UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

October 17, 1941

Legal Field Letter

No. 66 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
9-25-41	Acting Assistant Solicitor (ADH)	Samuel P. McChesney	Western Weighing Inspection Bureau Kansas City, Missouri File No. 24-1605 (Application of Section 13 (b)(2) exemption to employees of a weigh inspection bureau maintained by railroads for purposes of checking classifications and weights as well as in cooperating and distribution of grain doors and maintaining a grain door division at terminal points.) (p.61, par. E; p. 116, par. M.)
9-25-41	Acting Assistant Solicitor (ADH)	A. A. Cohen	Detroit Harbor Terminals, Inc. Detroit, Michigan (Collective Bargaining Agreements - Section 7(b)(1)- Liability of employer under-) (p. 49, par. 3; p. 60, par. D; p. 91, par. R.)
9-26-41	Acting Assistant Solicitor (GFH)	Samuel P. McChesney	Stoner-McCray Company and Combs Outdoor Advertising Company (Application of Act to employees engaged in posting bills and posters outside the State in which they are employed.) (p. 1, par. B; p. 197, par. 1.)

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Legal Field Letter
No. 66

MEMORANDA

Date	From	To	Subject
9-26-41	Acting Assistant Solicitor William S. Tyson (ER)		Interpretation of the term "local retailing capacity" as used in Section 13(a)(1) (Whether janitors and mechanics are engaged in a "local retailing capacity".) (p. 30, par. 12; p. 40, par. 8; p. 65, par. J; p. 102, par. 3.)
9-27-41	Acting Assistant Solicitor O. J. Libert (ADM)		Blue & Gray Sightseeing Tours, Inc. Washington, D.C. File 9-360 (Application of Section 13 (b)(1) to lecturers and lecturers' helpers who ride on sightseeing buses and comment on points of interest; application of Section 13(a) (1) exemption to hotel stand men selling tickets for interstate trips; interpretation of "places of business".) (p. 62, par. F; p. 65, par. J; p. 72, par. N; p.101, par. CC; p. 115, par. MM; p. 189, par. 3; p. 260, par. W.)
9-29-41	Acting Assistant Solicitor Samuel P. McChesney (EGH)		Davis-Nolan-Merrill Grain Co. Board of Trade Building Kansas City, Missouri File No. 24-2992 (Application of Section 7 (b)(3) exemption to (1) employees of grain buyers who store the grain which they buy in railway or public elevators, and (2) to the office employees of a concern which stores in its own elevator all the grain which it buys.) (p. 74, par. P; p. 94, par. T; p. 231, par. A.)

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(9406)

Legal Field Letter
No.66

MEMORANDA

Date	From	To	Subject
10-4-41	Rufus G. Poole (FUR)	Vernon C. Stoneman	Opinion letter written in this office (Explanation of retail sales to a private consumer and a commercial consumer market - interpretation of par. 10 of Interpretative Bulletin No. 6.) (p. 69, par. M; p. 102, par. DD.)
10-4-41	Rufus G. Poole (EB)	Samuel P. McChesney	Iowa Master Breeders Inc. Sioux City, Iowa (Application of proper tests under Regulations, Part 541, with respect to the following situations: (1) Where the employer has no non-exempt employees except possibly the one involved; or, (2) where the only employee of the employer might be considered for an exemption under Section 541.4 of the Regulations.) (p. 101, par. 1; p. 235, par. 4.)
10-6-41	Rufus G. Poole (GFM)	Donald M. Murtha	Maki v. Bailey Lumber Co. (Application of Act to the disposal of certain waste materials, (slab wood, etc.) resulting from the sawing of logs into lumber - meaning of the word "necessary" under Section 3(j).) (p. 86, par. I; p. 158, par. 11; p. 261, par. Z.)
10-6-41	Rufus G. Poole (EB)	Samuel P. McChesney	Fraternal Order of Eagles (Application of administrative exemption to auditors - even though their judgment is not final.) (p. 25, par. 1; p. 63, after par. 2; p. 101, par. 2.)

(9406)

MEMORANDA

Date	From	To	Subject
10-6-41	Rufus G. Poole (GFH)	Aaron A. Cohen	Request for Opinion re: Meech Avenue Foundry Cleveland, Ohio File No. 34-369 (Application of Act to employees of foundry engaged exclusively in the production of melting and pouring pots manufactured solely for the use of an aluminum company.) (p. 154, par. 2; p. 261, after par. EE.)

