DEPARTMENT OF LABOR

Wage and Hour Division

LEGAL FIELD LETTER

No. 7

Attached Opinions

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

MEMORANDA

Date	From	To	Subject
2-7-40	Joseph Rauh Asst. General Counsel	Robert C. Bell, Jr.	Request for Confirmation of Opinion to Federal Reserve Bank of Minneapolis
2-9-40	Joseph Rauh Asst. General Counsel (WMC)	John J. Cooney Boston, Mass.	Employer manufacturing kerchiefs, used as headwear.
2-10-40	Joseph Rauh Asst. General Counsel (THT)	G. C. Street Dallas, Texas	Texas and Pacific Terminal Warehouse Company, Fort Worth, Texas, File 42-855.
2-13-40	Joseph Rauh Asst. General Counsel	Frank J. G. Dorsey	Request for Opinion

LETTERS

Date	From	To
2-5-40	Milton C. Denbo Chief Opinion Attorney	E. G. Scoblionko, Esq. Allentown, Pennsylvania
2-6-40	Milton C. Denbo Chief Opinion Attorney	Paul W. Adams Hartford, Connecticut
2-8-40	Milton C. Denbo Chief Opinion Attorney	H. N. Johnson Spartanburg, S. C.
2-8-40	Milton C. Denbo Chief Opinion Attorney	Happ Brothers Company Macon, Georgia
2-9-40	Milton C. Denbo Chief Opinion Attorney	E. L. Nutt, Esq. Akron, Ohio
2-9-40	Milton C. Denbo Chief Opinion Attorney	N. B. Carstarphen Shreveport, Louisiana

(3566)

(Copy

Date	From	To
2-9-40	Harold D. Jacobs Administrator	Paul C. Dunn, Jr. Portsmouth, Virginia
2-9-40	Joseph Rauh Asst. General Counsel	E. F. Walker Providence, R. I.
2-9-40	Philip B. Fleming Col, Corps of Engineers	Mr. Wesley Hardenbergh Chicago, Illinois
2-9-40	Milton C. Denbo Chief Opinion Attorney	Mr. M. E. Grindstaff Aberdeen, South Dakota
2-12-40	Milton C. Denbo Chief Opinion Attorney	Mrs. J. E. Mackle Pottstown, Pennsylvania
2-17-40	Milton C. Denbo Chief Opinion Attorney	W. T. Williams, Esquire Texarkana, Texas
2-20-40	Milton C. Denbo Chief Opinion Attorney	Mr. W. E. Stowig Kankakee, Illinois

(3566)

(Copy)

February 7, 1940

LE:KCR:VO

Robert C. Bell, Jr.
Assistant Attorney
Minneapolis, Minnesota

Joseph Rauh
Assistant General Counsel

Request for Confirmation of Opinion to Federal Reserve Bank of Minneapolis

I have reviewed your letter of January 29, addressed to Mr. H. C. Core, Assistant Cashier, Federal Reserve Bank of Minneapolis, who inquires if notarial work performed by regular employees of the Federal Reserve Bank of Minneapolis should be considered in calculating the number of hours worked by such employees.

It appears to me that you have properly advised Mr. Core concerning the application of the Act under the facts presented by him. I believe an additional ground for your opinion could have been given by reference to paragraph 17 of Interpretative Bulletin No. 13. It would appear that the Federal Reserve Bank and the drawees of the checks in question have entered into an arrangement for the use of employees of the bank as notaries, and even if it be considered that the employees of the bank become the employees of the drawees of the checks when performing notarial services, the bank and the drawees would be considered as jointly employing such employees and the total number of hours worked, including both the bank work and the notarial work, should be considered for overtime purposes.

69792

February 9, 1940

In reply refer to:
LE:WMC:ML

John J. Cooney
Regional Attorney
Boston, Massachusetts

Joseph Rauh
Assistant General Counsel

Employer manufacturing kerchiefs, used as headwear.

In response to your request as to whether or not a manufacturer of kerchiefs used as headwear is within the definition of the millinery industry, it is my opinion that inasmuch as such articles are not manufactured by millinery manufacturers and according to usual millinery processes, they do not fall within the definition of the millinery industry but are included within that portion of the definition of the apparel industry relating to scarfs.

