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12/5/41

UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

September 5, 1941

Legal Field Letter

No. 63

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
8-11-41	Rufus G. Poole (GFH)	George A. Downing	Becker Roofing Company Atlanta, Georgia File 10-2371 (Application of Act to employees of a building material company engaged in applying the materials to private homes; whether the transportation of goods from company warehouse to job site is a covered activity.) (p. 174, par. B; p. 193, par. J.)
8-22-41	Acting Assistant Solicitor (EGL)	Jerome A. Cooper	Request for Opinion (Application of Section 13(a)(6) exemption to employees of an independent contractor who removes stumps from a tung tree grove.) (p. 54, par. 4(b); p. 99, par. 4(c).)
8-22-41	Acting Assistant Solicitor (FR)	Arthur E. Reyman	Tattersall Company Trenton, New Jersey File 29-1622 (Whether the sale and installation of heating equipment purchased outside the State and stored in company warehouse outside the State where place of business is located, prior to the retail sale of such equipment, are sales in interstate commerce, so as to defeat the Section 13(a)(2) exemption.) (p. 3, par. 12; p. 69, par. M; p. 102, par. DD; p. 138, par. E.)

Legal Field Letter
No. _____

MEMORANDA

Date	From	To	Subject
8-25-41	Acting Assistant Solicitor (GFH)	Alex Elson	Atchison, Topeka & Santa Fe Railway Los Angeles, California File: 4-465 (Hobart Ice Plant Branch) (Application of Section 13(b)(2) to an employee of a railroad employed in an ice plant owned and operated by the railroad. The ice is used only by the railroad for icing its refrigerator cars which move in interstate commerce.) (p. 61, par. 3; p. 116, par. 2; p. 152, par. 6.)

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LETTERS

Date	To	Subject
8-9-41	B. M. Larabee Akron, Ohio (NSA)	(Status of dealers of tires, tubes and automotive equipment under the Fair Labor Standards Act.) (p. 70, par. 4; p. 65, par. J; p. 101, par. 3; p. 103, par. 4.)
8-14-41	Gale J. Johnson Washington, D. C. (ADH)	(Deductions from wages - for purchase of defense stamps and bonds.) (p. 88, par. K; p. 248, par. E.)
8-16-41	George W. Omacht Chicago, Illinois (GFH)	(Application of Act to adjusters and collectors employed by an automobile finance company.) (p. 177, par. 1.)
8-22-41	Dillon Anderson Houston, Texas (FUR)	Re: Water travel time in the oil industry (p. 123, par. 18.)

COPY

George A. Downing, Esquire
Regional Attorney
Atlanta, Georgia

SOL:GFH:LGM

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

August 11, 1941

Becker Roofing Company
Atlanta, Georgia
File: 10-2371

This is in reply to your memorandum of March 29, 1941, which was attached to the file in the above case.

It was stated in the inspector's narrative that the subject company is a branch of the Becker Roofing Company, located at Chicago, Illinois. The subject company is one of 35 branches of the parent company, through which the parent distributes the products which it manufactures, consisting of roofing, siding, and insulating material. The subject company is engaged exclusively in reroofing, siding, and insulating private homes, all of which presumably are located within the state. This is the only way in which its products are sold, since the company does not sell any of the products to roofing dealers or contractors, or supply houses. About 75 percent of the total cost of the various jobs is the cost of the materials. The inspector states that "These materials are shipped from Chicago to the branch warehouse and then delivered to the individual jobs either by a truck driver who is an employee of the company or by the employees who apply the materials to the houses."

It appears from Mr. Nordstrom's supplementary report to Mr. Patterson that the subject company receives its materials in carload lots and maintains a stock in its warehouse from which the materials used to fulfil its roofing contracts are taken. Mr. Nordstrom's statement that the cost of unloading the materials is paid by the subject company implies that the materials are not unloaded by its own employees. Since you inquire only as to the status under the act of the employees who are engaged in applying the materials to the dwelling houses, the somewhat complicated system of financing these transactions, with which it appears that the installation employees have nothing to do, will not be considered.

