UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

September 8, 1941

Legal Field Letter

No. 57a

Erratum

On page 2 of Legal Field Letter No. 57, please note the following typographical error in indexing:

> Under date of May 7, 1941, from Rufus G. Poole to John J. Cooney, in the last line of the subject for this memorandum, "p. 139, par. J" should read "P. 193, par. J".

(9100)

57

UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

June 14, 1941

Legal Field Letter
No. 57

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
4-29-41	Rufus G. Poole (LS)	Dr. Gustav Peck	Interpretation of term "occupation" in textile learner regulations. (p.21, par. K; p.260, after par. S)
5-2-41	Rufus G. Poole (ADH)	Sameul P. McChesney	Spielberg Millinery Company St. Louis, Missouri File No. 24-2084 (Whether a company violates Section 7(b)(1) if it does not live up to a collective bargaining agreement calling for time and one-quarter overtime pay for hours worked from 35 to 40 a week.) (p.60, par. D; p.91, par. R)
5-3-41	Rufus G. Poole (GFH)	John J. Cooney	Eastern Pulpwood Company Calais, Maine (Coverage under the Act and computation of hours worked by Canadian and American employees of a company which conducts pulpwood operations along the boundary of a river between the United States and Canada; the employees are equally divided between citizens of the United States and Canada, according to an unwritten immigration agreement.) (p. 1, par. B; p. 120, par. B; p. 157, par. 8.)
5-6-41	Rufus G. Poole (GFH)	Arthur E. Reyman	Errand Service Corporation (Applicability of Act to dispatchers and clerks employed by a messenger service company which supplies messenger service to companies engaged in interstate commerce.) (p. 25, par. 4; p. 197, par. K.)

Legal Field Letter
No. 57

MEMORANDA

Date	From	To	Subject
5-7-41	Rufus G. Poole (ADH)	John J. Cooney	Interstate Commerce Commission Ruling (Applicability of Section 13(b)(1) to employees of truck service stations who do repair work for contract and common carriers and to employees of wholesale produce dealers who help load trucks in view of the Interstate Commerce Commission ruling affecting loaders of motor vehicles.) (p. 62, par. F; p. 115, par. MM; p.193 , par.J)
5-7-41	Rufus G. Poole (GFH)	Aaron A. Cohen	Request for Opinion re The Manning Studios, Inc. Cleveland, Ohio (34-3711) (Coverage under Act of an advertising photographic studio.) (p. 1, par. B; p. 160, par. M.)
5-8-41	Rufus G. Poole (FR)	W. W. LeMat	Time Spent in Transporting Goods (Computation of hours worked where homeworkers and factory workers take work home; whether they should be paid for time spent transporting goods to and from the factory.) (p. 120, par. ,
5-9-41	Rufus G. Poole (EGL)	Dorothy M. Williams	American Ice and Cold Storage Company Everett, Washington Routine Inspection First Processing - section 7(c) and section 7(b)(3). (Applicability of these sections to the cleaning, shelling, stemming and clipping of fresh fruits and vegetables, and to the freezing operations upon these fruits and vegetables.) (p. 68, par. 6; p. 74, par. P; p. 94, par. 1; p. 99, par. 4(c).)
5-10-41	Rufus G. Poole (FUR)	Jerome A. Cooper	Request for Opinion on Interpretation of Section 13(a)(11) (Applicability of this section to telephone operators who operate a company's switchboard for use of employees and town residents as well as for the company's business. (p. 76, par. R; p. 115, par. LL.)

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5-3-41	Rufus G. Poole (GFH)	John J. Cooney	Eastern Pulpwood Company Calais, Maine (Coverage under the Act and computation of hours worked by Canadian and American employees of a company which conducts pulpwood operations along the boundary of a river between the United States and Canada; the employees are equally divided between citizens of the United States and Canada, according to an unwritten immigration agreement.) (p. 1, par. B; p. 120, par. B; p. 157, par. 8.)
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5-9-41	Rufus G. Poole (EGL)	Dorothy M. Williams	American Ice and Cold Storage Company Everett, Washington Routine Inspection First Processing - section 7(c) and section 7(b)(3). (Applicability of these sections to the cleaning, shelling, stemming and clipping of fresh fruits and vegetables, and to the freezing operations upon these fruits and vegetables.) (p. 68, par. 6; p. 74, par. P; p. 94, par. 1; p. 99, par. 4(c).)
5-10-41	Rufus G. Poole (FUR)	Jerome A. Cooper	Request for Opinion on Interpretation of Section 13(a)(11) (Applicability of this section to telephone operators who operate a company's switchboard for use of employees and town residents as well as for the company's business. (p. 76, par. R; p. 115, par. LL.)

Legal Field Letter
No. 57

MEMORANDA

Date	From	To	Subject
5-13-41	Rufus G. Poole (EGL)	George A. Downing	Application of sections 7(b)(3) and 7(c) to lessor and lessee packing vegetables in the same establishment. RA:JHS:DM (p. 22, par. L; p. 68, par. 6; p. 74 par. P; p. 94, par. 1; p.99, par.4(c).)
5-14-41	Rufus G. Poole (EGL)	Samuel P. McChesney	Request for an Opinion re: "Process Butter" (Applicability of Section 7(c) to a creamery engaged in cutting, wrapping and distributing butter that it buys in tubs.) (p. 67, par. 3; p. 98, par. 3.)
5-28-41	Irving J. Levy (GFH)	Jerome A. Cooper	Calmes Construction Company, Baton Rouge, Louisiana File No. 17-203 (Whether the dredging of lateral canals for the purpose of permitting oil drilling companies to drill for oil from floating rigs is covered by the Act.) p. 183, par. 5; p. 192, par. 5(a)(1).)
6-3-41	Rufus G. Poole (GFH)	John M. Gallagher	Shirley Gas-Coal Corporation (Whether employees engaged in unloading, assembling and fitting together the parts of a large dragline-type power excavator which is used to perform strip mining operations, the coal from the mining operation to be sold in interstate commerce, are covered by the Act.) (p. 138, par. E; p. 182, par. 2.)
6-5-41	Rufus G. Poole (KCR)	Dorothy M. Williams	(Application of section 13(a)(5) to Alaska fishing and canning operation LE:IS:IB (p. 65, par. I; p. 106, par. GG.)

