UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

March 7, 1941

Legal Field Letter

No. 46 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
2-26-41	Rufus G. Poole (ADH)	Llewellyn B. Duke	Pickup and Delivery Service Contracts. (p. 61, par. E; p. 62, par. F; p. 115, par. MM; p. 116, par. NN.)
2-27-41	Rufus G. Poole (FR)	Samuel P. McChesney	Seiden's 935 Broadway Kansas City, Missouri (Whether a store engaged in selling and storing furs, as well as repairing old coats is exempt under Section 13(a)(2).) (p.69, par. M; p. 102, par. DD.)
3-5-41	Rufus G. Poole (ILS)	Dorothy M. Williams	Application of Section 13(a)(6) and Sections 7(c) and 7(b)(3) to winery employees. (p. 51, par. A; p.66, par. L; p. 74, par. P; p. 94, par. T; p. 95, par. U; p. 106, par. HH.)
3-5-41	Rufus G. Poole (KCR)	Aaron A. Cohen	Fred Harvey Cleveland, Ohio File No. 34-3188 (Applicablility of Act to operations of a company operating a storeroom which services a shopper's mart and five news stands and a commissary which services restaurants located in a terminal building.) (p. 193, par. J.)

Legal Field Letter
No. 46

LETTERS

Date	To	Subject
2-24-41	Ernest W. Greene Washington, D. C.	(Whether Section 7(c) exemption applies to employee engaged in transporting by truck raw sugar from sugar mills to company's warehouse.) (p. 38, par. 9; p. 69, par. 10; p. 100, par. (g); p. 239, after par. A.)
2-25-41	E. M. Burch St. Paul, Minnesota	(Whether investigators who ride on trains to observe the collections of fares and conduct of train crews are covered by the Act.) (p. 25, par. A; p. 191, par. (e).)
2-27-41	Hon. J. Hardin Peterson Washington, D. C.	(Interpretation of Section 7(c) and 7(b)(3) exemptions with respect to canning of perishable or seasonal fresh fruits and vegetables and with respect to repair and maintenance work during the dead season.) (p. 39, par. I; p. 68, par. 6; p. 74, par. P; p. 94, par. T; p. 99, par. (c).)
3-3-41	John A Kneeland White Plains, New York	(Applicability of Act to installation of heating systems in industrial buildings which are used to produce goods for commerce.) (p. 138, par. E.)
3-3-41	Robert W. Davis Washington, D. C.	(Applicability of Section 13(b)(2) to a manufacturer who operates his own boats and bargos for the purpose of hauling his logs to the factory.) (p. 61, par. E; p. 116, par. NN; p. 191, par. 5.)

Llewellyn B. Duke, Esquire
Regional Attorney
Dallas, Texas

LE:ADH:MGA

February 26, 1941

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

Pickup and Delivery Service Contracts

This is in reply to your memorandum of December 11, 1940, in which you raise certain questions in regard to the coverage of the employees of the O. K. Warehouse Company under the Fair Labor Standards Act and the applicability of the exemption contained in section 13(b)(1) thereof to them. I regret that an earlier reply has been impossible inasmuch as it has been necessary to confer with representatives of the Interstate Commerce Commission before rendering any opinion to you. Set forth below is a statement of our present position in regard to the various types of service performed by this company.

1. (a) The Interstate Commerce Commission informs us that drivers engaged in transporting mail mail from Montgomery Ward & Company to the post office and from the post office to Montgomery Ward & Company are engaged in transportation in interstate commerce within the meaning of the Motor Carrier Act. Such drivers are, therefore, within the exemption contained in section 13(b)(1).

(b) The employees who are engaged in delivering goods for the retail store operated by Montgomery Ward & Company might well be exempt under section 13(a)(2) as employees engaged in a retail establishment, if their work is devoted exclusively to the delivery of goods for a store of Montgomery Ward, which qualifies as a "retail establishment" under section 13(a)(2). Their immediate employer would not be considered as operating a service establishment within the meaning of the exemption, but these particular employees, by virtue of their exclusive activities with the Montgomery Ward & Company retail store, might be considered as engaged in a retail establishment. See, also, the local retailing capacity definition, section 541.4 of Regulations, Part 541.

