IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

In re:	)	**Chapter 11**
	)	**Case No. 19-bk-30289**
Blackjewel, LLC, et al.,	)	
	)	**(Joint Administration Requested)**
Debtors,	)	

THE ACTING SECRETARY OF LABOR'S EMERGENCY MOTION TO HALT THE TRANSPORT AND TRANSFER OF COAL LOCATED IN HARLAN COUNTY, KENTUCKY

From June through July 2019, Blackjewel, LLC failed to pay its employees minimum wage and overtime in violation of Section 6 and 7 of the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. §§206, 207, by not paying them at all for work performed in connection with the mining and processing of coal. Some of that coal currently sits in railcars in Harlan County, Kentucky. As such, the coal is considered "hot goods" and should be prevented from being transported or transferred in interstate commerce until these workers have been paid in accordance with the FLSA.

Counsel for the United States has been informed by counsel for the Debtors that this coal was purchased by Blackjewel Marketing and Sales, LLC and/or Blackjewel Marketing and Sales Holdings, LLC. However, CSX Transportation has not shipped the coal due to protests by miners at the Harlan mine owned by the debtors. The United States does not know whether the debtors have received payment for the coal or whether Blackjewel Marketing and Sales, LLC and/or Blackjewel Marketing and Sales Holdings, LLC is in the process of paying for the coal. In either event, the miners must be paid for the work they have performed in producing and processing the coal before the coal can be shipped and entered into interstate commerce.

Acting Secretary of Labor Patrick Pizzella, the United States Department of Labor, by the undersigned counsel, asks the Court to use its authority over the bankruptcy estate to halt the movement of this coal by any party until the workers are paid.

I. Background

On or about July 29, 2019, representatives for the U.S. Department of Labor, Wage and Hour Division ("Wage and Hour"), in the Louisville, Kentucky District Office became aware of a standoff between workers in Harlan, Kentucky and a train pulling approximately 100 cars loaded with coal. *See* Declaration of Christopher O. Binda ("Binda Decl.") at ¶ 5 attached hereto as Exhibit A. According to the news reports, workers were blocking the movement of the train because they had not been paid for the work that they had done in mining or otherwise producing the coal. Binda Decl., Ex A. ¶ 5. As discussed in more detail below, the Secretary of Labor has the authority under Section 15(a)(1) of the Fair Labor Standards Act (the "Act" or the "FLSA"), 29 U.S.C. § 15(a)(1) to seek an injunction to prevent the movement of goods produced in violations of Sections 6 and 7, 29 U.S.C. §§206, 207.[1]

On or about July 29, 2019, the Commonwealth of Kentucky Labor Cabinet contacted Wage and Hour inquiring as to what it could do to help these workers recover their wages. Binda Decl., Ex. A ¶ 7. The Kentucky Labor Cabinet had previously held a three-day town hall meeting with affected employees of Blackjewel and determined employees had not been paid for work they had performed. Binda Decl., Ex. A ¶ 8. Based on this investigation and the contemporaneous news

[1] Lest there is any dispute, coal is clearly a "good" within the meaning of the FLSA, underscored by the fact that the "hot goods" provision prohibits the movement in commerce of goods "in the production of which" any employee was employed in violation of the FLSA, and the FLSA's definition of "produced" explicitly lists "mining" as an example of production. 29 U.S.C. §§ 203(j), 215(a)(1).

reports, it appears that at least 172 workers have not been paid at least $664,000 in wages from June 1, 2019 through July 1, 2019. Binda Decl., Ex. A ¶ 8.

As a result, Wage and Hour initiated its own investigation, which is ongoing through the present day. Binda Decl., Ex. A ¶ 4, 12. As a part of that investigation, Wage and Hour investigators interviewed Blackjewel employees and determined that they had worked in excess of 40 hours in a workweek and were not paid for their work performed in June and July of 2019. *See* Declaration of Anthony Martinez ("Martinez Decl.") attached hereto as Exhibit B ("Ex. B") ¶¶ 5, 6. Employee witnesses also confirmed the uncompensated employees worked with the coal in dispute. Martinez Decl., Ex. B ¶ 7. Thus far, the evidence indicates Blackjewel violated Sections 6 and 7 of the FLSA. The evidence also indicates the coal located in Harlan County, Kentucky is a product of uncompensated work.

