P. 6 - Superseded by Reg. 576.8

DEPARTMENT OF LABOR

Wage and Hour Division

LEGAL FIELD LETTER

No. 5 (Revised)

5

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information.

MEMORANDA

Date	From	To	Subject
1-25-40	Joseph Rauh Asst. Gen. Counsel	Herman Marx Newark, New Jersey	Applicability of Textile Minimum Wage Order to Table Cloths, Lunch Cloths, Napkins and Towels
1-26-40	Joseph Rauh Asst. Gen. Counsel	Bertha E. Paret	Calhoun Chenille Corp., Calhoun, Ga. - 10-50-1 Mount Alto Bedspread Co., Calhoun, Ga.- 10-174-1 Calhoun Laundry Co., Calhoun, Ga.(See File 10-5C
1-27-40	Joseph Rauh Asst. Gen. Counsel	Col. Philip B. Fleming	Employees Working at Two Different Minimum Rates During the Same Workweek
1-29-40	Joseph Rauh Asst. Gen. Counsel	Peter M. Tamburo Dallas, Texas	Opinion of counsel for American Newspaper Publishers Association
1-31-40	Joseph Rauh Asst. Gen. Counsel	A. A. Cohen Cleveland, Ohio	Request for Interpretation; Section 13(a)(5) (The New Fisheries Co. Cincinnati, Ohio Case: 34-546)
2-1-40	Joseph Rauh Asst. Gen. Counsel	A. L. Fletcher Asst. Administrator	Regional Broadcasting Co. Jonesboro, Arkansas File: 3-271 B
2-2-40	Rufus G. Poole Asso. Gen.Counsel	Mr. Baird Snyder Asst. to the Administrator	Deductions from Wages under the Fair Labor Standards Act

LETTERS

Date	From	To
1-27-40	Joseph Rauh Asst. General Counsel	Mr. E. Bernet Willimantic, Connecticut
1-27-40	Joseph Rauh Asst. General Counsel	Epstein & Brothers New York City, New York
1-29-40	Philip B. Fleming Col., Corps of Engineers	Hon. James C. Oliver Washington, D. C.
1-31-40	Milton C. Denbo Chief Opinion Attorney	J. R. Cornelius, Esquire Jefferson, Texas
2-1-40	Joseph Rauh Asst. General Counsel	Mr. George A. McNulty General Counsel San Juan, Puerto Rico

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(3309)

January 25, 1940

In reply refer to:
LE:LS:RR

Herman Marx
Attorney-Investigator
Newark, New Jersey

Joseph Rauh
Assistant General Counsel

Applicability of Textile Minimum Wage Order to Table Cloths, Lunch Cloths, Napkins and Towels

This is in reply to your memorandum of December 28, 1939, which requests an opinion on the scope of Section (c)(4) of the Textile Minimum Wage Order.

Your question is raised with respect to firms who do not engage in manufacture of textile fabrics but perform the following operations on cloth to make table cloths, lunch cloths, napkins and towels:

(1) Cutting
(2) Hemstitching
(3) Laundering
(4) Embroidering
(5) Preparing for shipment

It is clear that Section (c)(4) of the Order is applicable to firms other than textile mills who are engaged in processing textile fabrics into the enumerated products. The question raised by this section of the Order is therefore, "What operations can be considered processing?" It is my tentative opinion, upon the basis of the facts stated in your memorandum, that the Wage Order is applicable to cutting, hemstitching, laundering and preparing for shipment. An opinion can not be rendered on the coverage of the Order with respect to embroidery until information on the following questions is obtained from you:

(1) Nature of the embroidery
(2) Types of products which are embroidered
(3) Plant where embroidery is done

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Is this work usually done in plants which process the textile fabrics into the named products or is it done in plants which embroider various types of products?

The information which is requested with respect to embroidery should also be furnished on hemstitching and laundering in order to enable me to render a definite opinion on the problems with which you are confronted.

As you have noted, the manufacture of handkerchiefs comes under the terms of the Apparel Industry Committee recommendation and is not subject to the Textile Minimum Wage Order. If an employee is engaged in manufacturing products which come under the definition of the textile industry in the Textile Minimum Wage Order and handkerchiefs, it will be necessary to pay him the minimum wage rate prescribed by the Order for all work performed during the workweek. The statutory minimum rate of 30 cents per hour can be paid only to employees who are exclusively engaged during the workweek in the manufacture of handkerchiefs. There must be a complete segregation of functions in order to warrant payment of the lower rate. The problem of segregation will be eliminated if the Apparel Industry Committee recommendation is approved, since it provides a 32½ cent rate for the handkerchief industry.

60808

January 26, 1940

In reply refer to:
LE:LS:RR

Bertha E. Paret

Joseph Rauh
Assistant General Counsel

Calhoun Chenille Corp., Calhoun, Ga. - 10-50-1
Mount Alto Bedspread Co., Calhoun, Ga. - 10-174-1
Calhoun Laundry Co., Calhoun, Ga. (See File 10-50

This is with reference to the file on the Calhoun Chenille Corporation, Mount Alto Bedspread Company and Calhoun Laundry Company which has been transmitted to this office by informal memorandum of A. E. Davidson for opinion on the scope of the Textile Minimum Wage Order. The question is raised in the file as to whether the Order is applicable to the Calhoun Laundry Company, and independent establishment housed on the property of the Mount Alto Bedspread Company and the Calhoun Chenille Corporation, which launders spreads for these concerns. It is stated that a very large percentage of spreads require laundering after manufacture. The laundering not only cleans the spread but also "fluffs" the chenille. The fluffing process may also be performed by shaking or hanging the spread on a line.