LETTERS

Date	To	Subject
9-26-41	Samuel Fraser Rochester, New York (EGL)	(Application of Section 13(a)(10) exemption to employees of a cold storage solely engaged in storage of fresh fruits and vegetables grown in the general vicinity of the storage, in view of the fact that some of the commodities have been previously packed in their raw or natural state in another establishment.) (p. 57, par. 1(g); p. 112, par. 1(e).)
10-6-41	Edgar L. Pearson Washington, D. C. (EGL)	(Application of Section 13(a)(10) and Section 7(c) exemptions to the delinting of cottonseed.) (p. 57, par. 3(a); p. 67, par. 2; p. 98, par. 4(a); p. 113, par. 3(a).)
10-10-41	Stanley Spoor Huntington, West Virginia (FUR)	(Application of Act to a timekeeper on a flood prevention project.) (p. 25, par. A; p. 176, par. 5.)

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:ADH:MS

Acting Assistant Solicitor

September 25, 1941

Western Weighing Inspection Bureau
Kansas City, Missouri
File No. 24-1605

This is in reply to Mr. Marx's memorandum of September 2 in which he inquires as to the applicability of the exemption provided in section 13(b)(2) to the employees of the subject company. The Western Weighing Inspection Bureau is maintained by the railroads for the purposes of checking classifications and weights, and since August 1937 it has extended its activities and now engages in coopering and distribution of grain doors and maintaining a grain door division at terminal points.

Informal consultation with a representative of the Interstate Commerce Commission indicates that the subject Company is not an employer subject to Part I of the Interstate Commerce Act. It is similar to other railroad contractors who, since they are not carriers, are not ordinarily subject to Part I of that act. It is, therefore, our opinion that the employees of the subject company do not fall within the exemption contained in section 13(b)(2).

(9406)

A. A. Cohen
Regional Attorney
Cleveland, Ohio

SOL:ADH:AEA

Acting Assistant Solicitor

September 25, 1941

Detroit Harbor Terminals, Inc.
Detroit, Michigan

This is in reply to your memorandum of September 12 in regard to certain of the employees of the subject company who are employed pursuant to a collective bargaining agreement entered into under the provisions of section 7(b)(1) of the act. You state that the 26-week period is drawing to a close and that while most of the employees are still well under the 1000-hour limitation five or six of the group have almost exhausted the 1000-hour period. The employer is desirous of retaining these employees on its pay roll during the coming weeks and is willing to pay restitution to each of the employees who will thereby exceed the 1000-hour limitation for all hours worked in excess of 40 during any workweek since the start of the 26-week period. You further state that the company is unwilling to make like restitution to other employees covered by the contract whose total number of hours of employment during the 26-week period will not exceed 1000 hours.

You point out that it is clear from a reading of paragraph 20 of Interpretative Bulletin No. 8 that the employer could have avoided this problem originally by excluding five or six employees referred to above from the operation of the 1000-hour limitation, and you further state that it seems clear to you from a reading of paragraph 29 of this bulletin that a failure to observe the 1000-hour limitation as to all of the employees results in the accrual of a liability for regular overtime compensation.

We have consistently maintained that the partial exemption from the overtime provisions provided by section 7(b)(1) of the act applies to individual employees and that a violation of the act as to one employee covered by the contract will not void the contract as to all employees covered thereby but only as to that individual. In the instant case, therefore, it is our opinion that the company must only pay to each of the employees whose hours exceeded 1000 during the 26-week period overtime for all hours worked in excess of 40 in any workweek.

275772

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:GFH:IDP

Acting Assistant Solicitor

SEP 26 1941

Stoner-McCray Company and
Combs Outdoor Advertising Company

This is in reply to your memorandum of September 17, 1941, on the above subject.

Our position regarding the status under the act of employees engaged solely in posting bills and posters entirely within the same state in which they are employed is set forth in Legal Field Letter No. 6, page 3.

However, you inquire further:

> "Assuming that employees of the subject post the posters out of the State of Iowa, operating from their headquarters in Iowa, is the second category of employees engaged in interstate commerce or in processes or occupations necessary for the production of goods for commerce?"

