DEPARTMENT OF LABOR

Wage and Hour Division

Legal Field Letter

No. 6 (Revoked) Attached Opinions

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

MEMORANDA

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(3557)

LETTERS

Date	To
2-15-40	Mr. H. L. Chalker North Bend, Oregon
2-17-40	Mr. Harry P. Rutecki Chicago, Illinois
2-17-40	Mr. Frank E. Ingraham Worcester, Massachusetts
2-17-40	Miss Helen B. Mays Baltimore, Maryland
2-21-40	Mr. Thomas H. McDonald Washington, D. C.
2-19-40	Mr. Edward R. Mares Los Angeles, California

(Copy)

February 3, 1940

In reply refer to:
LE:HM:LF

Bernard S. Needle
Attorney
Baltimore, Maryland

Milton C. Denbo
Chief Opinion Attorney

Request for Interpretation.

This is with reference to your request for an interpretation of the coverage of the Act to the employees of a sign display company engaged in the installation of displays for numerous national advertisers. It is stated that the employees make such installations only within the state but that the signs and displays are received from advertisers from without the state as well as from the local offices of national concerns.

The question which you present is very similar in nature to several which we have received in the last few weeks. In such cases we have taken the position that employees engaged in receiving, handling and unpacking materials received from outside of the state are "engaged in commerce" and hence within the coverage of the Act. With respect to the installation of these displays we hesitate to express a definite opinion as to the applicability of the Act. However, were the question presented to the courts for decision it might well be concluded that the work of the employees was an important function in the interstate distribution of the products advertised and hence within the coverage of the Act. For this reason we have been advising inquirers that compliance with the statute in our opinion is the wisest course to pursue, at least until such time as a determinative ruling from the courts may be obtained on such a question.

68512

(3557)

(Copy)

February 6, 1940

In reply refer to:
LE:GH:MS

Alex Elson
Regional Attorney
Chicago, Illinois

Joseph Rauh
Assistant General Counsel

Area of Production

This is in reply to your memorandum of January 25, 1940, in which you raise certain questions concerning the application of Section 13(a)(10) and 7(c) to employees who are truck drivers hauling commodities between the place of business and distribution points. In some cases, the regular routes of these drivers extend more than 100 miles in each direction from the central establishment. You also inquire concerning the application of Section 7(c) to truck drivers who haul commodities which have been processed or handled under the Section 7(c) exemption.

Section 13(a)(10)

You will note from paragraphs 25, 26, and 27 of Interpretative Bulletin No. 14 that Section 13(a)(10) provides that employees employed within the area of production (as defined by the Administrator) and engaged in handling agricultural or horticultural commodities for market, are exempt from both the wage and the hour provisions of the Act.

Paragraph 26 of Interpretative Bulletin No. 14 points out that employees engaged in transporting commodities away from the establishment are to be considered as "handling" within the meaning of Section 13(a)(10). Of course, they must be handling agricultural or horticultural commodities for market as discussed in paragraph 25. Further, the plant from which they are hauling agricultural or horticultural commodities must be located within the area of production as defined in Regulations, Part 536. It does not matter what distance these truck drivers haul the commodities if the plant from which they are hauled otherwise meets the requirements of Section 13(a)(10). It also might now be admissible at this point to indicate that paragraph 26 also deals with the transporting of agricultural or horticultural commodities to an establishment. In this circumstance

(3557)

the establishment to which they are hauled must be located within the area of production as defined. There is some limitation upon the distance which the truck drivers may haul the commodities to the establishment in order to come within the area of production. If the alternative definition found in Section 536.2(d) was used, the truck drivers could not haul the commodities for market from a distance greater than 10 miles and be considered within the Section 13(a)(10) exemption. If the alternative definition found in Section 536.2(a) is used, the truck driver could not haul agricultural or horticultural commodities for market from outside the "general vicinity of the establishment" and still come within the Section 13(a)(10) exemption.

Section 7(c)

A truck driver may come within the Section 7(c) exemption only in two circumstances.

As paragraph 23(a) of Interpretative Bulletin No. 14 points out, only those employees who perform the operations described in Section 7(c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by that exemption.

The activities of a truck driver seem to be within the words "handling . . . poultry or livestock" discussed in paragraph 21 of Interpretative Bulletin No. 14. As paragraph 21 points out this exemption includes the transportation of poultry or livestock to a slaughter house, stockyards or other concentration point and it may be added, includes the transportation therefrom if the commodities hauled may still be considered "poultry or livestock". In this circumstance, poultry or livestock means live birds and animals and does not include poultry or livestock in a dressed form or poultry or livestock products. Secondly, as indicated above, a truck driver may be included within the Section 7(c) exemption if his operations are so closely associated to any of the operations enumerated in Section 7(c) that they cannot be segregated therefrom for practical purposes, and if the truck driving is controlled by the irregular movement of commodities into the establishment, it will be readily seen that few truck drivers can meet these two tests prescribed and it may be said that the truck drivers of whom you inquire probably do not meet these two tests.

In discussing the meaning of the term "any place of employment" as used in Section 7(c), paragraph 22 of Interpretative Bulletin No. 14 says:

> "However, truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment', for they make regularly recurring trips to and from the establishment and may be deemed attached thereto. Further, some of their work, such as loading and unloading, takes place in the establishment."

It should be pointed out that with regard to this quotation, such truck drivers must either be performing operations within the meaning of the term "handling . . . poultry or livestock" as discussed in paragraph 21 of Interpretative Bulletin 14 or they must meet the two tests indicated above and discussed in paragraph 23(a) of Interpretative Bulletin No. 14.

