UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

April 18, 1941

Legal Field Letter

No. 52 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
4-9-41	Rufus G. Poole (GFH)	Irving J. Levy	United Farms Cooperative Creamery Association, Inc. Charlestown, Massachusetts File No. 20-1319 (Coverage under the Act of various operations performed on milk, butter, etc., by a dairy company engaged in processing and distributing such products - a complete description of certain dairying operations.) (p. 151, par. 3; p. 195, par. 5.)
	Rufus G. Poole (GFH)	Llewellyn B. Duke	Request for opinion--employees constructing boiler houses, etc. for oil wells (employees engaged in tearing down such structures when the well is completely drilled.) (p. 174, par. 2; p. 183, par. 5.)
4-10-41	Rufus G. Poole (GFH)	Donald M. Murtha	Coverage of employees of an operating gold mine engaged solely in exploration activities (p. 143, par. J; p. 184, par. 5(c).)

52

LETTERS

Date	To	Subject
4-7-41	Elmer E. Milliman Detroit, Michigan (WWC)	(Application of Section 3(d) of Act to a switching and terminal company owned by a city.) (p. 49, par. B; p. 81, par. D; p. 181, par. 4; p. 190, par. 4(a).)

(7915)

LETTERS

Date	To	Subject
4-7-41	John E. Greb Kenosha, Wisconsin (EB)	(Application of executive exemption under Section 13(a)(1) to an employee in charge of the experimental department of a company, who uses the same equipment as the nonexempt employees under him to a greater extent than 20% of the hours worked.) (p. 62, par. H; p. 101, par. 2.)
4-8-41	Mount Taylor Washington, D. C. (FR)	(Coverage of Act and the various exemptions thereunder to various branches of the ice industry and various employees engaged therein; analysis of status of certain employees under the Act and the Motor Carrier Act.) (p. 51, par. A; p. 56, par. B; p. 62, par. F; p. 65, par. I; p. 66, par. L; p. 69, par. M; p. 74, par. P; p. 94, par. T; p. 95, par. V; p. 102, par. DD; p. 106, par. GG; p. 106, par. HH; p. 111, par. KK; p. 115, par. MM; p. 152, par. 6; p. 189, par. 3(b); p. 191, par. 4(d).)
4-9-41	Orlando H. Dey Rahway, New Jersey (FUR)	(Computation of hours worked where an employee has to stand in line for a considerable period of time to receive his pay check.) (p. 123, par. 19.)
4-10-41	John J. Grealis Chicago, Illinois (FR)	(Computation of hours worked with respect to aptitude tests that are given to prospective employees by a manufacturer in a school the manufacturer establishes for training of future employees, and whether time spent in school need be considered hours worked.) (p. 120, par. B; p. 122, par. 13.)
4-10-41	W. T. Phillips Durham, N. H.	(Employer-employee relationship with respect to students of money and banking courses at a university who are placed in banks for short training periods to observe and to do actual operations performed by the banks.) (p. 23, par. P; p. 49, par. B; p. 178, par. 1(b); p. 185, par. 3.)
-41	W. Cooley El Paso, Texas (GFH)	(Hot goods provision with respect to goods produced in violation of the FLSA in Mexico and whether employers who handle such goods in the United States are subject to the hot goods provision under Section 15(a)(1).) (p. 1, par. 2; p. 117, par. RR; p. 137, par. D.)
4-12-41	H. Pierre Branning Miami, Florida (GFH)	(Interstate and intrastate commerce - coverage under Act of boats which go from one port in a state to another port in the same state and in so doing cross the three-mile limit.) (p. 1, par. B; p. 3, par. C; p. 143, par. 4.)

C O P Y

Apr - 9 1941

Mr. Irving J. Levy
Assistant Solicitor
In Charge of Litigation

LE:GFH:EG

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

United Farms Cooperative Creamery
Association, Inc.
Charlestown, Massachusetts
File No. 20-1319

East Berkshire, Vermont - File No. 44-226
Morrisville, Vermont - File No. 44-227
Troy, Vermont - File No. 44-228
Cambridge, Vermont - File No. 44-229
Greensboro Bend and Randolph, Vermont - File No. 44-230
Ten Substations - File No. 44-231

The attached file presents various questions as to the applicability of the act to the Charlestown plant of the subject company.

It appears from the narrative contained in inspection file No. 20-1319 and from the various memoranda included in the file that the above-names corporation operates six receiving stations in the State of Vermont and conducts a large plant in Charlestown, Massachusetts. It is stated that the Charlestown plant is engaged in processing and distributing, both in interstate commerce and for local consumption within the state, milk, cream and other dairy products. It appears from Item No. 3 of the narrative in the file that all the materials to be processed and distributed, with the exception of two, are received from Vermont plants. It is stated that 95 percent of the sales of the plant are wholesale sales, while only 5 percent of such sales are at retail. The various activities in which the 183 employees of this concern are engaged will be considered in the order in which they are described in the narrative.

FLUID MILK

We quote from the narrative:

"Received from Vermont plants in tank cars or tank trucks from which it is pumped directly into storage tanks. Automatically drawn through clarifier, pasteurizer, and cooling unit to storage tanks for bottling or can filling. Bottles placed in cases and automatically conveyed to refrigerator or shipping platform."

On its face, this statement clearly seems too meager upon which to base a definite opinion as to the coverage of employees engaged solely in performing such operations on milk which is received from outside the state but which is consumed locally. Dr. Lore A. Rogers, Chief of the Division of Dairy Research Laboratories, Bureau of Dairy Industries of the United States Department of Agriculture, has furnished us with information, however, which may be helpful in this connection. According to Dr. Rogers, a clarifier, while it does not perform the function of separating milk from cream, operates upon the same principle as a cream separator. By subjecting the milk to centrifugal force the clarifier performs the function of removing solid matter, such as the leucocytes, body cells, slime or sediment, from the milk. The bowl of the clarifier is revolved at a high rate of speed, causing these undesirable substances to collect on the inside of the bowl, from which they are then removed. We have been informed that no change in the chemical composition of the milk occurs other than the removal of the various substances which have been described, which in any case will constitute only a negligible proportion of the total bulk of the milk which is clarified. It is our understanding that the operation of a clarifier does not require a high degree of skill.

Dr. Rogers has informed us that the process of pasteurization is performed for the purpose of killing bacteria in the milk, and that there are two methods of pasteurization in use. Under the first method, known as the "holding system," the milk is heated to a temperature of approximately 145 degrees and held at that temperature for a period of 30 minutes, after which it is cooled. According to the second method, which is known as the "flash system," the milk is heated to a temperature of 160 degrees and held at this temperature for only a few seconds, and thereafter is cooled immediately. The first system is most commonly used. As a result of pasteurization certain chemical changes occur in the milk although such changes are almost negligible. Some of the calcium salts are precipitated and some of the enzymes are destroyed. According to the weight of expert opinion, however, no changes in the nutritive value of the milk occur.