It is my opinion that this laundering is a part of the processing operation and is therefore subject to the terms of the Textile Minimum Wage Order.

The file also states that wearing apparel laundries also accept spreads from chenille manufacturers and compete with the Calhoun Laundry on this type of work. Since the Textile Minimum Wage Order is phrased in terms of process, it is clear that the provisions of the Order are also applicable to wearing apparel laundry companies which are engaged in laundering chenille spreads. The 32½ cent rate, however, must be paid only to employees who are engaged in doing work which is subject to the Textile Wage Order or to employees who are engaged during the workweek in performing work subject to the terms of the Order and work which is excluded from the Order. In cases where there is no clear segregation of function, it will be necessary to pay an employee the 32½ cent minimum wage rate for all work performed during the workweek if he engages in any work which is subject to the Order. The statutory minimum rate of 30 cents per hour can be paid only to employees who are exclusively engaged during the workweek in the manufacture of products which are excluded from the definition of the industry which is contained in the Order.

I would suggest, therefore, that Supervising Inspector Johnson be advised that the Horton Laundry of Rome, Georgia is subject to the Textile Wage Order.

(3309)

January 27, 1940

Colonel Philip B. Fleming

Joseph Rauh
Assistant General Counsel

Employees Working at Two Different
Minimum Rates During the Same Workweek

The Legal Branch submits this memorandum in support of the proposition that an employee who is engaged during a workweek in two different types of work for which two different minimum wage rates have been set is entitled to be paid the higher minimum wage rate for all hours worked during the workweek.

Two alternatives to the proposition have been suggested:

1. For machine operators that the employee be paid at each rate for the number of hours worked at that rate during the workweek.

2. For auxiliary workers (clerical, shipping and maintenance employees) that the employee be paid at the rate applicable to the predominant product in the plant.

It is submitted that neither of these alternatives should be adopted.

First. The first alternative is suggested for a machine operator who works part time at one rate, for example, the processing of yarn, and part time at another rate, for example, the manufacture of full-fashioned hosiery. But to require the inspector to determine the number of hours spent at each of these jobs and then to determine whether the piece rate earnings at each job, is exactly the administrative burden which we refuse to put upon the inspector when the question is whether there has been compliance with Section 6 of the Act. The attached opinion which was approved by you adopts the rule "one week, one rate." This opinion was not based on any interpretation of the Act, but rather on administrative simplicity. As far as the interpretation of the Act is concerned, the previous opinion, which is also attached, is satisfactory. In other words, for administrative and enforcement purposes and for this reason alone, we limited the employee's rights to an amount equal to 30 cents multiplied by the number of hours worked. We explained that opinion on the basis of administrative simplicity -- that we couldn't divide up the employee's

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week and determine the rates at which he had been paid for different periods within that week. We cannot now tell these employees that we are going to divide the week up into two or more periods with different minimum rates for each period when the inspection problem is identical. We cannot say that we are able to inspect where there are two rates set by wage orders and not able to inspect where the employer has himself set two rates. We cannot take a week as the standard when it operates to the employee's disadvantage and then refuse to take the week as the standard where it operates to his advantage.

There is another reason why the employee in the case of the machine operator working on yarn and full-fashioned hose should be paid the higher rate for all hours worked during the workweek. For administrative and enforcement purposes, we have adopted the workweek as the standard in determining whether an employee is covered by the Act. We have set it forth as our opinion that an employee is subject to the Act for the entire workweek if he is subject to it at any time during the workweek. See paragraph 9 of Interpretative Bulletin No. 5 and paragraph 37 of Interpretative Bulletin No. 14. We have grave doubt whether we will be able to support this opinion, which is of great importance to the enforcement of the law in the lumber industry, if we reject it in the case put.

Note that this last argument would not apply to any wage order (e.g., apparel) into which we specifically wrote the condition that machine operators working at two different rates of pay should be paid for the time worked at each job at the rate applicable to that job. But the primary argument of administrative inconsistency is equally valid no matter how the wage order is written.

Second. The group of employees who will be most likely to be subject to two wage rates are the auxiliary workers -- clerical, shipping and maintenance workers. To adopt any but the higher rate test for such employees would require an inspector seeking to find out whether an employer has complied with the law to inspect, not the payroll records as to that employee, but the entire output of the employer's business. In other words, the only possible test -- the majority output of the plant -- is unworkable.