In such situations it is our opinion that these employees would be covered during all workweeks in which they were engaged in transporting materials across state lines. Moreover, aside from this basis of coverage, it is our opinion that employees whose movements across state lines are regular and recurring, and are made in the performance of their duties pursuant to the employer's instructions, are properly to be regarded as "engaged in commerce" for that reason. We are not prepared at present to express a definite opinion as to whether the advertising of nationally known products by means of the posters which these employees have put up, is sufficiently related, in and of itself, to the movement of goods in commerce to bring their employment within the coverage of the act.

(9406)

William S. Tyson
N. C. Department of Labor
Raleigh, North Carolina

SOL:EB:MR
September 26, 1941

Acting Assistant Solicitor

Interpretation of the term "local retailing capacity" as used in Section 13(a)(1)

This will reply to your memorandum of September 19, 1941, NC:WST:MD, in which you request our opinion concerning the applicability of the local retailing capacity exemption provided by section 13(a)(1) of the act to certain situations which you present.

In the first situation an employer operates a retail store and has an employee who is engaged in maintenance work in the retail store. This employer also operates another establishment which is engaged in nonexempt work. The employee in question each week works a number of hours in the nonexempt establishment for a number of hours not exceeding 15 percent of the number of hours worked in the workweek by the nonexempt employees. The retail establishment of this employer would be exempt under section 13(a)(2). The question is whether the maintenance employee would be entitled to the section 13(a)(1) exemption as being engaged in a "local retailing capacity."

In our opinion janitor work does not involve "making retail sales" or "performing work immediately incidental thereto" within the meaning of Section 541.4 of Regulations, Part 541. The employee in question would not, therefore, appear to come within the scope of the local retailing capacity exemption.

The second situation presented by you involves a garage owner who operates a service garage exempt under section 13(a)(2) and also operates a parts department as a separate establishment which is nonexempt. In this case a mechanic engaged in servicing cars also works a few hours each week in the nonexempt parts department. The question is whether the mechanic would be entitled to the section 13(a)(1) exemption as being engaged in a "local retailing capacity." We agree with your conclusion that the employee would not come within the exemption, as his work cannot be considered incidental to selling.

278260

O. J. Libert
Associate Director
Field Operations Branch

SOL:ADH:MS

Acting Assistant Solicitor

Blue & Gray Sightseeing Tours, Inc.
Washington, D. C.
File No. 8-360

September 27, 1941

This will reply to your memorandum of August 27, 1941, in which you request our opinion concerning the applicability of the Fair Labor Standards Act to the above company.

It seems clear from the file that the subject company is engaged in interstate commerce and that its employees are entitled to the benefits of the act unless they are specifically exempted therefrom. We have consulted the representatives of the Interstate Commerce Commission in regard to the lecturers and lecturers' helpers who ride on the buses and comment on points of interest. In spite of the fact that these men do not drive nor do any mechanical work on the buses, the Interstate Commerce Commission considers them to be drivers' helpers, apparently on the theory that in case of an accident these men would probably be called upon to put out the flags and flares required by the Commission's safety regulations. In accordance with the principles stated in paragraph 4 of Interpretative Bulletin No. 9, it is our opinion that these employees will be exempt from the overtime provisions of the act by virtue of section 13(b)(1) at such time as the Interstate Commerce Commission actually regulates their hours of service. Our enforcement policy in regard to them is stated in Inspection Field Letter No. 17, Second Revision, paragraph 5.

In our opinion the hotel stand men are engaged in selling tickets for interstate trips and are therefore within the coverage of the act. The outside salesman exemption provided by section 13(a)(1) of the act is not applicable to these employees, because the hotel stands should be considered as "places of business" of the company within the meaning of subsection (A) of Regulations, Part 541.5. These stands have been rented or secured by contract by the company from hotels or other establishments. The stands are very important locations from which business for the company is solicited by the employees in question. The stands are fixed

sites comparable to an office, and are used by the employees in making and soliciting their sales (cf. page 45 of the Report of the Presiding Officer). In view of these facts the hotel stand men do not qualify as "outside" salesmen.