As has been indicated, it is doubtful, on the basis of the available facts, whether any employees of the subject company are engaged in the unloading of these materials upon their receipt

from other states. As I understand the situation, the materials are placed in the company's stock at its warehouse, from which they are removed from time to time as needed to fulfil the company's roofing and insulation contracts. If the company were engaged in distributing these materials to other retail or wholesale outlets, or to other purchasers within the state, without its applying the materials to buildings, we believe the company would fall within the covered category of distributors which is treated in paragraphs 14 through 16 of Interpretative Bulletin No. 5. However, in view of the fact that no such dealings are carried on by the company, since it applies and installs all the materials which it sells, we believe that it is rather to be regarded as a construction contractor than as a distributor or wholesaler of building materials. In other words, even assuming that the transactions as described are properly to be considered as interstate contracts of sale--and it is unnecessary to decide this matter at the present time--we believe that the situation would fall within the doctrine expressed in Browning v. Waycross, 233 U.S. 16, rather than the principle enunciated in York Manufacturing Co. v. Colley, 247 U. S. 21. Since, from your account, the materials are not installed on buildings which are either essential instrumentalities of commerce or are used to produce goods for commerce, it is our opinion that no basis for coverage exists in the present case with regard to the employees engaged in installing these materials, provided that they are employed only in transporting these materials from the stock at the company's warehouse and applying them at the job site. We do not believe that the transportation of goods from the stock in the company's warehouse to the job site is properly to be deemed a covered activity, since it appears rather to be an activity incidental to the construction work which the employees perform than the type of interstate distribution which we consider to be covered under the principles expressed in paragraphs 14 through 16 of Interpretative Bulletin No. 5.

The file of the subject company is attached.

Attachment
(File)

225261

neg

C O P Y

Jerome A. Cooper, Esquire
Regional Attorney
Birmingham, Alabama

SOL:EGL:ESR

AUG 22 1941

Acting Assistant Solicitor

Request for Opinion

In your memorandum of August 11, 1941, you present additional facts supplementing your memorandum of July 12, 1941, and the memorandum of Mr. Matthew Harper, Jr., to you dated July 2, 1941. It appears from the two previous memoranda that a lumber company has planted tung trees (which produce nuts used in the production of paints and varnishes) in cut-over timber land which it owns. Several stumps were left standing on the land and a contractor has agreed to remove them without receiving compensation from the lumber company. He sells these stumps to companies engaged in producing naval stores. We stated in our reply of July 29 that, since it does not appear that the stumps are removed for the purpose of clearing the land for immediate cultivation or that the lumbering operations are in any way connected with farming operations performed on the land, the section 13(a)(6) exemption is inapplicable to the employees of the independent contractor who are engaged in removing the stumps.

It appears, however, from your memorandum of August 11, that the removal of the stumps after the tung trees have attained a four or five year growth and the plowing and fertilizing of the ground around the trees is necessary to the proper growth of the trees. It also appears that it is the usual practice of the owner of such trees to plant cover crops on the same land where the trees are located and to let his cattle graze on the land. Under such circumstances, we believe the tung tree grove come within the section 13(a)(6) exemption as performing practices on a farm which are incidental to and in conjunction with farming operations (the production of tung nuts and the cultivation of cover crops) which are performed on that land.

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Direct: that the employees of the independent contractor who remove stumps from

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COPY

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

Acting Assistant Solicitor SOL:FR:MR

Tattersall Company August 22, 1941
Trenton, New Jersey
File No. 29-1622

This will reply to your memorandum of August 1, in which you inquire whether the "greater part intrastate" portion of the Section 13(a)(2) exemption is satisfied by the Home Modernization Department of the subject company. You state "This department is engaged in the sale and installation of oil burners and similar heating equipment. Almost all of its equipment is received from outside of the State. In connection with this phase of its business, the company has a warehouse located in Morrisville, Pennsylvania. When oil burners are purchased they are usually received by the subject at its place of business in Trenton, New Jersey. It then transports the oil burners in its own trucks to Morrisville, Pennsylvania, where they are stored until needed. Almost all of the sales of the subject are sales at retail.