2. In regard to the truck drivers engaged in performing pickup and delivery service under contract between the employer and a railroad, the Interstate Commerce Commission has held that drivers engaged in this service are not within the Commission's regulatory power under section 204 of the Motor Carrier Act, Scott Bros., Inc., 4 MCC 551 (1938). Further, the Commission has not considered the employer subject to Part I of the Interstate Commerce Act. Hence, our position prior to the passage of the Transportation Act of 1940 was that these drivers were not within the exemption provided by section 13(b)(1) or 13(b)(2) of the Fair Labor Standards Act.

Section 202(c)(2) of the Transportation Act of 1940 raised the question as to whether the status of these employees was changed thereby. We have held several informal conferences with representatives of the Interstate Commerce Commission in regard to this matter. The Commission feels that the status of such employees, as far as any regulation by the Commission under the Motor Carrier Act is concerned, has not been changed by virtue of section 202(c)(2) of the Transportation Act of 1940. It also feels that section 202(c)(2) does not make these employees the employees of the railroad. In our opinion, therefore, the employees are not exempt by virtue of section 13(b)(1) or 13(b)(2) of the Fair Labor Standards Act.

3. The principles enunciated in the preceding paragraph would seem to be equally applicable to employees performing the service of transporting goods from the freight terminal of the Fort Worth and Denver City railway at Fort Worth to the Southern Pacific freight terminal in the City of Fort Worth.

4. The Universal Carloading and Distributing Company is not a carrier subject to Part I of the Interstate Commerce Act. The Scott Brothers doctrine, therefore, does not apply to it, nor does section 202(c)(2) of the Transportation Act of 1940.

Therefore, drivers engaged in pickup and delivery service under contract with this company are within the regulatory power of the Interstate Commerce Commission since they are engaged in transportation in interstate commerce within the meaning of the Motor Carrier Act and are, therefore, within the exemption contained in section 13(b)(1) of the Fair Labor Standards Act.

(C O P Y)

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

LE:FR:HE

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

February 27, 1941

Seiden's
935 Broadway
Kansas City, Missouri

This will reply to your memorandum of February 14, 1941, with which you submitted copy of memorandum of the same date from you to the regional director.

You inquire as to the applicability of the 13(a)(2) exemption to a concern engaged in selling and storing furs for individuals. It appears that the greater part of the sales are retail and are in intrastate commerce, but you raise the possibility that the exemption may be defeated by the "restyling" activities including the substitution of new skins for worn skins in old fur coats, the fixing of new collars, the replacing of linings, the replacing of padding in shoulders, and other similar activities. It appears that all such work is done upon order for individual consumers.

In my opinion, such activities constitute service similar to that performed by laundries, dry cleaners, hat blockers, tailors, etc.

209582

AIR MAIL

Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

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

LE:ILS:AMS

March 5, 1941

Application of section 13(a)(6) and sections 7(c) and 7(b)(3) to winery employees

With reference to your memorandum of February 14, 1941, you are quite correct in pointing out that the section 7(b)(3) seasonal exemption, when it is determined applicable by the Administrator, applies, during a workweek, only to those employees engaged exclusively in the particular industry found by the Administrator to be seasonal. However, it is my opinion that no different interpretation should be given to a situation in which an employee performs, during the same workweek, operations some of which are exempt under section 7(b)(3) and the remainder exempt under section 13(a)(6) than is given a case in which, during the workweek, an employee performs operations which are either exempt under section 7(c) or 13(a)(6). The fact that an employee must be engaged in an industry found to be seasonal in order for section 7(b)(3) to apply does not preclude him from performing, during the same workweek, work exempt under section 13(a)(6). His employer for that workweek would still be entitled to claim the section 7(b)(3) exemption.

207815

Aaron A. Cohen, Esquire
Acting Regional Attorney
Cleveland, Ohio

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

LE:KCR:FTR

Fred Harvey
Cleveland, Ohio
File No. 34-3188

Mar. 5, 1941

Reference is made to your memorandum of February 27, 1941, in which you request the opinion of this office concerning the applicability of the act to certain operations conducted by the subject company in the Cleveland Union Terminal Building. The subject company operates a storeroom which services the Shopper's Mart and five news stands located within the Terminal Building. Cosmetics, drugs, clothing, toys, books, etc., are received, for the most part, from out-of-state sources. All employees in the storeroom, including the manager, open shipments and store goods. The subject company also operates a commissary which services five restaurant units in the Cleveland Union Terminal Building. Substantial quantities of the goods handled in the commissary are purchased outside the state. You indicate that in your opinion the storeroom and the commissary should be considered to occupy the same status as central warehousing employees of chain stores and that the employees should thus be considered within the general coverage of the act on the wholesaler theory. You do not believe the fact that the units served by the storeroom and the commissary are under the same roof of a very large building should change this result. This office concurs in your opinion that the employees of the storeroom and the commissary are within the general coverage of the act.