As far as the employee C. B. Hutchinson is concerned, it does not seem that he is exempt from the act under section 13(a)(1). It is stated in the narrative report that the duties of this employee are to supervise hotel stand men, to see that tickets are in their hands, promote sales, collect customer's money from the hotels, dispatch buses and operate them one or two days a month. Although the supervisory duties of this employee might conceivably bring him within the scope of the executive exemption, it would seem likely that the amount of his nonexempt work does not meet the 20 percent test laid down in subsection (F) of Regulations, Part 541.1. Mr. Hutchinson likewise does not appear to qualify under the outside salesmen exemption on the same ground on which the hotel stand men were held not to come within the scope of this exemption.

COPY

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:EGL:VAS

Acting Assistant Solicitor

Davis-Nolan-Merrill Grain Co.
Board of Trade Building
Kansas City, Missouri
File No. 24-2992

September 29, 1941

In your memoranda of July 18 and of August 6, and in Mr. Herman Marx's memorandum of September 11, inquiry is made concerning the application of the section 7(b)(3) exemption (1) to employees of grain buyers who store the grain which they buy in railway or public elevators, and (2) to the office employees of a concern which stores in its own elevator all the grain which it buys.

The Administrator has determined that the section 7(b)(3) exemption is applicable to the storing of grain in certain types of grain elevators; cash grain commission merchants were specifically denied the exemption, because they are not engaged in the actual storage of grain and therefore do not satisfy the definition of seasonality contained in section 526.3(b) of Regulations, Part 526. Similarly, the exemption is inapplicable to buyers who have the grain which they buy stored in elevators that they do not own or lease; in such a situation, the grain is stored by the operator of the elevator and not by the buyer.

On the other hand, where a concern stores in its own elevator all the grain which it buys and sells, the buying and selling transactions are incidental to its storage of grain and are part of the grain storage industry; therefore, such transactions do not render the section 7(b)(3) exemption inapplicable to the office employees of that concern.

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266817

(9406)

Vernon C. Stoneman
Acting Regional Attorney
Boston, Massachusetts

SOL:FUR:ESR

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

October 4, 1941

Opinion letter written in this office

This will reply to your memorandum of September 25, 1941, in which you state that you question whether all sales to private consumers are classified as retail sales in view of paragraph 10 of Interpretative Bulletin No. 6.

It is true that the concluding sentence of that paragraph states:

> "Obviously, the sale of goods in a quantity approximating the quantity involved in a normal wholesale transaction and as to which a special discount from the regular retail price is given would not be a retail sale."

However, we intended in that paragraph to set up the price and quantity tests to be used in connection with the discussion in paragraphs 14 and 15 of goods having both a private consumer and a commercial consumer market. Sales to a private consumer for his own use are considered by us to be retail sales regardless of the price or quantity involved. However, the price and quantity standards to be used in determining whether a sale to a business consumer is a retail sale are the price and quantity incident to the sale to an ordinary private consumer.

280473

C O P Y

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:EB:MF
October 4, 1941

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

Iowa Master Breeders Inc.
Sioux City, Iowa
File No. 14-995

This will reply to your memorandum of September 26, 1941, KCL:TOM:HN, in which you request our interpretation regarding the 20 percent test set forth in subsection (B) of section 541.4 of the regulations. You ask particularly which tests would be proper in the case where the employer has either no nonexempt employees, that is where all other employees but the one in question are exempt under some provision of the act or where the act is not applicable to other employees but the one involved, or in the case where the only employee of the employer might be considered for an exemption under section 541.4.

As a matter of administrative convenience it will be proper in such cases to take as a base for computing the permissible hours of nonexempt work the 40 hour week that is established as the permanent standard under the act and consider 8 hours per workweek as the maximum allowance for such nonexempt work (cf. page 15 of the Stein report).

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(9406)

COPY

Donald M. Murtha
Regional Attorney
Minneapolis, Minnesota

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

SOL:GFH:MF

October 6, 1941

Maki v. Bailey Lumber Co.

We have your memorandum of September 26, 1941, on the above subject.

You state that as a result of the above-captioned action, the employer has made restitution to all of its employees with the exception of three whose occupations will be hereafter described. Counsel for both employer and employees have submitted to you a stipulation of facts and their opinions of coverage based thereon, and have requested that they be furnished with an opinion from this office based on the facts appearing in this stipulation and in the correspondence which was attached to your memorandum.