Dr. Rogers informs us that after pasteurization, the milk is made to flow over a system of refrigerating tubes in order that it may be cooled to the proper temperature before being poured into cans or placed in the bottling system. Presumably this is the operation to which the inspector's report refers in mentioning the "cooling unit."

It appears that in the usual case the bottling is performed by automatic machinery of quite a complicated nature which fills the bottles and caps them and sends them along on a conveyor from which they are removed by hand and packed into cartons for delivery.

We quote further from the inspector's report:

> "Some fluid milk also shipped from Vermont in ten-gallon cans, by rail or truck of contract carrier. These usually represent some special type of milk such as Grade A or Jersey. Cans are held on floor packed in ice, or deposited in refrigerator until ready to be dumped into storage tanks."

Presumably the fluid milk which is described as being received in ten gallon cans is treated in the same manner as that described as being received in tank cars and tank trucks.

The inspector's report continues:

> "Chocolate milk is processed in the same manner with the chocolate mix added to the fluid before pasteurizing."

It is our information that the mixing of the chocolate syrup is a somewhat technical operation which requires a considerable degree of skill on the part of the employees engaged therein. The ingredients must be kept at certain exact temperatures and the proportion of each ingredient must be carefully measured in accordance with definite formulae in order to prevent a separation of such ingredients after the mixing process has occurred. If the operations are inexpertly performed, the chocolate syrup will probably settle to the bottom of the bottle, thus impairing the marketability of the commodity.

Dr. Rogers explained to us that the operations which he described were commonly performed by employees of concerns such as the subject company, but he also pointed out that there were numerous variations in the methods employed by different concerns. For present purposes, however, we are assuming that the account of the various operations set forth above is an accurate description of the activities to which the inspector refers. On the basis of this assumption, it is our opinion that employees at the Charlestown, Massachusetts plant engaged in performing such operations on fluid milk which has originated in Vermont but which is consumed entirely within the State of Massachusetts are not covered by the act, provided, of course, that no other basis for coverage exists, and that the employer maintains the burden of establishing that their activities are completely segregated from other covered activities which are performed in the plant. Particular employees, however, who are engaged in unloading or handling such milk upon its being received from Vermont prior to the performance of the above-described processing operations would be covered.

Cream

We quote from the inspector's file:

> "Cream is shipped from Vermont in ten-gallon cans, usually by rail in carload lots. Cars are unloaded at spur track in the yard and cans conveyed by truck to the plant. A considerable portion of cream sold as received, in original containers, to large users. Another portion goes to bottle filling tanks where it is drawn for bottling without processing in any form. Balance is diluted with skimmed milk and pasteurized and homogenized (an operation to place fat globules in suspension to prevent settling) to produce a lighter cream"

Commenting on this passage, Dr. Rogers expressed his opinion that perhaps it may be inferred from this very meager statement that the cream which is described as going to the bottle filling tanks may have been pasteurized at the source, since hardly any unpasteurized cream is ever bottled. In situations of the type referred to, the bottling of cream is usually accomplished by pouring the cream into a large storage tank or reservoir, from which the flow is controlled in a constant stream to a smaller container, which is a part of the bottle-filling machinery, and which holds only a few gallons. The cream is then mechanically emptied into bottles from this smaller container and the bottles are automatically capped and moved on a conveyor to a point where the bottles are removed by hand and packed into crates for delivery to purchasers.

The inspector's report somewhat cryptically states that the "balance is diluted with skimmed milk and pasteurized and homogenized (an operation to place fat globules in suspension to prevent settling) to produce a lighter cream."

We understand that in the ordinary case of the type to which the inspector probably has reference, the cream may come into the plant with a standard fat content of 40 percent. The concern, however, may wish to market a lighter cream with a lower percentage of fat content. For example, they may wish to market a cream with a fat content of only 18 percent. In order to accomplish this result, they mix the cream with skimmed milk and then pour this mixture into a high pressure pump in order to homogenize it. The process of homogenization is a process by which the fat

globules in the cream are broken up with the result that a more desirable emulsion is obtained. This new emulsion is such that it prevents the fat globules from rising to the top of the bottle as would normally occur in the absence of homogenizing. In other words, as a result of the homogenizing operations the fat globules become more permanently suspended through the cream. A certain amount of technical knowledge on the part of the employees engaged in such operations is necessary. The percentage of fat in the cream must be very accurately determined in order that the proper amount of skimmed milk to be mixed with cream to produce the desired concentrate may be measured. In the usual case, the operation of the machinery by which homogenization is performed also requires a high degree of skill.

The inspector in his narrative also states:

> "Also, all unsold milk and cream from route trucks is dumped together and separated, pasteurized, and homogenized for cream, the skimmed milk being thrown away."

Evidently most milk dealers are forbidden by law to send out a second time milk which has been left over at the end of the day's delivery. Hence, the milk which is left over at the end of the day is run through a separator in order to extract the cream. Thereafter the cream is pasteurized and homogenized and the residue of skimmed milk is usually disposed of as waste.

On the matter of coverage, it is our opinion that employees engaged in distributing that portion of the cream which is sold as received, and in the original containers, are clearly within the coverage of the act, regardless of whether such cream is consumed locally or subsequently moves in interstate commerce. It is likewise our opinion, assuming that Dr. Rogers' account set forth above is an accurate description of the activities of the subject company's employees, that employees engaged in bottling cream which is not otherwise processed fall within the act's coverage. However, diluting and homogenizing operations of the type which Dr. Rogers describes would appear to break the stream of interstate commerce, and employees who were engaged solely in such operations would not appear to fall within the coverage of the act. Likewise, employees engaged in separating left-over milk for cream which is pasteurized and homogenized for local consumption would not be covered, provided that no other basis for coverage exists. Of course, for an employee to fall

within these latter categories, it would be necessary for the employer to sustain the burden of establishing that the employee's activities were entirely segregated from any other covered activities which were performed in the plant. If such an employee unloaded any cream originating from Vermont upon its being received at the plant, his employment would be covered during all weeks when he was so engaged.

Skimmed Milk; Buttermilk; Powdered Skimmed Milk; Condensed or Evaporated Milk

In the case of these four items coverage seems clear under the principles expressed in paragraphs 14 through 16 of Interpretative Bulletin No. 5.

Cheese

The inspector's report states:

> "Received from Vermont in 65 lb. tubs by rail or truck of contract carrier. Delivered to refrigerator. As orders are received, cheese sent to processing room where cream is added and mixed, to give a smoother, creamier, body. It is then packaged and distributed on retail and wholesale routes to the regular sources. No out of State sales direct or indirect."

Upon inquiry we have been informed that the cheese to which the inspector refers is very probably cottage cheese which is made from curdled skimmed milk. Usually in situations of this type cottage cheese is placed in a mixing vat where it may be mixed with cream either by hand or by the use of a power driven machine known as a "Hobart mixer." The effect of the addition of the cream to the cheese is to increase its fat content and its food value. Usually the cheese after it has been mixed is removed from the mixing vat and packed by hand into cartons and containers.