"When an order is received for the sale and installation of an oil burner, the order is given to the service man who will make the installation. The service man then drives his motor vehicle to the warehouse in Morrisville, Pennsylvania, picks up the particular oil burner required for the specific order, and returns to the State of New Jersey where the installation is to be made. The installation of oil burners takes place almost exclusively within the State of New Jersey. With respect to each installation, the above set forth procedure is carried through. The service man who will make the installation always goes to the Morrisville, Pennsylvania, warehouse, picks up the oil burner or other heating equipment, returns it to the State of New Jersey, and then proceeds to make the installation."

We agree with the interpretation that all sales made in the manner you describe must be considered sales in interstate commerce, and that if they amount to as much as fifty per cent of the total dollar volume, the exemption would be inapplicable.

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COPY

AIR MAIL

Alex Elson, Esquire
Acting Regional Attorney
San Francisco, California

Acting Assistant Solicitor

SOL:GFH:MGM
August 25, 1941

Atchison, Topeka & Santa Fe Railway
Los Angeles, California
File No. 4-465
(Hobart Ice Plant Branch)

This is in reply to your memorandum of August 13, 1941 in which you inquire concerning the status under the act of an employee of the subject railway who is engaged in an ice plant which manufactures ice solely for the use of the railroad. Presumably the ice is used for icing refrigerator cars which subsequently move in interstate commerce. In addition to his being employed, as you state, "in the storage of ice and in removing the ice from the storage room," the employee also loads the ice into the refrigeration cars.

In our opinion, if in fact the ice plant is owned and operated directly by the subject railroad company, the employees of such ice plant are exempt from the overtime provisions of the act by section 13(b)(2).

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elm

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August 9, 1941
SOL:NSA:AMS

B. M. Larabee, Esquire
The Firestone Tire & Rubber Company
Akron, Ohio

Dear Mr. Larabee:

Reference is made to your letter of July 31, 1941, written on behalf of the National Association of Independent Tire Dealers, The Goodyear Tire and Rubber Company, The B. F. Goodrich Company, The General Tire and Rubber Company, and the Firestone Tire and Rubber Company. You refer to your conference with Messrs. Altman and Robertson, of this office, on July 25, 1941, and submit a number of questions with respect to the status of dealers of tires, tubes and automotive equipment under the Fair Labor Standards Act of 1938.

1. Sales to Farmers

Your letter assumes that sales of tires, tubes and automotive equipment to farmers are retail sales. In determining whether an establishment may properly be considered a retail establishment within the meaning of section 13(a)(2) of the act, it is our opinion that the sale of tires, tubes and automotive equipment to farmers for consumption in farming operations may be considered as retail sales if such sales meet the "price-quantity" tests set forth in Interpretative Bulletin No. 6.

2. Nature of Goods Sold at Retail

As pointed out in Interpretative Bulletin No. 6, sales of "consumer" goods to business or industrial purchasers, Government agencies, institutions and similar purchasers will be considered as retail sales if the goods are sold at the normal price charged to private consumers or if the sale does not involve a quantity of goods materially larger than the quantity normally purchased by private individuals. The sale of goods having only a business or industrial market, however, may not be considered as a retail sale under any circumstances. In our opinion the sale of tires, tubes, and other automotive equipment for passenger cars and trucks of sizes and types similar to the sizes and types sold to individual consumers (including farmers) will be considered as "consumer" goods. Accordingly, sales of this type of goods to business, industrial, Governmental and institutional purchasers at the regular retail price or in small quantities will be considered as retail sales.