The employer is engaged in operating a lumber mill in which lumber is produced for interstate commerce. In connection with the sawing of the lumber in this mill certain waste materials, which are not fit for lumber and which are known as "edgings," are produced. These edgings, after they have been sawed into smaller pieces of various sizes, are carried along on a conveyor. The resulting slabs of edgings are disposed of in three ways. Some of them are dumped into what is known as a "hog," in which they are ground into sawdust. The sawdust thus obtained is fed into the furnaces in order to generate steam to drive the mill machinery. Other slabs may be fed into a burner which is operated solely for the purpose of consuming this waste by fire, although since the effective date of the act, according to your memorandum, the burner has been used very seldom, if at all, for this purpose. Between them, the hog and the burner have a disposal capacity sufficient to take care of all the waste produced. The disposal of this waste by one means or another is absolutely essential to the continued operation of the mill.

It is pointed out further in the stipulation of facts that there is a local market for slabwood, and that some of this wood is sold to consumers in nearby towns who use it as fuel for domestic and, possibly, industrial purposes. The stipulation states that--

> "This slabwood is picked off the conveyor by a man stationed thereat; after the same has

> been cut up by the slasher saws, the slabwood is dropped by him into a chute, which carries it onto a conveyor which runs to a hopper where the wood falls off the conveyor chain and is held in the hopper which consists of a four compartment elevated box-like container."

The stipulation of facts continues:

> "Since October 24, 1938, the edgings suitable for slabwood have usually been run into the hopper instead of into the hog or burner. The edgings not suitable for slabwood were run into the hog. Occasionally, some of the edgings suitable for slabwood were also run into the hog and on several occasions, for short periods of time, all edgings were run into the hog. Most of the edgings suitable for slabwood reached the hopper, which under those circumstances has to be emptied a number of times each day. When the edgings suitable for slabwood were so disposed of, unless the hopper was emptied as above stated, it would become filled up unless such edgings were sent to the hog. If sent to the hog, it could in conjunction with the burner take care of all of the edgings. However, it has not been necessary to use this burner during the time mentioned. During this time most of such edgings suitable for slabwood were disposed of, from the sawmill, through the medium of the hopper."

The employees in question were engaged solely in emptying the hopper as required, which was normally several times daily. It was their duty to back trucks under the hopper, to pull the release trap in order to allow the slabwood to fall into the truck, and thereafter to haul away the slabwood either directly to customers in a green condition, or to other locations in the yard where the wood would be allowed to dry before being sold as fuel to customers.

In the attachments which accompanied your memorandum, various arguments are ably advanced both by Mr. Bourgin, attorney for the employees, and by Mr. McCabe, attorney for the company. In his memorandum addressed to you under date of September 3, 1941, Mr. Bourgin points out that it is imperative that some system of keeping the plant free from these edgings, trimmings, and waste, be maintained in order to continue the operation of sawing logs into lumber. In the second paragraph on page 2 of this communication, Mr. Bourgin admits that

the employer might have disposed of all of the trimmings through the use of the disposal facilities located in the plant, but that he regards it--

> "as important and significant that he did not choose to do so. He chose to dispose of them through the hopper. * * * Since he was fit not to use the burner, the hopper had to be emptied in order to keep the mill in operation. This was the function performed by the yard truck operators. These men disposed of these trimmings and edgings from the saw mill, enabling the mill to carry on its normal operation of manufacturing lumber from saw logs."

In his memorandum of September 9, 1941, however, Mr. McCabe points out that while his client concedes that the employees engaged in placing the waste in the hog and in the burner are covered by the act, nevertheless, since the hog and the burner had a waste disposal capacity completely adequate to handle all the edgings produced in the mill, the operation of the mill was in no way dependent upon the disposal of the slabwood by means of the hopper. Mr. McCabe points out that prior to the time that slabs are conveyed to the hopper they are physically separated from the remaining waste and edgings. As he states--

> "It is intended when it is picked off to separate it from such interstate movement and it is so separated by being picked off one conveyor and thrown onto the other conveyor which carries it on to another conveyor, and at the moment it starts on that other conveyor it is then in intrastate commerce, because it is intended at that time by the employer that it shall be definitely segregated and it never does enter the flow of commerce. Furthermore, it is sold to local customers who consume it on the Iron Ranges, and it never enters into competition in the market with interstate wood."

