DEPARTMENT OF LABOR
Wage and Hour Division
Washington

LEGAL FIELD LETTER NO. 11 (2d Rev.)

SUBJECT: Authorization of Travel Originating Within Regions

For convenience, paragraph 11.07 of Division Instruction No. 36 is quoted below:

> "11.07--Sub-Letters of Authorization. Beginning September 1, 1940, the Regional Director shall authorize employees to travel through use of a standard sub-letter of authorization. Form AD-95 has been prepared for this purpose. This form may be used to authorize travel covering a specific itinerary, or to authorize general travel within the region during a quarterly period or a part of a quarterly period. These forms shall be numbered consecutively, as issued, and shall be prepared in quadruplicate or quintuplicate. Three copies shall be signed by the Regional Director or the Acting Regional Director, and shall be distributed as follows: one copy to the Administrative Branch; one copy to the traveler; and one copy to be attached to the first travel reimbursement voucher submitted thereunder. The fourth copy is for the files of the regional office, and a fifth copy may be made for the files of the branch office, when the traveler is assigned to a branch office."

Therefore, when it becomes necessary for travel to be incurred in connection with legal matters not covered by sub-letters of authorization issued by the Regional Director, attorneys shall request of the Regional Director such additional sub-letters of authorization as may be necessary to cover the required travel.

This procedure must be adhered to in order that control of the allotment of travel funds provided for each region can be accurately maintained and administrative direction of regional employees can be through the Regional Director.

DESTROY LEGAL FIELD LETTER NO. 11 (Rev.)

Issued 10/16/40

(5985)

COPY

Mr. A. L. Fletcher
Assistant Administrator

April 1, 1940

George A. McNulty
General Counsel

LE:DC:AEC

New Way Hosiery Company
Philadelphia, Pennsylvania
File 37-1361

The attached file shows that the New Way Hosiery Company dyes and converts full-fashioned hosiery which is purchased from other manufacturers, and also purchases for resale finished full-fashioned hosiery. In a memorandum dated November 4, 1939, which may be found in the attached file, I gave my opinion that employees engaged in converting full-fashioned hosiery are subject to the 40 cent minimum set in the Hosiery Minimum Wage Order. Also, a letter dated November 18 by Mr. Rauh has stated the opinion of this office that employees of a hosiery jobbing firm who are engaged in repairing, finishing and packing full-fashioned hosiery, are subject to the same 40 cent rate. These two opinions do not take care of employees of the New Way Hosiery Company engaged in (1) exclusively the purchasing for resale of finished full-fashioned hosiery, or (2) operations auxiliary to the entire business of the New Way Hosiery Company. I assume that any question of segregating the work of the auxiliary employees between that portion of a company's business dealing with the purchasing and resale of finished hosiery and that portion dealing with the converting of unfinished hosiery is academic.

In my opinion, the purchase of full-fashioned hosiery for resale is not covered by the Hosiery Minimum Wage Order. It follows, therefore, that the employees of the New Way Hosiery Company who work exclusively upon this portion of the Company's business are not covered by the 40 cent minimum wage rate.

In my opinion, all the auxiliary employees of the New Way siery Company whose work cannot be identified exclusively with the rchase and resale of finished hosiery are covered by the Hosiery imum Wage Order and the 40 cent minimum wage rate. The same prin- e must govern the coverage of these employees as that applicable ll non-productive employees in firms engaged in the production of for commerce.

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Attachment.

(4700)

COPY

April 16, 1940

Mr. Wesley Ash
Regional Director
San Francisco, California

LE:MCD:MBS

Philip B. Fleming
Colonel, Corps of Engineers
Administrator

Applicability of Section 13(a)(10) to dried fruit industry.

This is with further reference to your telegram of April 12, concerning the applicability of Section 13(a)(10) of the Fair Labor Standards Act to the dried fruit industry.

On July 13 the Administrator wrote to the Dried Fruit Association of California in reply to its petition for a redefinition of the term "area of production," as used in Section 7(c) of the act with respect to the dried fruit packing industry. The petition stated that the Association desired only a redefinition of the term "area of production" as used in Section 7(c), and not as used in Section 13(a)(10). In the Administrator's letter of July 13, a copy of which is enclosed, the petition for redefinition was rejected on the ground that the packing of dried fruits is not an operation described in that portion of Section 7(c) which is limited by the "area of production" requirement.

