UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

February 11, 1941

Legal Field Letter

No. 44

Attached Opinions

Copies of recent opinions on subjects indicated below are furnished herewith for your information and proper notation in the opinion manual.

MEMORANDA

Date	From	To	Subject
1-13-41	Rufus G. Poole (AED)	Walter C. Bryan	Application of Embroideries Industry Wage Order to Manufacture of Chenille-Dotted Veiling. (p. 199, par. C; p. 256, par. R)
2-3-41	Rufus G. Poole (ADH)	John M. Gallagher	Crescent Leather Goods Co. Philadelphia, Pennsylvania File No. 37-4369 (Collective bargaining agreement exemption under section 7(b)(1) — agreement does not contain a provision that the employer would not employ its employees for more than 1,000 hours in any period of 26 consecutive weeks.) (p. 60, par. D; p. 91, par. R.)
2-4-41	Rufus G. Poole (FR)	Arthur E. Reyman	Truck drivers employed by retail and wholesale establishments. (p. 38, par. 9; p. 194, par. (h).)
2-7-41	Rufus G. Poole (GFH)	Dorothy M. Williams	Gold Seal Tank Corporation Long Beach, California File: 4-621 Manufacturing and installation of oil storage tanks. (p. 138, par.E)
2-8-41	Rufus G. Poole (GFH)	Samuel P. McChesney	L. H. Herman Drug Company St. Joseph, Missouri File No. 24-1857 (KCL:TOM:LG) (Applicability of Act and the section 13(a)(2) exemption to various enumerated chain store employees.) (p. 69, par. M; p. 102, par. DD; p. 144, par. M.)

(7318)

Legal Field Letter

No._____

LETTERS

Date	To	Subject
1-31-41	O. R. McGuire Washington, D. C.	(Applicability of Act to marine construction work.) (p. 176, par. 5.)
2-3-41	Frank Scheiner New York, N. Y.	(Whether the manufacture of metal pocketbook frames is subject to ladies' handbags division of the apparel wage order.) (p. 199, par. C; p. 256, par R.)
2-4-41	T. C. Carroll Covington, Kentucky	(Computation of hours worked; whether trackmen (so-called section laborers) of a railroad should be for the period between the time they report at the tool house of a particular track section and the time when they arrive at the point where the work is to be done.) (p. 123, par. 18.)
2-5-41	Philip H. Zittel New York, N. Y.	(Whether employees of an art auction gallery are exempt under section 13(a)(2).) (p. 69, par. M; p. 102, par. DD.)
2-5-41	Gilbert H. Carter Nevada, Missouri	(Meaning of word "station" under section 13(a)(11) exemption.) (p. 76, par. R; p. 115, par. LL; p. 261, after par. DD.)
2-8-41	Daniel R. Forbes Washington, D. C.	(Applicability of section 7(c) and 7(b)(3) exemptions to the handling of carry-over stock from previous season and the warehousing of such carry-over stock.) (p. 68, par. 6; p. 74, par. P; p. 94, par. T; p. 99, par. (c).)
2-10-41	S. J. Levenson New York, N. Y.	(Applicability of Act and the section 13(a)(2) exemption to a corporation buying, selling, and repairing old silver.) (p. 69, par. M; p. 102, par. DD; p. 142, par. I.)

Issued 2/13/41

In Reply Refer To:
LE:AED:RBS

January 13, 1941

To: Walter C. Bryan
Regional Attorney
New York, New York

From: Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Subject: Application of Embroideries Industry Wage Order to Manufacture of Chenille-Dotted Veiling.

Further reference is made to your communication of November 19, 1940, with respect to the application of wage orders to the manufacture of chenille-dotted veiling. In our memorandum of January 6, we advised you it was the opinion of this office that the employees therein described were not subject to the wage orders of the Administrator for the Textile, Millinery or Apparel Industries, and that in disposing of a case involving employees so engaged who were paid less than the statutory minimum rate, it was not necessary to take into account the recommendation of the Industry Committee for Embroideries since no wage order was in effect.

We are, however, of the opinion that employees engaged in cutting or stamping circular pieces from chenille goods who attach these pieces by a pasting, cementing or sewing process to veiling piece goods, are engaged in activities covered by the definition for the Embroideries Industry under the wage order issued by the Administrator on December 28, 1940, which is to become effective on January 27, 1941. We suggest, therefore, that you advise employers whose employees are engaged in performing the above operations that commencing January 27, 1941, such employees must be paid not less than 37½ cents an hour.