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(Copy)

February 7, 1940

LE:HM:LF

Alex Elson
Regional Attorney
Chicago, Illinois

Milton C. Denbo
Chief Opinion Attorney

Distribution of Circulars - House-to-House.

We are writing you at this time concerning the applicability of the Act to employees of concerns engaged in the house-to-house distribution of circulars. In your memorandum dated January 27, 1940, you state that some of the circulars are shipped into Wisconsin from points outside of the state and that some of the circulars advertise products produced in states other than Wisconsin.

The interpretative problem raised by your inquiry is similar in nature to several which we have had presented to us within the last few weeks. Were the case presented to the courts, it may be that the courts would hold that employees engaged in distributing circulars received from outside of the state are "engaged in commerce" and hence within the coverage of the Act. On the other hand, the source of the circulars might be disregarded entirely, the courts looking rather to the fact that the work of these employees is an important function in furthering the distribution of the products advertised by the circulars.

Since it may be that employees engaged in such work would be deemed by the courts to be within the coverage of the Act, we do not feel that we can take a definite position on such a close question at this time. However, in view of the considerations outlined above, it would seem advisable for employers to consider such employees to be within the coverage of the Act, at least until such time as a determinative ruling of the courts on a question such as this can be obtained.

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(3557)

(Copy)

February 8, 1940

Peter M. Tamburo
Acting Regional Director
Dallas, Texas

LE:THT:ECH

Joseph Rauh
Assistant General Counsel

Texas and Pacific Terminal Warehouse Company
Fort Worth, Texas
File 42-855

From your memorandum of January 25 it appears that the Texas and Pacific Railway Company owns as a subsidiary the Texas and Pacific Terminal Warehouse Company and that certain employees of the railroad work a substantial amount of their time for the terminal company. It also appears that the railroad pays these employees, that they are entitled to all rights and privileges of other railroad employees and are under the Railroad Retirement Act, although their work for the terminal company is similar to that performed by employees working entirely for that company. But the terminal company reimburses the railroad for the time which these employees work for it although it carries no payroll records for them.

The issue is whether these employees of the railroad who work part of their time for the terminal company are exempt from the overtime provisions of the Act under Section 13(b)(2) as employees of an employer subject to Part I of the Interstate Commerce Act. You state that there is no question of falsification of records and that the terminal company is willing to pay restitution upon a ruling on this issue and one or two others of less importance.

The answer to this question would appear to depend upon the nature of the operations of the warehouse and the nature of the duties of these employees. If railroad employees are engaged in an operation which subjects their employer to regulations under Part I of the Interstate Commerce Act it is clear that they would be exempt under Section 13(b)(2). This would apparently include employees of a railroad engaged in the operation of a warehouse owned by the railroad and operated as an incident to railroad transportation. This would include the use of such a warehouse for the storage of goods awaiting outgoing shipment by the railroad or awaiting delivery after being received by shipment over the railroad. Ordinarily this service would be conducted for shippers. See Baltimore and Ohio Railroad Company v. United States, 305 U. S. 507 (January 3, 1939.)

(3557)

Railroad employees engaged in the operation of such a warehouse would thus probably be exempt under Section 13(b)(2) whether the warehouse is operated directly by the railroad or is operated as a separate company but owned or controlled by the railroad. If the employees in question are engaged in activities of this nature it is the position of this office in this case that no further attempt should be made to secure restitution for them.

If, however, the warehouse is operated as a public warehousing service and goods may be stored therein by persons other than shippers and regardless of whether the goods arrive or leave by the railroad which owns or controls the warehouse, employees engaged in the operation of such a warehouse would not, in the opinion of this office, be included in the exemption provided by Section 13(b)(2).

If the employees in question are engaged partly in operations of both types, the rule of non-segregation would apply and they would still be entitled to overtime compensation for any workweek in which they handled goods stored by the general public rather than by shippers.

Whether or not the employees in question are in fact the employees of the railroad company or of the terminal company would appear to be immaterial. It is true that for Section 13(b)(2) to apply, the employer himself must be subject to Part I of the Interstate Commerce Act, but in the Baltimore and Ohio Railroad case, supra, it was held that the Interstate Commerce Commission has power to regulate rates for warehousing services furnished by the railroads or their affiliates or subsidiaries to shippers. Thus, if the warehouse is used to store goods for shippers or is otherwise used incidentally to transportation by railroad, the terminal company would itself be subject to regulation under Part I of the Interstate Commerce Act and all employees engaged in such operations, whether employed by the railroad or by the terminal company itself, would appear to be exempt under Section 13(b)(2).

On the other hand, if the warehouse is operated for the use of the general public and not only for use by shippers or as incidental to railroad transportation, all employees engaged in such operation, whether employed by the railroad or by the terminal company, would be entitled to overtime compensation under the Fair Labor Standards Act. If such employees work partly in operation of both types the rule of non-segregation would apply, as stated above, and they would be covered by the Act if it can be shown they are engaged in interstate commerce.

The answer thus depends upon the nature of the operations of the warehouse and the nature of the duties of the particular employees. These facts are not made clear in the instant memorandum, but, undoubtedly, can easily be ascertained and the case settled, depending upon the result of such an investigation.

(Copy) February 9, 1940

Alex Elson
Regional Attorney
Chicago, Illinois

LE:OS:LS

Joseph Rauh
Assistant General Counsel

The Legislative History of Section 13(a)(2).

Original Bill H.R. 7200, S. 2475 introduced May 24, 1937.