In your letter you state that farmers purchase tires, tubes and other equipment for both passenger cars and trucks; that many farmers own more than one truck, which are regularly used in the operation of the farm; that a large percentage of these trucks have dual tire equipment of a size up to and including (8-1/4") in diameter. You state also that passenger car tire sizes range from (6") in diameter to (8-1/4") in diameter. On the assumption that tires of a size up to (8-1/4") are regularly purchased by individual consumers (including farmers), it is our opinion that sales of such tires to business, industrial or institutional users may be considered as retail sales if such sales meet the "price-quantity" test. Since tires of a larger size presumably are limited to industrial, business and institutional purchasers, sales of such tires may not be considered retail sales.

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3. Quantity of Goods Sold at Retail

You state that many individuals own two or more passenger cars and many farmers own two or more trucks; that in any period of six months such purchasers might reasonably be expected to purchase five passenger size tires or seven truck tires. Assuming this to be the case, it is our opinion that the sale of five passenger tires or seven truck tires during a period of six months would satisfy the quantity test used to determine whether a sale is retail. Further, on the same assumption, in our opinion the sale of seven passenger size tires or ten truck tires in a period of six months would not be considered as a non-retail quantity.

4. Local Retailing Capacity

(a) You state that many employees of tire dealers customarily and regularly are engaged in making retail sales or in performing work incidental thereto. Occasionally these employees assist in clerical work connected with non-retail sales and in other general work about the store. As you know, an employee is considered as one "engaged in a bona fide . . . local retailing capacity" if he satisfies the terms and conditions set forth in section 541.4 of Regulations, Part 541. If the total number of hours spent by the employee, to whom you refer, in doing clerical work with respect to non-retail sales and in other non-retail work does not exceed 20 percent of the number of hours worked in the workweek by non-exempt employees, the "local retailing capacity" exemption would not be defeated.

(b) You state that tire dealers employ persons to make sales at retail and also to perform services incidental and necessary to the use of the goods sold. In some cases the same employee who sells the goods also performs the services. In other tire stores the sale may be made by one group of employees and services performed by another group. For example, employees may be employed for the purpose of mounting tires, balancing tires, and aligning wheels in connection with retail sales made by their employer. In our opinion, such activities performed in connection with the retail sale of goods may be considered as work immediately incidental to the making of retail sales within the meaning of the definition of the term "local retailing capacity" contained in section 541.4 of Regulations, Part 541

(c) In some cases the employees are engaged in mounting tires, balancing tires, aligning wheels, relining and adjusting brakes and lubricating automobiles, but this work is not performed in connection with retail sales made by the establishment. Typically, a motorist will drive in and ask to have the wheels on his car balanced, a lubrication job done, his car washed, his motor tuned up, his battery charged, etc. It is our opinion that time spent by the employee in doing this type of work may not be considered as time spent in work immediately incidental to the making of retail sales. Accordingly, such time must be considered as non-exempt work in determining whether the employee spends more than 20 percent of his time in doing the same type of work as that performed by non-exempt employees. I should like to point out, however, that in the ordinary case charging batteries on cars or washing and lubricating cars would not be considered as "in commerce" work within the meaning of the wage and hour provisions of the act.

Sincerely yours,

263784
NSA:MD
ELM

Philip B. Fleming
Administrator

(9094)

COPY

August 14, 1941

Mr. Gale J. Johnston
Field Director
Defense Savings Staff
United States Treasury Department
Washington, D. C.

Dear Mr. Johnston:

In accordance with the telephone conversation between Mr. Hill of the Solicitor's office of the Department of Labor and Mr. O'Malley of the Treasury Department, I am writing you in regard to the propriety under the Fair Labor Standards Act of making deductions for defense stamps and bonds.

It is our opinion that where an employer is directed by a voluntary assignment or order of his employee subject to the act to pay a sum for the benefit of the employee to a creditor, donee, or other independent third party, deduction from wages of the actual sum so paid is not prohibited provided that neither the employer nor any person acting in his behalf directly or indirectly derives any benefit or profit from the transaction. In such case payment to the independent third person for the benefit and credit of the employee will be considered equivalent for the purpose of the Fair Labor Standards Act to payment to the employee.