LETTERS

Date	To	Subject
5-3-41	James Seddon Allen Memphis, Tennessee (EGL)	(Whether harvesters are to be counted in the 10 employees allowed under Sections 7(c) and 13(a)(10) exemptions; whether truck drivers are to be counted in the 10 employees under Sections 7(c) and 13(a)(10); whether shifts of employees are to be added together for purpose of the 10 employee requireme under Sections 7(c) and 13(a)(10). (p. 38, par. 9; p. 51, par. A; p. 56, par. B; p. 66, par. L; p. 95, par. U; p. 106, par. HH; p. 111, par. KK; p.129, par. J.)
5-5-41	W. E. Long Akron, Ohio (EB)	(Applicability of administrative exemption to an accountant when the cost estimates he prepares are passed upon by his superiors.) (p. 62, par. H; p. 101, par. 2.)
5-5-41	W. N. Watson Washington, D. C. (GFH)	(Applicability of Act to truck drivers of a company which processes liquid paving products which are placed in tank storage and delivered by means of tank trucks to state, county and municipal highway departments, the tank trucks being used to apply the products to roads under construction.) (p. 38, par. 9; p. 175, par. 3(d).)
5-5-41	Joseph L. Miller Washington, D. C.	(Applicability of outside salesman exemption under Section 13(a)(1) to outside advertising solicitors of radio stations who prepare commercial copy for use on programs which they have sold and to advertising solicitors who also announce the program as prepared by them.) (p. 72, par. N; p. 102, par.5; p. 172, par. 1.)
5-5-41	Marshall, Melhorn, Davies, Wall & Bloch Toledo, Ohio (EB)	(Employer-employee relationship;whether a registrar stationed at an elevator company to supervise the work of weighmen and inspectors and who is paid by the elevator company but who is selected and supervised in his job by

Legal Field Letter
No. 57

Date	To	Subject
5-5-41	Marshall, Melhorn, Davies, Wall & Bloch Toledo, Ohio (EB) (Continued)	the United States Department of Agriculture, in charge of the administration of the National Warehousing Act, is the employee of the elevator company or of the Federal Government.) (p. 49, par. B; p. 81, par. D; p. 236, par. A.)
5-7-41	Adron Coldiron Hibbing, Minnesota (KCR)	(Computation of hours worked with respect to lunch periods spent underground by miners.) (p. 121, par. 7.)
5-12-41	G. T. Wood Utica, New York (GFH)	(Coverage of Act with respect to "expediters" whose duties consist in facilitating and speeding up the delivery of machinery and tools used in the production of armament for the United States Government under Government contract.) (p. 158, par. 1(a).)
5-12-41	James W. Sullivan Lynn, Massachusetts (GFH)	(Applicability of Act to employees of an armored car service which transports payrolls from banks to factories engaged in interstate commerce and all located in the same state.) (p. 189, par. 3(a); p. 197, par. K.)
5-16-41	Fred E. Campbell Washington, D. C. (ILS)	(Application of Sections 7(c) and 7(b)(3) exemptions to a wholesale fruit and vegetable commission company in terminal warehouses where fruits and vegetables are packed and repacked for sale to the retail trade.) (p. 68, par. 6; p. 74, par. P; p. 94, par. 1; p. 97, par.1(d); p. 195, par. 5(b).)
5-23-41	James H. Warren Fulton, Kentucky (FR)	(Application of Section 13(a)(2) exemption to a company which distributes gas to home users in small quantities for storage in their tanks and more than 50% of whose sales are in intrastate commerce.) (p. 69, par. N; p.102, par. DD; p. 186, par. 2.)
5-29-41	Harris Berlack New York, New York (EGL)	(Application of Sections 7(c) and 7(b)(3) exemptions to plant manufacturing grape juice.) (p. 68, par. 6; p. 74, par. P; p. 94, par. T; p. 99, par.4(c).)

April 29, 1941

Dr. Gustav Peck
Assistant Director
Hearings Branch

LE:LS:VR

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

Interpretation of term "occupation" in textile learner regulations

Pursuant to your conversation with Mr. Sherman in Mr. Rea's office, you are hereby advised the term "occupation" as used in the textile learner regulations to determine whether a worker is "available" is construed by the Solicitor's Office as permitting distinctions to be made between persons engaged in various divisions of an occupation. Consequently, a weaver who is working on lace goods may be considered to be in a different occupation from a weaver working on coarse bagging provided the Hearings Branch finds that dissimilar skills are involved.

(8509)

C O P Y

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

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

LE:ADH:SQM
May 2, 1941

Spielberg Millinery Company
St. Louis, Missouri

File No. 24-2084

This is in reply to your memoranda of February 24 and March 10, 1941, to which was attached a memorandum to you from Willard B. Myers, Attorney, dated February 15. It is stated in Mr. Myers' memorandum that the subject company entered into a contract with the union, which met the requirements of section 7(b)(1) of the act.

The contract provided that time and one-quarter should be paid all employees subject to its terms for all hours worked in excess of 35 during the workweek. The company failed to pay time and one-quarter save for hours worked in excess of 40 by employees covered by the contract. The union insists that by such a breach of contract, the subject company has deprived itself of the benefits of section 7(b)(1).

We agree with your conclusion that the Wage and Hour Division is not in a position to enforce the consideration given to the union for its acceptance of such a contract. As far as the Wage and Hour Division is concerned, a contract made pursuant to section 7(b)(1) is only voided as to an individual employee employed thereunder by his working in excess of 1000 hours during any period of 26 consecutive weeks or by his working in excess of 1000 hours in a period of 26 consecutive weeks where only one such period in a year is specified.

It appears that the union has its remedy in a court of law. If, in a proceeding brought by the union, the court should hold that the failure to pay time and one-quarter for all hours worked in excess of 35 in a workweek in violation of the terms of the contract made the entire contract a nullity ab initio, we can then decide what the effect of such decision is upon the applicability of section 7(b)(1) to the employees employed under the contract.

#215552
99073

C O P Y

John J. Cooney, Esquire
Regional Attorney
Boston, Massachusetts

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

LE:GFH:DCW
May 3, 1941

Eastern Pulpwood Company
Calais, Maine

We have your memorandum of April 11, 1941, in which you inquire concerning the status under the act of employees of the above company. It appears that each spring the subject company conducts a pulpwood drive on the St. Croix River, which river forms a boundary between the United States and Canada for approximately 75 miles. You state that the immigration authorities of both countries have what appears to be an unwritten agreement to the effect that as long as the crew is evenly divided between the citizens of Canada and the United States they may work on both sides of the river. We quote from your memorandum:

> "It has been the policy of the company to comply with the provisions of the Act with respect to both Canadians and Americans. The question in the company's mind is whether or not the Canadian employees, while working in the international stream, are subject to the provisions of the Fair Labor Standards Act."

Particularly the company seeks to be advised regarding the status under the act of employees who work on both sides of the river within a workweek.

In our opinion, both the American and the Canadian employees of the subject company are covered by the act during all workweeks in which they spend all or a part of their time in the United States in the production of goods for interstate commerce. During workweeks in which an employee is covered by the act, all hours which the employee works both in the United States and Canada are properly to be considered "hours worked" under the act.

224747

In Reply Refer To:
LE:GFH:GW

May 6, 1941

To: Arthur E. Reyman, Esquire
Regional Attorney
New York, New York

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

Subject: Errand Service Corporation

This is with reference to your memorandum of March 6, 1941, on the above subject. We regret the delay in replying.

It appears that the subject firm is engaged in supplying messengers who perform essential messenger services for firms which are engaged in interstate commerce or in the production of goods for interstate commerce. While the messengers are paid in compliance with the act, this is not true in the case of three dispatchers and three clerical workers employed in the firm's office. The dispatchers' duties consist of receiving telephone calls from customers requesting that messengers be sent to the customers' offices in order to perform messenger services. As a result of such calls the dispatcher dispatches messengers to the customers and thereafter enters into the subject company's records the name of the firm making the call, the number of the boy sent out on the call, the time of the call, and the charge to be made for the service. It is the duty of the clerical workers to keep the books of account, prepare statements for the customers, etc. It is with regard to the status under the act of the dispatchers and the clerical workers that you seek to be advised.

