion of temporary measures by which part-

¹⁹In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 35 (Stoner).



Proceedings, at 173 (statement of Susan Stoner).

¹⁴In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings at 31-32 (statement of Susan Stoner).

¹⁵In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings at 33-34 (statement of Stoner).

¹⁶In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings at 180, 181-82 (statement of Dennis Duggan, attorney representing C-Tran).

¹⁷In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 35 (Stoner).

¹⁸In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 216 (Stoner).

time drivers would go to layover places to perform the work such as boarding passengers and unloading wheelchairs that prevents drivers from getting to go to the bathroom and/or supervisors would watch buses while drivers left to void.²⁰ In spite of the hearing officer's entreaty to the parties that they settle the dispute amicably and spare him the writing of a decision that neither side would like,²¹ the ATU and C-Tran could not,²² and on February 14, 1995, the hearing officer ruled that the employer's schedules did not allow drivers sufficient time to use toilets and that C-Tran had to allow such time.²³

During the pendency of C-Tran's appeal to the Board of Industrial Appeals, the ATU's general counsel informed the judge that in the interim only in a small proportion of routes had the employer made changes providing for what appeared to be adequate time for drivers to use the bathroom. Moreover, the changes had been made without surveying drivers and without planners' having ridden the buses. Despite this "abysmally inadequate" response and failure to address the issues raised by the citations,²⁴ in July 1995—just as WISHA was issuing the aforementioned citation to a local passenger transportation subsidiary of Ryder—as a result of a mediation and settlement conference held on June 28 involving the employer, Local 757, and the Washington Department of Labor and Industries,²⁵ the citation and penalty were dropped.²⁶ Although the formal settlement agreement merely vacated the citation without more,²⁷ a state assistant attorney general stated that the Clark County bus authority "acknowledged that some routes need extra time for breaks. However, the union won only advisory

²⁷In re Public Transportation Benefit Area dba (C-Tran), Docket No. 95 W058, Agreement of Parties (Board of Industrial Insurance Appeals State of Washington, Sept. 11, 1995).



²⁰In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 203-204 (Stoner).

²¹In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 261.

²²In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings, at 257-58 (Heintzman (ATU Local 757 President) and Duggan)..

²³"C-Tran Loses Potty Break Ruling; Will Rule," *The Reflector* (Battle Ground, WA), Feb. 22, 2995, at A2.

²⁴Letter from Susan Stoner to Judge Sally Satwell, Board of Industrial Appeals (June 21, 1995).

²⁵In re Public Transportation Benefit Area dba C-Tran, Docket No. 95 W058, Notice of Settlement Conference (Board of Industrial Insurance Appeals State of Washington, June 1, 1995).

²⁶In re Public Transportation Benefit Area dba (C-Tran), Docket No. 95 W058, Order on Agreement of Parties (Board of Industrial Insurance Appeals State of Washington, Sept. 20, 1995).

power over routes...." The state conceded that the "agreement doesn't mean an immediate solution for uncomfortable drivers," but the Department's "interest was trying to get the drivers an opportunity to go to the bathroom. It's more important that the problem be solved than fight over the penalties." The official argued that "[e]verybody anticipates that this will result in some major schedule changes down the line." In fact, however, the problem was not solved: bus drivers there and elsewhere in Washington still have to wait up to six hours to urinate. The union stated that although C-Tran encouraged drivers to take breaks, the system's officials "admitted that the system would 'break down' if they did so." The union stated that although C-Tran encouraged drivers to take breaks, the system's officials "admitted that the system would 'break down' if they did so."