Assuming that we have correctly described the operations to which the inspector refers, it is our opinion that employees engaged in processing cheese in this manner entirely for local consumption are not within the coverage of the act. The caution should be sounded again, however, that our opinion is based on the

assumption that such employees do not unload the cheese upon its receipt from Vermont or perform any other covered activities in a workweek, and that the employer can carry the burden of establishing that their employment is entirely segregated from all other covered work which is performed in the plant.

Butter

The inspector states:

> "No Vermont butter is handled at Charlestown. Table butter is purchased from local jobbers, packaged in special cartons, and sold as a regular item on retail and wholesale routes. No sales, direct or indirect, made out of State."

If the butter is produced locally and distributed purely for local consumption within the state, employees of the subject concern engaged solely in such distributive operations would not fall within the general coverage of the act, provided, of course, that no other bases for coverage existed in their case, and the employer maintained the burden of establishing that their employment was clearly segregated from that of covered employees.

If, however, the subject company is engaged in distributing for local consumption butter which it has obtained from other jobbers who have received such butter from other states, we are not prepared at this time to render a definite opinion regarding the status under the act of employees engaged solely in such distributive operations, provided, of course, that no other bases for coverage exist. As you know, our enforcement policy in such cases is outlined in Legal Field Letter No. 15 (revised).

The inspector's report continues:

> "All cream that is soured is neutralized, and processed into a low-grade butter, not suitable for table use, but acceptable for cooking purposes. Sold principally to wholesale butter dealers and as far as known, sold within the State. Only a small amount produced, averaging 200 lbs. weekly."

We have been informed that various chemicals are employed for the purpose of neutralizing cream in order to reduce its acidity

and improve the flavor of the butter which is derived therefrom. Some of these chemicals are lime, sodium carbonate, and magnesium carbonate. In some instances of the type described the cream is pasteurized after it has been neutralized. In some cases a "starter" consisting of milk which has been soured by cultures of bacteria is added to the cream. If, however, the butter described in the inspector's report is of a particularly low grade, it is probable that the cream is merely neutralized and churned without any other intervening operations. Assuming that the soured cream originated in Vermont and that the butter is consumed locally within Massachusetts, employees engaged solely in the neutralizing and churning operations are not covered by the act. This opinion is subject to all the qualifications which have been reiterated in the expressions of opinion immediately preceding the present.

Eggs

We quote from the inspector's report:

> "Eggs are shipped to Charlestown from Vermont just as received from the farmers. At Charlestown they are candled, sized, and packed in one-dozen and fifteen-dozen containers for sale to the usual retail and wholesale route outlets within the State."

There are various methods by which these operations may be performed. The eggs may be moved along a line by means of a conveyor, and in the course of this movement employees will inspect and candle them. In smaller plants, probably no conveyor will be employed, but all the enumerated operations will be performed by hand. Employees in such plant would remove the eggs by hand from the cartons in which they were received, candle and sort them by hand, and pack them into other cartons for sale to purchasers. In our opinion, if the eggs are candled, sized and packed by either of the methods described, employees engaged in such activities are covered by the act, since their employment, in our opinion, does not constitute a processing of the eggs, but is merely incidental to the interstate distribution of goods.

Beverages

The distribution within the state of bottled beverages received from other states would appear clearly to fall within the coverage of the act.

It is stated on page 2, paragraph 5, of Mr. Winship's memorandum to Mr. Risley that the wholesaling operations carried on by the subject company would appear to bring a considerable proportion of its employees within the coverage of the act. Some indication of the extent of these wholesaling operations appears in Item 3 of the narrative, where it is stated that in 1940, sales of cream represented 35 percent of the value of the total sales, and that from 60 percent to 70 percent of the cream received from Vermont was sold without processing. Powdered milk represented 5 percent of the total value of sales. In addition, the company was distributing in interstate commerce such items as skimmed milk, buttermilk, condensed milk, eggs and bottled beverages. It seems apparent from such considerations and the additional information contained in Item 8 of the narrative that a goodly proportion of the employees were covered as being engaged in distributing goods in interstate commerce. Hence we can see no objection to going forward with the case.

As far as we have been able to determine from the available information in the file, there is no exemption in the act applicable to many employees of the subject company with respect to whom violations have been found.

Attachment
(File)

214280

Llewellyn B. Duke, Esquire
Regional Attorney
Dallas, Texas

April 9, 1941

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

LE:GFH:NC

Request for opinion--employees constructing boiler houses, etc. for oil wells

This is with reference to your communication under date of January 4, 1941, in which you ask for my opinion with regard to the above subject.

You state that employees of a construction contractor are engaged in building boiler houses, pump houses, and engine houses which are necessary in drilling oil wells. The employees do not install the boilers, pumps, and engines, but only construct the buildings in which such equipment is placed. When the construction is being performed the wells are being drilled but are not producing wells; and when these buildings are torn down by such employees, the well has been completed. Any oil which has been produced moves in interstate commerce. It is stated in your memorandum that this work may be done both in Texas and New Mexico and that the crews employed in such work may move from state to state. At other times, however, the work is performed by local labor.

You ask (1) if the erection of such structure is covered by the act, (2) if the employment of local crews changes the situation with respect to coverage, and (3) if the work of tearing down these structures is covered.

It is our opinion that employees engaged in erecting such structures are engaged in a process or occupation necessary to the production of oil for commerce and hence are within the coverage of the act. We do not believe our position is in conflict with the opinions we have expressed in paragraph 12 of Interpretative Bulletin No. 5. See page 17 of Legal Field Letter No. 35.

In our opinion, such activities are covered regardless of whether they are performed by travelling or local crews.

It is my opinion that the tearing down of these structures is not within the coverage of the act unless the employer intends, hopes, or has reason to believe that the resulting materials will move in interstate commerce. It is assumed that the tearing down of these structures takes place after the well is completely drilled and in no way contributes to the production of oil.

#192678

(7915)

Copy

Donald M. Murtha, Esquire
Acting Regional Attorney
Minneapolis, Minnesota

LE:GEH:LF

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

April 10, 1941

Coverage of employees of an operating gold mine engaged solely in exploration activities

This is with reference to your communication of November 6, 1940, with respect to the above subject.

By reason of the great flood of inquiries which we have received from the field in recent months, an earlier reply has not been possible.

A letter from the Basin Montana Tunnel Company, Butte, Montana, dated October 20, 1940, from which you quote, describes the following situation: While the company is presently operating a property known as the Comet Mine, for the past two years, it has been seeking other properties. "Some of these have been merely prospects, while others have been examinations and explorations of old mines. Just now the Company has secured a lease and option on a property located approximately 10 miles from the Comet Mine . . . . This property was trenched by a bull-dozer with encouraging indications, and diamond drilling of the formation has now been started. If the results of this are encouraging, a shaft will be sunk . . . The question is, do the men regularly and exclusively employed in this project come under the provisions of the Wage and Hour Act . ."