Assuming, as appears to be the case from your account, that the messengers of this concern regularly perform services for firms which are engaged in commerce or in the production of goods for commerce, it is our opinion that the dispatchers fall within the general coverage of the act. It appears that the activities of the dispatchers furnish the points of contact which exist directly between the firm's customers and the messenger services which the firm holds out to interstate dealers and producers.

The services performed by these dispatchers appear to be indispensable to the continued operation of the firm's business, and a necessary prerequisite in each instance to the performance of the messengers' services. Such services, by reason of the type of concerns to which the services are rendered, are properly to be regarded as activities in interstate commerce or as occupations necessary to the production of goods for commerce. Since the activities of the dispatchers appear to be so integrally bound up in each instance with the covered activities of the messengers, it is our opinion that the dispatchers are likewise covered by the act.

It also seems clear that the activities of the clerical employees are intimately related to the furnishing of the messenger service to the customers. In our opinion, the business of furnishing messenger service is not limited exclusively to the actual physical tasks performed by the messengers whom the firm employs, but also includes such additional employments as are essential to the continued existence of the messenger service company as a going establishment. Clearly, the keeping of books of account and the preparation of statements of services rendered which are transmitted to clients of the concern are an integral factor in the furnishing of messenger service to the firm's customers. Consequently, it is our opinion that the clerical workers likewise fall within the coverage of the act.

213578

In Reply Refer To:
LE:ADH:MD

May 7, 1941

To: John J. Cooney, Esquire
Regional Attorney
Boston, Massachusetts

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

Subject: Interstate Commerce Commission Ruling

This is in reply to your memorandum of April 29, to which was attached a copy of a memorandum to Mr. L. A. Gleason, supervising inspector, from Mr. A. S. Friedman, senior inspector, dated April 7, 1941. Two problems are raised by Mr. Friedman's memorandum. (1) A question is raised in regard to the possible application of the exemption contained in section 13(b)(1) to employees of truck service stations who do repair work for contract and common carriers. The Interstate Commerce Commission has no jurisdiction under the Motor Carrier Act over employees of such service stations, and therefore the exemption contained in section 13(b)(1) is inapplicable.

(2) The second question is raised in regard to employees of wholesale fruit and produce dealers. An association composed of these dealers has interpreted the recent Interstate Commerce Commission opinion as exempting practically every man working for these companies, since almost every employee at some time during the week is engaged in helping to load trucks. It is our opinion that employees who do an incidental amount of loading during a workweek will not be within the exemption contained in section 13(b)(1), even should the Interstate Commerce Commission prescribe maximum hours of service for loaders. In its decisions in Ex Parte No. MC-2 and Ex Parte No. MC-3 the Interstate Commerce Commission refers to loaders as employees "whose sole duties are to load and unload motor vehicles and transfer freight between motor vehicles and the vehicles and the warehouse." You will note in paragraph 5(b) of Interpretative Bulletin No. 9 (third revision) that we stated that "any mechanic, loader or drivers' helper who might

otherwise be considered to be within the 13(b)(1) exemption after the Commission's regulations become effective would not be within this exemption during any workweek in which he engaged in a substantial amount of nonexempt work." In various letters we have suggested that the test of "substantial" in this case is similar to that used in Regulations, Part 541.

As you know, of course, the Division does not presently consider as exempt even employees who are actually "loaders," although for practical reasons, no enforcement action is taken with respect to them. See Inspection Field Letter No. 17 (Rev.).

226713

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

May 7, 1941

LE:GFH:HO

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

Request for Opinion re
The Manning Studios, Inc.
Cleveland, Ohio
(34-3711)

This is with reference to your communication of February 26, 1941, on the above subject in which you inquire concerning the application of the act to its employees. I quote from your letter:

"The firm advises by letter that:

'This is a creative studio and ideas are our product.

'These ideas are expressed in what we call layouts.

'These layouts may be made in three ways: - rough, semi-comprehensive and comprehensive.

'Often times these layouts come back and what we call working drawings are made from them.

'After delivering these we have nothing further to do with the job -- we are finished.

'But our clients do not use these actual drawings for anything. They are photographed by the engraver or the lithographer, and then returned to a file or destroyed.

'The engraver makes plates from his photograph. This is in turn sent to the printer, who makes impressions on paper and delivers the final job.

> 'As you see, our work is three times removed from the finished product, and only a photograph is used even then. But nevertheless, we are complying with the spirit and the letter of the law and are content to do so.'
>
> "All technical employees of the company are compensated in accordance with the provisions of the Act but certain young men seeking training and experience opportunity are given a chance to learn the trade and in return therefor are merely paid their carfare and are asked to run errands and make deliveries within the city. It is only with respect to these persons that violations exist."

In my opinion employees of the firm are covered by the act under the principles expressed in paragraph 11 of Interpretative Bulletin No. 5. Even though the working drawings are photographed, and printing plates are designed in accordance with the photographs thus obtained, nevertheless it is quite apparent that employees of the subject company are engaged in producing the basic pattern or design which is used to produce other goods for interstate commerce. Hence, it is our opinion that the products of this concern do not appear to be any further removed from the production of goods for interstate commerce than are the patterns, designs, or blueprints enumerated in paragraph 11 of Interpretative Bulletin No. 5. It would follow that in the absence of special certificates obtained pursuant to section 14 of the act, the particular employees described by you are entitled to compensation in accordance with sections 6 and 7 of the statute.

100766

Mr. W. W. LeMat
Associate Director
Field Operations Branch

LE:FR:DCW

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

May 8, 1941

Time Spent in Transporting Goods

This will reply to your memorandum of recent date in which you inquire as to the applicability of the Fair Labor Standards Act of 1938 to situations which you describe. You state:

> "1. Home workers obtain work materials from the factory and return the finished goods. Should they be paid for hours spent in transporting goods?
>
> "2. Factory workers take work materials home at night and return finished goods in the morning. Should they be paid for time spent transporting goods?"

In the opinion of this office, principles set forth in paragraphs 9 through 12 of Interpretative Bulletin No. 13 would indicate that time spent by employees carrying materials to and from the factory should be considered hours worked. It would not, in our opinion, alter the case if the employees were factory workers rather than home workers. Under the broad definition of the word "employ" contained in section 3(g) of the act, it would seem clear that both home workers and factory workers are entitled to compensation for all time spent in transporting goods of their employer to or from the factory.