68556

(3566)

(Copy)

February 10, 1940

LE:THT:ARC

G. C. Street
Regional Director
Dallas, Texas

Joseph Rauh
Assistant General Counsel

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

From the memorandum of Mr. Peter M. Tamburo, Acting Regional Director, on 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).

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 13, 1940

Mr. Frank J. G. Dorsey
Regional Director
Philadelphia, Pennsylvania

LE:HM:EH

Joseph Rauh
Assistant General Counsel

Request for Opinion

We regret that we have been unable to supply you with an opinion concerning the status of an employee engaged in maintaining the living quarters of other employees of a company which produces goods for commerce before this time. We refer to your communication dated November 25, 1939, to which you attached a copy of a letter from Mr. John S. McKelvy, Jr., of Pittsburgh, Pennsylvania.

Under the broad definition of "produced" contained in Section 3(j), employees engaged in the type of work outlined in your communication would seem to be engaged "in a process or occupation necessary to the production" of the goods in question. It is our opinion that it is proper to assume that the company would not have the employees in question on its payroll unless they were necessary to the productive activities of the company. It is our view that company-owned houses and villages are as much a part of and as necessary to the process of production as is the factory itself.

It is our view, therefore, that company employees engaged in the maintenance of the company houses in question are, like employees engaged in keeping up the factory, "necessary to the production" of the factory's goods and, therefore, entitled to the benefits of the Act.

54423

COPY

February 5, 1940

LE:CAA:ERL

E. G. Scoblionko, Esquire
Commonwealth Building
Allentown, Pennsylvania

Dear Mr. Scoblionko:

This will reply to your letter of January 26, 1940, addressed to Mr. Nordholm in which you present the following case for our consideration:

Piece-workers are normally paid on the basis of voucher tickets which they must turn in. It appears that often, as you put it, the employees "conveniently" lose these vouchers and still demand payment. You ask whether the company may refuse payment to employees who do not have their voucher tickets.

Section 6 of the Act requires the employer to pay each of his employees subject to the provisions of the Act at least 30 cents an hour. In our opinion if an employer does not pay his employees the equivalent of 30 cents an hour for all hours which they work in any workweek, he will not meet the requirements of Section 6 regardless of the fact that the employer has not made sufficient payment because the employees have lost their voucher tickets.

Very truly yours,

For the General Counsel

By ___________________
Milton C. Denbo
Chief Opinion Attorney

68542

COPY

February 6, 1940

LE:NSA:AC

Mr. Paul W. Adams
The Manufacturers Association
of Connecticut Inc.
Fifty Lewis Street
Hartford, Connecticut

Dear Mr. Adams:

Reference is made to your letter (File No. 1301) in which you inquire whether time spent by employees in using the shower room facilities after the end of their regular shift should be considered as hours worked for the purposes of the Fair Labor Standards Act of 1938. I regret that an earlier reply was not possible.

In your letter you refer to paragraphs 2 and 3 of Interpretative Bulletin No. 13, and point out that paragraph 2 states that hours worked include all time during which an employee is required to be on the employer's premises.

Whether or not time spent by employees in taking showers should be considered hours worked depends, of course, upon the facts in the particular case. This Division is not prepared at the present time to express any opinion on this matter.

Very truly yours,

For the General Counsel

By____________________
Milton C. Denbo
Chief Opinion Attorney

17966

(Copy)   February 8, 1940

LE:THT:SAF

Mr. H. N. Johnson
Box 688
Spartanburg, South Carolina

Dear Mr. Johnson:

This is in reply to your letter of January 25, in which you state that you are "making a proposal for carrying the mail in a panel or screen body motor truck, to and from the Post Office and the railroad station." You inquire whether persons who may be employed by you for this work would be subject to the Fair Labor Standards Act and the "Eight Hour Law," and what the wages and hours should be for these men.

The wage and hour provisions of the Act apply in general to all employees engaged in interstate commerce or in the production of goods for interstate commerce, unless otherwise exempt. We are enclosing a copy of the Act and copies of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage.