I believe the reasoning in Legal Field Letter No. 26, page 57, relating to geophysical survey employees, and in Legal Field Letter No. 34, page 22, with regard to topography crews, applies with equal force to the situation which you present. In my opinion, such employees are within the coverage of the act, regardless of whether the exploratory work is done by companies which are already operating in the production of ore for commerce, or by companies which have not yet engaged in production but intend to produce if the results of their explorational activities are successful.

Neither, in our opinion, should a distinction be made between exploratory work which is entirely new and exploratory work in the already existing shaft of a mine which has been either exhausted or abandoned.

172085

COPY

In reply refer to:
LE:WHC:SL

April 7, 1941

Mr. Elmer E. Milliman, President
Brotherhood of Maintenance of Way Employees
61 Putnam Avenue
Detroit, Michigan

Dear Mr. Milliman:

This is in reply to your inquiry of March 12, 1941, concerning the coverage within the Fair Labor Standards Act and the wage order for the railroad carrier industry of the switching and terminal company known as the New Orleans Public Belt, which is owned by the City of New Orleans. We understand your argument to be that, because employees of this company are not employees of a political subdivision in its governmental capacity and because the company is subject to Part I of the Interstate Commerce Act, there should be no exemption under section 3(d) of the act.

Since we have understood that the New Orleans Public Belt is owned in entirety by the city, it has been our position that the company is within the exemption of section 3(d), a view which we have expressed on several occasions.

We do not believe that the language of the act justifies a distinction between the governmental and proprietary functions of the city.

Very truly yours,

For the Solicitor

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

(7915)

COPY

In Reply Refer To:
LE:EE:ESG

April 7, 1941

Mr. John E. Greb, Personnel Director
Specialty Brass Company, Inc.
Kenosha, Wisconsin

Dear Mr. Greb:

Reference is made to your letter of February 24, 1941, in which you inquire concerning the application of the executive exemption provided by section 13(a)(1) of the Fair Labor Standards Act to an employee who is in charge of your experimental department. You point out that the work of this employee necessitates the use of the same equipment as that used by nonexempt employees who are under his direction, and that sometimes this use of the same equipment exceeds 20 percent of the number of hours worked in the workweek by these nonexempt employees.

Normally, manual labor, including the operation and repair of machinery, will properly be counted as nonexempt work. An exception to this may be found where the supervisor of a department performs work of an unusually difficult nature which his subordinates cannot perform and which directly affects the continued operation of his whole department. If the supervisor used the same equipment as that used by nonexempt employees, the probability would appear to be that such work should be counted as nonexempt work.

Very truly yours,

For the Solicitor

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

(7915)

C O P Y

APR 8 1941

In Reply Refer To:
LE:FR:MB

Mr. Mount Taylor, Executive Secretary
National Association of Ice Industries
1022 Investment Building
1511 K Street, N. W.
Washington, D. C.

Dear Mr. Taylor:

This will reply to the brief which you submitted concerning the applicability of the Fair Labor Standards Act of 1938 to employees in the ice industry.

Your brief consists of several parts, of which Part One is a general introductory statement, and the remaining parts raise questions of legal interpretation. We shall discuss these problems in the order in which they are submitted in your brief:

PART TWO

RETAIL ESTABLISHMENT

Part Two of the brief presented by you seeks exemption under section 13(a)(2) for several types of "establishments" which will be considered separately:

1. PLATFORM ESTABLISHMENT.

It is stated that in the ordinary case the production department of an ice plant is separate and apart from the rest of the plant. As soon as the ice has been manufactured, it is placed in storage to be kept at a freezing temperature. You state:

> "The outlet from the storage is an outdoor platform, which contains facilities for sale and delivery of ice. The ice is brought from the storage and delivered to customers or is loaded into trucks or wagons and delivered to the salesmen who take the ice and make sales and deliveries to customers along their respective routes in the city or surrounding country. In a good many instances the large cakes of ice are run through a scoring machine so as to enable delivery in small quantities in accurate weights. The entire organization, including the office employees, the storage men to bring the ice from storage, all platform hands, and everybody in the organization, outside of the engine room men and the ice pullers, are engaged in the business of selling the ice. The platform establishment is entirely physically separated from the production department. The chief engineer reports daily the quantity of ice that has been produced and pulled from the ice cans and placed in storage. No other employees, outside of the engine room men and the pullers, have anything to do with the production of the ice."

Upon the basis of these facts and upon the assumption that 50 percent of the sales are at retail and over 50 percent are in intrastate commerce, in our opinion the exemption applies. In this connection we wish to point out that the division is presently engaged in revising its bulletin on the section 13(a)(2) exemption. It has been suggested that the division modify its position that a distributive establishment is retail if 50 percent of its sales are retail and that it increase the 50 percent to some higher figure. It cannot be stated now what position the division will take. The revision of the bulletin, however, should be forthcoming shortly, and it will deal with this problem. In any event you understand, of course, the section 13(a)(2) exemption extends only to those employees who are connected solely with the distributional activities in question. Thus, for example, it will not extend to office employees who keep books with respect to the production of ice or to any other employees doing any work other than in connection with distribution.

2. STATIONS OR BRANCHES.

You state:

> "Many ice companies have established a number of stations from which they sell and distribute ice. These stations are serviced daily from the storage of the producing plant. Along with the sale of ice, it may carry groceries and other articles of merchandise."

Assuming in each case that 50 percent of the sales of the station are at retail and over 50 percent are in intrastate commerce, the exemption would seem to apply for reasons set forth in paragraph 18 of Interpretative Bulletin No. 6, a copy of which is enclosed.

3. ICE DELIVERY COMPANIES.

You state:

> "In many communities producers sell their ice to a Delivery Company: that is, the producers do not have anything to do with the delivery of ice other than deliver it to the Delivery Company who in turn with its own employees, accept and sell the ice to its customers. The Delivery Company usually maintans one central office where sales are made and accounted for. These Delivery Companies possess a garage where all vehicles are housed and/or a stable where horses and wagons are kept."

You urge that a delivery company which makes at least 50 percent of its sales at retail and makes over 50 percent of its sales in intrastate commerce should be exempt under section 13(a)(2). If you are referring to separate distributional establishments, this appears to be in accord with the present position of the Wage and Hour Division. However, the exemption would not extend to central office employees serving more than one establishment. If the garage is part of the distributional establishment and serves only the one establishment, the exemption if applicable to the rest of the establishment would extend to the garage.

If, on the other hand, the garage is separated from, but serves merely a single delivery establishment, the garage employees would seem to be in a position similar to that

occupied by warehouse employees serving a single retail store. In such cases, the Wage and Hour Division is not presently prepared to express an opinion as to the applicability of the act. If, however, the garage employees service trucks or horses and wagons for more than one delivery establishment, it is the opinion of the division that the service establishment exemption is not available to the garage employees. They will be within the coverage of the act, of course, if they repair or maintain vehicles which move in interstate commerce.