Susan Stoner, Local 757's general counsel, who argued the case before the hearing officer, reported that regardless of the wording of the citation, the central issue at the hearing was C-Tran's failure to schedule routes so that drivers had enough time to void. She added that even though the citation was rescinded, the union "won" the case and there was eventually some improvement. However, the union's collective bargaining agreements in Washington and Oregon do not provide for formal breaks of any kind (including rest or meal breaks) so that it is a perpetual struggle for drivers to find any time for any of these activities.³¹

The union's account was confirmed in part by C-Tran's Human Resources Director, Arlene Doern, who had held this same position during the 1990s and also attended the hearing. She agreed that, although the citation was for failure to provide a toilet or transportation to a toilet (which prompted her to laugh because the drivers, after all, have transportation), the real dispute at the hearing was over whether drivers had enough time to use the toilet. However, she insisted that drivers could then and can now stop the bus whenever they need to go so long as they inform the dispatcher (in code, if they prefer, to avoid embarrassment in front of the passengers). Moreover, Doern believed that by pointing out that runs average 30 minutes, with the longest being 60 minutes, and asserting that drivers did not need to go to the bathroom at such intervals anyway, she could demonstrate that, despite the fact that drivers had no contractually guaranteed formal breaks, they could still eat and go to the bathroom "in between," and

³¹Telephone interview with Susan Stoner, general counsel, ATU Div. 757, Portland, OR (Oct. 25, 2002); "Agreement Clark County Public Transportation Authority Benefit Area and Amalgamated Transit Union Local No. 757, September 1, 1999 - August 31, 2002, For Fixed Route and Paratransit Operators," on http://atu757.org/contracts/ctran99.pdf.



²⁸Jeanette Steele, "C-Tran's Drivers Gain a Bit," *The Columbian* (Vancouver), July 9, 1995, F1 (Lexis).

²⁹Telephone interview with Susan Stoner, Gen. Counsel, ATU Div. 757, Portland, OR (Oct. 21, 2002).

³⁰"C-Tran Loses Potty Break Ruling" (quoting Jason Reynolds).

that, since many worked split shifts, breaks were not a problem.³² In fact, however, once a driver, as a result of the normal press of driving and dealing with passengers, has fallen behind schedule, "it could," as one driver observed, "easily take the driver 6 to 8 hours to catch up,"³³ thus leaving him or her without a break for that length of time.

Mark Bevington, a veteran full-time C-Tran driver and Local 757 executive board member who was the employee representative at the time of the WISHA investigation, reported that before the citation drivers often had had to go three or four hours without being able to urinate because there was not enough time planned into the schedules for them to take the time to urinate at the end of the line before heading back to the beginning of a run, where the same tightness of schedules might again prevent the driver from urinating. When the union filed a complaint with WISHA, a WISHA inspector actually sat on the bus observing the tight scheduling that made stops to urinate impossible. The outcome of the hearing, in Bevington's view, was WISHA's informing C-Tran of the measures that it had to adopt to comply with the law—building more time into the schedules for stops and providing (for) toilets at stops, both of which C-Tran in part has done. Bevington also noted that as a result of the mediation (which was part of the employer's appeal process), drivers obtained more of a say in scheduling by virtue of sitting on the committee that builds routes. Consequently, drivers did gain somewhat more time to go to the bathroom at the end of a route, although similar problems began cropping up again after a few years. The real and ironic problem is that drivers suffer from both lack of access and stress resulting from the displeasure and anger they perceive or anticipate from passengers who just want to get to work or home as fast as possible and are not focused on the drivers' problems. Bevington, who believed that hardly any drivers stop in the middle of a run to urinate, agreed with Stoner that the drivers' (involuntary) complicity in the suppression of their own voiding would make a successful OSHA case very problematic in the face of the employer's truthful claim that it does not stop drivers from delaying the bus; indeed, he observed that the company would pay overtime to any driver who, by taking the time to urinate, wound up working overtime.34