As we understand Mr. McCabe's principal argument, it is his contention that, even conceding that the disposal of the edgings is indispensable to the operation of the lumber mill, nevertheless, since the hog and the burner which are located in the mill, or integrally connected with it, are adequate to dispose of all the edgings, the operation of the hopper and the removal of the stripwood therefrom, are not indispensable to the operation of the mill. As a result, he is of the opinion that the employees in question are not engaged in "an occupation necessary to the production" of goods for commerce within the meaning of section 3(j) of the statute.

Before considering this point on the merits we should like to point out that Mr. McCabe's position appears to us to be difficult to defend purely from a logical point of view. As we understand the situation, the hog by itself could not adequately dispose of the waste, unless it was used in conjunction either with the burner or the hopper. It appears from the stipulation and from memoranda of counsel that the burner was seldom if ever used since the effective date of the act as an auxiliary to the hog, but that the hopper was continuously used for this purpose. In such a situation we find it difficult to follow Mr. McCabe's theory which, apparently, is that the burner's potential, but unused, capacity to dispose of waste was indispensable to the operation of the mill, while the actual disposal of the waste by means of the hopper without which, admittedly, the mill could not continue to operate, was not indispensable. Since it is our opinion, however, that the act does not require as a prerequisite to its application that an occupation be indispensable to the production of goods for commerce, we believe the question of which types of disposal are to be regarded as indispensable is moot, and we shall proceed to consider the meaning of the term "necessary to the production" of goods for commerce, contained in section 3(j) of the act.

In our opinion, the term "necessary" contained in section 3(j) of the act is not to be construed as synonymous with "indispensable." As the court stated in Fleming v. A. B. Kirschbaum Co., 38 F.Supp. 204, in considering the proper meaning to be attached to the word "necessary" appearing in section 3(j)--

> "The definition of 'necessary' given by Chief Justice Marshall is fairly applicable. 'To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.' McCulloch v. Maryland, 4 Wheat. 316, 413. The employees involved here can not be excluded from the operation of the act unless the word necessary is interpreted to mean indispensable. So to do would be to deny a liberal construction to a remedial act, contrary to the fundamental canon for the interpretation of the statutes."

This statement is in accordance with the position which the Wage and Hour Division has consistently maintained, as Mr. McCabe will note by reference to paragraph 5 of Interpretative Bulletin No. 1. We have stated that the act applies to maintenance employees, clerical workers, watchmen, and messengers whose activities contribute to the production of goods for commerce, or whose activities aid in such production. Coverage would exist in such situations even though it could be established that the activities of the particular employee whose status under the act was sought to be determined were not absolutely indispensable to the continued operation of a plant producing

goods for commerce. As a result, we do not believe that the status under the act of the employees in question is to be determined solely by the fact that the lumber mill could continue to operate if their services were dispensed with.

This leaves for discussion the final question of whether or not the activities of these employees are properly to be regarded as being of a local character and completely segregated from the production of the lumber for interstate commerce which is carried on in the lumber mill. As Mr. McCabe is aware, it is stated in paragraph 6 of Interpretative Bulletin No. 1 that the act does not cover employees who produce goods purely for consumption within the state of production, provided, of course, that they perform no other work which is within the coverage of the act. In paragraph 9 of Interpretative Bulletin No. 5 it is pointed out that employees who are not covered by the act may be segregated from employees who are covered, although the burden of establishing that such segregation has been made is upon the employer. The difficulty of sustaining this burden becomes apparent when it is considered, as is further stated in that paragraph, that--

> "as to any particular employee not accorded the benefits of the act during any workweek, it would be necessary, for example, to show that he did not prepare or handle materials used in the production of goods for interstate commerce, nor clean machinery used in such production, nor aid in any way in the production of any goods for commerce." /Underscoring added./

If in the present situation it could be shown that the three employees in question while they were engaged in disposing of wood strips were in no way aiding in the production of lumber for interstate commerce, and that their activities in no way contributed to the operation of the mill, but that they were engaged solely in the entirely separate occupation of producing or distributing wood fuel for local domestic consumption, it is our opinion that their employment would not be covered by the act. But Mr. McCabe admits that the disposal of the edgings, by one means or another, is necessary and in fact indispensable to the continued operation of the mill. No matter by what means this disposal was accomplished, it certainly contributed directly to the productive activities performed in the plant itself. Hence it is our opinion that the employees engaged exclusively in disposing of this slabwood were covered by the act as being engaged in an "occupation necessary to the production" of lumber for commerce under section 3(j) of the act.