We would direct your attention to Section 3(d) of the Act, excluding from the coverage thereof employees of the United States. In our opinion, that section does not exempt from the Act employees of private contractors with the Post Office Department. From the facts contained in your letter, it is our opinion that employees of contractors engaged in transporting the mails between the Spartanburg post office, depots and stations are engaged in interstate commerce and, therefore, subject to the Act, unless otherwise specifically exempt.

Section 13(b)(1) provides an exemption from the maximum hour provisions of the Act for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." We are enclosing a copy of Interpretative Bulletin No. 9, dealing with the scope of this exemption.

The Interstate Commerce Commission has disclaimed jurisdiction under the Motor Carrier Act of employees engaged in the transportation of mail under contract with the Post Office Department in vehicles used exclusively for that purpose. See 3 M.C.C. 694, 697. It would thus appear that such employees are not within the exemption provided by Section 13(b)(1) of the Fair Labor Standards Act and since it would also appear that they are engaged in interstate commerce within the meaning of that Act, it is the position of this office that, at least when such employees are employed by a carrier operating under Government contract, for the transportation of mail in vehicles used exclusively for that purpose, they are entitled to overtime compensation under Section 7 of the Fair Labor Standards Act.

You also inquire how many hours you may hold your employees on or near the job while not on duty. On this matter we would refer you to Interpretative Bulletin No. 13, a copy of which is enclosed, and would call your particular attention to paragraphs 4 to 8 of that bulletin. For your information, we are also enclosing a copy of Interpretative Bulletin No. 4 and would call your attention to paragraph 4. In addition, you will find enclosed a copy of Regulations, Part 516, specifying the records employers are required to keep for the purposes of the Fair Labor Standards Act.

As to whether your employees would be subject to the "Eight Hour Law," I am referring your letter to the Interstate Commerce Commission, under which that law is administered.

If, after reading the enclosed material, you have any further questions, please do not hesitate to call upon us again.

Very truly yours,

For the General Counsel

By____________________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (8)

#68637

(Copy)

February 8, 1940

LE:CAA:DG

Happ Brothers Company
Macon
Georgia

Dear Sirs:

This will reply to your recent letters concerning the application of the Fair Labor Standards Act. As you will note in the enclosed copy of Press Release, R-609, in our opinion, the longest period of time over which earnings may be averaged to determine whether the employer has paid wages at the applicable minimum wage rate is a workweek and there may be no averaging of wages over two or more workweeks. Nor, as you will note in Paragraph 5 of the enclosed Interpretative Bulletin No. 4, may hours be averaged over two or more weeks for the purposes of the overtime provisions of Section 7 of the Act.

The "one-thousand hours" provision to which you refer has no application whatsoever. That provision contained in Section 7(b)(1) of the Act merely provides for a partial exemption from the overtime requirements of the Act. For your information with respect thereto I should like to refer you to the enclosed Interpretative Bulletin No. 8, particularly paragraphs 16 through 20 thereof.

You state that you are faced with a particular problem in view of the fact that, "At the close of a week an operator might have a lot of work nine-tenths finished but the credit for the piece-work on this lot goes over in to the succeeding week, causing a shortage in one week and an average in the other . . ." The employer may in such case reasonably compute what was actually earned on the unfinished lot the first week. We have suggested in similar cases that the employer might do so by keeping a record of the number of hours worked on the unfinished lot the first week and of the number of hours worked to finish it the second week and allocate the piecework earnings for the lot over the two weeks in proportion

to the number of hours worked each week. If a reasonable method of calculating what was actually earned the first week cannot be devised, then the only safe course for the employer to pursue is to pay an extra amount the first week to bring the earnings up to the applicable minimum wage rate. In the latter case, however, the employer is not permitted to deduct from the employees' earnings in excess of the minimum in a subsequent week in order to balance the amount which the employer was required to pay to make up the minimum in a preceding week. Such deduction is in the nature of a "kick-back" and will constitute a violation of Section 6 of the Act.