212679

In reply refer to:
LE:ILS:MGA

February 24, 1941

Mr. Ernest W. Greene, Vice President
Hawaiian Sugar Planters' Association
731 Investment Building
Washington, D. C.

Dear Mr. Greene:

This will reply to your letter of February 13, 1941, which concerns the application of the section 7(c) exemption to employees who are engaged in conveying by truck raw sugar from the sugar mill to the company's warehouse, a distance of approximately seven miles.

The essential facts surrounding these operations are as follows:

The company has no warehouse at its sugar mill for the storage of bagged raw sugar; the company owns and uses for storing exclusively its own raw sugar a warehouse at the shipping point at Honuapu which is seven miles from the sugar mill; continuously as the sugar is made it is loaded into company trucks which are operated by company employees and then transported to storage; the hours of the truck drivers and helpers are directly related to the hours of employees on the sugar centrifugals and bagging scale of the sugar mill. Due to lack of storage facilities at the mill, it is necessary to move the sugar as rapidly as it is dried and bagged.

Upon the basis of the facts indicated, it is the opinion of this office that the section 7(c) exemption applies to the employees engaged in transporting by truck raw sugar from the mill to the company warehouse.

Very truly yours,

For the Solicitor

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

(7555)

In reply refer to:
LE:GFH:MGA

February 25, 1941

Mr. E. M. Burch
94 East Fourth Street
St. Paul, Minnesota

Dear Mr. Burch:

This will reply to your letter of February 5, 1941 in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present.

The act, a copy of which is enclosed, applies to employees who are engaged in interstate commerce or in the production of goods for interstate commerce. I am enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which deal generally with the scope of coverage of the act. Since you state that is is the function of these investigators to ride on trains and make observations of the collections of fares and the conduct of train crews, it is our opinion that their activities are so closely related to interstate commerce as to bring their employment within the coverage of the act. See particularly paragraph 4 of Interpretative Bulletin No. 5.

Employees subject to the act are entitled to receive a minimum wage of not less than 30 cents an hour and compensation for all hours worked in excess of 40 in a workweek at not less than one and one-half times their regular rates of pay. Overtime is computed on the basis of the regular rate of pay of the employee. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

For your general information I am enclosing a copy of Interpretative Bulletin No. 3 dealing with methods of payment of wages under the act.

The views of this office with respect to the proper determination of hours worked are to be found in Interpretative Bulletin No. 13. Your attention is specifically directed to paragraphs 2 and 9 through 14 thereof.

Very truly yours,

For the Solicitor

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

Enclosures (6)

(7555)

In reply refer to:
LE:ILS:ABS

February 27, 1941

Honorable J. Hardin Peterson
House of Representatives
Washington, D. C.

Dear Congressman Peterson:

This will reply to your letter of February 12, 1941, to which was attached a copy of a letter from R. W. Hamilton, Lakeland, Florida, concerning the applicability of the Fair Labor Standards Act to a canning plant. Mr. Hamilton's letter apparently inquires concerning the exemptions provided for in sections 7(c) and 7(b) (3) of the act, which is enclosed.

It will be noted from paragraphs 14, 19, and 22 through 24 of the enclosed Interpretative Bulletin No. 14 that section 7(c) provides an exemption from the hour provisions only for an aggregate of 14 workweeks in a calendar year for the employees of an employer engaged in the first processing or in the canning or packing of perishable or seasonal fresh fruits and vegetables. As we have interpreted that exemption, only 14 workweeks in the aggregate may be claimed as exempt by an employer engaged in the specified operations. The employer may not take a separate 14 weeks' exemption for each employee who may be within the exemption.

The Administrator has determined that the section 7(b)(3) seasonal exemption is applicable to the canning, etc., of perishable or seasonal fresh fruits and vegetables. (See the enclosed G-61 and R-974.) Contrary to Mr. Hamilton's belief, that exemption is for 14 workweeks rather than 12 and is from the maximum hour provisions only. It differs from the section 7(c) exemption in that overtime must be paid during the 14 exempt workweeks for all hours worked in excess of 12 in any workday or 56 in any workweek. Further, it applies on an industry basis. Here again, the employer may not take a separate 14 workweeks' exemption for each employee.