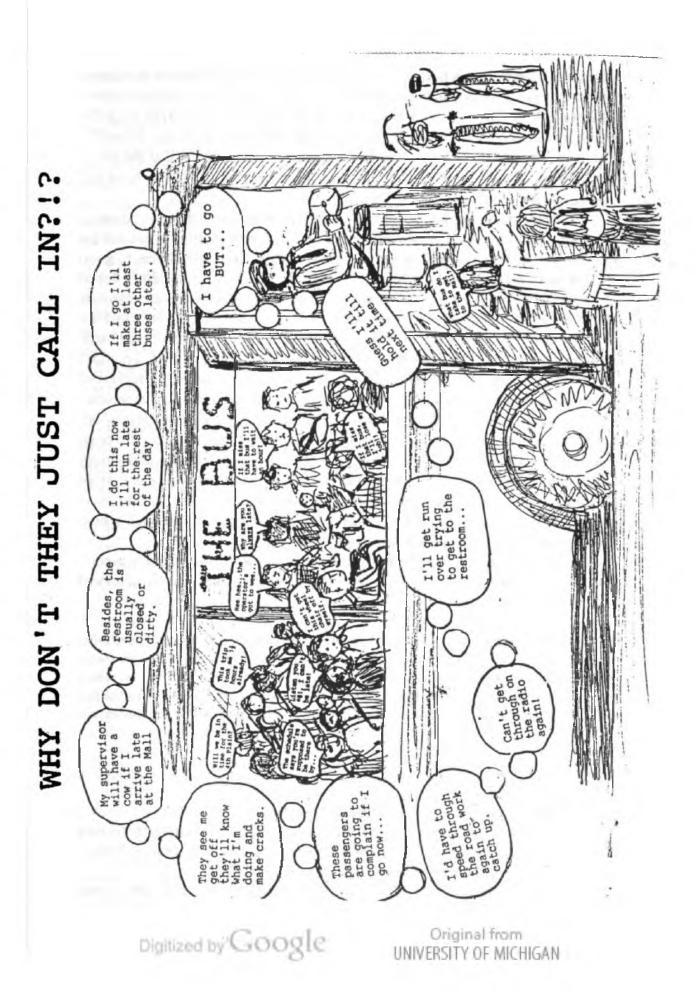
The accompanying cartoon (by Hekate, a long-time C-Tran driver and former

³⁴Telephone interview with Mark Bevington, C-Tran driver and ATU Local 757 executive board member, Vancouver (Oct. 26, 2002). Interestingly, Bevington did not see himself as in the same position as his colleagues because as a former truck driver he had "learned to hold it."



³²Telephone interview with Arlene Doern, Human Resources Director, C-Tran, Vancouver, WA (Oct. 25, 2002); telephone interview with Stoner (Oct. 25, 2002).

³³Email from Hekate to Marc Linder (Jan. 1, 2003).



union executive board member) nicely captures the multifaceted pressures operating on drivers not to take bathroom breaks. In light of this psycho-socioeconomic situation, the hearing officer's tongue-in-cheek suggestion to C-Tran might be worth considering: "What would you do to take the pressure off the drivers? I mean, would you post big signs on the bus that say, our policy is that the driver gets to stop a bus when they need to go to the restroom, and if you have any complaints about this policy, call Tom?"³⁵

The brunt of the burden, according to driver-cartoonist Hekate, is borne by drivers with less seniority, since those, like her, with more seniority can bid for those routes that do have enough time built into them to enable drivers to go to the bathroom at the transit stations at the end of the line. 36 As of late 2001, Local 757 estimated that at least 3,000 of its 4,500 members "do not have immediate access to restroom facilities." To be sure, the union added, drivers often "feel unable to use the restroom when needed...even when there are no institutional barriers to restroom use." As a sample survey revealed, "almost one-half...practices voluntary retention and voluntary dehydration as means of avoiding perceived passenger and supervisory disapproval. Almost one-half also reported experiencing illnesses associated with urine retention and dehydration."37 Bus drivers' acquiescence in such social pressure constitutes a major obstacle to successful prosecution of an OSHA complaint: employers' (truthful) response that all a driver would have to do is radio in to the dispatcher and explain that he or she is stopping the bus to go to the bathroom would, in Stoner's view, be difficult to overcome.³⁸ In any event, WISHA has apparently never again issued such a busdriver-related toilet-access citation to any employer.³⁹