Very truly yours,

For the General Counsel

By____________________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)

#57818
#66700

(Copy)

February 8, 1940

LE:CAA:GNS

E. L. Nutt, Esquire
Assistant Counsel
The B. F. Goodrich Company
Akron, Ohio

Dear Mr. Nutt:

This is in reply to your letters of August 15 and November 14, addressed to Mr. McNulty, in which you make inquiry regarding the applicability of the executive and administrative exemption provided by Section 13(a)(1) of the Fair Labor Standards Act to several of your foremen who are paid on an hourly basis.

It appears that during the first year of the effective date of the Act the foreman in question, who you state "meet all of the requirements outlined in the first five paragraphs of Regulation 541.1" were paid on an hourly basis ranging from 54 cents an hour to 69 cents an hour, which latter rate was in effect when your August 15 letter was written. You further state that it is contemplated that the employees in question will be required to work 48 hours a week and occasionally more, for a period of several months, and that during such period their earnings at their basic hourly rate, plus bonuses, will be considerably in excess of $30 per workweek.

During the first year of the effective date of the Act, while the maximum hour requirement was 44 hours a workweek, the salary requirement of Section 541.1 was met in the case of an employee who received a sufficiently high hourly wage to compensate him at $30 or more for a workweek of 44 hours. An hourly rate of 69 cents was necessary in that situation. When the applicable maximum hour provision was reduced on October 24 of this year to 42 hours a workweek, an executive and administrative employee paid on an hourly basis must receive a sufficiently high hourly rate to compensate him at $30 for a workweek of 42 hours. An hourly rate of approximately 71½ cents is necessary in that situation.

Your attention is directed to the enclosed copy of our records regulations, Part 516, in which the question of bonuses is discussed in Section 516.4(f).

Whether a bonus may be included in determining when the salary requirement of Section 541.1 is met depends upon the nature of the bonus, about which no information is given in your letter. Only a production bonus, which becomes part of the employee's regular hourly rate of pay, may be so included in the week in which it is earned. Thus in determining whether an employee is receiving 71½ cents an hour, the amount paid as a production bonus for the week should be averaged over the total hours worked in the week. The equivalent hourly rate thus obtained added to the basic hourly rate paid must yield 71½ cents to satisfy the salary requirement of Section 541.1. Thus if the basic hourly rate paid is less than 71½ cents but the employee is also paid a production bonus it may be that the employee is an executive and administrative employee one week and not another, depending upon the amount of the bonus.

As you may know, it has been the policy of this office to refrain from making definite rulings as to the applicability or non-applicability of the executive and administrative exemption in particular cases. All of the requirements of Section 541.1 must be met in any case in which the exemption is sought to be made applicable.

Very truly yours,

For the General Counsel

By ______________________
Milton C. Denbo
Chief Opinion Attorney

Enclosure
49417

(Copy)

February 9, 1940

LE:CAA:GNS

Mr. N. B. Carstarphen
Wabry and Carstarphen
331 Ward Building
Shreveport, Louisiana

Dear Mr. Carstarphen:

This will reply to your letter of September 1, 1939. I regret that an earlier reply was not possible.

The Fair Labor Standards Act, a copy of which is enclosed, requires that every employee subject to its provisions (engaged in interstate commerce or in the production of goods for interstate commerce) receive at least 30 cents an hour and overtime compensation for all hours worked in excess of 42 hours in any workweek, at a rate at least one and one-half times the regular rate of pay at which such employee is employed.

Paragraphs 10 through 12 of the enclosed Interpretative Bulletin No. 4 outline the method of computing a salaried worker's regular rate of pay. If 52 hours was the regular number of hours worked during the summer months, computed as indicated in paragraph 10 of Bulletin No. 4, the equivalent weekly wage may be divided by 52 to arrive at the regular rate of pay during such months. If $54\frac{1}{2}$ hours was the regular number of hours worked during the rest of the year the equivalent weekly wage may be divided by $54\frac{1}{2}$ hours to arrive at the regular rate of pay during such periods.

If an employer prior to the Act customarily allowed his employees vacations or holidays with pay the deprivation of such vacations and holidays by the employer because he is required to pay overtime under the Act, may constitute a violation of Section 18 thereof. The Division, therefore, cannot approve of such deprivation.