May 9, 1941

In Reply Refer To:
LE:EGL:MGM

To: Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

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

Subject: American Ice and Cold Storage Company
Everett, Washington
Routine Inspection
First Processing - section 7(c) and section 7(b)(3)

In regard to your memorandum of April 1, 1941, we are of the opinion that the cleaning, shelling, stemming and clipping of fresh fruits and vegetables preparatory to freezing and the freezing operations are all part of the first processing of the fruits and vegetables, if performed as a necessarily continuous series of operations throughout which the products remain perishable. Under such circumstances, employees engaged in the freezing operations, as well as those engaged in cleaning, stemming, shelling, and other like preparatory operations, are within the section 7(c) exemption; section 7(b)(3) is also applicable.

The mere fact that the preliminary operations are performed by an establishment that is not owned or controlled by the freezing establishment does not in itself prevent the sections 7(c) and 7(b)(3) exemptions from applying to the employees of the latter establishment, nor does the packing of fruits in sugar prior to the freezing change the result.

223158

LE:FUR:RL

May 10, 1941

Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

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

Request for Opinion on Interpretation of
Amendment to Section 13(a)(11)

This will reply to your memoranda of March 17, 1941, and April 21, 1941, concerning the applicability of the 13(a)(11) exemption to the following situation:

> "A large lumber company employing 271 employees operates, in conjunction with its plant, a company town. Employees of the concern include a physician, street cleaner, et cetera. An exemption under the amendment to Section 13(a)(11) is claimed for telephone operators who operate the company's switchboard.
>
> "The system serviced by this switchboard provides local and long distance service to employees, town residents other than employees, a C.C.C. camp, fire protection towers of the State Department of Forestry, and pay station facilities for some nonresidents, such as neighboring farmers. The switchboard is located in the private residence of the chief operator, in a building housing the U. S. Post Office and located approximately two blocks from the company's offices.
>
> "No specific service charge is assessed against users of the local telephone service, other than indirect charges for utility services included in house rental rates. Although the operators are not required to be in constant attendance at the board, they are assigned no other duties and the switchboard service is available at all hours of the day or night.
>
> "This employer insists that a major portion of calls through the switchboard are handled for the public and for purposes not connected with its business. It would seem, however, that service to the C.C.C. camp and to fire protection towers of the State Department of Forestry bears a substantial connection to the company's commercial activities which are those of a large scale lumber producing and manufacturing business."

(8509)

As you state in your memorandum of March 17, this switchboard is an integral part of a commercial concern. At least part of the activities of these operators, moreover, are the same as those of any covered operator employed by a private concern, and those activities would clearly be nonexempt. It further appears that the Public Service Commission of Alabama does not regulate the exchange in question.

Accordingly, it is our opinion that the switchboard operators are not within the 13(a)(11) exemption which is limited to switchboard operators employed in any public telephone exchange with less than 500 stations. It would seem clear that these switchboard employees are engaged in interstate commerce, and are thus within the general coverage of the act.

216316

Samuel P. McChesney, Esquire
Regional Attorney
St. Louis, Missouri

LE:EGL:SQM

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

May 14, 1941

Request for an Opinion
re: "Process Butter"

In regard to your memorandum of May 1, 1941, we are of the opinion that the section 7(c) exemption is inapplicable to a creamery engaged in cutting, wrapping and distributing butter that it buys in tubs. Said operations do not constitute the "first processing of milk, whey, skimmed milk or cream."

#233535

In Reply Refer To:
LE:EGL:MAG

To: George A. Downing, Esquire
Regional Attorney
Atlanta, Georgia

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

May 13, 1941

Subject: Application of sections 7(b)(3) and 7(c) to lessor and lessee packing vegetables in the same establishment.
RA:JHS:DM

In your memorandum of April 15, 1941, you present a situation where the owner of a packing house, who grades and packs vegetables other than tomatoes during certain weeks of the year, leases a part or all of the packing house while he is not so engaged to a second party for use by the latter in packing tomatoes. The lessee carries his own crew of specialized wrappers from packing house to packing house and packs tomatoes and other products that require expert wrapping. Consideration for the lease consists of a certain sum for each package handled by the lessee.

The lessor intends to take during the calendar year 28 exempt workweeks under sections 7(c) and 7(b)(3), and the lessee also wishes to use these exemptions for his operations while he is engaged in packing tomatoes at the lessor's packing house.

We are of the opinion that the lessor and the lessee between them may take only 28 exempt workweeks at the establishment in a calendar year. Were we to construe these sections 7(c) and 7(b)(3) exemptions otherwise, we would find it necessary in every case to determine whether the agreement was a bona fide lease or whether it was merely an attempt on the part of the "lessor" to secure more than 28 exempt workweeks for his operations. Furthermore, a contrary result would mean that a lessee, by moving from one leased establishment to another, could secure the benefit of the exemption the year around. Finally, since we permit a single employer to take one set of exempt workweeks at one establishment and another set at another establishment, it is obvious that the test must be made on an establishment basis, and the exemptions must be applicable to all the employees at the establishment no matter who their employer may be.

101454
227408

(COPY)

In Reply Refer To:
LE:GFH:MGM

May 28, 1941

To: Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

From: Irving J. Levy
Assistant Solicitor
In Charge of Litigation

Subject: Calmes Construction Company
Baton Rouge, Louisiana
File No. 17-203

This will reply to your memoranda of March 26 and April 22, 1941, in which you raise the question as to whether certain oil field dredging operations performed by the above named company are covered by the act. It appears from the report of the inspector that the work involved is the dredging of lateral canals for the purpose of permitting oil drilling companies to drill from floating rigs in the marsh country in southern Louisiana. The dredging is accomplished by towing a dredge through the mouth of a river into shallow inlets or bar pits. Upon reaching the point where the oil company desires to drill, a lateral canal is dug large enough and deep enough to float the drilling rig. The drilling rig is then set up by the oil company and drilling begins. From there the dredge will move up to another point and create another canal. The oil company drills to the desired depth and, if no oil is obtained, will abandon the unproductive site and move up to the next canal.

In our opinion the activities of the employees engaged in the described operations are covered by the act. The dredging of lateral canals for the purpose of permitting oil drilling companies to drill from floating rigs is an essential prerequisite to the actual drilling operations. Since the dredging operations serve the purpose of clearing the way for the drilling operations, they must be considered as necessary and indispensable to the production of oil under the conditions which have been outlined above. We have consistently taken the position that oil drilling operations and the performance of processes or occupations necessary thereto constitute a production of goods for interstate commerce, regardless of whether a producing well results, provided,

of course, that the employer intends, hopes, or has reason to believe at the time such activities are performed that the resulting oil, if any, will move in interstate commerce. In our view, therefore, employees on the subject company's dredges, who are engaged in such dredging or in operations immediately incidental thereto, would appear to be within the general coverage of the act. For a discussion of the application of the act to employees engaged in analogous activities, see Legal Field Letter No. 35, page 17.

As you know, the Smoot ruling is limited to the facts of that particular case. Even if that ruling had a general application, it would not appear to be applicable here, since these employees apparently are not engaged in maritime work, but rather in the creation of new waterways in connection with an oil-drilling project.

229100
220243

John M. Gallagher, Esquire
Regional Attorney
Philadelphia, Pennsylvania

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

LE:GFH:HO

Jun - 3 1941

Shirley Gas-Coal Corporation

This is in reply to your memoranda of February 18 and April 1, 1941. Your memorandum of April 1 amplifies the statement of facts contained in your memorandum of February 18.