Remarkably, bus drivers in Britain are exposed to a similar predicament. According to Martin Mayer, the Transport and General Workers Union's national representative for UK bus drivers:

Access to toilets is a problem for bus drivers. Although bus stations normally have toilet facilities, and sometimes separate facilities for bus staff, many bus drivers operate routes which do not serve the bus station and so have no access to toilets. The UK has seen a marked decline in public toilet provision over the years, particularly in suburban areas due to vandalism and cost cutting. In Sheffield (my home city) many bus routes are

³⁹Telephone interview with Mike Rohde, WISHA, Olympia (Oct. 22, 2002), who mistakenly believed that WISHA had not issued any toilet-related citations since 1998.



³⁵In the Matter of Informal Conference on Citations Issued to C-Tran, Transcript of Proceedings at 236

³⁶Telephone interview with Hekate, Vancouver, WA (Dec. 27, 2002).

³⁷ATU Div. 757, Application for OR-OSHA Occupational Safety and Health Training and Education Grant Program: The Eight and Two Campaign at 13, 6 (Oct. 26, 2001)

³⁸Telephone interview with Susan Stoner (Oct. 25, 2002).

"cross-city" i.e. travelling back and forth from one outer terminus to another via the city centre but not via the bus station and not timed to spend any time in the city centre. With spells of work of up to 5 hours or more this can be very difficult if no toilets are on the route. The City Council refused to accept it was their responsibility..... The public body in charge of bus stations and bus stops...said it was up to the bus operators. The Bus operators said they would not provide only to find other bus operators' drivers were using the toilets whilst not contributing to the cost. Actually we can only get round the problem by encouraging drivers to call on the radio for a toilet relief, in which case the driver gets permission to drive off route to a toilet facility. Although this is agreed, many drivers will not do so and simply urinate behind bushes at terminus or even use an empty bottle when it's quiet and passengers are off the bus. We are currently in talks with the City Council on public funding for specialised bus shelters at key terminal points with toilet facility attached. In London where special bus drivers' toilets were once common under the public sector, the problem has returned with private bus operators unwilling to foot the bill. Again the impetus is to discuss this with the public sector infrastructure provider, in this case Transport for London. We are concerned at the possible health and safety risks to drivers of "holding it in" on frequent occasions throughout their working career. It is also particularly unattractive to female employees.⁴⁰

In Washington's neighbor, Oregon, which has yet to cite an employer for restricting employees' access to the toilet, the ATU met with the state OSHA on March 2, 1999, to explain bathroom access problems. The union stressed the following obstacles:

Bus drivers are not allowed timely access to the restrooms (this includes scheduled stops which are not long enough for the drivers to get to, use and return from restrooms).

Identified bathrooms have no bus parking or hazardous bus parking....

Identified bathrooms are popular areas (too busy to be able to use in scheduled amount of time).

Bus drivers are concerned about leaving the bus unattended in poorly lit areas to walk to the bathroom.

Bus drivers are concerned about walking alone in poorly lit areas during hazardous times...to an identified restroom.

Bus drivers are often embarrassed to ask permission over a radio/cb unit....

Bus drivers suffer subtle punishments when their routes are late or if they ask to use the restroom.

In rejecting the union's request that Oregon-OSHA develop a rule to address this situation, the agency replied that section 1910.141(c)(1)(i), as interpreted by the Memorandum of April 6, 1998, addressed the issue and that the agency would

⁴⁰Email from Martin Mayer to Marc Linder (Oct. 6, 2002).



enforce the standard if an employee filed a complaint.⁴¹ To be sure, Oregon OSHA (like Washington OSHA) takes the position that a bus driver is a "mobile crew,"⁴² subject to a different standard,⁴³ but, as the Federal OSHA Memorandum itself declares, even such workers are entitled to "equivalent" protection.⁴⁴