In this bill there was no express exemption for retail or service establishments and there was no mention of any limitation in respect to the coverage of such establishments. However, in the first hearing on the bill Robert H. Jackson, in answer to a question about the application of the bill to retailers and the service trades, stated "It was not intended by this bill to apply generally to retailers or to apply to the service trades, such as the filling-station attendant, and the pants presser and small business. In fact, there is in it a provision which provides for the exemption of businesses which have a number of employees below some certain figure which the Congress of course may fix." (Hearings, page 35.) He pointed out, in addition, two groups of retailers may be affected if the Labor Standards Board so ordered: (1) the retailer close to the state line who sold by delivery across state lines, and (2) the retailer who by his labor practices and standards was able to affect the interstate movement of goods. But "as a practical proposition" Mr. Jackson said that the bill does not affect retail trades.

In reference to a store like Sears Roebuck or Montgomery Ward, Mr. Jackson said that "insofar as the mail-order business is concerned, it is interstate commerce, and is subject to the regulation by Congress" and that those stores which are agencies "for taking orders to be transmitted, would be engaged in interstate commerce." However, if Sears Roebuck had a local store "that store does not necessarily follow to be in interstate commerce. It would depend on the set-up." (Hearings, page 36.)

Senate Committee Bill introduced July 8, 1937.

This bill contained the following provision, Section 2(a)(7): Employee shall not include any person employed in a local retailing capacity as defined and delimited by regulations of the board.

In addition, this bill omitted the provision for exempting small employers. An amendment from the Senate floor to replace this exemption was rejected. (81 Cong. Rec. 7887-7888.)

Third House Committee Bill introduced April 21, 1938.

In this bill the wage and hour provisions were to apply to employees of employers engaged in any industry affecting commerce. Section 6 of this bill provided:

> The Secretary, as soon as practicable after the effective date of this section, shall, after due notice to interested persons and giving them an opportunity to be heard, determine the relation of the various industries to commerce. If, in the case of any industry, the Secretary finds (a) that the activities of such industry are Nation-wide in their scope, or (b) that such industry is dependent for its existence upon substantial purchases or sales of goods in commerce and upon transportation in commerce, or (c) that the relation of such industry to commerce is in other respects close and substantial, the Secretary shall issue an order declaring such industry to be an industry affecting commerce.

House debate regarding the exemption for retail business May 24, 1938.

Three amendments to Section 6 were offered with the express intention to exempt retail enterprises. Two proposed changes in the phrasing of Section 6(b) and as stated were intended to exclude those retail enterprises which purchased goods from outside of the state. Representative Massingale moved to change the word "or" to "and" and Representative Pearson moved to eliminate the words "substantial purchases." Both amendments were defeated.

Representative Celler then offered an amendment to insert after "the Secretary shall issue an order declaring such industry to be an industry affecting commerce" the following restriction: "but no such order shall be applicable to any retail industry the greater part of whose selling is in intrastate commerce." The author of the amendment stated that it was intended to dispel doubt about the exemption applicable to retailing and that if accepted then "retail dry goods, retail butchering, grocers, retail clothing stores, and department stores will all be exempt." Representative Norton agreed to this amendment and it was passed by the House. After passage, Representative Johnson of Oklahoma remarked that the amendment is intended "to protect the little corner store, filling station and other retailers who purchase a substantial part of their goods across the state line." (83 Cong. Rec. 7437-7438.)

Conference Committee Report

In conference Section 6 which authorizes the Secretary of Labor to determine which industries affected interstate commerce was eliminated. The exemption for retail enterprises was then inserted in Section 13(a). In the confidential conference committee draft of June 12, 1938, it read as follows: "The provisions of Sections 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail establishment the greater part of whose selling is in intrastate commerce." In the final conference report the words "or service" and "or servicing" were included. There appears to be no record of any discussion concerning these words.

(Copy)

February 9, 1940

George A. McNulty
General Counsel

Joseph Rauh
Assistant General Counsel LE:NSA:ECH

Rest Periods

I.

In my opinion this office should adopt a definite position at this time as to whether short rest periods which interrupt continuous operations should be considered as hours worked under the Act. There is a considerable amount of unanswered correspondence on this point in our files and several cases under investigation involve this question. Miss Margolin indicated that she found the problem to be a very important one in the field. Mr. Poole has recently informed the Zenith Radio Corporation that he would advise the Chicago office to withhold any action in their case until an official interpretation on rest periods as hours worked is issued.

The problem is very complicated and you will recall that we considered it last September and decided to refrain from expressing any opinion at the time. In view of the recent developments, however, it seems necessary that we try to reach some solution now. The Economics Branch and Messrs. Altman and Schachter believe that short rest periods which interrupt the regular shift should be considered as hours worked; I take the same position, and, as indicated in my memorandum to you of September 26, 1939, Mr. Sifton was also of this same opinion.

II.

1. The problem of rest periods has been discussed in several treatises on industrial management. In addition, statistical studies have been made showing the relation between rest periods and cumulative industrial fatigue and accident frequency. In Watkins and Dodd, The Management of Labor Relations, it is pointed out that industrial experience has proved that rest periods tend to check cumulative fatigue in its latent or initial stages, and to prevent the development of illness which would issue in loss of output and increase of absenteeism. Thus, it is stated:

> "Rest periods are usually from 5 to 15 minutes in length, the 10-minute pause being most common. Ordinarily, one is taken in the middle of the forenoon and one in the middle of the afternoon.