It is stated in your memorandum of April 1 that during the fall of 1939, the subject company began strip mining operations. The first step toward the beginning of these operations consisted of the unloading, assembling and testing of a large dragline-type power excavator. We quote from your memorandum:

> "'The actual work done by these employees consisted of unloading the various parts from railroad cars in which the equipment was received, and in assembling, fitting and testing the excavator in question. This work required approximately six weeks and at various times nine men were engaged for certain periods between September 17 and November 5, 1939. Considerable overtime was worked in these periods by these men assembling the equipment. Previous to and during this time no coal or other products had been shipped from this operation.
>
> "'The coal subsequently uncovered by the operations of the excavator in question was mined and shipped in interstate commerce but up to the time that the erection of this shovel was completed, no excavating to uncover coal had been done by the Shirley Gas-Coal Corporation. I do not know whether this shovel was received from an out-of-state manufacturer or whether it was purchased second-hand from some other contractor or equipment dealer.'"

It is our information that strip mining, as distinguished from underground mining, is performed in situations where a vein of coal lies at a shallow depth. The overlying layer of soil and clay is removed by large dragline-type power excavators of the type

to which you refer. These excavators, with certain minor differences, operate upon the same principle as ordinary steam shovels. They are extremely heavy mechanisms, weighing many tons, and hence are dismantled in order that they may be transported from job to job in a knocked down form. When they have reached a new mining site, they are again assembled, after which they are tested and put into actual operation.

It is stated in the quoted portion of your memorandum that the employees in question were engaged in unloading the parts of the excavators from the railroad cars in which they were received, and in assembling, fitting, and testing the excavators. Since it is not known if these parts were received from other states, it is not possible to ascertain if the unloading operations were covered by reason of the fact that the employees engaged therein were employed in handling or unloading goods which were still in the stream of interstate commerce.

However, since it is stated that the coal which was mined by use of this excavator moved in interstate commerce, it seems very probable that the employer at the time the excavator was being assembled and tested, intended or hoped or had reason to believe that the resulting coal would move in interstate commerce. If such was the case, it is our opinion that the employees engaged in assembling or testing the excavator were covered by the act as being engaged in a process or occupation necessary to the production of coal for interstate commerce. Such activities appear to us to be no further removed from the actual productive operations than is the original construction of an oil derrick at a drilling site; and, as you know, we have consistently regarded such construction work, and construction activities incidental thereto, as being within the coverage of the act. See in this connection Legal Field Letter No. 35, page 17.

208863
222109

AIR MAIL

In Reply Refer to:
LE:KCR:RAG

To: Miss Dorothy M. Williams
Regional Attorney
San Francisco, California

June 5, 1941

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

Subject: _____

Application of section 13 (a)(5) to
Alaska fishing and canning operation.
LE:IS:IB

Reference is made to your memorandum of May 14, 1941, enclosing a copy of an inquiry directed to _____, relating to the application of the section 13 (a)(5) exemption to preliminary activities conducted in an Alaska salmon fishing operation.

It appears that approximately two months prior to the opening of the Alaska fishing season crews of fishermen, electricians, machinery maintenance and repair men leave for the scene of the canning operations in order to perform the necessary preseason preliminary work. Inquiry is made with respect to the application of the seafood and fisheries exemption to various categories of workers. The different categories of workers will be discussed in the order in which they appear in _____ memorandum.

The Making of Nets.

One category of workers is engaged in making wire nets which are later hung from frames in the fish traps. It is stated that there is no urgency in connection with the production of the nets. When completed, the wire nets are hung from a trap frame and their purpose is to guide the fish into the trap itself. It is our opinion that the production of the wire nets is not an exempt operation within the meaning of section 13 (a)(5).

(8509)

Laying of Traps and Building of Traps.

It is stated that the wire netting is hung from log frames and that some operations require the building of the trap frames ashore. "They are then towed into position for anchoring. In some instances the wire is hung onto the frame logs before such logs are towed into position. In other cases the wire is not hung into position until the trap frames are anchored to cement anchors or held into position by driven piles."

In our opinion the shore operations described above are included in the term "catching *** of fish" if they occur immediately prior to the towing of the traps into position for anchoring. The operations performed after the frames are towed from the shore, in our opinion, are also included within the term "catching *** of fish." Such operations are similar to the placing and taking of nets described in paragraph 3 of Interpretative Bulletin No. 12.

Pile Driving.

In the first situation the piles are a part of the trap and consist of the anchors which hold the traps in position. This pile driving operation would appear to be incident to the catching operation and thus exempt.

In the second situation employees are engaged in pile driving for docks, improving facilities for commerce, and repairing cannery docks and building foundations. These operations would not appear to be included within the section 13 (a)(5) exemption. They are, of course, covered operations.

Preparation of Cannery for Operations.

Electricians, machinists and other employees prior to the opening of the fishing season engage in maintenance and repair work on the cannery buildings and machinery, and also engage in the repair, painting, and overhauling of tugs, tenders and barges to be used in later operations.

This office concurs in the opinion expressed by the Seattle office to the effect that these operations are included within the general coverage of the act and are not exempt by section 13 (a)(5).

Trap Watchmen.

These employees "fish" the trap--that is, they must constantly watch the "spiller" or net, which guides the fish into the main body of the trap from the "wing", i.e., the long guide net leading to the trap proper. They must clear the nets of seaweed or other accumulations. They must assist in "brailing" -- loading the fish from the trap into the scows which transport the fish from the trap to the cannery.

This office concurs in the tentative opinion expressed by the _____ office to the effect that these operations are immediately incidental to the catching of fish and are within the section 13 (a)(5) exemption.

Storekeeper.

Inquiry is made as to the application of the section 13(a)(2) exemption to the company store which engages not only in furnishing goods, food supplies, etc., to the cannery but also makes retail sales to the native fishermen and company employees. It is suggested that the revised Interpretative Bulletin No. 6 be considered in connection with this claim for exemption.

Cooks.

The possible application of the section 13 (a)(2) exemption to the cook house employees should be considered in the light of the revised Interpretative Bulletin No. 6.

Can Manufacture.

The manufacture of cans, in our opinion, is not included within the section 13 (a)(5) exemption.

Office Employees.

This office concurs in the opinion expressed by the Seattle office that the words "marketing" and "distributing" in section 13(a)(5) are applicable only to such operations as are performed in connection with fresh fish. Paragraph 6 of Interpretative Bulletin No. 12 will determine the applicability of the exemption to office employees generally.

- - - - - -

Mr. _____ also inquires as to the extent of the exemption contained in section 13 (a)(5) for the canning operation after the fishing season has commenced. He indicated that in his opinion the exemption would extend at least to the lye bath of the cans which is the last operation before the labeling or packing of the cans into cases.

This office is of the opinion that the labeling and the packing of the cans into cases, if performed as a part of an uninterrupted canning process, may be considered exempt under section 13 (a)(5). If, however, the labeling and packing are performed upon goods that have been stored for some length of time, in our opinion the exemption does not apply.