4. SMALL PLANT OPERATIONS.

You urge that small plants which both manufacture and sell ice should be considered as exempt under section 13(a)(2) if 50 percent of their sales are at retail and if over 50 percent of their sales are in intrastate commerce. You state:

> "In a small ice plant the line of demarcation as between the duties of employees is not very clear. The principal business of the small plant is to sell ice and very little labor is required in the production of the ice. The retail salesmen and even those who keep records very frequently take a hand as an ice puller or as a storage man."

The division has consistently adhered to the position that establishments which engage in manufacturing are not retail establishments regardless of the character of their sales. The principles which impel us to that result are no less present in the case of ice production than in other cases. Accordingly, in the case of a plant which both manufactures and sells ice, the exemption will be defeated unless the distributional activities are completely segregated from the productional activities, in which case employees engaged solely in the former activities may be within the exemption.

CASES WHERE ONLY A SMALL PROPORTION OF ICE PRODUCED MOVES IN COMMERCE

1. PLANTS LOCATED IN STATE LINE CITIES.

It is stated in your brief that in many instances ice plants are situated near the border line between two states, and that as a result a small percentage of the ice of such plants will

move in interstate commerce. You request that the Administrator establish some maximum percentage of the total volume of goods which may be produced for interstate commerce by ice companies, without the employees of such companies falling within the general coverage of the act. The Wage and Hour Division has consistently taken the position that the applicability of the act does not depend upon the percentage of his employer's goods, or the percentage of goods upon which an employee works which move in interstate commerce. The views of the Wage and Hour Division in this regard have been fully substantiated by the Supreme Court of the United States, in the case of United States v. F. W. Darby Lumber Company, No. 82--October term, 1940, docided February 3, 1941. The Court, through Mr. Justice Stone, denied that the application of the act is dependent upon the percentage of the goods produced which moves in interstate commerce, in the following language:

> "Congress, to attain its objective in the suppression of nation wide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong. 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts. Cf. National Labor Relations Board v. Fainblatt, supra. 606."

It may be pointed out, however, that work which is not within the coverage of the act may be segregated from work which is within the act's coverage, although no such segregation is permissible within a workweek, and the burden of establishing that such segregation has been made is upon the employer.

2. CAR ICING.

It is your position that employees engaged in producing ice which is used in icing refrigerator cars are not within the coverage of the act, since the ice in such situations is delivered

into the actual physical possession of the ultimate consumer thereof. Since section 3(i) provides that "goods" does not include "goods" after their delivery into the "actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof," it is apparently your contention that the manufacture of ice to be used for car icing is not a production of "goods" for interstate commerce. The position of the Wage and Hour Division in this regard is fully set forth in paragraph 6 of Interpretative Bulletin No. 5, as follows:

> "The fact that products lose their character as 'goods' when they come into the actual physical possession of the ultimate consumer does not affect the coverage of the act as far as the employees producing the products are concerned. The facts at the time that the products are being produced determine whether an employee is engaged in the production of goods for commerce, and at the time of the production of the containers they were clearly 'goods' within the meaning of the statute since they were not, at that point of time, in the actual physical possession of the ultimate consumer. All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of section 15(a)(1). This seems clear from the language of the statute. Thus section 15(a)(1) makes it unlawful for any person 'to transport * * * (or) * * * ship * * * in commerce * * * any goods' produced in violation of the labor standards set up by the act. By defining 'goods' in section 3(i) so as to exclude goods 'after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof," the Congress made it clear that it did not intend to hold the ultimate consumer as a violator of section 15(a)(1) if he should transport 'hot goods' across a State line. Thus, if a person purchases a pair of

> shoes from a retail store[1] and carries the shoes across a State line, the purchaser is not, in our opinion, guilty of a violation of section 15(a)(1) if the shoes were produced in violation of the wage or hour provisions of the statute. But Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer who transports or ships the goods outside the State."

You request the Administrator to modify his interpretation of the law with respect to employees of plants, which are engaged in producing ice used to ice vehicles which transport such ice in interstate commerce. Reference is made to paragraph 1 of Interpretative Bulletin No. 1, where the Wage and Hour Division has stated its position, to which it has consistently adhered, that the act confers upon the Administrator no general authority to issue orders including industries within the coverage of the act, or excluding them. Under the act, employments are included or excluded by the terms of the statutes as interpreted by the courts, and not by the force of any administrative action. Interpretations of the Administrator, except in situations where the statute directs the Administrator to make special definitions, classifications, or regulations, serve merely to indicate the construction of the law by which the administrator will be guided in the enforcement of his official duties under the act, unless and until he is directed otherwise by authoritative rulings of the courts.

3. DESTINATION CAR ICING.

As is stated on page 7 of your brief, there is a considerable amount of car icing known as destination icing. This icing is performed in situations where a car of perishable freight has reached its destination and is ready to be distributed locally.

1/ Note that the retail or service establishment exemption in sec. 13(a)(2) does not protect the retail store from a violation of the "hot goods" provision if it sells in interstate commerce goods produced in violation of secs. 6 or 7.

The ice placed in the bunkers of such cars does not move across state lines. You state in your brief:

> "We submit, therefore, that the Administrator should rule that all ice delivered into bunkers of cars, where the ice does not cross state lines and the contents of the cars are distributed locally, is produced for intrastate commerce, and that the employees engaged in producing it, delivering it and keeping records relating to it should not be covered by the act."

While the particular distributive operations which are performed in connection with this perishable freight are not described in your brief as clearly as might be desired, it is assumed that the freight car, while standing at the "destination" serves a function closely analogous to that which is served by a cold storage warehouse. The freight car, in other words, is used in the wholesale distribution for local consumption of perishable commodities received from other states. If this assumption is correct, it is possible that a court would consider the production of the ice to be used in icing the freight car as covered on the ground that it facilitates commerce and therefore is an integral part thereof. Nevertheless, the division does not take a position on this question and will therefore institute no enforcement proceedings with respect to employees engaged solely in the production of such ice, until such time as it announces that coverage exists and gives adequate notice of such opinion. Employees, of course, may still bring suit under section 16(b) in this type of case.

With respect to particular employees of an ice company, engaged in destination icing, who in any workweek haul ice to the cars and place it in the car bunkers, it is the opinion of the division that their employment would fall within the coverage of the act during all workweeks when they were so engaged. In the opinion of the division, such employees are properly to be regarded as directly within the flow or stream of interstate commerce, since the goods have not yet come to rest in the state and their activities, performed with a view to preserving such perishable goods in a marketable condition, directly tend to facilitate the interstate movement of such goods from other states to their ultimate point of destination within the state.

PART THREE

GIVING REFRIGERATION TO FRESH FRUITS AND VEGETABLES IN ANY FORM SHOULD BE CLASSIFIED BY THE ADMINISTRATOR UNDER SECTION 7(c) OF THE ACT AS A FIRST PROCESSING

In this portion of the brief you argue that the icing of cars containing fresh fruits and vegetables is within the exemption granted by section 7(c) to the first processing, canning, or packing of fresh fruits and vegetables. You contend that such icing is "first processing" of fresh fruits and vegetables. We are unable to agree that this exemption applies to car icing.