The length of the pause and the time and frequency of distribution will depend upon the nature of activities and the conditions of employment. Formal rest periods may not be necessary in those occupations in which the work automatically allows periodic relaxation and relief from nervous strain. An investigation of rest periods in industry made by the National Industrial Conference Board leads to the conclusion that such pauses are essential in occupations which are monotonous in character and require prolonged and intense concentration of attention, enforce continuous sitting or continuous standing posture, involve severe physical exertion, or expose the workers to extreme heat or gases or other unfavorable conditions. While there is no general agreement with regard to the results of rest periods, a large number of employers are convinced that such pauses have contributed to health and efficiency through the provision of opportunities for relaxation and the elimination of irregular pauses which usually cause so much lost time. One study shows, for instance, that during 8,300 hours of work without rest periods, the average personal time lost was 3.6 per cent of the total and the average incidental time lost was 8.7 per cent of the total; whereas during 2,973 working hours where rest periods were maintained the average personal time lost was only 1.8 per cent and the incidental time lost was 5.4 per cent. In general, it is safe to conclude that from 12 to 15 per cent of total time is lost if no rest periods are allowed, but this loss can be greatly lessened by means of breaks in the work schedule.

"Benefits will accrue from rest periods when they are properly administered. The time must not be spent in the midst of noise, dust, and vitiated air in a crowded workroom. Most organizations recognize this and thoroughly ventilate shops and offices with fresh air by opening all doors and windows during the pause; not a few companies provide for complete stoppage of machinery and power in order to eliminate noise and vibration. Although employees are usually free to do as they please at such times, they are encouraged to make use of the rest rooms or engage in some form of relaxing activity. The provision of light lunch is not an uncommon practice. Tea, milk, malted milk, coffee, sandwiches, and sweet chocolate are sold at cost or furnished free of charge. Many workers leave home hurriedly in the morning after a scanty breakfast or none at all. Undernourishment is common, and many firms testify to the favorable effects of a light lunch in the middle of the forenoon and again in the afternoon. A traveling canteen is sometimes used to furnish refreshments while workers remain at their machines, but this does not seem so desirable and beneficial as the custom of allowing employees to leave their work.

"The inauguration of rest periods has often been attended with some difficulty. Workers frequently prefer a shorter workday to pauses during the regular shifts. Until they discover that rest

periods aid production, pieceworkers are inclined to oppose them on the ground that the pauses slow up output and diminish earnings. Some employers oppose rest periods because they fear that such a practice involves undue loss of time through interruption of processes, encourages breaches of discipline on account of the tendency of employees to overstay their time, and affords too much opportunity for workers to get together and talk over their common grievances. These objections have not proved formidable. Left to themselves, most workers take rest pauses at irregular and unsuitable times, so it is better for management to prescribe both the time and the distribution. There is increasing evidence to the effect that pauses are a good investment.

"At this juncture, it is well to urge the wisdom of providing adequate time for the noon-hour lunch. The practice of letting the worker snatch a bit whenever he can while the machine is in operation or while he is still on office duty is inexcusable. Self-respecting wage earners will not accept such a condition. At least a half-hour should be allowed for noonday meal, and in some occupations even a longer period may be necessary. Only in this way is it possible to encourage proper habits of eating and relaxation, which are so directly related to proper digestion and nourishment and which, in turn, determine health and productivity."

2. Lansburgh, Industrial Management, points out that there are three general types of rest periods; namely, (1) stated rest while working on the job, (2) a change in the type of work, and (3) stated rest period in the middle of the morning or in the middle of the afternoon.

As an example of the stated rest on the job, there is given an illustration of a case of a contracting firm engaged in the steel construction work. This firm determined to introduce a rest period of two minutes for its riveters after each ten rivets had been driven in. This involved approximately 1-3/4 minutes work out of each 3-1/4 minutes. The result was an increase in the amount of rivets driven of 125% per man.

Rest periods involving change in type of work would occur in the case e.g., having the worker secure and deliver his own material.

Stated rest periods of 5, 10 and 15 minutes during the morning and afternoon, are generally instituted where machinery can be stopped and started at a given time. It is found that such rest periods will ordinarily even up the curve of production and reduce the amount of accidents throughout the day without a diminution of total output.

3. In Baridon & Loomis, Personnel Problem, reference is made to an experiment with rest periods conducted by the Western Electric Company, in which it is concluded that total daily productivity is increased by rest periods.

4. State minimum wage and maximum hour laws for women, children and certain specified occupations do not deal specifically with the problem of rest periods. Administrative regulations issued thereunder likewise do not take up this problem specifically. The Statutes generally provide that a given number of hours may be worked during a day and/or during a week and that a 45-minute rest or lunch period be provided after a specified number of hours of continuous work. In some cases, it is stated that a break in the work of less than a specified length of time (anywhere from 15 minutes to 4 hours) shall not be deemed to interrupt a period of continuous work. In addition, the use of split shifts is often hedged about with a provision to the effect that the employee may not work say 8 hours a day and such 8 hours may not be spread over a period longer than 13 hours in the aggregate. In addition, the state statutes provide for the keeping of records by employers and generally do so in substantially the following language. Every employer must post in a conspicuous place in every room a printed notice stating the hours required of employees each day, the hours of beginning and stopping work and the hours when the meal periods begin and end. It is recognized, of course, that the foregoing provisions are not determinative in our case. In the first place, the statutes are different and the problem is not directly treated. On the other hand, there is an implication that as a matter of policy short breaks in the employment will not be recognized as something outside of the regular working day.

As pointed out above, the state statutes do not deal specifically with the problem of rest periods. However, I am informed that in the administration of such laws rest periods are considered to be part of the working day. Misses McConnell, Coleman, Stitt and Smith were unanimously of the opinion that short recesses not only should be considered hours worked but that they were so considered in the administration of state law.