II. Argument

A. The Fair Labor Standard Act's "Hot Goods" Provision Prohibits the Transferring and Transporting of the Coal.

The Fair Labor Standards Act (FLSA) contains a "hot goods" provision found at Section 15(a)(1). 29 U.S.C. §215(a)(1). Section 15(a)(1) of the FLSA states it is unlawful for any person "to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of [the FLSA's minimum wage and overtime requirement]." 29 U.S.C. § 215(a)(1).

"The basic purpose of the § 15(a)(1) [hot goods] prohibition [29 U.S.C. § 215(a)(1)], as the Supreme Court pointed out . . . 'is to exclude from interstate commerce' goods produced under substandard labor conditions, which would compete unfairly with goods produced by complying employers, and which in their total effect might force complying employers out of business." *Ford*

v. Ely Group, Inc., 621 F. Supp. 22, 25 (W.D. Tenn. 1985), *aff'd*, 788 F.2d 1200 (6th Cir. 1986), *cert. granted*, 479 U.S. 929, 107 S. Ct. 397 (1986), *aff'd*, 483 U.S. 27, 107 S. Ct. 2694 (1987) (*quoting U.S. v. Darby*, 312 U.S. 100, 109–110, 122, 61 S. Ct. 451 (1941)); *see also* 81 Cong. Rec. 4960, 4961 (1937) ("only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.") (*quoted with approval in Powell*, 339 U.S. at 516).

In *United States v. Darby*, 312 U.S. 100 (1941), the Supreme Court considered the purposes generally served by the Act, and the specific purposes served by Section 15(a)(1)'s prohibition of "hot goods" into commerce:

> [The Act's] purpose...is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards...and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states.

312 U.S. at 109-110. The Court continued:

> The motive and purpose of the [prohibition of the sale or shipment of "hot goods" are] plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows.

312 U.S. at 115.

Prohibiting the sale of goods produced in violation of the FLSA serves several

fundamental statutory purposes. In addition to ensuring employers who violate the FLSA do not enjoy an unfair competitive advantage over their law-abiding peers, *see Ely Group, Inc.,* 621 F. Supp. at 25, the hot goods provision serves to incentivize employers to adhere to the FLSA's minimum wage and overtime requirements. *See Darby*, 312 U.S. at 117; *Powell*, 339 U.S. at 510. The hot goods provision also serves to protect the interests of those workers who have suffered substandard working conditions during the production of such goods. Excluding hot goods from interstate commerce is more than a simple enforcement mechanism to achieve other statutory aims: it is itself one of the central purposes of the FLSA. *See Citicorp Indus. Credit Inc. v. Brock*, 483 U.S. 27, 36 n.8, 107 S.Ct. 2694 (1987).

The Supreme Court reaffirmed its reading of the Act and the purposes served by Section 15(a)(1) in *Citicorp Industrial Credit Inc. v. Brock*, 483 U.S. 27 (1987). In *Citicorp*, an employer as well as its secured creditors were enjoined from shipping or selling "hot goods" that had been produced by employees who were not paid wages in accordance with the Act's requirements. In this context, the Court observed that the application of the Act's "hot goods" provision fully supports the Act's dual goals: to prevent goods from being produced with labor that does not meet minimum standards and to "eliminate the competitive advantage enjoyed by goods produced under substandard conditions." *Id.* at 36.