Paragraph C of the Hosiery Wage Order gives a slight hint of the administrative complexities which would follow an adoption of the majority product test. The Legal Branch opposed the adoption of paragraph C of the Hosiery Wage Order which makes the volume of production the deciding factor in determining whether auxiliary employees are subject to the seamless or the full-fashioned rate and our conferences with the Cooperative and Inspection Branch

indicate that they join us in opposing the extension of this principle. The Hosiery Wage Order presently requires the inspector to determine for each workweek whether or not the mill has produced by volume a majority of seamless or full-fashioned hosiery. The following questions are thereby raised:

1. By what unit of volume shall this measurement be made? Does one dozen half hose equal one dozen full-length hose?

2. At what time is production completed? For instance, shall undyed hose be included as well as finished hose?

These questions have not been answered. More difficult problems arise if value of product is taken as a measure. Clearly our inspector should not be required to estimate value of product before sale.

The problems that are raised by this provision in the Hosiery Wage Order, however, are slight as compared with those which will face the inspector if a like test is adopted for determining whether the Textile or Hosiery rate should apply to auxiliary help in the plant producing both yarn and full-fashioned hosiery. In this instance volume could hardly be measured by dozens, spools, or weight. A value test would be the only available alternative. The value test would make economic experts out of inspectors and would require them to appraise the value of the product at market prices or study the employer's books for cost figures. It will be still more difficult to devise a workable scheme for measuring plant production within the Apparel Industry for which Industry Committee No. 2 has recommended five different rates. Finally, it becomes impossible to design a practicable measure by which to compare the production of the plants in industries for which Wage Orders are issued with their production in anyone of the many unascertainable industries to which a 30 cent rate is applicable and in which any one of these plants may also be engaged.

The National Recovery Act Breakdown is inherent in these complications. Practical administration demands a simpler solution. And -- the only other available position is to permit both rates to apply to these employees -- whereupon the higher rate must be paid to comply with the Act.

Enclosure

January 29, 1940

Mr. Peter M. Tamburo
Acting Regional Director
Dallas, Texas

LE:CRR:MW

Joseph Rauh
Assistant General Counsel

Opinion of counsel for
American Newspaper Publishers Association

I have before me your memorandum of January 23 concerning the recent Bulletin No. 4411 issued by the American Newspaper Publishers Association under date of January 17, 1940. I have not seen a copy of this particular Bulletin but I am familiar with a somewhat similar Bulletin of January 10, issued by the Association, advising all daily newspapers in the United States to refuse to make their records available in the absence of a final court order. The Bulletin of January 17 apparently repeats this advice in addition to advising on certain other questions.

In connection with the power of the Administrator to investigate and require the production of records, as you no doubt are aware, several courts have already sustained the power of the Administrator to examine records under the Act. In a recent decision of the United States District Court for the Northern District of Illinois, Judge Holley held that investigations under Section 11(a) violated no constitutional provisions; that the Administrator could require the production of records to determine whether the employer was covered by the provisions of the Act and whether he had violated them. Andrews v. Montgomery Ward Co., Inc. The investigatory power of the Administrator was also sustained by the Federal Courts in the Eastern District of Missouri (Andrews v. Reade Manufacturing Co.) and in the Northern District of West Virginia (Andrews v. Standard Trouser Co.)

Ample authority supports these decisions. Some of the precedents are discussed in Judge Holley's opinion, a copy of which I am enclosing.

The General Counsel is not in accord with the Association's advice to the effect that a newspaper sending no copies outside the state is wholly exempt, nor with the opinion to the effect that newspapers are service establishments within the meaning of Section 13(a)(2). In this connection I quote from the typical letter which has been used by the General Counsel's office in answering questions of this nature.

"As indicated in paragraph 12 of our Interpretative Bulletin No. 6, a copy of which is enclosed, newspapers are not service establishments within the meaning of the exemption granted by Section 13(a)(2)

for "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." The Act, therefore, applies to all employees of newspapers (not exempted by Section 13(a)(1) of the Act) who are engaged in interstate commerce or in the production of goods for interstate commerce.

First, as stated in paragraph 9 of Interpretative Bulletin No. 5, a copy of which is enclosed, "where an employee is engaged in the production of any goods for (interstate) commerce, the Act makes no distinction as to the percentage of his employer's goods or of the goods upon which he works that move in (interstate) commerce." Therefore, it is our opinion that the shipment of any newspapers outside the state will ordinarily bring any employees necessary to the production of such newspapers within the scope of the Act. In this connection your attention is directed to paragraph 5 of Interpretative Bulletin No. 1, a copy of which is enclosed.

Second, it should be noted that at least some of the employees of a newspaper which sends no papers outside of the state may yet be "engaged in (interstate) commerce." For example, employees of a newspaper, all copies of which are sold locally, who are essential to the stream of interstate commerce in that they receive and disseminate information from outside the state, may well be subject to the Act. Similar considerations may apply to employees engaged in gathering news for out-of-state distribution. Further arguments of an economic character may be urged for the view that newspaper employees are engaged in interstate commerce without reference to the shipment of any papers outside the state. Just where the line is to be drawn cannot be asserted with particularity at this time."

We are not in accord with the Association's opinion that Section 13(a)(8) of the Act is unconstitutional as being discriminatory because it draws the line at 3,000 circulation. The Supreme Court has held that size is constitutionally a valid criterion for classification in statutes relating to employment. In Carmichael v. Southern Coal and Coke Co., 301 U. S. 485, the Alabama unemployment compensation law was upheld in spite of objections to its application only to employers who employed 8 or more persons for 20 or more weeks in the year. There are numerous other precedents along this line which, in our opinion, completely dispose of this part of the Association's Bulletin.