Washington OSHA did cite at least one employer for denying workers access to toilets after April 6, 1998. In 1999 WISHA cited Custom Apple Packers, a large commercial packing shed in Quincy (which received a total of 16 citations between 1990 and 2002) because it had not provided toilets. The workers, whose shifts ran from 7 a.m. to 5:30 p.m. with breaks from 9:45 to 10 a.m., 12:30 to 1 p.m., and 3:15 to 3:30 p.m., complained to the agency that the employer

has restricted employees from using bathroom facilities.... A foreperson...informed Hispanic workers that we could only use bathroom facilities during scheduled breaks. This meant that workers would have to wait two to three hours in order to use bathroom facilities. When we complained about the rule to [] (who speaks Spanish), she informed us that this rule was an order from...a supervisor. We were not given anything in writing about this rule. [] informed us that workers who violated the rule would be given warnings and then they would be fired. When [] asked about changing the rule because she could not wait two to three hours, [] told her to wear Pampers. Also, when [] informed [] that she had problems with her kidneys, [] pointed at a bucket on the floor and told her that she could use the bucket. Due to this workplace rule both [] and [] developed urinary tract infections. [] was taken from work to the hospital emergency room....⁴⁵

Omitted from the OSHA report was the part of the complaint that explained that the urinary tract infection had caused one of the women workers "severe and painful abdominal pain during her work shift, resulting in her collapsing to the warehouse floor and wetting herself in front of dozens of co-workers. Along with the physical pain that [] has endured as a result of her UTI, the episode has caused her tremendous shame and humiliation."

⁴⁶Letter from Patrick Pleas, Northwest Justice Project, Wenatchee, to Don Wanamaker, WISHA, Yakima (Mar. 30, 1999).



⁴¹Letter from Barry Jones, Manager of Enforcement, Oregon OSHA, to Susan Stoner, Gen. Counsel (June 9, 1999) (also quoting the points made by the union on Mar. 2).

⁴²Telephone interview with Barry Jones, Manager of Enforcement, Oregon OSHA (Oct. 22, 2002); telephone interview with Michael Wood, Sen. Prog, Mgr., WISHA (Oct. 21, 2002).

^{431910.141(}c)(1)(ii).

⁴⁴See below Appendix II.

⁴⁵[Washington] Department of Labor & Industries, Alleged Safety or Health Hazards, Custom Apple Packers, Inc., Complaint No. 201176971 (Feb. 24 [1999]). The square brackets in the text represent names that were deleted by WISHA in making the documents available.

The inspector's report noted that management had stated that "there had been problems with certain employees" who "would not go during the break, then 5 minutes later they would want to use the bathroom and be gone for up to 20 minutes." The report went on to note that "all the employees interviewed...seemed to be scared, most of them said they had either been denied to [sic] use the bathroom or have seen others denied the use of the bathroom during regular working hours." Without imposing a monetary penalty, the inspector cited the employer: "Provided means available for use at all times.' Management was not allowing employees the use of the bathrooms during working hours except during break."

Despite the zero-dollar citation, the employer appealed the decision because it was "fearful of being sued by some of the employees and their Attorney." Although the company alleged that some employees "abused the bathroom privileges, by visiting with other employees, using the telephone, or going into the lunch room and heating their lunch early," the hearing officer, ruling that the firm in fact "did deny one or more of their employees...the opportunity to use the bathroom," upheld the citation.⁴⁹

⁴⁹WISHA Services Div., Resumption of Jurisdiction Conference Report (June 14, 1999).



⁴⁷WISHA Violation Report, Custom Apple Packers, Inc., Insp. No. 302194816 (Apr. 1, 1999).

⁴⁸Custom Apple Packers, Inc., Insp. No. 302194816 (citation issued May 13, 1999). The sentenced in double quotation marks sounds like some official definition, but, according to Michael Wood, who as the Senior Program Manager is the second highest official at WISHA, it was not taken from any official written source and was probably merely the inspector's way of emphasizing the point. Telephone interview with Michael Wood (Nov. 25, 2002).