282093

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:EB:MF

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

October 6, 1941

Fraternal Order of Eagles

This will reply to your memorandum of June 4, 1941, KCL:SPM:LG, in which you request our opinion concerning coverage of certain employees of the subject. I regret that an earlier reply was not possible.

We fully agree with the views expressed by you on coverage of certain groups of employees of the subject. As regards the auditors, the fact that, after an audit has been made, a report is sent from the particular lodge to Mr. Mann, in Kansas City, would not necessarily take these employees out of the scope of the administrative exemption. If their work involves the exercise of discretion and independent judgment, the exemption may apply even though such judgment is not final.

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(9406)

COPY

Aaron A. Cohen, Esquire
Regional Attorney
Cleveland, Ohio

SOL:GFH:HC
Oct. 6, 1941

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

Request for Opinion re:
Meech Avenue Foundry
Cleveland, Ohio
File No. 34-369

This is with reference to your communication of June 4, 1941 on the above named subject.

In your memorandum you inquire concerning the status under the act of an employee engaged exclusively in the production of certain melting and pouring pots which are manufactured solely for the Aluminum Company of America to be used at its "Cleveland plant (within the state of production)." As you point out, the pouring pots are the receptacles used to transfer the molten aluminum from the melting pot to the mold in which the finished aluminum casting is formed.

We have been informed by experts of the National Bureau of Standards that pouring pots of the type described in your communication are considered in the trade to fall within the general category of "foundry equipment," -- a category which includes, in addition, such items as sand mullers, molding machinery, sand conditioning equipment, cranes, and sand blasting equipment. All foundries, whether brass, iron or aluminum, operate melting furnaces for melting the metal, and employ ladles or pots of the general type described by you in transferring the molten metal from the melting furnace to the molds. In some foundries the pot or ladle transfers the metal directly from the furnace to the mold; but in others the ladle transfers the metal to smaller pots or ladles, and under this latter method the metal is transferred directly from such smaller ladles to the molds in which the metal castings are made.

On the basis of this information, we believe that the pot or ladle is properly to be considered a "tool" used in the production of aluminum castings, within the meaning of paragraph 11 of Interpretative Bulletin No. 5, and that the employee in question is properly to be deemed covered by the act.

238969

(9406)

September 26, 1941

Mr. Samuel Fraser
Internation Apple Association
1132 Mercantile Building
Rochester, New York

Dear Mr. Fraser:

This is in reply to your letter of June 16, 1941, addressed to Mr. Baird Snyder, in which you inquire about the applicability of the exemption provided by section 13(a)(10) of the Fair Labor Standards Act to the employees of a cold storage that is solely engaged in the storage of fresh fruits and vegetables which you state have been grown in the general vicinity of the storage. A small percentage of the fruits and vegetables are packed in a packing house before they are stored in the establishment. We regret the delay in replying to your inquiry.

As you know, section 13(a)(10) of the act exempts from the minimum wage and overtime provisions of the act any employee employed within the area of production (as defined by the Administrator) and engaged in handling or storing agricultural commodities for market. If all the fruits and vegetables handled and stored at the storage to which you refer have been grown on farms within the general vicinity of the storage, the general vicinity requirement of the "area of production" definition is not defeated merely because some of the commodities have been previously packed in their raw and natural state in another establishment. Of course, if any operations are performed on the commodities which effect a change in their natural form, the subsequent storage of such products is not within the section 13(a)(10) exemption.

Sincerely yours,

Philip B. Fleming
Administrator

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SOL:EGL:BM

(9406)

In reply refer to:
SOL:EGL:FB

October 6, 1941

Mr. Edgar L. Pearson
Consultant, Chemicals Branch
Office of Production Management
Social Security Building
Washington, D. C.