As you will note from paragraph 15 of Interpretative Bulletin No. 14, a copy of which is enclosed, "first processing" means, in our opinion, the first change in the form of the raw materials. As we understand it, the icing of cars in no way changes the form of the fruits or vegetables, and therefore the exemption appears inapplicable.

There is another and perhaps more basic reason why this exemption does not apply to car icing. We believe that Congress contemplated that the exemption would extend to employers who are engaged in physically packing, canning, or first processing fruits and vegetables. Ice companies engaged in icing cars are of course not physically packing, canning, or first processing fruits and vegetables. They are simply engaged in facilitating the movement of fruits and vegetables to market. It seems clear that Congress did not consider that the exemption would apply to ice companies.

EMPLOYEES ENGAGED IN GIVING REFRIGERATION TO AGRICULTURAL AND HORTICULTURAL PRODUCTS WITHIN THE AREA OF PRODUCTION SHOULD BE EXEMPT UNDER SECTION 13(a)(10) OF THE ACT

In this portion of the brief you contend that section 13(a)(10) applies to the production of ice for use in icing cars and trucks which contain the fresh fruits and vegetables. You also contend that the exemption applies to the actual icing of

the cars and the trucks and to keeping of records in connection with the production and icing operations.

As you will note from section 13(a)(10), the exemption applies only to individuals engaged in certain specified operations performed upon agricultural commodities. It is very clear that the production of ice and the keeping of records are not among the operations specified in section 13(a)(10) and that, therefore, the exemption is wholly inapplicable to such operations. Furthermore, it is our opinion that the exemption does not apply to the icing operations either. As you will note from both paragraphs 25 and 28 of Interpretative Bulletin No. 14, the terms "handling" and "storing," which appear in section 13(a)(10), apply only to physical handling and storing of agricultural commodities. As we understand it, employees engaged in car icing never come into contact with the fresh fruits and vegetables and they cannot be said to be physically handling or storing agricultural commodities. The section 13(a)(10) exemption, therefore, does not apply to such employees.

EXEMPTION CLAIMED FOR ICE SOLD TO FISHING BOATS

You claim exemption (1) because the fishing industry is seasonal; (2) because the ice is sold to a consumer within the state and is no longer goods after it is transported in interstate and foreign commerce; and (3) because the ice manufacture and handling is exempt under the fisheries exemption provided by section 13(a)(5).

Under argument (1) you claim an exemption for the ice producing industry as a seasonal industry under section 7(b)(3) of the Fair Labor Standards Act. You will note from section 526.3 of the enclosed copy of Regulations, Part 526, that in order to be found an industry of a seasonal nature, an industry must meet certain requirements. One requirement is that the industry cease operations for some period of time during the year because the raw materials upon which it works are no longer available. The ice producing industry does not meet this test. Any "seasonality" which it encounters is caused solely by a peak demand of the fishermen and not by the unavailability of raw materials rendering productive operations impossible.

Your argument (2) is answered elsewhere in this letter. See the discussion under the heading "CAR ICING" on page 5 hereof.

In answer to your argument (3), the manufacture of ice for sale to a fishing boat is not an operation enumerated in section 13(a)(5), and is not, therefore, exempt by that section. Your assertion that ice manufactured by a fishing company is exempt by section 13(a)(5) seems to be without merit. The division has announced the position that the manufacture of ice is not an operation enumerated in section 13(a)(5), even though the ice is manufactured by a fishing company whose fishermen are exempt by that section. Therefore, no competitive disadvantage is suffered by the independent ice manufacturer as stated by you in your brief.

PART FOUR

THE CAR ICING INDUSTRY SHOULD BE DECLARED SEASONAL UNDER SECTION 7(b)(3)

Pursuant to your recent conversations with Messrs. Stein, Warren, and Denbo, we are withholding any comment with respect to the possible applicability of section 7(b)(3) to car icing until such time as certain additional information is submitted by you to us. Meanwhile, you realize, of course, that section 7(b)(3) is inapplicable until such time as the Administrator makes a specific finding that an industry is of a seasonal nature.

REFRIGERATING FRESH FRUITS AND VEGETABLES IN ANY MANNER FOR STORING OR SHIPPING SHOULD BE DECLARED SEASONAL UNDER SECTION 7(b)(3) OF THE ACT

In this portion of the brief you contend that the precooling of fresh fruits and vegetables should be exempt under section 7(b)(3). To the extent to which these precooling operations are performed in precooling rooms in which fresh fruits and vegetables are being stored, it is our opinion that they constitute part of the fresh fruit and vegetable storing industry to which seasonal exemption has already been granted. See the enclosed copies of G-61 and R-974.

We also understand that sometimes precooling operations take place on a farm and are performed solely upon the fruits and vegetables grown upon that farm. Where these are the facts, the employees, who are engaged solely in working upon the farm and do not perform any work off the farm, seem to be within the exemption provided by section 13(a)(6) for employees employed in "agriculture." See paragraph 11 of Interpretative Bulletin No. 14.

PART FIVE

EXEMPTIONS OF CERTAIN EMPLOYEES AND CONFLICTS WITH THE MOTOR CARRIER ACT

The brief presented by you seeks a determination by the Administrator of the exemption of various classifications of employees under section 13(a)(1), as such exemptions have been defined in Regulations, Part 541.

The facts submitted in the brief are entirely inadequate to enable this office to express a definite opinion as to the applicability or nonapplicability of the exemptions to the particular classifications. It is believed that you you should be able to determine the application of the exemptions in particular cases by a reference to the regulations themselves and to the report of the presiding officer, on which the definitions are based. Copies of such regulations and report are enclosed. An ex parte presentation of the facts is not a proper basis on which such determinations can be made by this office.

Some comment appears necessary, however, concerning the presentation made by you with respect to certain classifications of employees. Our failure to comment with respect to the other classifications does not mean that we concur in them.

Under the heading "EXECUTIVE EMPLOYEES" it is stated that executive employees must "receive in compensation at least $30.00 per week." Reference is made to section 541.1(E) which provides that the compensation must be on a salary basis (exclusive of board, lodging, or other facilities).

Under the heading "ADMINISTRATIVE EMPLOYEES" it is stated that administrative employees must "receive compensation of at least $200.00 per month." Section 541.2(A) provides that administrative employees must be compensated on a salary or fee basis at a rate of not less than $200.00 per month (exclusive of board, lodging, or other facilities). The discussion appearing in the report of the presiding officer at pages 23 through 36 should enable you to determine the applicability or nonapplicability of the administrative exemption to the particular classifications of employees.