Moreover, an action to enforce the 15(a)(1) prohibition is brought, "not to compel the foreclosing creditor to pay the statutory wages or to put pressure on the defaulting producer to pay such wages, but to keep tainted goods from entering the channels of interstate commerce." *Citicorp*, 483 U.S. at 38. Allowing the Defendant to move any of these goods in interstate commerce:

> [W]ill result in the immediate and irreparable injury or damage to plaintiff and the public interest in that such shipment and movement

> of goods will make use of the channels and instrumentalities of interstate commerce to spread and perpetuate an unfair method of competition and interfere with the orderly and fair marketing of goods in commerce.

Ford v. Ely Group, Inc., 621 F. Supp. 22, 26-27 (W.D. Tenn. 1985), *aff'd*, 788 F.2d 1200 (6th Cir. 1986), aff'd *sub nom., Citicorp Indus. Credit, Inc. v. Brock, supra*.

Importantly under the facts of this case, the "taint" of hot goods continues to exist after the goods have been sold by the original employer. Because of its essential purpose, the hot goods provision applies broadly to all goods as that term is defined in the FLSA. *See* 29 U.S.C. § 203(i) (definition of "goods" includes "wares, products, commodities . . . or subjects of commerce of any character"), § 203(j) (definition of "produced" includes "handled, or in any other manner worked on in any State"). By its express terms, the hot goods provision of the FLSA also applies broadly to "any person," and is not limited to the violating employer who has underpaid his own employees. Rather, in accordance with its stated purpose to keep the stream of commerce free from goods produced under substandard labor conditions, the hot goods prohibition extends to prohibit "any" person, whether "innocent or not," from selling or shipping said hot goods in commerce. *Citicorp*, 483 U.S. at 34.

Furthermore, where goods produced in violation of the FLSA are commingled with goods produced in conformity with the FLSA, the hot goods provision applies to *all* the commingled goods. The burden of disentangling them -- if even possible -- is properly placed on the non-compliant employer. *See S. Advance Bag & Paper Co., Inc. v. United States*, 133 F.2d. 449, 450 (5th Cir. 1943); *Dickenson v. United States*, 353 F.2d 389, 392 n.7 (9th Cir. 1965) (*citing S. Advance Bag* with approval).

Employee statements indicate Blackjewel employees worked on the coal in Harlan County, Kentucky and were not compensated for the work they performed on the coal. Pursuant

to the FLSA, the transporting and transferring of the coal in dispute should be halted in light of the violations of the "hot goods" provisions of the FLSA and the evidence that these goods were produced by uncompensated employees. *See, e.g., Brock v. Kentucky Ridge Mining Co., Inc*., 635 F. Supp. 444, 451 (W.D. Ky. 1985) (preliminary injunctive relief granted for violation of Section 15(a)(1)); *Donovan v. TMC Indus., Ltd*., 20 Bankr. 997, 1000 (N.D. Ga.1982). Since the issue of this coal is also before the Bankruptcy Court, this Court can and should halt the transport and transfer of the coal until the issue of the uncompensated work is resolved.

B. The Automatic Stay Provision Does Not Apply.

Pursuant to Section 362(b)(4) of the Bankruptcy Code, the Secretary's ability to enforce the FLSA and prevent the movement of "hot goods" is exempted from the automatic stay provision of the Bankruptcy Code because it is an exercise of the Secretary's police power. *See Brock v. Rusco Indus.*, *Inc.,* 842 F.2d 270, 270 (11th Cir. 1988), *accord In re: Russel Transfer*, 107 B.R. 535 (Bankr. W.D. Va. 1989). Here, the Secretary is seeking analogous relief from this Court—the Secretary is seeking an Order directly from the Bankruptcy Court to prevent the disposition of "hot goods" in order to prevent this illegally produced coal from entering the stream of commerce.

Upon the filing of a bankruptcy petition, Bankruptcy Code § 362(a)(1) imposes a stay on the commencement or continuation of most judicial proceedings against a debtor. However, Congress provided for exceptions to this provision, as it recognized the need to prevent debtors from "frustrating necessary governmental functions by seeking refuge in bankruptcy court." *See McMullen v. Sevigny* (*In re McMullen*), 386 F.3d 320, 324-25 (1st Cir. 2004); *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991).