In order that the information at our disposal in connection with this question may be comprehensive, it would be appreciated if you would forward to this office for our examination any files or other material which you may have dealing with this subject.

(7318)

C O P Y

LE:ADH:HWJ:MF

John M. Gallagher, Esquire
Regional Attorney
Philadelphia, Pennsylvania

February 3, 1941

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Crescent Leather Goods Co.
Philadelphia, Pennsylvania
File No. 37-4369

This is in reply to your memorandum of December 17, to which was attached a letter from the attorney for the subject company. In his letter the attorney claims for the company the benefit of the exemption contained in section 7(b)(1) of the Fair Labor Standards Act, even though the collective bargaining agreement entered into between the subject company and the Suitcase, Bag and Portfolio Makers' Union, Local 61 of Philadelphia, an affiliate of the parent, the International Ladies' Hand Bag, Pocketbook and Novelty Workers Union, did not contain a provision that the company would not employ its employees for more than 1,000 hours in any period of 26 consecutive weeks.

We believe that the lawyer's position is completely untenable. Section 7(b)(1) of the Fair Labor Standards Act provides:

> "No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed--in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks."

The contract in the instant case is fatally defective inasmuch as it does not provide "that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks." The

requirements of section 7(b)(1) are clearly set forth in paragraphs 16 through 20 of Interpretative Bulletin No. 8. In paragraph 17 thereof it is stated "the agreement by its own terms must set one thousand hours as the absolute maximum which any employee sought to be employed pursuant to the provisions of section 7(b)(1) may work in any period of twenty-six consecutive weeks."

I believe that you should call the above facts to the attention of the company's attorney and also point out to him the material contained in paragraphs 4 through 9 of Interpretative Bulletin No. 8, which set forth the position of the Wage and Hour Division as to the effect of the act upon existing collective agreements.

You should also point out to the attorney the material contained in paragraphs 13 through 15 and 32 and 33 of Interpretative Bulletin No. 8, which deals with the requirement of certification of the union by the National Labor Relations Board. As of this date we have no record that either Local 61 or the parent union has been certified as required by the act. It should be pointed out to the attorney that certification by the National Labor Relations Board is a condition precedent to entering into a valid contract under section 7(b)(1).

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(7318)

LE:FR:DH:HS

C O P Y

Arthur E. Reyman, Esquire
Regional Attorney
Cleveland, Ohio

February 4, 1941

Rufus G. Poole, Assistant Solicitor
In Charge of Opinions and Review

Truck drivers employed by retail
and wholesale establishments.

This will reply to your memorandum of January 16, 1941, in which you inquire as to the applicability of the Fair Labor Standards Act in the following two cases:

> "The owner of a strictly retail establishment employs truck drivers who make ordinary routine deliveries of their employer's merchandise. The owner of the retail establishment has an agreement with the owner of a nearby wholesale establishment which provides that on the basis of a given consideration the owner of the retail establishment will have his truck drivers deliver orders which are filled by the wholesaler to the latter's customers. Since it is possible for a single establishment to make wholesale sales up to and including as much as 49 per cent of its total sales by volume, it would seem reasonable to say that the drivers employed by the retail establishment may make deliveries of wholesale merchandise and still be within the 13(a)(2) exemption, so long as the dollar value of the merchandise so delivered does not exceed 49 per cent of the total amount of merchandise delivered.
>
> "In the second situation the employer is engaged in both a retail and wholesale business but maintains a definite segregation of the two branches of the business within the establishment. Most of the goods sold is delivered by truck. The question presented then is, can an employee who is employed solely in the retail department be permitted to deliver packages from the wholesale department while

> engaged in the delivery of packages for the retail department without being compensated in accordance with the provisions of the Act?"

The second situation presented is the simpler, since in that case the truck driver is performing exempt and non-exempt work for the same employer. In other words, if he delivers for the wholesale establishment he is not "employed solely in the retail department"; the segregation is not maintained as to him.

With respect to the first situation, the 13(a)(2) exemption is likewise lost to the truck driver since he is working for more than one establishment during a workweek. This result is reached on any of three possible approaches;

> (1) the case presented is that of a joint employment as in paragraphs 16 and 17 of Interpretative Bulletin No. 13 and the employee is doing some covered non-exempt work; or
> (2) the truck driver is performing exempt and non-exempt work for an employer who, in so far as his business is lending the use of his truck drivers, is not conducting a retail establishment; or
> (3) the truck driver's work in any one week does not find him "in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce," but rather finds him working in more than one establishment, one of which is not a retail establishment.