I suggest that your office reply to Mr. Massengill's inquiry, a copy of which is attached to your memorandum, in line with the opinions above mentioned.

January 29, 1940

Mr. Peter M. Tamburo
Acting Regional Director
Dallas, Texas

LE:CRR:MW

Joseph Rauh
Assistant General Counsel

Opinion of counsel for
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I suggest that your office reply to Mr. Massengill's inquiry, a copy of which is attached to your memorandum, in line with the opinions above mentioned.

February 1, 1940

Mr. A. L. Fletcher
Assistant Administrator
Attention: Miss Paret

In reply refer to:
LE:CAA:ERL

Joseph Rauh
Assistant General Counsel

Regional Broadcasting Co.
Jonesboro, Arkansas
File: 3-271 B

The employer in this case, after the effective date of the Act, entered into an agreement with a local cleaner to exchange radio advertising time for cleaning service. The employer put the cleaning facilities at the disposal of his employees free of charge. A similar arrangement was entered into with a motion picture house. Thus free passes were given the employees. The employer now claims that he should be credited with the value of the cleaning services and free passes to the employees as overtime compensation. No record was kept of the amount of overtime compensation due the employees and of the extent to which the employees used the cleaning service or the free passes.

Free Passes

The inspector allowed no credit to the employer on this account. The amount charged to the employees for free passes could not be verified because no records were kept of number of shows attended, etc. Furthermore, the employees considered the free passes as a courtesy commonly extended employees of radio stations and not as a salary payment. In our opinion, the inspector is correct. The value of the free passes cannot be considered as overtime compensation because it was not regarded as such. The employer cannot now, when an issue arises, consider this gratuity as overtime compensation.

Cleaning Services

The cleaner kept accurate records and on the basis of the records the inspector credited the employer with the cleaning charges as overtime compensation.

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You also state that the interpretation of the slaughtering exemption in paragraph 21 of Interpretative Bulletin No. 14 follows the same reasoning as that expressed in paragraphs 4 and 5 of Interpretative Bulletin No. 12. That paragraph expressly states that Section 7(c) does not extend to "livestock products or byproducts." Thus, the distinction between Section 13(a)(5), which does use such language, and Section 7(c), which does not, is obvious.

Fresh fish in their raw or natural state, which are received by a wholesaler in refrigerated form, would ordinarily appear to be perishable fish, and employees of the wholesaler engaged in marketing or distributing such products appear to come within the exemption provided by Section 13(a)(5).

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The first question that must be answered in determining whether or not the employer should be credited for the cleaning services is: were the cleaning services, made available to the employees by the employer, considered by the parties as an addition to the cash wage or as payment for overtime? If it was considered to be an addition, then clearly the employer cannot take credit therefor as overtime compensation. The value of the services, however, will not be included in computing the regular rate of pay. The material in the file is not very clear on this point. The employee statements indicate that the value of the cleaning services was considered to be "part of the salary." This is ambiguous. The fact that the owner entered into the arrangement with the cleaner after the effective date of the Act, knowing of the overtime provisions, would seem to indicate that he thought he would thereby pay for overtime worked. The fact that he kept records, however, would tend to indicate the contrary. Until this question is answered we can express no further opinion.

February 2, 1940

Mr. Baird Snyder
Assistant to the Administrator

LE:EBE:MM

Rufus G. Poole
Associate General Counsel

Deductions from wages under the Fair Labor Standards Act

I

Before enumerating the opinions which have been rendered by the Legal Branch on particular deductions from wages, an outline of the general principles which have been adopted will be set forth. Attached are copies of Regulations, Part 531 and Interpretative Bulletin No. 3, which are the published rulings and opinions on this question.

The problem of deductions does not arise where an employee is paid so much in excess of the minimum rates required by the Act that his cash wage, after all deductions have been made, does not fall below the minimum prescribed. The same is true of the additions case; where the employee receives in cash more than the statutory minimum wage, the fact that he receives additional facilities or services from his employer does not raise any questions under the Act. Nor is there a violation of the Act simply because a deduction brings the employee's cash wages below the minimum provided in Section 6, if the cost of facilities furnished by the employer within the meaning of Section 3(m), when added to the cash wage, brings the wage to at least the minimum. This view is announced in Interpretative Bulletin No. 3.

If the basic minimum cash wage is paid over to the employee, free and clear, later use of the money in purchasing facilities from the employer, even where a profit is made, is not within the purview of the Act. (Interpretative Bulletin No. 3, paragraph 6.) It cannot be said, however, that an employee is paid free and clear if he has become indebted to his employer with the understanding, express or implied, that the debt will be paid out of the next paycheck. Cash payments to the employee, under such circumstances, are controlled by the standards for deductions. (Interpretative Bulletin No. 3, paragraph 4.)

It should also be mentioned that so-called kick-backs are not included within the following discussion although in a loose sense they may be classed as deductions. A kick-back is nothing but

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a more or less complicated stratagem of the employer to have the employee refund a part of the money which he has been paid. It is equivalent to the payment of a sub-minimum wage and is thus a violation of Section 6 of the Act.