In computing the regular rate of pay fractions of less than one-half cent may be disregarded and fractions over one-half cent should be raised to the next full cent. Fractions of one-half cent must be retained or may be raised to the next full cent.

Very truly yours,

For the General Counsel

By ______________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (2)
28165

(3566)

February 9, 1940

In reply refer to:
LE:OS:LS

Mr. Paul C. Dunn, Jr.
302 - 6th Avenue
Portsmouth, Virginia

Dear Mr. Dunn:

Congressman Darden's office has referred to this Division your request about the Fair Labor Standards Act. I regret than an earlier reply was not possible.

You state that you are employed by the Seaboard Air Line Railway Company and that you wish to get over to the depot ticket office in Portsmouth, in order to learn about routes, tariffs, etc. You inquire whether the wage and hour provisions of the Act require the company to pay you for the time so spent.

The question raised in your letter is whether the time voluntarily spent by an employee in learning new methods and techniques shall be considered "hours worked" under the Act and, therefore, paid for. The Division has discussed this problem with reference to meetings and lectures in a recent revision of paragraph 15 of Interpretative Bulletin No. 13, a copy of which is enclosed. In our opinion time spent in learning new skills or methods will not be regarded as time worked unless such activity may reasonably be considered part of the job. However, you do not furnish a sufficiently detailed statement of facts to enable us to express an opinion as to whether your attendance in the Portsmouth ticket office may be so considered.

For your further information I am enclosing a copy of the Workers' Digest. If you have any questions please do not hesitate to call on me again. We are returning herewith your self-addressed envelope.

Sincerely yours,

Harold D. Jacobs
Administrator

Enclosures (3)
15181
21531
25861

(3566)

(Copy)

February 9, 1940

LE:LS:AP

Mr. E. F. Walker
Secretary-Treasurer
Rhode Island Textile Association
49 Westminster Street
Providence, Rhode Island

Dear Mr. Walker:

This is in reply to your request for an opinion on the applicability of the textile minimum wage order to engravers in textile printing plants.

You state in your letter that the engravers are employed by plants which print fabrics manufactured and owned by other companies.

Section (c)(1) of the order is applicable to the "bleaching, dyeing, printing and other finishing of woven fabrics" from enumerated fibers. Any plant which is engaged in such processing comes within the terms of the order, even if it is not engaged in the manufacture of the fabric or has not acquired title to the fabric. The order is not confined in its application to finishing and printing done in integrated plants.

All occupations in the textile industry which are necessary to the production of textile are covered by the order. Under this rule it would seem clear that the order is applicable to the engravers mentioned in your letter.

It is regretted that an earlier reply to your letter was not possible.

Very truly yours,

For the General Counsel

By ____________________
Joseph Rauh
Assistant General Counsel.

Enclosures (2)

36337

(Copy)

February 3, 1940

LE:MCD:MBS

Mr. Wesley Hardenbergh
Institute of American Meat Packers
59 East Van Buren Street
Chicago, Illinois

Dear Mr. Hardenbergh:

Pursuant to my conference of January 10, 1940, with representatives of the Institute of American Meat Packers, I sent various members of our Division to make a thorough investigation of the operations conducted in meat packing establishments. Such investigation having been completed, I desire now to reaffirm our position with respect to the application of the exemption provided by Section 7(c) of the Fair Labor Standards Act to the meat packing industry.

Section 7(c) of the Fair Labor Standards Act grants a 14 workweeks exemption from the hour provisions to employees of an employer engaged in the "handling, slaughtering or dressing poultry or livestock." In a letter dated December 20, 1939, our General Counsel, Mr. McNulty, informed you that, in our opinion, the interpretations contained in Paragraphs 21 to 24, inclusive, of our Interpretative Bulletin No. 14, insofar as they related to the meat and livestock industry, were correct.

After careful consideration of the report made to me by the members of the Division who investigated the meat packing establishments recently, I have also concluded that the interpretations contained in our Interpretative Bulletin No. 14 are correct. I therefore desire to reaffirm the opinions expressed in Mr. McNulty's letter to you.