Since deductions for defense stamps or bonds from the wages of the employee cannot involve any direct or indirect profit to the employer, we believe that such deductions are proper provided that the individual employee voluntarily consents to such deductions.

Please do not hesitate to call upon us again if there is any further information you desire in this matter.

Sincerely yours,

Philip B. Fleming
Administrator

SOL:ADH:LWK

(9094)

In reply refer to
SOL:GFH:LWK

August 16, 1941

George W. Omacht, Esquire
American Finance Conference
Burnham Building
Chicago, Illinois

Dear Mr. Omacht:

This is in reply to your letter of August 1, 1941, in which you seek to be advised regarding the status under the Fair Labor Standards Act of certain employees of automobile finance companies, whom you designate by the alternative titles of "Collectors," "Adjusters," or "Field Representatives."

We quote from your description of the duties of these employees:

> "Regardless of his title the principal duty of such employee consists of collecting delinquent retail accounts by seeking out the debtor and demanding payment. His work is commonly designated as an 'outside job.' He usually calls in the morning at the office of the finance company where he is employed and, which has supervision of his work, accounts for his collections of the day before and receives from the collection department a list of retail buyers who are delinquent in the payment of one or more instalments of a retail instalment contract held by his employer. The collector then spends his day outside contacting these debtors and collecting these items in as far as he is able. If he finds an item uncollectable he may take possession of the motor vehicle or other property which is the subject matter of the sale ('commonly called repossessing') and takes such property to a point of storage in the locality wherein the office from which he works is located. If the retail buyer promises to pay later the collector may grant an extension of time for payment. If the collector finds that a rearrangement of all of the payments would be helpful to the retail buyer, the collector may agree on behalf of his employer to a rearrangement satisfactory to the buyer. Also incidental to the 'outside' work in respect to retail instalment accounts of his employer the collector may inspect the motor vehicle or other property which is the subject matter of the sale to observe its condition or to determine its identity and whereabouts."

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You further state:

> "Such a collector's work is purely local. He calls upon only such retail buyers, who if they had not defaulted, would have called at the office from which the collector works and made the payment to the cashier in such office.
>
> "The collector has no duties in respect to the wholesale financing which his employer does, or with the original sale of the motor vehicle, or with the purchase of the retail instalment contract by the employer. His duties in respect to any retail buyer arises only after the transaction of the sale is made and the retail buyer is in possession of the property."

It is also stated in your letter:

> "We are directing this inquiry only in respect to the collectors of employer finance companies of the so called 'independent' type, which are not owned or controlled by any motor vehicle manufacturer. Such independent finance companies operate either a single office within a single state or a number of offices within one or more states."

It appears from your letter that you have studied Mr. Poole's opinion addressed to Mr. Baird Snyder relative to the application of the act to employees of automotive finance companies. For convenience of discussion it seems appropriate to summarize the relevant portions of Mr. Poole's memorandum to Mr. Snyder to which you refer. As was pointed out in that opinion, there are two general groups of automotive financing companies, which may be designated respectively as "national" and "local." For our purposes a "national" financing company may be roughly defined as one containing branches in several states. At the present time three national companies operate in every state of the Union, while five such companies operate in eight or more states. The great majority of financing companies, however, are more appropriately described as "local," since they do all of their business within one locality or state. There appear to be at least two discernible distinctions between national and local companies which merit attention in connection with determination of the application of the Fair Labor Standards Act to their employees. One of these differences lies in the fact that employees of national companies usually cross state lines in the performance of their work, while employees of local companies do not. Moreover, in national companies, the branch offices will forward to national headquarters reports describing activities of the branch and of all of its employees. On the other hand, there is no need for a "local company" to forward reports outside of the state.

It seems quite obvious from your description that the activities of these collectors are an indispensable function in the conduct of retail automotive financing, since, if the companies made no efforts to collect the obligations of delinquent debtors, they could not possibly continue to operate. Hence, since the duties of collectors employed by national concerns are so vitally necessary to the conduct of their interstate financing transactions, it is our opinion that such collectors are covered by the act along with the other employees whose activities contribute to the conduct of such companies' interstate business.