It is, however, possible that the employees may be exempt under section 541.4 of the regulations, if all of the requirements, including the 20 percent provision, are met.

AIR MAIL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

LE:GFH:RFP

Rufus G. Poole
Associate Solicitor
In Charge of Opinions and Review

February 7, 1941

Gold Seal Tank Corporation
Long Beach, California
File: 4-621

Manufacturing and installation of oil storage tanks

This is in reply to your communication under date of October 26, 1940, with regard to the above subject. I regret that due to the great flood of inquiries which we have received from the field in recent months, an earlier reply has not been possible. You inquire if, in my opinion, (1) employees engaged in manufacturing petroleum storage tanks for sale to oil companies producing oil within the state for interstate commerce are within the coverage of the act, and (2) if employees engaged in installing such tanks at the oil well site within the state of production are subject to the act.

It appears that the tanks are installed by the subject company at the time an oil well is being brought into production. The oil company to whom the tanks have been sold then pumps oil from the oil well into the tank. Subsequently, the oil is either transported from the drilling site directly through pipe lines or is taken away by tank trucks. Some of the oil from the tanks, after being refined, is sold in interstate commerce.

We are not prepared at this time to render a definite opinion regarding the employees engaged in producing these storage tanks. As you know, the enforcement policy of the division with regard to cases of doubtful coverage is outlined in Legal Field Letter No. 15 (Revised).

However, it is our opinion that employees engaged in installing such storage tanks are to be deemed covered as engaged in a process or occupation necessary to the production of

goods for commerce. Moreover, the courts may well hold that such installation operations are so integrally connected with the drilling and pumping operations as to render them a "production" of petroleum as fully as the erection of an oil well derrick, which we have consistently held to be within the coverage of the act. No conflict exists, in my opinion, between this position and the opinion expressed in paragraph 12 of Interpretative Bulletin No. 5. The reasoning in the second paragraph on page 17 of Legal Field Letter No. 35 appears to me to apply precisely to the installation operations which you describe.

Samuel P. McChesney, Esquire
Acting Regional Attorney
Kansas City, Missouri

LE:GFH:ELN

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

February 8, 1941

L. H. Herman Drug Company
St. Joseph, Missouri
File No. 24-1857
(KCL:TOM:LG)

This is in reference to your memorandum of November 20, 1940. You state that the subject company owns and operates eight retail drug stores in the city of St. Joseph and that in Store No. 1 three employees are employed in a segregated room in which goods received from without the state are handled and distributed to all the retail stores. Also in Store No. 1, a central executive office is maintained to serve all the retail stores. One janitor has worked in Store No. 1 in the retail end thereof, and in the receiving and storage room, and in the central executive office.

It is our opinion that the three employees engaged in the segregated receiving and storage room properly fall within the coverage of the act, this room being comparable to a warehouse.

The two employees of the executive office maintained for all the retail stores likewise fall within the general coverage of the act in view of their operations in connection with assignment of the interstate goods to the various retail outlets. We have consistently taken this position with regard to chain stores.

If the retail portion of Store No. 1 is entitled to the section 13(a)(2) exemption, the janitor would be exempt from the provisions of the act during any workweek in which his activities were confined solely to that portion of the store. However, during any workweek in which the janitor, in addition to his duties in the retail portion of Store No. 1, performs any work for either the receiving and storage room or the central executive office, he would not be within the exemption of the act.

In Reply Refer To:
LE:GFH:MF

January 31, 1941

O. R. McGuire, Esquire
Southern Building
Washington, D. C.

Dear Mr. McGuire:

I have read with great interest your communications of October 8, November 12, December 9, and December 13, 1940, in which you set forth arguments and authorities for your position that the Fair Labor Standards Act should not apply to employees engaged in marine construction work. It is your position that employees of a marine construction contractor engaged, for example, in dredging a harbor, building a sea wall, building a pier attached to the land, or building or repairing a bridge - whether for a highway authority or for a railroad - are not engaged in commerce or in the production of goods for commerce and hence are not covered by the Act.