It is my opinion, therefore, that the only operations conducted by meat packing establishments, which are within the Section 7(c) exemption, are the operations of handling, slaughtering and dressing and those operations immediately essential thereto, as explained in Paragraph 23(a) of Interpretative Bulletin No. 14. The exempt operations would, therefore, include the transporting to the slaughterhouse, stockyards or other place where the livestock is to be sold; receiving same, weighing or otherwise determining the basis for

payment to producers; grading; selling; slaughtering; and dressing. "Dressing" would include the bleeding, removing head, hide, hair, entrails and dirt and the operations performed upon warm fancy meats before they are placed in coolers. The term "dressing" would also seem to include the placing of shrouds on carcasses as they move from dressing rooms into coolers; the transferring into tanks from the killing or dressing rooms of warm fats and other products which are to be cooked or rendered; and the operations of cleaning, grading and first dry salting performed upon casings before they are placed in coolers.

Very truly yours,

Philip B. Fleming
Col, Corps of Engineers

(Copy)

February 3, 1940

LE:HM:DG

Mr. M. E. Grindstaff
Aberdeen Storage Company
Aberdeen, South Dakota

Dear Mr. Grindstaff:

We are writing you at this time in reply to your inquiry concerning the applicability of the Fair Labor Standards Act to your business. We regret very much that we have been unable to write you before this time.

In your letter you list four types of operations in which your company is engaged and you ask whether the employees who perform work incidental to these operations are entitled to the benefits of the Act.

With respect to that feature of your business which involves the selling of coal at retail we desire to point out that the benefits of the statute apply to employees engaged in commerce or in the production of goods for commerce unless otherwise exempt. You must decide therefore whether these employees are so engaged and if so whether any exemption is applicable. Since the coverage of the Act depends entirely upon the facts in each case we find it difficult to advise you definitely as to the status of these employees. For this reason we are enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which explain the general scope of coverage of the statute and a copy of our Interpretative Bulletin No. 6 dealing with the exemption provided in Section 13(a)(2) to any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. In connection with this latter question we wish to call your attention to paragraphs 5 through 9 and 21 through 25 of Bulletin No. 6. We also desire to remind you that even if this exemption should otherwise be applicable, your employees engaged in this feature of your business will still be entitled to the benefits of the Act unless there is an actual physical separation of this feature from other features of your business which are not within any exemptions.

With respect to the distribution of cars shipped into the state by Colgate-Palmolive-Peet Company and other such companies we call your attention to paragraphs 14-16 of the enclosed copy of our Interpretative Bulletin No. 5 from which we believe you will be able to determine the status of employees engaged in this work or in work incidental thereto.

With respect to No. 4 of your letter regarding the furnishing of ice for railroad cars which go out of the state, it is our opinion that employees engaged in this work are entitled to the benefits of the statute upon the same grounds as those employed in the distribution of cars referred to in the preceding paragraph.

In No. 3 you state that you pick up freight at depots in the city and deliver the freight to local firms or to other depots. In connection with this collection and delivery service the question arises whether you are operating under a contract with the railroads to furnish them with collection and delivery service to and from their terminals. If such is the case it then becomes important to decide whether the employees engaged in this work are exempt under Section 13(b)(1) of the Act as a common or contract carrier subject to the jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act.

If the entire operations of this department are devoted to pick up and delivery service under contract with a railroad, it would seem that the exemption under Section 13(b) of the Act would not be applicable and thus that the employees will be subject to both the wage and hour provisions. On the other hand if no contract exists between the carrier and the railroad, it is our opinion that the carrier would be subject to the Motor Carrier Act and thus not subject to the maximum hour and overtime provisions of the Fair Labor Standards Act despite the fact that it picked up or delivered baggage or freight to or from a railroad station.

It may be, however, that this feature of your business involves a combination of the above referred to possibilities. If, therefore, a part of your operations are under contract with a railroad and the remainder of your operations are for the general public the coverage of the statute to your employees becomes a very close question and one upon which we do not feel that we can express a definite opinion at this time. The question will ultimately have to be decided by the courts. It would seem advisable, however, to comply with the provisions of the statute in such a case at least until such time as the courts have made a determinative ruling upon this question.