You will recall, however, that in Mr. Poole's memorandum to Mr. Snyder he expressed an opinion regarding the application of the act to employees of local companies, which was different from that regarding employees of national companies. Mr. Poole stated the opinion that with regard to the wholesale financing transactions carried on by local finance companies, the employees would be covered if their activities contributed to the carrying on of financing transactions pursuant to which automobiles move from a manufacturer or wholesale dealer in one state to a wholesaler or retail dealer in another state, or from a wholesale dealer to a second wholesale or retail dealer within the same state, the first wholesale dealer having received the goods directly from another state.

The indispensability of the duties performed by collectors to the conduct of financing transactions (whether such transactions in the particular instance are to be considered interstate or local) has been pointed out above. However, we are not prepared at the present time to express a definite opinion relative to the application of the act to collectors or adjusters employed by local finance companies, provided, as appears to be the case from your memorandum, that their activities contribute solely to the conduct of retail financing, and provided also that no other bases for coverage exist aside from those set forth in the facts of your communication. It is entirely possible, however, in some cases where collectors are employed by local finance companies, that other grounds upon which coverage could be predicated might exist. As was stated in Mr. Poole's memorandum to Mr. Snyder:

> "We believe that it would be well for the division to emphasize to all local financing concerns that if such concerns engage in activities which are covered under the principles outlined above, all the employees of such concerns, in our opinion, are properly to be deemed within the coverage of the act unless the employer is able to maintain the burden of establishing that the employment of particular employees in particular workweeks is

entirely segregated from, and in no way contributes to the conduct of such interstate transactions.

"In addition to the broad grounds of coverage mentioned in the preceding paragraphs, there are several other bases upon which coverage could properly be predicated with respect to employees of both 'national' and 'local' automotive finance companies. Thus if employees drove automobiles across state lines upon repossessing them, such work would appear clearly to be covered. Employees engaged in connection with the compilation and preparation of reports to be sent in interstate commerce would appear to be covered during all workweeks when they are so engaged. Likewise, employees engaged in making remittances in interstate commerce would appear to fall within the act's coverage. Moreover, employees who regularly travel from state to state in the performance of their duties may be found by the courts to be engaged in interstate commerce for that additional reason. And, of course, as has been previously stated, if an employee performs any covered activities within a workweek, his entire employment for that week is deemed to fall within the coverage of the act."

Sincerely yours,

PHILIP B. FLEMING
Administrator

AUG 22, 1941.

SOL:FUR:HC

Dillon Anderson, Esquire
Baker, Botts, Andrews & Wharton
Esperson Building
Houston, Texas

Re: Water travel time in the oil industry

Dear Mr. Anderson:

Reference is made to your letters of July 25 and August 9, 1941. You refer to our letter of July 17 on the question of travel time on water as hours worked, and to a letter of August 5 from the Acting Regional Director for your region.

In our letter we stated that "travel time from the dock to the wells and back would definitely, in our opinion, fall into the 'hours worked' category if the employee was required, either by orders from his employer or due to the lack of a practicable alternative, to utilize this means of transportation." We stated further that men traveling by company boat to the wells also have a certain amount of land travel to reach the dock, and that in the ordinary case such travel need not be considered as "hours worked."

In your letter of July 25 you point out that in many cases the men live in camps that are situated right at the dock and do not have any land travel time. You suggest, therefore, that the time spent in traveling on water should not be considered as hours worked.

In our opinion, the fact that men live at the dock and hence have little or no land travel does not affect the principle stated above with respect to water travel. The test is not whether the employees spend a good deal of time in getting to work. The travel time on water is considered hours worked because the employee during such time is not free from the control of his employer.

Mr. Noah's letter of August 5 undoubtedly referred to the opinions set forth above since there has been no further statement from this office on this matter.

Sincerely yours,

Baird Snyder
Deputy Administrator

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