After giving your arguments careful consideration, we have concluded that the position which we have taken in paragraph 13 of Interpretative Bulletin No. 5 is correct. Moreover, it is our opinion that as a general proposition, employees of contractors engaged in maintaining and improving navigable waters in the United States, with a view to enhancing their efficiency as essential instrumentalities of interstate or foreign commerce, are engaged in interstate commerce, and subject to the act.

You point out that in section 3(b) of the act it is stated that "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." You argue that since marine construction employees are not engaged in any of the activities enumerated in that section, it follows that they are outside the scope of the act. Of course, you will agree that the terms employed in section 3(b) are highly technical legal terms, carrying a connotation far more complex and comprehensive than would be attached to the same symbols if they were used in ordinary laymen's conversations. "Commerce" as used in section 3(b) is a term which carries in its significance a great number of authoritative court decisions. By a long process of accretion, the term has acquired a significance which can hardly be embodied in any cuccinct formula. One must consider the actual facts of the decisions in which the term has been defined. We believe that there is ample judicial authority for our position that employees engaged in maintaining, repairing, or reconstructing essential instrumentalities of commerce, including navigable waters, are engaged in commerce, and hence subject to the act.

(7318)

In approaching questions of coverage under the Fair Labor Standards Act, where construction workers are engaged in the employments you describe, it is clear that a conclusive answer may be given only with respect to particular situations. In each case, the question to be answered is whether the activities of the employee are so closely related to interstate commerce as to be a part of that commerce.

Unfortunately the precise details of the activities of the employees to whom you refer are not described in your memorandum of October 8 with sufficient particularity to enable me to advise you with respect to their status under the act as precisely as I should like. You state on page 5 of your memorandum, however, that the dredging employees described by you are not engaged in the production of goods for commerce by the obtaining of the materials which accumulate in navigable waters, but that the chief purpose of these dredging operations is, as you point out, usually the deepending of the river or harbor and removing obstructions therein. If such rivers or harbors are regularly utilized by craft which ply in interstate commerce, it would seem even on this incomplete statement of facts that the dredging employees are engaged in work designed to protect and facilitate such interstate commerce and that the employee engaged in such work is as much engaged in interstate commerce as an employee engaged in the repairing of an interstate bridge, track, engine, or car. Pedorson v. Delaware, Lackawanna & Western R. Co., 299 U.S. 146. It is also of interest to note in this connection that the Supreme Court of the United States in the recent decision of United States v. Appalachian Electric Power Company (U.S. S. Ct., No. 12 - October term, 1940, decided December 16, 1940) held that a waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken.

With respect to the original construction of a pier, a bridge or a sea wall, on the basis of the meager facts contained in your communication, I can only refer you again to paragraphs 12 and 13 of Interpretative Bulletin No. 5. Even the original construction of certain bridges and piers might well be held by the courts to fall within the coverage of the act if in fact such operations tended sufficiently to enhance the streams of navigable waters as means of interstate transportation. Furthermore, where, as is frequently the case, the construction of a levee or similar structure directly operates to improve or protect the navigability of a river, harbor or other navigable water of the United States, employees engaged in such construction work, whether original or repair, are, in our opinion, properly to be deemed engaged in interstate commerce. Such construction work might be covered by the Fair Labor Standards Act, even if it did not directly improve navigability. Again the case of United States v. Appalachian Electric Power Company (citation supra) is of interest:

> "In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation . . . . Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control . . . . That authority /the commerce power/ is as broad as the needs of commerce."

With regard to the maintenance, repair or reconstruction of piers and bridges, however, assuming that under the particular circumstances such items are properly to be viewed as essential instrumentalities of commerce within the meaning of paragraph 13 of Interpretative Bulletin No. 5, it is our opinion that employees engaged in maintaining, repairing, or reconstructing such structures, are properly to be deemed covered by the act. There would not appear to be any appreciable distinction in legal contemplation between such construction work and the repair and maintenance of a highway, a railroad bridge or track, or any other essential instrumentality of interstate commerce.

I have obtained the file containing the pleadings in the case of Wohlgemuth v. Dickie Construction Company, to which you refer in your letter of December 13. It did not appear to be clear whether the employee was engaged in connection with the original construction of a new telephone building or the reconstruction of the existing building. Hence, it seems that the true significance of the decision cannot be estimated until sufficient evidence is available to resolve this question of fact.