Under the heading "RETAIL BOOKKEEPERS AND CLERKS" the suggestion is made by the association that bookkeepers, checkers, and other clerks who devote "over 80% of their time" in connection with retail sales are exempt by section 541.4. Section 541.4(B) provides that employees, to be entitled to the exemption, must not engage in nonexempt work to an extent greater than 20 percent of the number of hours worked in the workweek by such nonexempt employees. In this connection see pages 14, 15, and 18 of the report of the presiding officer.

Under the heading "ROUTE DELIVERY SALESMAN" it is suggested that the route delivery salesmen are exempt both by section 541.4 and by section 541.5. Such employees sell and deliver products both to homes and to stores. To the extent that such employees are engaged in making nonretail sales or deliveries, as for example, to stores, they are clearly not engaged in work exempt by section 541.4. The applicability of the outside salesman exemption to driver salesmen is adequately discussed at pages 49 through 52 of the report of the presiding officer, to which reference has already been made.

Under the heading of "ROUTE FOREMEN" request is made for a determination that such employees are exempt as outside salesmen. From the description of the employees' duties it appears that they are "working foremen" who serve as relief drivers for regular delivery salesmen. Time spent by the route foremen at the place of business of the company cannot be considered as outside sales work. In order for the route foremen to be exempt as outside salesmen they would have to conform with all of the requirements of section 541.5, including the 20 percent requirement that they must not engage in nonexempt work to an extent greater than 20 percent of the number of hours worked by the nonexempt employees.

The association seeks a determination that salesmen's helpers are exempt as outside salesmen. An adequate discussion of this problem appears on page 48 and 49 of the report of the presiding officer mentioned above.

Under the heading "OUTSIDE SALESMEN CAPACITY" the association seeks a determination that service salesmen who engage in "checking up on the service being received by the old customers" and in taking new orders are exempt as outside salesmen. The service work would not appear to be exempt by section 541.5. Page 46 of the report of the presiding officer indicates the inapplicability of the outside salesman exemption to outside service men.

THE MOTOR CARRIER ACT

1. DRIVERS OF TRUCKS WHO DELIVER ICE TO BUNKERS OF CARS.

Section 13(b)(1) of the Fair Labor Standards Act exempts from the overtime provisions "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." Informal conferences with representatives of the Interstate Commerce Commission indicate that they prescribe no qualifications or maximum hours of service for truck drivers who haul ice to bunkers of railroad cars which later move across state lines. See New Pittsburgh Coal v. Hocking Valley Railway, 24 ICC 244, Basin Supply Company v. Texarkana and Ft. S. Railway Company, 33 ICC 157, and Bunker Coal, 227 ICC 485. It is the position of the Wage and Hour Division, therefore, that such truck drivers are not within the scope of the exemption contained in section 13(b)(1).

2. DRIVERS OF TRUCKS WHO DELIVER ICE TO RAILROADS FOR USE IN AIR CONDITIONING AND DINING CARS AND CLUB CARS.

The principles set forth in the preceding paragraph are equally applicable to these truck drivers.

3. HELPERS AND MECHANICS.

On March 13, 1940, the Interstate Commerce Commission published a report in Ex Parte No. MC-2 and Ex Parte No. MC-3 to the effect that mechanics, loaders and drivers' helpers affect the safety of operation of motor vehicles.

The Commission has not yet issued any regulations concerning maximum hours of service for loaders, mechanics, and drivers' helpers, and has stated it will hold further hearings before so doing. In accordance with the opinion which we have consistently maintained, it is our opinion that the exemption provided by section 13(b)(1) of the Fair Labor Standards Act will not become operative for loaders, mechanics, and drivers' helpers at least until the effective date of any regulation of hours of service which may be prescribed by the Interstate Commerce Commission for such classes of employees.

In this connection is is noteworthy that at least two courts have already held that in suits under section 16(b), the courts may determine what employees lie within the Commission's jurisdiction to prescribe hours of service and may reach decisions different from those reached by the Commission.

4. HOW MUCH OTHER WORK MAY AN INTERSTATE DRIVER PERFORM AND STILL REMAIN UNDER THE MOTOR CARRIER ACT?

Below is set forth the text of a recent letter written in response to a similar inquiry. This letter sets forth the position of the Wage and Hour Division in regard to this question.

"On February 5, 1941, you left with this office a question which is stated below:

> 'The company operates a warehouse and owns and operates trucks in interstate commerce. The company employs a man to normally and regularly do two things: (1) work in the warehouse and (2) drive one of the trucks. The man works a substantial number of hours each week on each job. The total hours worked during a workweek on the two jobs exceeds 40 hours but is less than 60 hours. The employee receives more that 30¢ an hour.
>
> 'Does Section 7(a) -- the overtime provisions of the Act -- have any application to this?'

"The employee in question in effect has two separate and distinct jobs: (1) that of a truck driver and (2) that of a production employee. Such an employee is engaged in both exempt and non-exempt work during the same workweek inasmuch as his employment as a truck driver may bring him within the exemption contained in section 13(b)(1) of the act where his hours of service are regulated by the Interstate Commerce Commission.

"We have stated that an employee who engages in exempt and nonexempt work during the same workweek shall not be considered to be exempt from the provisions of the act. Similarly, an employee who works part of a week producing goods for interstate commerce and part of a week producing goods for intrastate commerce has been held to be within the general coverage of the act.

"It is doubtful, however, whether the Congress intended that a truck driver should love the exemption contained in section 13(b)(1) merely because for an hour or two during the week he engaged in production work. On the other hand, we are convinced that the hours exemption granted by the Congress to employees who affect the safety of operation of motor carriers, such as truck drivers, was not intended to operate to remove such workers from the overtime provisions of the law when they regularly engage in a substantial amount of production work.

"We think that section 13(b)(1) in this situation should be viewed in the same manner in which the United States Supreme Court viewed the antitrust laws in the case of United States v. William L. Hutcheson (decided February 3, 1941) in which Mr. Justice Frankfurter said:

> 'Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. RFC., 306 U. S. 381, 391, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy

> of the law, although it expressed that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." Johnson v. United States, 163 Fed. 30, 32.'

"We shall therefore take the position that a truck driver employed by a private motor carrier who regularly spends a substantial part of his time during any workweek on nonexempt activities which have nothing to do with transportation, is not within the exemption contained in section 13(b)(1) and is entitled to receive overtime as specified in section 7(a) of the act. One test which might be used to determine what constitutes a substantial part of the time of such an employee might well be similar to that set up by the Administrator in Regulations, Part 541, in regard to the definition of executive and administrative employees."

We trust that we have adequately answered the various questions presented in your brief.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures

In Reply Refer To:
LE:FUR:HO

April 9, 1941

Orlando H. Dey, Esquire
Rahway
New Jersey

Dear Mr. Dey:

This will reply to your letter of March 21, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present.

We are enclosing copies of the act and Interpretative Bulletins Nos. 1, 5, and 13. See particularly paragraphs 2 and 3 of Interpretative Bulletin No. 13. Also enclosed is the Employers' Digest.