In Reply Refer to:
LE:EGL:VAS

May 3, 1941

James Seddon Allen, Esquire
Armstrong McCadden Allen Braden & Goodman
Commerce Title Building
Memphis, Tennessee

Dear Mr. Allen:

In your letter of March 24, 1941, you ask the following questions concerning the definition of the term "area of production" as it is used in sections 7(c) and 13(a)(10):

1. "Are the harvesters to be counted in the computation of ten where the harvesters are not employed in the operation or processing?

2. "Are the drivers of trucks conveying the agricultural commodity from the field where harvested to the processing plant to be counted in the computation of ten where such drivers do not even unload the trucks at the plant and have no duty whatsoever in the processing the commodity?

3. "In the computation of ten, if two or more shifts of ten or less than ten are worked, is the employer still treated as employing ten or less?"

1. If these employees do no more than harvest the crops, as harvesting is explained in paragraph 5(a) of the enclosed copy of Interpretative Bulletin No. 14 they are within the exemption granted by section 13(a)(6) to employees employed in agriculture. Since they do not work in the establishment, they need not be counted either under section 7(c) or under section 13(a)(10) in determining whether the establishment is within the "area of production."

2. As for the truck drivers, the first question is whether they are within the sections 7(c) and 13(a)(10) exemptions, considering these exemptions apart from the "area of production" requirement.

If they are within either section, they must be counted in determining whether the "area of production" definition for that section is satisfied. If they are not the exemptions are inapplicable to them and they need not be counted. Whether they are within the exemptions, apart from the "area of production" requirement cannot be determined from the facts presented. In regard to section 7(c), you are referred to paragraph 23(a) of Interpretative Bulletin No. 14, and as for the section 13(a)(10) exemption, see paragraph 26 of the same bulletin.

3. Where more than one shift of employees works in the establishment during a workweek, it is our opinion that the employees of all the shifts must to totalled to determine whether the "area of production" definition has been satisfied. This is true for both the section 7(c) and section 13(a)(10) exemptions.

At your request, we are sending a copy of the new Regulations, Part 536, redefining the term "area of production", together with a press release thereon (R-1314).

Very truly yours,

For the Solicitor

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

Enclosures (5)

220048

The same principle would bring the drivers within the coverage of the act in the second situation described by you. The fact that the raw materials were brought in for processing into liquid paving products only to fill definite orders obtained prior to the movement of raw materials into the processing plant would not affect the result.

I quote the third problem which is presented in your letter:

> "Inflammable liquids are brought in from out of state by rail and placed in tank storage. They are then sold, as orders are received, to various customers and delivered in same form by tank trucks within the state. The drivers in addition to making truck deliveries, take orders from customers, keep records and in many cases are the sole employees of the station from which they operate. Do these drivers come under the provisions of the Fair Labor Standards Act?"

It will be noted from paragraphs 14 through 16 of Interpretative Bulletin No. 5 that employees of wholesalers engaged in distributing locally goods received from other states, are deemed "engaged in commerce" and hence subject to the act.

There is an exemption contained in section 13(a)(1) of the act, however, for any employee engaged "in the capacity of outside salesman." Enclosed is a copy of Regulations, Part 541, defining and delimiting the scope of this exemption and your attention is directed particularly to section 541.5 of the enclosed regulations which defines this exemption. All the criteria therein set forth must be met in the case of every employee to which this particular exemption is sought to be made applicable. I also direct your attention to pages 44 through 53 of the enclosed copy of the Report and Recommendations of the Presiding Officer published in connection with the issuance of such regulations, which should be of aid to you in determining if this exemption is applicable in particular cases.

It should also be pointed out that section 13(b)(1) provides an exemption from the maximum hours provision of the act "for any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service

In Reply Refer To:
LE:EB:MH

May 5, 1941

Mr. W. E. Long
979 Stadelman Avenue
Akron, Ohio

Dear Mr. Long:

Reference is made to your letter of April 21, 1941, in which you make further inquiries concerning the applicability of the Fair Labor Standards Act to your employment on the basis of additional facts which you present.

If you are employed as an accountant, it may be that you are exempt from the act as a professional employee. The professional exemption is defined in section 541.3 of Regulations, Part 541, a copy of which you have received. See also the discussion of the professional exemption on pages 33 through 43 of the report of the presiding officer.

Regarding the applicability of the administrative exemption to your employment it should be stated that the $200.00 a month salary test is a very important, though not altogether decisive, test in determining the applicability of the exemption. You seem to question the applicability of the exemption in your employment on the ground that your cost estimates are passed upon by one of your superiors or his assistants. However, if your work involves the exercise of discretion and independent judgment, the exemption may apply to you even though your judgment is not final. I also wish to direct your attention to the discussion on page 32 of the report of the presiding officer.

Very truly yours,

For the Solicitor

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

228795
214941

(8509)

In Reply Refer To:
LE:GFH:IGH

Mr. W. N. Watson, Secretary
Manufacturing Chemists' Association
608 Woodward Building
Washington, D. C.

Dear Mr. Watson:

This is in reply to your letters of December 11, 1940, January 3, 1941, and February 7, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to various situations 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 first situation which is presented in your letter of December 11, 1940, is that in which raw materials are brought in from outside the state by rail and processed into liquid paving products which are placed into tank storage. When sold to various customers, consisting principally of state, county and municipal highway departments, the finished liquid paving products are delivered into tank trucks designed not only for transporting the product, but also for applying it under pressure to the road. You ask: "Do the drivers of the tank trucks, who also apply the material to the road, come under the provisions of the Fair Labor Standards Act?"

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. It will be noted from paragraph 13 of bulletin No. 5 that employees engaged in maintaining, repairing or reconstructing highways or other essential instrumentalities of interstate commerce are deemed "engaged in commerce" and hence subject to the act. Drivers of the tank trucks which you describe are to be regarded as covered by the act during all workweeks in which they apply these materials to the roads.

pursuant to the provisions of section 204 of the Motor Carrier Act, 1935." We are enclosing a copy of Interpretative Bulletin No. 9 dealing with the scope of this exemption. Paragraphs 5 through 7 of this bulletin set forth the position of the Wage and Hour Division with regard to the employees of private motor carriers.

The act provides that employees must be paid not less than 30 cents an hour and overtime compensation at not less than time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek.

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 (6)

183291
192047
206070

Mr. Joseph L. Miller
Director of Labor Relations
National Association of Broadcasters
Normandy Building
1626 K Street, N. W.
Washington, D. C.

In Reply Refer To:

May 5, 1941

Dear Mr. Miller:

This is in reply to your letter of April 28, 1941, in which you ask certain questions concerning the application of the outside salesman exemption provided by section 13(a)(1) of the Fair Labor Standards Act to employees of radio stations.

Your first inquiry relates to outside advertising solicitors who prepare the commercial "copy" for use on the programs which they have sold. You state that you consider the preparation of the copy to be "incidental to and in conjunction with the employee's own outside sales or solicitations" within the meaning of section 541.5(B) of Regulations, Part 541. If an outside advertising solicitor otherwise conforms with section 541.5 of the regulations, it is the opinion of this office that preparation of commercial "copy" when written exclusively with respect to the advertising accounts sold by such employee may be considered to be incidental to and in conjunction with his own outside sales or solicitations.