The section of the Act most pertinent to the deductions question is the definitional provision of 3(m):

> "'Wage' paid to an employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

The controlling elements of this language, as defined and affected by the Regulations, Part 531, may be summarized as follows:

A. Board, lodging or other facilities must be "furnished" the employee by the employer.

This includes the situation where board, lodging or other facilities are furnished free of charge in addition to a cash wage, as set forth in Interpretative Bulletin No. 3, paragraph 3(1). It likewise includes the situation where charges for board, lodging or other facilities are deducted, directly or indirectly, from a stipulated wage, as set forth in Interpretative Bulletin No. 3, paragraph 3 (2). The reasons for this ruling are briefly discussed in the third paragraph of Bulletin No. 3; they are somewhat elaborated in a memorandum of May 13, 1939, a copy of which is attached for your information. This interpretation, which seems essential if 3(m) is to be given any importance, has been consistently referred to in our correspondence.

In the Williams v. Atlantic Coast Line Ry. Co. case the employer railroad assigned vacant box cars to each of its employees as housing facilities and sought to deduct for such facilities whether the particular employee did or did not occupy the box car. It was the position of the Division in this case that such facilities were not "furnished" within the meaning of the Act. Uncoerced acceptance by the employee is deemed essential.

B. Board, lodging or other facilities must be furnished "customarily" to the employee.

This requirement follows the statutory language and is set out in Interpretative Bulletin No. 3, paragraph 10. Of all the requirements, this has received the least stress in our rulings.

It has generally been considered that the Division would give a liberal construction to this requirement. If a particular service is customarily furnished in a given industry or in a particular area, it will probably be sufficient fulfillment of this standard; otherwise an employer seeking to initiate a new practice would be prevented from doing what a competitor had been doing for a long time.

C. Board, lodging or other facilities must be furnished to the employee at "reasonable cost."

Reasonable cost is defined in the Regulations, Part 531, as being the actual cost to the employer of the board, lodging or other facilities furnished (Section 531.1). It is also stated that it includes no profit to the employer or any affiliated person. /Section 531.1 (a)/ Under subsection (b) certain methods of determining the actual or reasonable cost of company houses and other capital investments are set forth.

Little elaboration of the regulations has occurred despite numerous letters issued on the subject. The attached letter to G. F. Brock, October 21, 1939, is the only significant ruling. This will be referred to briefly when considering the lodging item.

D. Facilities which are primarily for the benefit or convenience of the employer may not be included in computing wages.

This is the principle of Part 531 of the Regulations, Section 531.1(c). See the discussion under "other facilities", infra. See, also, item 3 in the attached memorandum of May 13, 1931.

The reason for such a requirement is fairly self-evident for, otherwise, the whole purpose of the Act could be defeated by permitting the employer to furnish facilities essentially useless to the employee and vital to his own purposes.

Application of this requirement will be indicated under the appropriate headings.

E. Certain other deductions from wages are permitted although not within Section 3(m) or the Regulations, Part 531.

This classification is not made in either the statute or the Regulations as such. It stems from the fifth paragraph of Interpretative Bulletin No. 3 which allows deductions for Social Security taxes and union dues under a union check-off. The implications and limits of this category will be discussed in appropriate headings.

II

A. Board: Board furnished an employee by the employer may be deducted to the extent of the actual cost of such facility, exclusive of any profit to the employer, under the express language of the Act, Section 3(m). The chief problem involved is the determination of the actual cost of the board furnished; no written interpretations on this point appear in our records.

Attention is called to a letter to C. L. Christy, February 23, 1939, stating that if supper money given an employee is really some compensation for working overtime, the employer may deduct the amount so given from the overtime compensation he is required to pay under the Act. This would not be true, of course, unless the employee understood that the supper money was overtime compensation rather than a gratuity or an addition to his cash wage.

B. Lodging: A deduction for the actual cost of lodging furnished an employee by an employer is expressly allowed in the statute and Regulations. Lodging has generally been considered any kind of housing or dwelling arrangements, including individual company houses (letter to Crowell and Spencer Company, Inc., December 18, 1938); tenement houses (letter to Rhodes Whitener Mills, Inc., August 28, 1939); and rooms (letter to National Association of Cotton Manufacturers, December 21, 1938).

As above noted, determination of the reasonable cost of company housing is set out in some detail in Part 531 of the Regulations, Section 531.1(b) and in the accompanying letter to C. P. Brock, General Manager of the Gulf, Mobile and Northern Railroad Company, October 21, 1939. Such issues are involved as the determination of a proper valuation base (original cost, reproduction cost, etc.)

method of depreciation allowance, reserves for maintenance, insurance, etc. It is sufficient to indicate the difficulties without cataloguing them here.