(Copy)

February 3, 1940

LE:HM:DG

Mr. M. E. Grindstaff
Aberdeen Storage Company
Aberdeen, South Dakota

Dear Mr. Grindstaff:

We are writing you at this time in reply to your inquiry concerning the applicability of the Fair Labor Standards Act to your business. We regret very much that we have been unable to write you before this time.

In your letter you list four types of operations in which your company is engaged and you ask whether the employees who perform work incidental to these operations are entitled to the benefits of the Act.

With respect to that feature of your business which involves the selling of coal at retail we desire to point out that the benefits of the statute apply to employees engaged in commerce or in the production of goods for commerce unless otherwise exempt. You must decide therefore whether these employees are so engaged and if so whether any exemption is applicable. Since the coverage of the Act depends entirely upon the facts in each case we find it difficult to advise you definitely as to the status of these employees. For this reason we are enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which explain the general scope of coverage of the statute and a copy of our Interpretative Bulletin No. 6 dealing with the exemption provided in Section 13(a)(2) to any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. In connection with this latter question we wish to call your attention to paragraphs 5 through 9 and 21 through 25 of Bulletin No. 6. We also desire to remind you that even if this exemption should otherwise be applicable, your employees engaged in this feature of your business will still be entitled to the benefits of the Act unless there is an actual physical separation of this feature from other features of your business which are not within any exemptions.

With respect to the distribution of cars whipped into the state by Colgate-Palmolive-Peet Company and other such companies we call your attention to paragraphs 14-16 of the enclosed copy of our Interpretative Bulletin No. 5 from which we believe you will be able to determine the status of employees engaged in this work or in work incidental thereto.

With respect to No. 4 of your letter regarding the furnishing of ice for railroad cars which go out of the state, it is our opinion that employees engaged in this work are entitled to the benefits of the statute upon the same grounds as those employed in the distribution of cars referred to in the preceding paragraph.

In No. 3 you state that you pick up freight at depots in the city and deliver the freight to local firms or to other depots. In connection with this collection and delivery service the question arises whether you are operating under a contract with the railroads to furnish them with collection and delivery service to and from their terminals. If such is the case it then becomes important to decide whether the employees engaged in this work are exempt under Section 13(b)(1) of the Act as a common or contract carrier subject to the jurisdiction of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act.

If the entire operations of this department are devoted to pick up and delivery service under contract with a railroad, it would seem that the exemption under Section 13(b) of the Act would not be applicable and thus that the employees will be subject to both the wage and hour provisions. On the other hand if no contract exists between the carrier and the railroad, it is our opinion that the carrier would be subject to the Motor Carrier Act and thus not subject to the maximum hour and overtime provisions of the Fair Labor Standards Act despite the fact that it picked up or delivered baggage or freight to or from a railroad station.

It may be, however, that this feature of your business involves a combination of the above referred to possibilities. If, therefore, a part of your operations are under contract with a railroad and the remainder of your operations are for the general public the coverage of the statute to your employees becomes a very close question and one upon which we do not feel that we can express a definite opinion at this time. The question will ultimately have to be decided by the courts. It would seem advisable, however, to comply with the provisions of the statute in such a case at least until such time as the courts have made a determinative ruling upon this question.

We wish to repeat that employees may be covered by the statute during one workweek because of the nature of the work which they perform and not covered during another workweek for the same reason. It may be, therefore, that you will be able to work out segregation between those of your employees who perform work which entitles them to the benefits of the Act during a workweek and those employees who perform work which is not covered by the statute.

If you should have any further questions with respect to the coverage of the statute to particular employees of your business please do not hesitate to communicate with us again.

Very truly yours,

For the General Counsel

By ____________________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4)

#12977

February 12, 1940

LE:CAA:ARC

Mrs. J. E. Mackle
812 Queen Street
Pottstown, Pennsylvania

Dear Mrs. Mackle:

This will reply to your letter of January 14, 1940.

The Fair Labor Standards Act, a copy of which is enclosed, requires that every employee subject to its provisions (engaged in interstate commerce or in the production of goods for interstate commerce) receive at least 30 cents an hour and overtime compensation for all hours worked in excess of 42 hours in any workweek, at a rate at least one and one-half times the regular rate of pay at which such employee is employed.