I wish now to point out that in my opinion the Section 13(a)(10) exemption is likewise inapplicable to the packing of dried fruits. As pointed out in paragraph 25, Fourth, of Interpretative Bulletin No. 14, the term "agricultural or horticultural commodities," as used in Section 13(a)(10), means the commodities as they come from the farm and before any change has been made in their natural form. As applied to fruits, the term would include only fresh fruits but would not include dried fruits. Thus, although the drying of fresh fruits, if conducted within the "area of production," is an exempt operation under Section 13(a)(10), the packing of the fruits once they have been dried is not an exempt operation.

For the reason stated in the foregoing paragraph, the forthcoming "area of production" hearings will relate to the drying of fresh fruits but they will not relate to the packing of fruits that have already been dried.

For your further information there is enclosed a copy of a letter dated January 5, 1940, addressed to Mr. Samuel A. Syme, Counsel for the Dried Fruit Association of California, in which the application of that Association for the exemption of dried fruit packing from the overtime provisions of the act under Section 7(b)(3) as an industry of a seasonal nature is denied.

(4700)

COPY

Mr. A. L. Fletcher
Assistant Administrator

April 1, 1940

George A. McNulty
General Counsel

LE:DC:AEC

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Philadelphia, Pennsylvania
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COPY

AIR MAIL

April 9, 1940

Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:IIS:SM

Joseph Rauh
Assistant General Counsel

Section 7(c); where the same crew is used in various establishments.

In response to your request for an opinion regarding paragraph 22 of Interpretative Bulletin No. 14, the assumption you make that it is immaterial that the employer employs the same crew in each of two establishments, moving them from one establishment to another as crops mature in the various localities in which his plants are situated, is correct if such establishments are actually separate, and if it is not a matter of several establishments located on the same or nearby premises and operated as a unit.

Unless this last condition exists, there is a separate 14 workweeks exemption for each establishment.

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COPY

March 27, 1940

Richard E. Cotton
Associate Attorney
Atlanta, Georgia

LE:IS:ML

Joseph Rauh
Assistant General Counsel

Opinion re digging up and balling shrubs and trees.

This will reply to your memorandum of February 23, 1940, requesting an opinion as to whether the operations of digging up and balling shrubs and trees grown in a nursery and storing such shrubs and trees are exempt under the agricultural exemption.

The digging up of shrubs would seem to come within the language "production, cultivation, growing and harvesting of any agricultural or horticultural commodities," which is found in section 3(f) and would therefore appear exempt. As for the balling and storing of the shrubs, if the employees ball and store only the shrubs and trees which their employer himself has grown, those activities would appear to be practices performed by a farmer as an incident to or in conjunction with his farming operations and hence also exempt. See paragraph 10(b) of Interpretative Bulletin No. 14.

On the other hand, if the balling and storing operations are performed not only upon the shrubs and trees grown by the employer but also upon the shrubs and trees obtained by the latter from others, there would be no exemption for those operations under sections 13(a)(6) and 3(f). Exemption, if any, would have to be sought in section 13(a)(10). With respect to that, attention is called to paragraphs 25 through 28, 33 and 37 of the bulletin, and to the "area of production" regulations.

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COPY

March 23, 1940

Alex Elson
Regional Attorney
Chicago, Illinois

LE:KCR:JR

Joseph Rauh
Assistant General Counsel

Letters dated March 4, 1940, from you to Mr. George W. Gates and Mr. Harold A. Becker. Symbols LE:CK-F

In your letter to Mr. Gates the suggestion was made that a workman temporarily "laid off" as an employee who was given an order to make a sign for his former employer is an independent contractor and that upon his subsequent reemployment by the company, the work performed by him after hours in completing the sign is not covered employment because his designation as an independent contractor in the first instance would carry over to the work after hours after his reemployment.

Aside from the question of whether or not a workman temporarily laid off as an employee of the company is an independent contractor when he is given an order to perform a special job for the company, it would seem that after his reemployment, work performed by him after hours should be considered as hours worked by the employee. In other words, it seems unrealistic for a person to be designated as an employee for 42 hours and an independent contractor for some additional hours in the same workweek when all the work is performed for the same employer on the premises of the employer. I also believe that Mr. Gates should be advised that with respect to the original order for the construction of the sign, the Fair Labor Standards Act contains a statutory definition of the employer-employee relationship, and, inasmuch as the construction of the sign would appear to have been performed on the premises of the company with materials furnished by the company, the courts would probably hold that the workman was an employee rather than an independent contractor.