A. I was informed on February 8, by Miss Stitt, that the question of rest periods was considered at a recent conference of the Administrators of state laws for the eastern states. The Administrators all agreed that short rest periods should be considered as hours worked. In this connection Mr. Altman advised me that he requested Miss Florence Smith of the Women's Bureau to write to the authorities in Utah and Oregon with respect to the problem of rest periods in those states since the statutes in those states require that 10-minute rest periods be given but do not indicate whether such rest periods are considered as hours worked.

5. There is being made a study under the supervision of the Bureau of Labor Standards of the provisions of collective bargaining agreements. Mr. Altman inquired about the treatment of rest periods and was informed that such periods were ordinarily treated as hours worked. They did not, however, have any specific information on the point. If you think it is worthwhile you might get in touch with Mr. Lubin and perhaps he would be willing to have this matter studied in detail.

6. In the Zenith Radio case referred to above, the company indicates that they have paid straight time for the 10-minute rest period in the past but object to the payment of time and one-half for such minutes. They stated, however, that there is a precedent for the omission of rest period time from the calculation of maximum hours in the wording and regulations of the Illinois statute which controls the working hours of women. We have not discovered any such provision in the Illinois statute or in the regulations issued thereunder, and I have today written to the Illinois authorities requesting their advice on this question.

7. The Bureau of Labor Statistics considers rest periods as working time in computing hourly rates in industry. They advise that rest periods are commonly considered as working time but indicate that the practice is much less common in the south. Thus, in their report of December 11, 1939, regarding earnings and hours in the men's clothing industry in the south the tables as to average hourly earnings include brief rest periods as working time, even though the companies in several such cases did not so consider rest periods.

The following short extracts from articles published by the Bureau of Labor Statistics discusses the problem of rest periods and indicate, in general, that rest periods are normally considered as working time:

Bakery Industry - November 1936 Monthly Labor Review, p.1118:-

"Short formal rest periods, aggregating from 20 to 30 minutes a day, in addition to the lunch time were allowed production and shipping employees in one plant, woman workers in two, and office employees in one. All of these rest periods were on company time."

Cigarette Industry - February 1937 Monthly Labor Review, p. 335:-

"Scheduled rest periods, in addition to the suspension of work for lunch, were reported by four large and two small plants. Three of these extended the privilege to all workers, two gave it only to female workers, and one only to machine operators. In one chewing-tobacco plant, in which the operatives were predominantly Negroes, the time was devoted to prayer meeting. The time allowed by one plant was a total of 25 minutes in two periods, and by another a total of 20 minutes in four periods. A third plant gave morning and afternoon rest periods, the length of which was not reported, and two plants gave two periods of 10 to 15 minutes respectively. In the sixth plant, machine operators were relieved four times daily for from 10 to 15 minutes, the production of the relief operator being credited to the regular operator. The time of the rest periods was in each instance credited as working time."

Folding-Paper-Box Industry - Bulletin #620, p. 40:-

"Short rest periods, in addition to lunch periods, were provided in none establishments in the north. All employees benefited in two of the plants, and only female workers in five of them. One gave a smoking period to male employees only, and the ninth establishment failed to report the workers affected. These periods varied in length from 5 to 15 minutes, given in most instances twice each day. All but three plants paid the employees for this time."

Set-Up Paper-Box Industry - Bulletin #633, p. 69:-

"Short formal rest periods, aggregating from 10 to 20 minutes a day, in addition to the lunch period, were the practice in 10 plants, of which 4 were in the consumer and paper and printing groups, and 6 were strictly paper-box establishments. These rest periods were credited as working time in all excepting two of the plants."

III.

The following is a draft of a suggested statement on the problem of rest periods in connection with hours worked:

Paragraph 2 of Interpretative Bulletin No. 13 indicates that in the ordinary case hours worked includes all time from the beginning of the workday to the end of the workday, except periods during which the employee is relieved of all duties for the purpose of eating meals. We have received many inquiries as to whether rest periods or recess periods during the working day should be considered as hours worked. It is our opinion that 10 or 15 minute rest periods should not be considered as a break in the employment which may be deducted from the hours worked, and we shall consider such periods as hours worked in our enforcement policy.

(Copy)

February 13, 1940

Bernard S. Needle
Assistant Attorney
Baltimore, Maryland

LE:CRR:VM

Joseph Rauh
Assistant General Counsel

Request for Interpretation dated January 11, 1940.

I have your memorandum of January 11 raising several problems as to the application of the Act.

The first question involves employees engaged in the construction of a new plant on an old plant's foundation, where the walls of the new plant are immediately adjacent to the walls of another building of the partially demolished old plant and gain support therefrom. It is believed that the principle set forth in paragraph 13 of Interpretative Bulletin No. 5 will apply and the employees should be regarded as covered on the theory that they are engaged in the reconstruction of a plant used to produce goods for commerce. To be sure, paragraph 13 speaks of employees of contractors but it is our opinion that the same principle applies where the producing establishment itself employs the workers.

The second problem involves truck drivers employed by a wholesaler who receives merchandise from outside the state. These truck drivers are employed to deliver merchandise from the wholesale warehouse to retail customers within the state. In line with paragraphs 14, 15, and 16 of Bulletin 5, it is our opinion that these employees are engaged in commerce and, therefore, they are subject to the Act.