Piece-workers, like other employees subject to the provisions of the Act, must be paid in accordance with the standards fixed therein. The Act does not require that all employees be paid on a yearly basis. It does require, however, that piece-workers be paid an amount equivalent to the minimum wage fixed in the Act. In this connection, I should like to refer you to the enclosed copy of Press Release R-609.

If, in a particular week, the piece-worker has not earned the equivalent of 30 cents an hour, the employer must pay the additional sum to make up the 30 cents or he will violate the provisions of Section 6. An attempt by the employer, by requiring a "kick-back" in some subsequent week when the employee has earned in excess of the minimum, to make up the additional amount which the employer was required to pay to meet the requirements of the Act in the previous week, is clearly an attempt to evade the minimum wage requirements of the Act and will be treated as a violation thereof.

The fact that the employees agree to such a practice is immaterial. The Act does not require, nor does it forbid, employers to install timeclocks. So far as the Act is concerned, the employer may require his employees to ring a timeclock.

With respect to your question concerning the matter of deductions, I should like to refer you to Section 3 under the Act and to the enclosed copy of Interpretative Bulletin No. 3.

Very truly yours,

For the General Counsel

By ____________________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (3)
65966

(3566)

(Copy)

February 17, 1940

LE:GH:BW

W. T. Williams, Esquire
203 Municipal Building
Texarkana, Texas

Dear Mr. Williams:

This is in reply to your letter of February 6, 1940, in which you indicate that you are interested in the application of the Fair Labor Standards Act to lumber and pulpwood operations.

We quote from your letter,

"Question 1. Does a party who owns his own farm, when clearing same for cultivation, sell the timber to the best advantage come under the terms of the Wage and Hour Bill, if he sells some of the timber for pulpwood to be shipped to a mill in another state. (It is my opinion that such labor would be classed as farm labor, and therefore be exempt from the terms of the Wage and Hour Law.)

"Question 2. Does a man who occasionally buys a little timber, and cuts some into pulpwood, and sells same in the State where it was cut come under the terms of the Wage and Hour Law if the wood is later shipped to a paper mill outside of the state where same was cut and sold. (It is my opinion that the party above would be exempt for the reason that he is not a contractor and he does not follow the timber business as a profession. The sale of a few cars of pulp wood is only an incidental matter, or what we might say a side issue.)"

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.

The wage and hour provisions of the Act are applicable to employees "engaged in commerce or in the production of goods for commerce." Types of employees covered by that expression are described in our Interpretative Bulletins Nos. 1 and 5. We particularly invite your attention to the paragraphs numbered "2", "4" and "5" of Interpretative Bulletin No. 5. As indicated in those paragraphs, if a timber operator has reason to believe, at the time he produces timber, that an unsegregated part of it will move in interstate commerce, either as produced or after further processing, his employees would seem to be engaged in the production of goods for commerce within the meaning of the Act and, therefore, entitled to its benefits unless they are exempt as agricultural employees.

Section 13(a)(6) of the Act renders the wage and hour provisions inapplicable to employees employed in "agriculture." Agriculture is defined in Section 3(f) as including, in addition to ordinary farming operations, "any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." We are enclosing a copy of our Interpretative Bulletin No. 7, which deals with the interpretation of that part of Section 3(f) which has just been quoted.

Very truly yours,

For the General Counsel

By______________________
Milton C. Denbo
Chief Opinion Attorney

Enclosures (4).

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COPY

February 20, 1940.

LE:CAA:SM

Mr. W. E. Stewig
Assistant Cashier
The City National Bank of Kankakee
Kankakee, Illinois

Dear Mr. Stewig:

This will reply to your letter of December 13, 1939.

The precise question you ask is answered in paragraph 12 of the enclosed Interpretative Bulletin No. 4. There is no objection, however, if the employer computes the regular rate of pay by dividing the weekly salary by 42 hours. In such case, the employer may obviate the necessity for computing the regular rate of pay anew each week.

Very truly yours,

For the General Counsel

By ____________________
Milton C. Denbo
Chief Opinion Attorney

Enclosure

#59668