Dear Mr. Pearson:

This is in reply to your letter of September 30, 1941, in which you inquire about the application of the Fair Labor Standards Act to the employees of establishments which gin cotton and remove linters from cottonseed. You wish to know whether such employees would be covered by the act if all the cotton linters produced are sold f.o.b. the plant.

An employee "engaged in commerce or in the production of goods for commerce" is covered by the act and, unless otherwise exempt, is entitled to receive at least 30 cents an hour and one and a half times his regular rate of pay for all hours he works in excess of 40 in any workweek. If an employer has reason to believe at the time he prepares or produces goods that such goods or any unsegregated part of them will eventually move in interstate commerce, whether in the same form or after further processing, his employees engaged in the production of such goods are within the coverage of the act. Thus, if the goods are purchased by an out-of-state purchaser f.o.b. the factory and are taken by the purchaser out of the state, the employees in the plant are covered. The same is true where the producer sells his products within the state of production to another who in turn sells them in interstate commerce. See paragraphs 2, 4, 5, 9 and 10 of the enclosed copy of Interpretative Bulletin No. 5.

Section 13(a)(10) of the act, a copy of which is enclosed, exempts from the wage and hour provisions of the act employees employed within the area of production (as defined by the Administrator) and engaged in handling or ginning agricultural commodities for market. The term "area of production" is defined in section 536.2(a) of the enclosed copy of Regulations, Part 536, and information concerning the exemption is contained in paragraphs 25, 26, 29 and 33 of

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the enclosed copy of Interpretative Bulletin No. 14.

Cotton authorities of the United States Department of Agriculture inform us that the term "ginning" includes only the removal by means of a cotton gin of the spinnable fibres from the seed, and that the delinting of the seed--that is, the removal of the short fibres and fuzz--is a different operation, involving entirely different machinery. The delinting operations are usually performed in cottonseed processing establishments and seldom at the gins. These facts and the legislative history of the act have led us to conclude that the delinting of cottonseed is not "ginning" within the meaning of the section 13(a)(10) exemption. It is also our view that the delinting of cottonseed does not fall within any other term used in section 13(a)(10) of the act.

As it is indicated in paragraphs 14, 16, 17, 22 and 23 of Interpretative Bulletin No. 14, section 7(c) of the act exempts from the overtime provisions employees of an employer engaged in the processing of cottonseed or in the ginning and compressing of cotton. This exemption does not affect the 30 cents an hour minimum wage requirement of the act, and it is not qualified by the term "area of production."

Employees engaged exclusively in ginning cotton are completely exempt under section 13(a)(10) from the wage and hour provisions of the act, provided that the "area of production" requirement is satisfied. If that requirement is not satisfied, such employees come only within the hours exemption provided by section 7(c). Further, the only exemption available to employees employed in delinting cottonseed is the hours exemption of section 7(c). If some of the employees perform operations connected both with the ginning of cotton and with the delinting of cottonseed, then even though they be employed within the "area of production," they are only within the section 7(c) exemption.

If we can be of any further assistance, do not hesitate to call upon us.

Very truly yours,

For the Solicitor

Enclosures (4)

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

C O P Y

In reply refer to:
SOL:FUR:SAF
OCT 10 1941

Mr. Stanley Spoor
636-1/2 Sixth Street
Huntington, West Virginia

Dear Mr. Spoor:

This will reply to your letter of September 26, 1941, inquiring as to the applicability of the Fair Labor Standards Act to your employment as timekeeper on a flood prevention project.

The act, a copy of which is enclosed, applies to employees engaged in interstate commerce, or in the production of goods for interstate commerce. We are enclosing copies of Interpretative Bulletins Nos. 1 and 5, which discuss the general coverage of the act and direct your attention to paragraphs 12 and 13 of Interpretative Bulletin No. 5. If you were employed on a construction project, the purpose and effect of which was to enhance or improve navigable waters as instrumentalities of interstate commerce, it is our opinion that your employment as "timekeeper" was probably covered by the Fair Labor Standards Act.

I am enclosing a Workers pamphlet and a confidential complaint form, which you may file with the regional office at 215 Richmond Trust Building, 627 East Main Street, Richmond, Virginia. If violations of the act are indicated, an inspection will be made and appropriate action taken.

Very truly yours,

For the Solicitor

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

Enclosures (5)

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