Lodging is either rented or sold. If deductions made for rental of company houses equal the cost of houses to the employer as set forth in the Regulations, Part 531, or are for less than such, the deductions are allowable (letter to the Crowell and Spencer Lumber Company, December 18, 1939). This is, of course, subject to the qualification that this deduction cannot exceed the fair rental value of the property. (Section 531.1(b) of the Regulations, Part 531.) A deduction is likewise allowable under the Act where an employee rents more space from an employer than he requires and then sub-lets a part of the space at a profit, if the net rental paid by the employee does not exceed the cost to the employer of the space actually occupied by the employee, or if rent actually paid by the employee by deduction does not exceed the cost to the employer of the space actually occupied by the employee, or if rent actually paid by the employee by deduction does not exceed the cost to the employer of the premises rented to the employee (letter to the National Association of Cotton Manufactuers, December 21, 1938). Where company houses are not leased but sold to the employee, oral opinions have been given by the Division that allocated installment payments on the land contract are permissible deductions where the land is sold at the appraised value and there is no evidence of overreaching or coercion, but that interest on unpaid principal is not deductible to the extent that it represents a "profit to the employer" under Section 531.1(a) of Part 531 of the Regulations.

C. Other facilities: Under this heading will be considered all items which are or are not considered "other facilities" under the Act, leaving for later consideration items altogether outside of Section 3(m). "Other facilities must be something like board or lodging," we have said in Interpretative Bulletin No. 3, paragraph 6. Although this has been repeatedly quoted or paraphrased, its meaning has been clarified only by the inclusion or exclusion of particular items from the list of "other facilities."

1. Tools: Tools of the trade and other materials and services incidental to carrying on the employer's business are specifically held not to be "other facilities" under Part 531 of the Regulations, Section 531.1(c)(1). The reason is that they are "primarily for the benefit of the employer." Therefore, even the actual cost of "lights, cloth, light globes, cotton" cannot be deducted from the employee's wage if these are primarily for the employer's benefit or convenience. (Letter to Joseph L. Carlton, October 12, 1939). The same advice has been given as to "tools, light bulbs, saws, files, small hammers,

waterworks, spuns, etc." (Letter to I. T. Moss, June 8, 1939). Miners' safety caps and explosives for blasting have also been considered "tools" for which no deduction can be made.

Similarly, no deduction is allowable for the cost of electric power allegedly purchased by employees engaged in the manufacture of pearl buttons, where shells were sold to employees and resold to employer in processed form. (Letter to Morrow Button Shop, June 10, 1939). The relationship was found to be one of employer-employee and for this reason deductions for power and cost of shells were disallowed, the theory being that such costs were for materials and services incidental to carrying on the employer's business, and primarily for his use or convenience.

The same has been indicated with respect to deductions made from the employee's wage for the cost of services furnished by a helper or apprentice, technically to the employee, but in effect to the employer.

2. Capital charges and expenses: Part 531 of the Regulations, Section 531.1(c)(2) provides that no deduction shall be made for "the cost of any construction by and for the employer." This was aimed at the practice of shifting capital charges to the wage of labor. It includes deductions for repayment of subsidies given the employer to locate his factory in a particular community, to create sinking funds for the rebuilding of his plant, and the like. Deductions made for the upkeep of a building and for the payment of taxes and insurance thereon are made equally for the benefit of the employer and do not constitute "facilities" within the meaning of the Act. (Letter to Karl M. Vetsburg, May 24, 1939).

3. Uniforms: The cost of uniforms and their laundering, where the nature of the business requires the employee to wear a uniform, may not be deducted under Part 531 of the Regulations, Section 531.1 (c)(3). The scope of this prohibition is self-evident, as are the reasons for it. No significant interpretations have been made under it.

4. Purchases at company stores: Purchases of this nature may be deducted by the employer at actual cost of the merchandise to him. This is contemplated in Interpretative Bulletin No. 3, paragraph 6. There have been numerous letters written on this point but none illuminate the subject further than to indicate that deductions are allowable at "reasonable cost." The distinction between purchases at company stores and purchases at independent retail stores in which the employer had neither direct nor indirect source of profit, was pointed

F. M. Downing Lumber Company, December 8, 1938). Thus deductions from wages for a contribution to a "medical fund" would seem to be unobjectionable where there is no possibility of the employer or any affiliated person making a profit from the service for which the deduction is made (letter to W. W. Findley, January 6, 1939). However, in a letter to Messrs. Cullen & Hendrie, June 26, 1939, it was stated that whether a deduction for group hospitalization is valid under the Act has not been specifically decided.

7. Police protection: In the case of Williams v. Atlantic Coast Line Railroad Company, the employer claimed as a valid deduction from wages the cost of furnishing police protection to negro employees to "keep the white hoodlums from running them off" the company's premises "by violence." That this was a valid deduction was specifically denied by the Division. No ruling has as yet been made on this point by the Court. It would seem that guard police and detective facilities are designed not only for the protection of the employee but for the benefit or convenience of the employer as well.

8. Schooling: Tuition for a company operated school is not deductible as a "facility" furnished the employee, at least where such schooling is designed to improve the employee's ability to perform his services for his employer (letter to Harry Elshove, September 4, 1939.) This merely follows paragraph 15 of Interpretative Bulletin No. 13 which provides that time spent in attending mettings and lectures sponsored by the employer (whether or not attendance is voluntary) should be considered time worked if such meetings and lectures are related to the work of the employee.

9. Transportation: In certain cases, it is conceivable that reasonable transportation charges might be allowed as deductions. However, where an employee is working on a commission basis and is furnished a truck by his employer for delivering orders, for example, it has been held that if the employee pays the operating expenses of the truck, the wage received by him is really the amount of the total commissions minus the amount of such expenses. Such wage must at least equal the minimum wage fixed in the Act. (Letter to Wholesalers' Food Institute of Iowa, December 28, 1938).