Very truly yours,

Gerard D. Reilly
Solicitor of Labor

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184250

In Reply Refer To:
LE:JDH:EW

Feb. 3, 1941

Frank Scheiner, Esquire
270 Broadway
New York, New York

Dear Mr. Scheiner:

Your letter of November 26, 1940, addressed to the New York regional office of the Wage and Hour Division, has been referred to me for answer.

You refer to manufacturers who make metal pocketbook frames and who are paying a minimum wage of 30 cents an hour. A 35 cent minimum wage rate became effective for the ladies' handbags division of the apparel industry on July 15, 1940. This division was defined to include "the manufacture of ladies', misses' and children's handbags, pocketbooks and purses from any material of any kind or nature except metal handbags, pocketbooks, purses and mesh bags." It will be noted, however, that this is one of the divisions of the apparel industry over which the committee was given jurisdiction for the recommendation of minimum wages. The apparel industry over which the apparel industry committee was given jurisdiction was defined as including "the manufacture of all apparel, apparel furnishings and accessories made by the cutting, sewing or embroidery processes." In general, the minimum wage rate applicable to the manufacture of a specified article does not apply to the manufacture of parts which are made by processes other than the cutting and sewing processes characteristic of the apparel industry.

On the basis of the facts submitted in your letter, therefore, it is our opinion that the wage order for the ladies' handbag division of the apparel industry does not apply to firms which are engaged in the manufacture of metal pocketbook frames.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

185559

(7318)

February 4, 1941

LE:FR:AF:HS

C O P Y

Mr. T. C. Carroll, Vice-President
Brotherhood of Maintenance of Way Employees
711 Scott Boulevard
Covington, Kentucky

Dear Mr. Carroll:

This is in reply to your letter of January 24, 1941, in which you ask whether trackmen (so-called section laborers) of the Georgia and Florida Railroad should be paid for the period between the time they report at the tool house of a particular track section and the time when they arrive at the point where the work is to be done. You cite paragraph 12 of the Division's Interpretative Bulletin No. 13 in support of your contention that trackmen are entitled to be paid for the period in question.

You are correct in your understanding. Trackmen under the conditions you describe begin work, in our opinion, at the time they are required to assemble at the tool house. See paragraphs 2 and 12 of Interpretative Bulletin No. 13, a copy of which is enclosed.

Note that section 16(b) of the act authorizes employees to institute suit to recover double the amount of alleged unpaid minimum wages or unpaid overtime compensation.

For your information I am also enclosing a copy of the Workers Digest and a Confidential Complaint Form which you may file with the regional office indicated on the attached pink slip. If, after studying the enclosed material, you have any further questions, please do not hesitate to call upon me again.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (4)

(7318)

In Reply Refer To:
LE:FR:AMS

Feb. 5, 1941

Mr. Philip H. Zittel
3206 - 3rd Avenue
New York, New York

Dear Mr. Zittel:

This will reply to your letter of December 5, 1940, in which you give further details concerning your employment in an art auction gallery. You state that the goods sold come from other states. You also state that certain of the customers of the gallery are dealers who resell at a profit, and the rest are private people who reside in the state although there are some buyers from other states who have their purchases shipped out to them. However, you state that it is your opinion that less than 50 percent of the sales are to people in other states.

It does not appear from your letter whether 50 percent of the sales at the auction gallery are to individual private consumers. If 50 percent or more of the sales are to individual private consumers, employees of the gallery would be exempt as employees of a retail establishment, the greater part of whose selling is in intrastate commerce. (See paragraphs 5 through 9, 24 and 25 of Interpretative Bulletin No. 6, a copy of which I sent you. See also release G-27). If, on the other hand, over 50 percent of the sales are non-retail sales, the exemption would be inapplicable. If such is the case, it is my belief that employees of the gallery would be entitled to the benefits of the act, except those who may meet one of the definitions described in Regulations, Part 541, a copy of which I sent you.

With respect to those galleries who send their employees out of the state to hold an auction at an owner's home, it is possible that the auctioneer will be exempt under Parts 541.4 or 541.5 of Regulations, Part 541. The auctioneer's assistants may be exempt under Part 541.4. All of the requirements of the applicable definition must of course be satisfied.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

182675

(7318)

In Reply Refer To:
LE:FR:ESG

February 5, 1941

Gilbert H. Carter, Esquire
Ewing, Ewing & Ewing
Nevada, Missouri

Dear Mr. Carter:

Reference is made to your letter of October 23, 1940, in which you inquire about the applicability of the Fair Labor Standards Act of 1938 to employees of a telephone company.