With respect to the second question in Mr. Hamilton's letter, it is the opinion of this division that employees engaged in repair and maintenance work during the dead season are covered by the act and that they are not within the section 7(c) exemption during that period. Whether they were within the section 7(c) exemption during the productive period depends upon what they were doing during that time. See paragraph 23(a) of Interpretative Bulletin No. 14. As for the section 7(b)(3) exemption, that would apply to these employees both during the dead and productive seasons, subject, of course, to the qualification that the employer may take only 14 workweeks in all under section 7(b)(3) for his employees.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (4)

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In Reply Refer To:
LE:GFH:EC
Mar. 3, 1941

Mr. John A. Kneeland
206 Battle Avenue
White Plains, New York

Dear Mr. Kneeland:

This will reply to your letter of November 2, 1940, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present. I regret that, due to the great flood of inquiries which we have received in recent months, an earlier reply has not been possible.

The act, a copy of which is enclosed, applies to employees who are engaged in interstate commerce or in the production of goods for interstate commerce. I am enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which deal generally with the scope of coverage of the act. Paragraphs 12 and 13 of Interpretative Bulletin No. 5 sketch the broad outlines of the opinions of the Wage and Hour Division with respect to the applicability of the Fair Labor Standards Act to building and construction work. You will note from these paragraphs that employees of construction contractors may be subject to the act even though all their work is performed within the state in which they are employed. While the installation of heating systems within homes would not appear to be within the general coverage of the act, unless such operations are properly to be considered as an incident to an interstate contract of sale, the installation of such systems in industrial buildings which are used to produce goods for interstate commerce would fall within the general coverage of the act in accordance with the principles expressed in paragraph 13 of Interpretative Bulletin No. 5.

Employees subject to the act are entitled to receive a minimum wage of not less than 30 cents an hour and compensation for all hours worked in excess of 40 in a workweek at not less than one and one-half times their regular rates of pay. Overtime is computed on the basis of the regular rate of pay of the employee. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

I also direct your attention to section 16(b) of the act authorizing an employee to institute proceedings against his employer

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for twice the amount of his unpaid minimum wages or unpaid overtime compensation, as the case may be.

Very truly yours,

For the Solicitor

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

Enclosures (4)

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In Reply Refer To:
LE:ADH:PG
March 3, 1941

Mr. Robert W. Davis, Secretary-Manager
American Veneer Package Association
804 Seventeenth Street, N. W.
Washington, D. C.

Dear Mr. Davis:

This will reply to your letter of January 27, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present.

The act, a copy of which is enclosed, applies to employees who are engaged in interstate commerce or in the production of goods for interstate commerce. I am enclosing copies of our Interpretative Bulletins Nos. 1 and 5, and I direct your attention particularly to paragraphs 1 and 5 of Interpretative Bulletin No. 1 and paragraphs 2, 4, and 9 of Interpretative Bulletin No. 5. If the products of the manufacturer to whom you refer move in interstate commerce, his employees who are engaged in the operation of boats and barges for the purpose of hauling such raw materials as logs to the factory would appear to be engaged in "a process or occupation necessary to the production" of such goods within the meaning of section 3(j) of the act.

Section 13(b)(2) provides an exemption for the maximum hours provision of the act of "any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act." Informal conference with representatives of the Interstate Commerce Commission indicate that a manufacturer who operates his own boats and barges for the purpose of hauling his logs to the factory is not an employer subject to Part I of the Interstate Commerce Act and, therefore, the employees of the company in question would not fall within the exemption contained in section 13(b)(2).

However, section 13(a)(3) of the act provides a complete exemption from both the minimum wage and maximum hours provisions of the statute for "any employee employed as a seaman." Unfortunately, the description of the activities of these particular employees contained in your letter is too limited to enable us to advise you definitely whether or not this exemption is applicable to their employment. It is believed that the contents of the enclosed copy of

Interpretative Bulletin No. 11, dealing with the scope of the seamen exemption, should be of aid to you in determining their status under the act.

For your information, employees subject to the act are entitled to receive a minimum wage of not less than 30 cents an hour and compensation for all hours worked in excess of 40 in a workweek of not less than one and one-half times their regular rates of pay. Overtime is computed on the basis of the regular rate of pay of the employee. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

I also direct your attention to section 16(b) of the act authorizing an employee to institute proceedings against his employer for twice the amount of his unpaid minimum wages or unpaid overtime compensation, as the case may be.

Very truly yours,

For the Solicitor

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

Enclosures (5)

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