Your second inquiry relates to employees who solicit advertising away from the place of business, prepare the commercial copy at the place of business and also announce the program as prepared by them. In the opinion of this office, the announcement of the program is too far removed from the outside solicitations to be considered incidental to or in conjunction therewith. Accordingly, the time devoted by the outside solicitors in question to the announcing of programs should be considered as nonexempt work within the meaning of the 20 percent test contained in section 541.5 of Regulations, Part 541.

Very truly yours,

For the Solicitor

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

230312

In Reply Refer To:
LE:EB:HH

May 5, 1941

Marshall, Melhorn, Davies, Wall & Bloch
Nicholas Building
Toledo, Ohio

Gentlemen:

Reference is made to your letter of April 8, 1941, addressed to General Fleming, in which you inquire concerning the application of the Fair Labor Standards Act to a registrar stationed at The Anderson Elevator Company whose duties are principally to supervise the work of the weighmen and inspectors.

I quote from your letter:

> "The registrar is selected by the officials of the Department of Agriculture in charge of the execution of the National Warehousing Act and have full and complete supervision and control of the registrar. The Anderson Elevator Company, however, pays the salary of the registrar direct, due to the fact that there is no provision in the Warehousing Act for the payment of registrars by the Federal Government. The Anderson Elevator Company, however, does not hire and fire the registrar, nor has any supervision of his duties or acts. They do not fix his hours of work or designate his duties. In other words, all activities of the registrar are directed by officials of the Department of Agriculture, with the one exception that he is paid by The Anderson Elevator Company."

You inquire if the registrar should be considered an employee of the Federal Government or an employee of The Anderson Elevator Company.

(8509)

Section 3(d) of the act provides that the act shall not apply to persons employed by the United States. It is the opinion of the Wage and Hour Division, based upon the facts presented by you, that the register in question cannot be considered an employee of the United States in view of the fact that he is not on the pay roll of the Federal Government. It would appear, therefore, that he is within the general coverage of the act as an employee of The Anderson Elevator Company, if the products stored at the elevator are destined for interstate commerce or have been received from outside the state. See paragraph 4 of Interpretative Bulletin No. 1.

Very truly yours,

For the Solicitor

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

Enclosures (2)

#225047

In Reply Refer To:
LE:GFH:MB

May 12, 1941

Mr. G. T. Wood, Secretary
Savage Arms Corporation
Utica, New York

Dear Mr. Wood:

Your letter of April 9, 1941, has been referred to us by the National Labor Relations Board for reply.

You ask to be advised regarding the status under the Fair Labor Standards Act of certain employees whom you describe as "Expediters," and whose duties consist of facilitating and speeding up the delivery of machinery and tools to be used in the production of armament for the United States Government under Government contract. As you state, "They will act in the capacity of outside contact men concerning themselves with the speeding up of delivery of machinery and tools necessary to the commencement of manufacture above referred to."

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. It is believed that the contents of these bulletins should enable you to decide if the employees whom you describe are within the coverage of the act. As is stated in paragraph 5 of Interpretative Bulletin No. 1, all the employees of a producer of goods which are shipped or sold in interstate commerce are included in the act's coverage, unless the employer maintains the burden of establishing that the activities of particular employees in no way contribute to, or are in no way related to, the production of such goods. Since, from your statement, these employees are engaged in facilitating and speeding up the delivery of machinery and tools to be used by you, the employer, in producing goods for commerce, it is our opinion that such employees are within the act's coverage. Moreover, if the direct effect of their activities is to facilitate the movement of tools and machinery in interstate commerce, for that reason too these employees would seem covered.

The act provides that employees must be paid not less than 30 cents an hour and overtime compensation at not less than time and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek. I am enclosing a copy of our Interpretative Bulletin No. 4 dealing with maximum hours and overtime compensation.

For your further information we are enclosing Regulations, Part 516, and an Employers' Digest.

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.

If I can be of further assistance, please communicate with me.

Very truly yours,

For the Solicitor

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

Enclosures (9)

In reply refer to:
LE:KCR:LGC

May 7, 1941

Mr. Adron Coldiron
Steel Workers Organizing Committee
3 Reed Building
2121-A First Avenue
Hibbing, Minnesota

Dear Mr. Coldiron:

Reference is made to your letter of April 24, 1941, in which you ask certain questions relating to the recent determination made by the Wage and Hour Division concerning the method of computing travel time in underground metal mines.

In accordance with your request, I am enclosing two copies of the report to which you refer. You inquire particularly with respect to that portion of the report which concludes that lunch time underground should not be included as a part of the working day. You state that in some iron ore mines in the Minnesota area the practice has been for miners to be given one hour for lunch which is eaten on the surface. You apparently construe the ruling made by the Division to mean that lunch time to be excluded from the working day must be eaten underground.

The determination of the Division on this question provides that any fixed lunch period of one-half hour or more during which the miner is relieved of all duties should be excluded from the workday, even though the lunch period is spent underground. Of course, if the lunch period is spent on the surface, such period is not included in the working day. In the case of nonferrous metal mines in the west at which lunch is required to be eaten above ground, the practice appears to be to pay the miners for the time spent in going to and coming from the surface, but not to pay them for the lunch period proper on the surface.

It is our opinion that if the miners have the option of eating underground or going to the surface for their lunch, the travel time in connection with the lunch period would properly not be considered as a part of the working day. However, if the miners have no option in the matter, but are required to eat on the surface, the travel time in connection with the lunch period should, in our opinion, be considered as a part of the working day although the lunch period proper on the surface would not be included.

(8509)

The act, of course, does not require miners to work at least eight hours a day, and the determination in question of the Division does not have that effect. A union agreement, for example, fixing a workday of seven hours, would be proper under the statute. The maximum hour provision in section 7 of the act merely provides that work in excess of forty hours a week shall be compensated for at not less than one and one-half times the regular rate of pay.

Sincerely yours,

Philip B. Fleming
Administrator

Enclosures (2)

101539

In Reply Refer to:
LE:GFH:LWK

May 12, 1941

James W. Sullivan, Esquire
Security Trust Building
Lynn, Massachusetts

Dear Mr. Sullivan:

This will reply to your letter of March 28, 1941, in which you inquire concerning the application of the Fair Labor Standards Act to a situation which you present.

You state that your client is a corporation engaged in furnishing armored car service to various customers. In some instances, your client's armored car with a guard goes to a local bank and carries money from the bank to the office of a factory which, it appears from your letter, is engaged in the production of goods for interstate commerce. I quote from your letter:

> "In other instances the corporation goes to the factory office weekly, gets a check for the total payroll, gets the sheet and vouchers for the individual pay envelopes, draws the money from the bank and puts up the payroll in individual envelopes, returns to the factory with these envelopes and goes around inside the factory and distributes them to the workmen. These factories undoubtedly buy and sell raw material and finished products outside Massachusetts, but this corporation's activities are all in this State."