The act, a copy of which is enclosed, which became effective on October 24, 1938, applies to employees engaged in interstate commerce or in the production of goods for interstate commerce. On August 9, 1939, an amendment to the act, designated section 13(a)(11), was enacted. This amendment, which was not retroactive, removed from the wage and hour provisions of the act "any switchboard operator employed in a public telephone exchange which has less than five hundred stations." It should be noted that the exemption relates solely to switchboard operators and does not include maintenance and other employees of telephone companies. It should be noted further that the term "station" as used in the exemption means a telephone transmitting and receiving instrument and includes extension telephones and telephones for which switching service is provided. It is our opinion that employees of public telephone exchanges who do not fall within the scope of the exemption should be considered as subject to the act.

The foregoing discussion represents the opinion of this office, and is based on a study of the legislative history of the act and of the amendments thereto. You will note that in the case you put, each of the farmers' telephones would be considered a station and so would each of the phones in the hotel.

As is suggested in paragraph 9 of bulletin No. 5, the applicability of the act is not affected by the amount of work which an employee performs in interstate commerce.

Section 13(a)(2) of the act provides that the wage and hour provisions shall not apply to "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Enclosed herewith is a copy of Interpretative Bulletin No. 6 which discusses this exemption, and your attention

is particularly directed to paragraphs 10 through 15 thereof. On the basis of the information contained therein, you will note that your business is not considered to be a "service establishment" within the meaning of this exemption.

For your information, I am also enclosing copies of Interpretative Bulletins Nos. 1, 4, and 13; Regulations, Parts 516 and 541; and the Employers' Digest. 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 Solicitor

By _____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Enclosures (9)

(7318)

copy

In reply refer to:
LE:ILS:NC

February 8, 1941

Daniel R. Forbes, Esquire
National Preservers Association
839 Seventeenth Street
Washington, D. C.

Dear Mr. Forbes:

This will reply to your letter of December 11, 1940, concerning the applicability of sections 7(b)(3) and 7(c) of the Fair Labor Standards Act to a particular factual situation.

You indicate that it is a customary procedure in canning plants for the employees during the canning season to move canned fruits and vegetables, which have been carried over from the previous canning season, either from one place to another within the cannery or from the cannery to a place outside thereof. You inquire whether or not the handling of this canned stock would defeat the exemptions?

With respect to the section 7(c) exemption, we have consistently stated that that exemption applied only to employees of the cannery engaged in canning perishable or seasonal fresh fruits and vegetables or in operations that are an integral part thereof. See paragraph 23(a) of Interpretative Bulletin No. 14, which indicates the tests that must be met in order for the exemption to apply to particular employees. In my opinion the handling of carry-over stock is not exempt under section 7(c) and in any workweek in which an employee handles such stock, the exemption is inapplicable to him.

With reference to the section 7(b)(3) exemption, you are aware of the fact that that exemption applies on an industry basis. See the enclosed copy of release R-974. If the warehousing operations about which you inquire are operated exclusively in connection with the canning of fresh fruits or vegetables by a particular cannery, it is my opinion that the exemption applies also to the warehousing of carry-over stock. The exemption is lost, however, if products other than canned fresh fruits or vegetables are handled in the warehouse, or if canned goods prepared in other canning plants are stored there.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

Enclosures (2)
cc Mr. Harold Stein

(7318)

In Reply Refer To:
LE:FR:MF

February 10, 1941

Mr. S. J. Levenson
51 East 42nd Street
New York, New York

Dear Mr. Levenson:

This will reply to your letter of December 18, 1940, in which you give further details as to the activities of the corporation engaged in buying, selling, and repairing old silver. You state:

> "The repair work is segregated to a separate corporation, and so must be treated as a separate entity. The repairs consist of polishing, removing dents, repairing broken handles, etc. which includes minor solder work and hinges; to a small extent, silver-plating and engraving."

If some of the silver thereafter leaves the state, it is the opinion of this office that the employees engaged in the repair work are within the general coverage of the act and are not exempt under section 13(a)(2) to which I referred in my letter of December 14, 1940.

If the repair work is completely segregated from the distributional activities of the company, the employees engaged solely in distributional work may be within the 13(a)(2) exemption if the greater part of the sales of the distributional establishment are in intrastate commerce and if at least 50 percent of its sales are at retail.

Very truly yours,

For the Solicitor

By_____
Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review

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