In Williams v. Atlantic Coast Line Railroad Company, the railroad company sought to charge the employees with interest on the capital investment of a small railroad motorized car, as well as for the cost of repairs, replacement, taxes, gas and oil thereon. It was the position of the Division that under the facts, the deduction was

probably wholly improper, and at any rate, no more than the actual cost to the employer would be deductible. In certain situations, it would no doubt be improper to allow a deduction for any transportation charge. For example, where a mine or lumber station is accessible only by a company railroad, transportation by such means would presumably be for the use and convenience of the employer.

III

Deductions not within Section 3(m) or Regulations, Part 531.

Certain deductions have been allowed or conceivably might be allowed although they are not within either the statute or the Regulations issued under Section 3(m). These may be classified into those made without any voluntary action by the employee and those made as a result of his voluntary action. The two categories are set out below:

A. Deductions made without voluntary action by the employee:

1. Taxes: Deductions from an employee's wage which are compelled by either state or Federal law taxing the employee would seem to be valid although not technically within the term "facilities" or within the other requirements of Section 3(m) as set forth above. Deductions for Social Security Tax are specifically mentioned in Interpretative Bulletin No. 3, paragraph 5. Similar rulings have been made on taxes paid by the employer under the Railroad Retirement Act. (Letter to Collins & Glennville Railroad Co., February 6, 1939). However, employee contributions to a fund for the payment of taxes on a manufacturer's plant and buildings would not be deductible from the minimum wage.

2. Other deductions required by law:

Although no specific instance has been ruled upon by the Division in any of its letters or memoranda, it would appear that where an employer is directed by court order to pay money to a creditor of an employee by garnishment, wage attachment, trustee process, bankruptcy proceeding, or similar judicial action, deduction of the actual amount so paid would be proper. Of course, no profit to the employer will be permissible.

3. Penalties: Penalties represent a further involuntary item for which deductions have been sought. They have not, however, been permitted in any form. Where an employee is late for work, it is proper for the employer to reckon his wage on the basis of the time actually expended on the job, but in no event is an additional penalty permitted. A sanction imposed for tardiness is held to be equivalent to a penalty for poor work and the employee must be compensated at the minimum rate for the time he has actually been occupied in the performance of his duties for his employer (letter to Chicago Association of Commerce, December 12, 1938). Thus it has been said that any deduction for defective goods produced by such employees where the employees are responsible for such defects, which results in a net wage below the statutory minimum, constitutes a violation of the Act (letter to Cotton Manufacturing Association of Georgia, December 15, 1938). Likewise, no deductions are allowed for work which is below a certain fixed production speed (letter to Southern Hosiery Manufacturers' Association, January 24, 1939). The same principles have been set forth in a letter to Goodwin Saw Mill, May 26, 1939.

B. Deductions made as a result of voluntary action of employees:

1. Union dues: Generally, union dues under a check-off system, are deductible as a voluntary assignment by the employee of a portion of his wages to an independent, unaffiliated third party. This is specifically recognized in Interpretative Bulletin No. 3, paragraph 5.

2. Assignment: There is nothing in the Act which prevents a valid voluntary assignment of wages by an employee to an unaffiliated third person and in compliance with the general law relating to assignments, an employer may properly follow the instructions of the employee and deduct a portion of wages due the employee, forwarding them directly to the third person. So long as there is no possibility for profit by the employer, it is immaterial whether the portion of wage paid to the creditor does or does not include a profit. (Letter to William I. McKay, July 12, 1939). Of course, attention is called to various state laws relating to assignment of wages which may prevent or qualify such practice.

3. Contributions to charitable institutions: Contributions to charity are governed by similar principles. In a field letter dated December 11, 1939, it was stated that if an employer, without the consent of an employee, makes a deduction from wages for a Community Chest contribution, the employer is violating Section 6, since he is not paying 30 cents an hour. However, if the employee voluntarily authorizes such contribution, it will be treated as an assignment to the Community Chest or other charity.

IV

Miscellaneous considerations:

Payment of wages due under the Act must be made in negotiable currency or by check payable at par to the extent that the wage is not properly absorbed by deductions (Interpretative Bulletin No. 3, paragraph 6). This does not, however, make it unlawful for an employer to deduct on a pay day the full amount of cash previously advanced the employee against his future wages (letter to Mrs. C. C. Masser, July 26, 1939).

For purposes of such payment, a deduction cannot be made for scrip furnished the employee since this is not a "facility" (Interpretative Bulletin No. 3, paragraph 6) but it may be a perfectly valid medium for designating deductions which are proper. Thus, if an employee is given a credit card for the company store on a Monday morning and he uses it throughout the workweek to purchase provisions, the employer may deduct from his wage the actual cost of the provisions so furnished, as represented by the card. To the extent that scrip which is issued is not used at the company store, no deduction can, of course, be made since no facilities have been furnished. It is also improper to use scrip as a source of employer profit or as a method by which the minimum wage provision of Section 6 of the Act can be circumvented either deliberately or by accident. Thus, it has been ruled that an employer cannot account for piece-work by delivering tickets to the employee and then redeem them in cash in such a manner that where the employee lost the ticket the wage received would be brought below the minimum (letter to Joseph L. Carlton, November 1, 1939).