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 Interpretative Bulletins Nos. 1 and 5, and I direct your attention particularly to paragraphs 1, 3 and 5 of bulletin No. 1 and paragraphs 2, 4 and 9 of bulletin No. 5. It would seem that employees of armored car companies who are engaged in transporting pay rolls from banks to manufacturing concerns which are engaged in the production of goods for commerce are properly to be deemed engaged in "a process or occupation necessary to the production" of such goods within the meaning of section 3(j) of the act, and hence within the act's general coverage. See particularly paragraph 5 of Interpretative Bulletin No. 1, and also paragraph 6 of the enclosed Interpretative Bulletin No. 9. With regard to the applicability of the Act to employees of this corporation who are engaged in performing the activities listed

in the portion of your letter which we have quoted, it seems clear on the basis of the facts therein set forth, that such employees are likewise engaged in "a process or occupation necessary to the production" of goods for commerce, and for that reason within the act's general coverage. The fact that such activities were performed within a single state, of course, would not affect the application of the act to their employment.

For your further information we are enclosing Regulations, Part 516, and an Employers' Digest, which explains the act generally.

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.

If I can be of further assistance, please communicate with me.

Very truly yours,

For the Solicitor

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

Enclosures (6)

In Reply Refer To:
LE:FR:HS

May 23, 1941

James H. Warren, Esquire
City National Bank Building
Fulton, Kentucky

Dear Mr. Warren:

This will reply to your letter of April 8, 1941, evidently meant to be May 8, in which you submitted further information concerning the business of Airlene Gas Company, Fulton, Kentucky.

It appears that this company distributes gas to its customers, who store it in their tanks. It also deals in gas appliances. You state that over 80 percent of the sales are to domestic or home users and in small quantities, and that more than 50 percent of the sales are in intrastate commerce.

You also state:

> ". . . that this company is not regulated by the State Public Service Commission; it holds no franchise and does not use mains or conduits for the distribution of gas as each customer is serviced by an individual plant; they have not been issued a certificate of convenience by the commission, and the commission does not assume any control; they do not use public property for distribution of gas; there is no flow of gas from the company to the consumer but it is delivered to the consumer's tank on order by the consumer or under an understanding that upon checking the tank and need discovered, the delivery is made; it does not propose to sell to any and everyone or to the public generally but is selective in its sales; it has no rights of eminent domain."

Under these circumstances, it is our opinion that the employees of this establishment are exempt from the wage and hour provisions of the act under section 13(a)(2) thereof, which exempts "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

Very truly yours,

For the Solicitor

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

(8509)

Published in BNA - Wage & Hour at 35: 759

In Reply Refer to:
LE:ILS:MF

May 16, 1941

Fred E. Campbell, Esquire
Feldman, Kittelle, Campbell & Ewing
726 Jackson Place
Washington, D. C.

Dear Mr. Campbell:

This will reply to your letter of April 17 in which you request an opinion concerning certain packing operations performed by the Atlantic Commission Company in terminal warehouses.

You refer particularly to the packing of bananas which are received in bulk and to the repacking of green tomatoes which are received in containers at the warehouse. It is our understanding that these two operations are the commonest of any so-called packing operations at terminal warehouses, though there is frequently some repacking of other fruits and vegetables either to break down large lots into small lots for the convenience of the retailer or to salvage good fruit and vegetables from lots which have partially deteriorated or spoiled.

It is the opinion of this office that these operations do not come within either the section 7(c) or the section 7(b)(3) exemption for the "packing" of fresh fruits and vegetables.

Reference to the legislative history of the act will show clearly that the purpose of section 7(c) was to relieve packing house operators from the burden of paying the overtime penalty during fourteen workweeks in a calendar year because of their irregular hours caused by the uneven receipts of commodities from farmers. It is, of course, true that some packing houses at the point of origin receive part of their commodities from point of origin warehouses or precooling plants but the general pattern of operations is, of course, dictated by the daily and even hourly fluctuation caused by climatic conditions on the farms themselves. This condition does not hold true with the operations at terminal warehouses which cannot properly be considered as operations on a seasonal basis. These packing and repacking operations are performed merely as an incident to and to facilitate the wholesale distribution of fresh produce and the hours which employees engaged in these operations work are not directly and continuously affected by the hourly and daily movement of commodities from the farm. Accordingly it is our belief that the application of the section 7(c) exemption to operations of this type in terminal warehouses would be a

(8509)

distortion of the intent of Congress and unwarranted; further, it would appear inconsistent with the well established rule of statutory construction, that exemptions are to be narrowly construed.

With respect to the application of the section 7(b)(3) exemption, reference is made to the Findings and Determination of the Presiding Officer, copy of which is enclosed for your information. It is clear from these findings that the exemption is to be applicable only to the same types of establishments as are entitled to exemption under section 7(c). The basis for this exemption is indicated in section 526.3(b)(2) of the enclosed Regulations, Part 526. In accordance with that section the exemption applies only if the industry receives for packing or storing fifty percent or more of the annual volume in a period or periods amounting in the aggregate to not more than fourteen workweeks. This test seems wholly inapplicable to terminal warehouses. The bulk of their products is not received for packing or storing within the meaning of those terms in the regulations. Their operations are merely an essential cog in the transmission of products to the retailers and again are performed as an incident to the wholesale distribution of fresh fruits and vegetables. The fact that some of the operations conducted by terminal warehouses are properly describable as "packing" was simply fortuitous. For the reasons already mentioned, any packing conducted by such warehouses is not part of the packing industry to which exemption has been granted.

Very truly yours,

For the Solicitor

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

Enclosures (3)

101371

In Reply Refer To:
LE:EGL:HO

May 29, 1941

Mr. Harris Berlack
One Wall Street
New York, New York

Dear Mr. Berlack:

This will reply to your letter of May 5, 1941, addressed to General Fleming, in which you inquire about application of sections 7(c) and 7(b)(3) of the Fair Labor Standards Act to a plant manufacturing grape juice. The juice is extracted during a short period in October, and is then stored at low temperatures for several months. You say the storage is necessary to clarify the product of undesirable argels and tartrates. Beginning in January or February the juice is placed in bottles and cans, sometimes with sugar, and it is then pasteurized and labeled.

Since the pressing of juice from grapes is a first processing of fresh fruit, the operation is within the sections 7(c) and 7(b)(3) exemptions. However, in our opinion neither exemption is applicable to the canning, bottling, or pasteurizing of the juice several months after it has been extracted, because these operations are not a part of one continuous process involving the first processing or canning of perishable or seasonal fresh fruits; nor can they in themselves be considered the first processing or canning of fresh fruits.

It should be called to your attention that section 7(c) exempts employees from the overtime provisions of the act only for an aggregate of 14 workweeks in a calendar year. Section 7(b)(3) is likewise applicable for 14 workweeks in a calendar year, but under this section overtime compensation must be paid for all hours worked in excess of 12 in any workday or in excess of 56 in any workweek.

Very truly yours,

For the Solicitor

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

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Enclosure

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