As indicated in paragraph 3, if an employee is required to stand in line a considerable period of time waiting to punch a time clock, the time thus spent should be considered hours worked. Similarly if an employee is required to stand in line a considerable period of time to receive his pay check, such time should also be regarded as a part of his working hours.

Very truly yours,

For the Solicitor

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

Enclosures (5)

219511

(7915)

In reply refer to:
LE:FR:MFJ

April 10, 1941

John J. Grealis, Esquire
Pruitt and Grealis
105 West Adams Street
Chicago, Illinois

Dear Mr. Grealis:

This will reply to your letter of March 14, 1941, addressed to the Administrator, in which you inquire as to the applicability of the Fair Labor Standards Act of 1938 to the following situation:

> "A manufacturer proposes to give graduates of mechanical schools, and other prospective employees, mechanical aptitude tests and written examinations in a school which they propose to establish in one of their hangars. This test and written examination will probably take about six or eight hours, and should be completed within one day. Persons who pass this test satisfactorily will be offered employment and put through a normal hiring procedure. They will be placed on the company payroll the day that they actually start to work in the factory.
>
> "Persons who take the test and just barely get through or who show signs of nervousness that would be a safety hazard in the factory, will be told that in their estimation they are not yet ready to enter the plant. If they so desire they may return for practice in the school for a day or two until they have become accustomed to the work and the conditions. They will at that time be given a normal employment examination. If that is successfully passed they will be put through the normal hiring procedure and put to work in the factory and be put on the payroll as of that date.
>
> "If the results of the pre-employment tests are poor, the prospective employee will be advised to either return to the school from which he came, or to get further training some place else, or to give up this line of endeavor and select employment in some other field. These prospective employees would, of course, not do any productive work."

It is the view of this office that time spent taking the examination need not be considered hours worked for purposes of the Fair Labor Standards Act. It is our further opinion that time spent at the school need not be considered hours worked if no productive work is performed.

Very truly yours,

For the Solicitor

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

216004

(7915)

In Reply refer to:
LE:FR:EC

April 10, 1941

Mr. W. T. Phillips
University of New Hampshire
Durham, New Hampshire

Dear Mr. Phillips:

Your letter of March 17, 1941, addressed to the Secretary of Labor has been referred to me for reply. You inquire as to the applicability of the Fair Labor Standards Act of 1938 to certain students taking a course in Money and Banking. You state:

> "In order to give our students a better grasp of the subject, it seems desirable to let them get some actual first hand experience which can only be gotten in a bank. Several of the leading bankers in the state have indicated a willingness to allow us to place four or five of our better students in their banks for a short training period. Six to eight weeks time so spent would seem to be the minimum time feasible for such a program. These students would presumably spend their time in the bank observing and for short periods actually doing the various operations which are carried on in the particular banks chosen "

It is impossible to state categorically whether or not the students are employees of the cooperating banks during the periods of time when they are gaining experience in such banks. The mere fact that the student is not formally hired by the bank is not conclusive, since section 3(g) of the Fair Labor Standards Act defines "employ" as including "to suffer or permit to work." If the students are actually engaged in performing the various operations which are carried on in the particular banks, it is our opinion that they are "suffered

or permitted to work" by the banks and are therefore employees under the act. Mere observation, as distinguished from the performance of the bank operations, would not appear to be employment under the act.

I am enclosing a copy of Regulations, Part 520, issued by the Wage and Hour Division providing for the issuance of special student-learner permits.

Very truly yours,

For the Solicitor

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

Enclosures (2)

#218060

(7915)

In Reply Refer To:
LE:GFH:HO

April 10, 1941

Mr. W. Cooley, Vice President
El Paso Ice & Refrigerator Co
El Paso
Texas

Dear Mr. Cooley:

This will reply to your letter of December 18, 1940, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present. I quote from your letter:

> "Inquiry is made concerning the application of the Fair Labor Standards Act of 1938 to importers and handlers of commodities produced in Mexico under conditions violative of the Act.
>
> "It is realized that the employees themselves are beyond the jurisdiction of the United States, but it is believed that perhaps persons handling these commodities within the United States will be in violation of the "hot goods" section of the Act. Is it possible that these importers and handlers could be enjoined or prosecuted under the Act?"

As you know, 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 refer you to sections 3(c), 3(j), and 15(a)(1) of the act. Section 3(j) provides: "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." Clearly under section 3(c) of the act, Mexico is not a "state" within the meaning of the statutory definition. Hence it would follow that the minimum wage (section 6) and the maximum hour (section 7) provisions of the act do not apply to employees engaged in manufacturing or fabricating goods in Mexico,

because such employees are not engaged in the production of goods for commerce "in any state" within the meaning of the statute. As a consequence, such goods could not be "hot goods" under section 15(a)(1) of the statute. That section renders unlawful the shipment, delivery, or sale in commerce only of goods produced in violation of section 6 or section 7 of the act, or of any regulation or order of the Administrator issued under section 14. It seems clear that the coverage of section 14 is no more extensive than the coverage of section 6.

Very truly yours,

For the Solicitor

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

Enclosure

189157

(7915)

In Reply Refer To:
LE:GFW:LK

April 12, 1941

H. Pierre Branning, Esquire
1103-6 First Trust Building
Miami, Florida

Dear Mr. Branning:

This is in reply to your letter of November 22, 1940.

You state that you have a client who operates a foundry and machinery construction and repair business in Miami, Florida, who does a considerable amount of repair work on ships. You ask if employees who repair ships which move to points outside the State of Florida fall within the coverage of the Fair Labor Standards Act, and if employees who repair ships plying purely within the State of Florida are covered. You state further that your client does repair work for the Florida Power and Light Company which furnishes power to customers both within and outside the State of Florida, and you ask if such employment is within the coverage of the act. You also ask if a wage order for foundries has been issued establishing higher wages than the minimum prescribed in the act

As you know, 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. You will note by reference to paragraph 13 of Interpretative Bulletin No. 5 that employees of contractors engaged in maintaining, repairing, or reconstructing ships would seem to be engaged in interstate commerce and subject to the act. You will note by reference to section 3 (b) of the act that commerce is defined as "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof." However, it is my opinion that the employment of employees who are engaged in repairing boats and ships which ply solely in intrastate commerce is not within the coverage of the act. But in quoting the definition of "commerce" contained in section 3(b) of the act we have underscored the phrase "from any state to any place outside thereof" in order to caution you that if a boat in its journey from one Florida port to another crosses the three-mile limit, such a boat, in our opinion, is plying in interstate commerce.

(7915)

I believe that paragraph 13 of Interpretative Bulletin No. 5, to which I have already referred, should satisfy you that employees who are engaged in maintaining, repairing, or reconstructing the plant of a power and light company which furnishes power to out-of-state customers, are properly to be deemed covered by the statute.

The Administrator has not issued any wage orders for foundries. Hence, the minimum wages and maximum hours prescribed in the act are applicable to employees of such firms who are covered by the act.

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 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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(215)