Where a particular facility has been furnished by the employer below its actual cost to him, it is the opinion of the Division that the loss cannot be equalized by charging the employee for another furnished facility above the actual cost thereof. The statute makes no provision for balancing losses in one case by profits in another.

So-called "deductions" for holidays, injuries and the like must be discussed on the basis of hours worked and not as subtractions from wages. For this reason they have not been included in this memorandum.

January 27, 1940

LE:LS:AP

Mr. E. Bernet
266 Summit Street
Willimantic, Connecticut

Dear Mr. Bernet:

There is herewith transmitted, pursuant to your request, a copy of the textile minimum wage order and a copy of the Fair Labor Standards Act of 1938.

The order is applicable to the printing of woven fabrics (other than carpets and rugs) from cotton, silk, flax, jute, and other fibers which are enumerated in Section (c)(1) of the order.

Any plant which is engaged in the printing of fabrics within the meaning of Section (c)(1) of the order is subject to its terms, even though it may not be engaged in the manufacture of the woven fabrics.

Very truly yours,

For the General Counsel

By _____
Joseph Rauh
Assistant General Counsel

Enclosures (2)
45084

(3309)

January 27, 1940

LE:LS:AP

Epstein & Brothers
Attorneys at Law
11 Broadway
New York City, New York

Gentlemen:

This is in reply to your letter of December 26, 1939 which has been referred to this office by Mr. Merle D. Vincent, Chief of the Hearings Branch. You request an opinion on the applicability of the Textile Minimum Wage Order to the manufacture of ribbons and other fabrics from mixtures of silk, rayon, cotton and tinsel.

Section (c)(1) of the Order is specifically applicable to the manufacture of woven fabrics, including ribbons, from mixtures of cotton, silk and rayon. Although tinsel is not within the terms of the Order, it will be necessary to pay employees who are engaged in the manufacture of fabrics from mixtures of tinsel and yarns which are subject to the Order, a minimum wage of not less than 32½ cents per hour.

If you feel there are any peculiar circumstances connected with the manufacture of the tinsel mixtures, I would suggest that you submit a detailed statement of the facts of such manufacture.

There is being transmitted, pursuant to your request a copy of the decision on the employment of learners in the textile industry.

Very truly yours,

For the General Counsel

By_____
Joseph Rauh
Assistant General Counsel

Enclosures (3)
62559

(3309)

January 29, 1940

LE:GH:DG

Honorable James C. Oliver
House of Representatives
Washington, D. C.

Dear Congressman Oliver:

This is in reply to your letter of January 16, 1940, in which you indicate that you are interested in the application of the Fair Labor Standards Act to the digging, drying and shipping of peat moss. You also wish to be advised as to whether or not interstate chain stores, particularly in the grocery business, are considered as retail.

We are enclosing copies of the Fair Labor Standards Act and of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage.

We are also enclosing a copy of Interpretative Bulletin No. 14 dealing with the exemptions granted by the Act to agriculture and the processors of agricultural commodities.

Peat moss is reduced to possession by direct appropriation methods, without the application of any agricultural techniques. Destructive gathering methods have reduced the supply so that it has become advisable to replace and conserve the natural flora supply of sphagnum mosses from which peat moss comes. This conservation of the natural resources has taken place largely, if not entirely, in the State of Wisconsin, and one rough estimate suggests that only about 10 percent of that gathered has been artificially propagated. Hence it is our opinion that the digging, drying and shipping of peat moss is not an activity intended by Congress to be included within any of the exemptions granted to agriculture or the processors of agricultural commodities. It must be concluded therefore, that if the peat moss enters into commerce, those engaged in its production (as defined by the Act) are entitled to the benefits of the Fair Labor Standards Act.

Now we turn to your question relative to chain stores. Section 13(a)(2) of the Act exempts from the wage and hour provisions "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Enclosed herewith is a copy of Interpretative

(3309)

January 31, 1940

LE:GH:SM

J. R. Cornelius, Esquire
Cornelius & Heaton
City Hall Building
Jefferson, Texas

Dear Mr. Cornelius:

This is in reply to your letter of November 29, 1939, in which you indicate that you are interested in the application of the Fair Labor Standards Act to the manufacture of syrup by mixing sugar and glucose with ribbon cane syrup to keep it from turning to sugar. You state that it is your opinion that this activity is within the Section 7(c) exemption.

For your information we are enclosing copies of the Fair Labor Standards Act and of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage.

We are also enclosing a copy of Interpretative Bulletin No. 14 dealing with the exemptions granted by the Act to agriculture and the processors of agricultural commodities. You will note from paragraphs 14, 18, and 22 to 23 of Interpretative Bulletin No. 14 that Section 7(c) provides a complete exemption from the hours provision only for the employees of an employer engaged in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup.

It is our opinion that the mixing or blending of sugar or glucose into cane syrup is not part of the "processing of . . . sugar cane . . . into syrup," and hence would not be included within the Section 7(c) exemption.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)
#55760

(3309)