The automatic stay exception most pertinent in this matter is for the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental

unit's police or regulatory power." 11 U.S.C. § 362(b)(4). The purpose of this exception is to prevent "the endangerment of the public that would result from permitting a bankruptcy to avoid statutes and regulations enacted in the furtherance of governmental police powers." *U.S. v. Standard Metals Corp.*, 49 B.R. 623, 625 (D. Colo. 1985). The legislative history explains the scope of this exception:

> Paragraph (4) excepts commencement or continuation of actions and proceedings of governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop a violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of injunction, and to permit the entry of money judgment, but does not extend to permit enforcement of a money judgment.

S. Rep. 989, 95th Cong. 2d Sess. 52 (1978), H. Rep. 595, 95th Cong. 1st Sess. 343 (1977) reprinted in [1978] U.S. Cong. & Ad. News 5787, 6299; *National Labor Relations Board v. P*I*E Nationwide, Inc*., 925 F.2d 506 (7th Cir. 1991) (unfair labor proceedings excepted from automatic stay by governmental unit enforcing police or regulatory power).

Courts have uniformly held that a civil action by the Secretary under the FLSA constitutes the exercise of "police and regulatory power" within the meaning of 11 U.S.C. § 362(b)(4), and that the automatic stay provisions of 11 U.S.C. § 362(a) do not apply. *See e.g.*, *Martin v. Chambers*, 154 B.R. 664, 666 (E.D. Va. 1992) (Secretary's FLSA case fell within the regulatory and police powers exemption to the automatic stay); *Solis v. SCA Restaurant Corp.,* 463 B.R. 248 (E.D.N.Y. 2011) (Secretary's action to enjoin violations of the FLSA fell within regulatory and police powers exemption to the automatic stay); *Brock v. Rusco Indus., Inc.*, 842 F.2d 270 (10th Cir. 1988) (FLSA); *Chao v. Mike & Charlie's Inc.*, Civ. A. No. H-05-1780, 2006 WL 18497, *2-3 (S.D. Tex. Jan. 4, 2006); *Chao v. Mexico City Rest., Inc.,* 2005 WL 4889254 (S.D. Ind. 2005); *Chao v. BDK Industries, L.L.C.,* 296 BR. 165, 169 (C.D. Ill. 2003); *Donovan v. Timbers of Woodstock*

Restaurant, 19 B.R. 629 (N.D. Ill. 1981) ("FLSA enforcement proceedings plainly constitute an exercise of 'police or regulatory power' and are therefore within the exception to the automatic stay provision.").

Because the automatic stay does not apply to the Department of Labor's enforcement action, we request that the Bankruptcy Court provide the requested relief. Additionally, we note, that the Department will take all other actions necessary, pursuant to its enforcement power, to protect the interests of the employees who have not been compensated in violation of Section 6 and 7 of the FLSA. This request is in the interest of judicial economy and the Department asks that this Court recognize the purpose and tools of the FLSA and, using its own jurisdiction over the bankruptcy estate, halt the movement of the coal until the workers are paid their appropriate wages.

III. Relief Requested

Based on the foregoing, the Secretary seeks an Order:

> (1) halting the transport and transfer of the coal in Harlan County, Kentucky until the issue of the uncompensated work that produced the coal is resolved;
>
> (2) ordering that any sales proceeds from the coal be held in escrow and not be used until the issue of the uncompensated work that produced the coal is resolved, and/or
>
> (3) declaring that an action under the FLSA brought by the Department of Labor relating to the 100 train cars loaded with coal in Harlan County, Kentucky is not subject to the automatic stay of the Bankruptcy Code.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2019, I caused a copy of the foregoing Emergency Motion to be served by electronic mail upon all parties receiving notice through the Court's CM/ECF Noticing System.

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