As for the exemption provided by Section 13(b)(1), since these employees are employees of private carriers, it is our opinion, as pointed out in paragraph 5 of Bulletin 9, that they are entitled to overtime until such time as the Interstate Commerce Commission determines there is a need, because of safety of operation, for establishing qualifications and maximum hours of service for employees of private motor carriers pursuant to Section 204 of the Motor Carrier Act of 1935. The Interstate Commerce Commission is presently studying this problem. It should be pointed out, however, that such a finding of need could not be retroactive, and employees of private motor carriers will thus be entitled to receive overtime compensation under the Fair Labor Standards Act until the date on which such a finding is made.

The last problem involves truck drivers engaged in picking up milk from farmers within the state and delivering the milk to a dairy which pasteurizes it and ships it out of the state. It is our opinion that these employees are within the coverage of the Act unless otherwise exempt.

If they are employees of a farmer, see paragraph 10 of Interpretative Bulletin No. 14. Further, even if they are not employees of the farmer, as paragraphs 25, 26, and 33 of Interpretative Bulletin No. 14 point out, employees engaged within the area of production in handling agricultural or horticultural commodities for market are exempt from both the wage and the hour provisions. "Area of production" is discussed in Regulations, Part 536, and Press Release #334. If employed by a dairy, see also paragraphs 14, 15, 22, and 23 of Interpretative Bulletin No. 14 which discuss a 7(c) exemption which may be applicable.

Because of the limited statement of facts contained in your memorandum, we are unable to give you a definite opinion on all phases of the various problems which suggest themselves from even your very limited factual statement.

#65105

(Copy)

February 13, 1940

LE:THT:LS

Winfrey G. Nathan
Acting Supervising Inspector
Kansas City, Missouri

Joseph Rauh
Assistant General Counsel

Letter of January 29, 1940, to Mr. James Givens

This letter was in reply to a letter asking whether watchmen employed by the Pullman Company are covered by the Fair Labor Standards Act, and are entitled to overtime compensation under Section 7.

As you may know, the Pullman Company is included in the definition of common carriers subject to Part I of the Interstate Commerce Act. It would thus appear that, in general, its employees would be exempt from the overtime requirements of the Act under Section 13(b)(2) unless there are particular reasons why this result should not follow in this case.

It has been the position of this office that the exemption provided in Section 13(b)(2) was primarily intended to apply to employees of carriers whose duties are of such a nature as to subject their employer to regulation by the Commission under Part I of the Interstate Commerce Act. Ordinarily, watchmen would be included within this exemption as employed by a carrier subject to Part I. But, if the duties of a watchman consist in watching property used in the manufacturing or assembling of Pullman cars, rather than in their operation in connection with the actual transportation of passengers, it might well be argued that such operations of the Pullman Company are not subject to regulation by Part I of the Interstate Commerce Act, and, consequently, that such a watchman would not be exempt under Section 13(b)(2).

It is not clear from your letter whether or not any such unusual circumstances are present in this case, but unless they exist the employee in question would not be entitled to overtime compensation under the Act.

(3557)

(Copy) February 14, 1940

Walter W. King
Acting Regional Director
Kansas City, Missouri

In reply refer to:
LE:CRR:MM

Joseph Rauh
Assistant General Counsel

Ted Brossman Service
30th & Tracy
Kansas City, Missouri

File No. 24-988-1

This will acknowledge your request for an opinion, dated February 3, involving the application of the Act in the case of an employee engaged to fire a boiler apparently located in a distillery establishment. I assume the distillery produces goods for interstate commerce.

It is stated that the boiler fired by the complainant furnishes steam to the distillery. The steam is used in the manufacturing processes. I assume that the boiler is in the distillery building. It does not appear definitely by whom the complainant is employed although the complaint is filed against Ted Brossman Service, a concern engaged in servicing and supplying employees who perform maintenance work. However, the business engaged in by the employer would not appear to be material, since coverage depends upon the activities engaged in by the employee.

It is the opinion of this office that the employee in question is engaged in processes or occupations necessary to the production of goods for interstate commerce, and is therefore entitled to the benefits of the Act. It is not believed that this case differs from the case of the ordinary fireman or maintenance man employed in a factory. Therefore, it is believed that paragraph 5 of Interpretative Bulletin No. 1 is applicable. This case should not be confused with the doubtful case presented in paragraph 11 of Interpretative Bulletin No. 5, involving the employees of a small coal mine selling all its coal within the state to a manufacturer using the coal to operate a plant which produces other goods for commerce.

(3557)

(Copy)

February 14, 1940

Col. Fleming

Rufus G. Poole
Acting General Counsel

LE:RGP:BP

Release on Automobile Dealers and Distributors (R-584)

Your memorandum of February 3 to Mr. McNulty called attention to page 3 of the above release and the words "very minor or insignificant". You stated that the dealers had said that the prior opinion was not so restrictive. You asked "What was the prior opinion?"

The prior opinion referred to is apparently Interpretative Bulletin No. 6, particularly paragraphs 21 and 22. This is the bulletin which relates to the retail and service establishment exemptions. Paragraph 21 of the bulletin contains the following sentence: "A few isolated wholesale sales made by "predominantly retail enterprise will not preclude such enterprise from being designated as a retail establishment" within the meaning of the exemption. In considering whether the recent letter is more restrictive than the interpretative bulletin, this sentence is to be compared with the following sentence which appears in the letter: "If the nonexempt activities are not very minor or insignificant, then the business, taken as a whole, may not be considered as a retail establishment within the meaning of the exemption."

The recent letter also states that "a service station servicing the dealer's wholesale business" is not within the exemption. (See page 2, last sentence, first full paragraph). This appears to be consistent with paragraph 11 of Interpretative Bulletin No. 6.