In the letter to Mr. Becker the statement is made with respect to an "in commerce" case that employees "whose work is necessary to" interstate transactions are within the coverage of the act. In paragraphs 14 and 15 of Bulletin No. 5, in order to distinguish "in commerce" cases from the "production for commerce" cases, we use

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the language that employees in the former who perform work in connection with or, incidental to, interstate transactions are covered. In your letter to Mr. Becker you also state that bottlers of beverages whose sales are made within the state are engaged in intrastate commerce. Reference should have been made to paragraphs 2 through 6 of Bulletin No. 5 as to those instances in which goods are produced for interstate commerce although sales are made within the state. Also, reference should have been made to paragraph 10 of Bulletin No. 5, on the question of a processor importing his raw materials, because that paragraph gives a fuller discussion than is contained in your letter. While your letter to Mr. Becker does not so disclose, it may be that some of the beer and beverage distributors may be engaged both in bottling their own products and in distributing other products received from outside the state. In that event there might be employees engaged in distributing products received from outside the state and also engaged in distributing the locally produced product in the same workweek. Even assuming that the distributors are bottling their own products for local consumption within the meaning of paragraph 10 of Bulletin No. 5, the employees will thus be covered in such workweeks.

COPY

March 23, 1940

Mr. Charles R. Hersum
Acting Regional Director
Kansas City, Missouri

LE:CAA:EMC

Joseph Rauh
Assistant General Counsel

Request for Interpretation

This will reply to your memorandum of March 6, 1940, in which you present the following case:

A local manager of the Standard Oil Company violated instructions and permitted the employees to work overtime. Upon discovery of the overtime, which was not paid for over a period of months, the company sought to compensate the employees by giving them time and one-half off the regular number of hours worked for each hour of overtime worked. The employees were paid during the time which they were thus off duty. You ask whether in computing restitution the employer may be given credit for the amounts so paid while the employees were off duty. The question, of course, is whether the employees were paid the overtime compensation due them.

It is clear that if the employer paid his employees in cash for overtime previously worked and unpaid at the regular pay period the amount so paid may be credited by him as overtime compensation. Nevertheless, a violation of the provisions of section 7 of the act would still have occurred. The employees may still sue under section 16(b) to recover an equal amount as liquidated damages. However, so far as we are concerned, restitution would have been made. If in such case the employer decided that because he had paid up the employees' overtime he was going to lay them off without pay and thereby make up for the amounts of overtime paid up, nothing in the act would forbid him from so doing.

This, in effect, is what the employer in the case apparently did. The question as to whether the amount paid during the time the employee was laid off constituted compensation for the overtime previously worked, would depend upon whether the employee was or was not entitled to be paid during such time off. If he was not, and if the employer did not customarily pay him while off for such periods, the amount so paid the employee may be considered as overtime compensation and may be credited to the employer in determining the amount of restitution. However, it is clear that a violation of section 7 occurred in such case and that the employees still retain their rights under section 16(b).

(4700)

COPY

March 21, 1940

Alex Elson
Regional Attorney
Chicago, Illinois

LE:CAA:AP

Joseph Rauh
Assistant General Counsel

National Carloading Corporation
Chicago, Illinois
In reply to your memorandum of January 5, 1940

File No. 12-345

Mr. Delany presents the case where 48 hours is fixed as the basic workweek in a union agreement and the employee's regular rate of pay arrived at by dividing the weekly salary by 48; however, actually, the employees do not work 48 hours but hours which vary between 40 and 46, averaging 44 or 45.

We have consistently taken the position that an agreed number of hours may not be taken as the basis for computing the employee's regular rate of pay if such agreed number of hours is in excess of the number of hours actually worked, or if the employee actually works a fluctuating number of hours. The reasons for our position are (1) we interpret the regular rate of pay at which the employee is employed to be the regular rate of pay at which he is actually employed, and (2) we fear that any other position would open up the possibility of nullifying the effect of the overtime requirements of the act by permitting an excessive number of hours to be agreed upon as the basis for computing the regular rate of pay.

To adopt the agreed workweek as the basis for computing the regular rate of pay but to first find as a fact "that the agreed workweek has not been fictitiously adopted in order to decrease the regular rate of pay for overtime purposes," imposes a task of great magnitude, which we do not believe to be administratively feasible nor in accordance with the best interpretation of section 7.

As you know, a particular union may not be in sympathy with the spread-the-work aims of section 7, and may be willing to resort to the device of agreeing upon a number of hours as constituting the workweek, whereas such number will not actually be worked, in order to avoid the effect of the overtime requirements of the act. An agreement to enter into such method of evading overtime payment is secured because of the union's fear that hours and total wages may

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