The letter also provides that the sale of trucks, tractors and trailers to business concerns are activities that do not fall within the exemption and if they comprise a significant portion of the business, the car dealer would be covered. This appears to be in line with Section 8 of the bulletin.

As the letter appears to be consistent with Interpretative Bulletin No. 6, the question is whether the tests laid down in the bulletin form a reasonable line of demarcation between coverage and non-coverage.

(3557)

(Copy)

February 15, 1940

LE:NSA:EHS

Mr. H. L. Chalker
Lumber and Sawmill Worker's Local 116
North Bend, Oregon

Dear Mr. Chalker:

Reference is made to your letter of August 29, 1939, in which you inquire whether men operating machines have to give the time that it takes to oil or adjust their machines before the regular shift starts. I regret that an earlier reply was not possible.

Enclosed herewith is a copy of Interpretative Bulletin No. 13, which discusses the manner of determining hours for which employees are entitled to compensation under the Fair Labor Standards Act of 1938. Your attention is particularly directed to paragraph 2 thereof. It is my opinion that time spent by employees in oiling or adjusting machines should be considered as hours worked for purposes of the Act.

For your information I am also enclosing copies of the Employers' and Workers' Digests.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (3)

28178

(3557)

(Copy)

February 17, 1940

LE:NSA:ERS

Mr. Harry P. Rutecki
7919 Marquette Avenue
Chicago, Illinois

Dear Mr. Rutecki:

Reference is made to your letter of January 13, 1940, in which you inquire whether "time outs", necessary because of physical reasons, may be deducted from hours worked.

Enclosed herewith is a copy of Interpretative Bulletin No. 13 which discusses the manner of determining hours for which employees are entitled to compensation under the Act. It is my opinion that "time outs", necessary because of physical reasons, may not be deducted from hours for which employees are entitled to compensation.

For your information, we are enclosing copies of the Workers' and Employers' Digests. If, after studying the enclosed material, you have any further questions, please do not hesitate to call upon me again.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (3)

65813

(3557)

(Copy)

February 17, 1940

LE:NSA:EHS

Mr. Frank E. Ingraham
1 Mount Hope Terrace
Worcester, Massachusetts

Dear Mr. Ingraham:

Reference is made to your letter of October 24, 1939, in which you inquire about the problem of hours worked. I regret that an earlier reply was not possible.

You inquire whether it is permissible for an employer to deduct one quarter of an hour's time in the pay of a salaried worker when only five minutes off was taken by the employee. Enclosed herewith is a copy of Interpretative Bulletin No. 13 which discusses the manner of determining hours for which employees are entitled to compensation under the Act, and your attention is particularly directed to paragraph 2 of this Bulletin. It is my opinion that an employer may not deduct fifteen minutes time if the employee only takes off five minutes. As to whether the five minutes may be deducted from hours worked, your attention is directed to paragraphs 4 through 8 of the Bulletin.

For your information, I am also enclosing copies of the Workers' and Employers' Digests. If, after studying the enclosed material you have any further questions, please do not hesitate to call upon me again.

Very truly yours,

For the General Counsel

By _____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (3)

41398

(3557)

COPY

February 17, 1940

LE:KCR:VG

Miss Helen B. Mays, Secretary
Industrial Nurses Association of Maryland
4221 Euclid Avenue
Baltimore, Maryland

Dear Miss Mays:

This is in reply to your letter of November 7, 1939, in which you inquire if industrial nurses employed in factory dispensaries are subject to the Fair Labor Standards Act.

I am enclosing a copy of the Act, together with copies of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage. Your attention is particularly directed to paragraph 5 of Bulletin No. 1, enumerating the types of employees not directly engaged in producing goods for interstate commerce, who are considered to be included within the broad definition of the word, "produced", in Section 3(j), and, therefore, within the general coverage of the Act. In our opinion, a nurse employed in a factory dispensary, the products of which factory move in interstate commerce, is engaged in "an occupation necessary to the production" of such goods, and, therefore, within the general coverage of the Act.

There is an exemption in Section 13(a)(1) of the Act for professional employees which may be applicable to certain registered nurses. The professional exemption has been defined and delimited in Section 541.2 of Regulations, Part 541, a copy of which is enclosed. All of the requirements of that section must be met in the case of each employee for whom the exemption is sought to be made applicable.

In connection with your inquiry as to whether or not the clerical work performed by industrial nurses, such as the making out of compensation reports, etc., will change the status of the nurse under the Act, I wish to point out the requirement of Section 541.2 that a professional employee must not do a substantial amount of work of the same nature as that performed by nonexempt employees of the employer. If the clerical work performed by the industrial nurse

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is of a nonexempt character, and if it constitutes a substantial amount of the work of the nurse, the exemption would thereby be rendered inapplicable. This office is unable to make definite rulings as to the applicability of the exemption in particular cases because we are not in possession of all of the facts necessary to make such rulings.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)
47539

(Copy)

February 21, 1940

In reply refer to:
LE:HM:MS

Mr. Thomas H. McDonald
Commissioner of Public Roads
Public Roads Administration
Federal Works Agency
Washington, D. C.

Dear Mr. McDonald:

This will reply to your request for information, referred to as your File No. B-1, concerning the applicability of the Fair Labor Standards Act to employees of contractors engaged in highway construction work. You inquire particularly about the coverage of the Act to employees engaged in the maintenance, repair, construction, reconstruction or relocation of Highways located entirely within a state.

The Act applies to employees engaged in commerce or in the production of goods for commerce. The coverage of the Act, therefore, will depend entirely upon the facts in each case. In general, the applicability of the Act to employees of contractors is explained in paragraphs 12 and 13 of our Interpretative Bulletin No. 5, a copy of which is enclosed. Some pertinent considerations in determining whether an employee in a given situation is covered by the Act while employed in highway construction work include among other things whether the work involves the original construction of a new highway, whether or not the highway may be considered to be an instrumentality of interstate commerce or whether the work involves the repair, maintenance or reconstruction of the highway.

You will note that the question of coverage to the original construction of a highway, which when completed will be used as an instrumentality of interstate commerce, is left open in paragraphs 12 and 13 of Interpretative Bulletin No. 5. Some doubt exists as to whether employees engaged in the original construction of such a road may be considered to be within the statutory provisions. We are not prepared to take a definite position on this question at least until the courts have had an opportunity to indicate the broad outlines of coverage.

We have found that no real problem exists in the usual situation as most instances involve the repair, maintenance or reconstruction of existing highways; for example, the building of a new road over a preexisting roadbed or the widening or resurfacing of already existing roads. The chief problem, therefore, is what may be considered as repair, maintenance or reconstruction.

(3557)

It is our opinion that almost all road construction contracting comes under the act and the Administrator is proceeding in the performance of his duties of enforcement on that basis. One illustration will serve to show the necessity for adopting such a point of view in applying the Act in such instances. Suppose the county commissioners let a contract for straightening an existing highway. It is an old road laid out by the pioneers and it skirts hills and streams in such winding fashion that it is no longer safe or adequate to the requirements of the automotive age. The commissioners, while using most of the old roadbed, condemn some additional land for straightening, propose several new bridges and decide to cut through a hill here and there. Is this original construction or is it repair and reconstruction? We believe that the work contemplated in this sample is reconstruction despite the fact that parts of this may involve road building through virgin land, and that the contractor is under the law.

With respect to the question what highways may be deemed to be instrumentalities of interstate commerce, in our opinion, all highways with the possible exception of trails and woods roads may be so considered. The discussion contained on page 4 of the enclosed treatment of the subject of highway construction entitled "Highway Construction Under the Fair Labor Standards Act" will serve to illustrate the basis for the position we have taken in this regard. Of course, upon the facts in each case will ultimately hinge the decision whether or not an employee is engaged in maintenance, repair or reconstruction work on an interstate highway.

Finally, we desire to point out that Section 7(b) of the Act may be applicable to the employment under consideration in many instances. We are enclosing a copy of our Interpretative Bulletin No. 8 which deals with the exemption provided in this Section where collective bargaining agreements fulfilling certain stated requirements have been entered into between employer and employees.

We have enclosed two extra copies of the treatment entitled "Highway Construction Under the Fair Labor Standards Act" which you may desire to transmit to inquirers in certain instances. It is also suggested that you inform these inquirers that we will be happy to consider the application of the Act to their particular case upon the presentation of the facts involved to this office.

Very truly yours,

Philip B. Fleming
Col., Corps of Engineers

Enclosures (6)
#69033

COPY

February 19, 1940

LE:GEH:EB

Mr. Edward R. Mares, Secretary
United Cannery, Agricultural, Packing
212 West 3rd Street, Room 315
Los Angeles, California

Dear Mr. Mares:

This is in reply to your letter of November 14, 1939 in which you indicate that you are interested in the application of the Fair Labor Standards Act to canning operations. We quote from your letter:

> "If a canner is canning pork and beans, hominy, or dried peas which are not exempted during an exempted week granted him, does he have to pay time and one half over eight hours for that day? Also if he packs a perishable product for the first five or six hours and then switches over to non-perishable products for another five or six hours, when does the overtime start or does it?
>
> "Canning is defined in the above mentioned bulletin in Section #34, last paragraph of page 29. It includes the sealing and labeling the cans, as well as placing the cans in cases or boxes. Does this mean that all warehouse operations including car loading and storing are included in this? Can a canner label and case products that were manufactured in other weeks than the week for which an exemption has been granted and still be exempted from the hours provisions of the act. The common practice in canneries is to stack all cans on the floor for periods from three days up. So we want to know if a canner can take old goods from a storage and label and case them during an exempt week and still not have to pay overtime after eight hours."

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.

(3557)

You will note (from paragraphs 14, 19 and 22 to 24, of Interpretative Bulletin No. 14) that Section 7(c) provides an exemption from the hours provisions only for an aggregate of 14 workweeks in a calendar year for the employees of an employer engaged in the first processing of, or in canning or packing perishable or seasonal fresh fruits or vegetables.

As paragraph 23(a) of Interpretative Bulletin No. 14 points out, only those employees who perform the operations described in Section 7(c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by that exemption.

As paragraph 23(b) points out, if during any part of any workweek an employee is engaged in canning pork and beans, hominy or dried peas, he would not, during that workweek, be entitled to the Section 7(c) exemption because he would not be engaged in canning "fresh fruits or vegetables".

As paragraph 4 of Interpretative Bulletin No. 4 (a copy of which is enclosed) points out, an employee may work any number of hours per day or week, so long as he is paid time and a half his regular rate of pay for all time in excess of 42 hours in each workweek. If the Section 7(a) exemption from the hours provisions for 14 workweeks is applicable, no time and a half need be paid, regardless of the number of hours worked in any of these 14 workweeks.

With regard to the extent of the meaning of the term "canning" as used in Section 7(c) and Section 13(a)(10), we are not prepared to extend our general discussion. However, if you will submit a complete, detailed and real set of facts with regard to any particular problems we will be glad to give you an opinion thereon.

Very truly yours,

For the General Counsel

By_____
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)
50629