UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

December 11, 1941

Legal Field Letter

No. 69

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
11-19-41	Rufus G. Poole (RUB)	A. A. Cohen	Meaning of "Public Messenger Service" as defined in Child Labor Regulation No. 3. (p. 18, par. D; p. 260, after par. W.)
11-21-41	Rufus G. Poole (EGL)	Charles H. Livengood, Jr.	Hopkinsville, Kentucky (Application of Section 13(a)(10) exemption to employees engaged in stripping tobacco in a partioned-off part of a tobacco warehouse, if the number so engaged is less than ten, and a separate pay roll is maintained for such employees; or in the case where the warehouse makes a bona fide lease of physically separated space therein to be used in the stripping of tobacco by the lessee's employees who fulfill the requirements of Section 13(a)(10) and Regulations, Part 536.) (p. 59, par. (g); p. 114, par. (i); p. 232, par. A.)
11-22-41	Rufus G. Poole (SE)	Alex Elson	Corporation Chicago, Illinois (Deductions from wages -- whether a two percent deduction from an employee's salary, which is credited to the employee's account in a

69

Legal Field Letter
No._____

MEMORANDA

Date	From	To	Subject
11-22-41	Rufus G. Poole (SE)	Alex Elson	savings and profit-sharing trust fund set up by a company, is a proper deduction within the meaning of Section 3(m).) (p. 88, par. K; p. 248, par. E.)
11-24-41	Rufus G. Poole (GFH)	Philip F. Herrick	Road Construction in Puerto Rico (p. 175, par. 3(d); p. 239, par. D.)
11-24-41	Rufus G. Poole (ADH)	George A. Downing	Paying Employees with Two Checks (One check representing the amount the employee owes at the company store, and the other check, the remainder of the pay due the employee.) (p. 232, par. A; p. 248, par. 2.)
11-24-41	Rufus G. Poole (GFH)	Dorothy M. Williams	_____ and Company Arizona File _____ (Application of Act to employees of a custom broker located in a border town of the United States, who arrange contents of railroad cars, containing imports from Mexico, for clearance through the United States Customs, prior to the shipment of such imports in interstate commerce.) (p. 1, par. 2; p. 193, par. 1(a).)
11-25-41	Rufus G. Poole (FUR)	Arthur E. Reyman	_____ Company (Application of local retailing capacity exemption under Section 13(a)(1) to bushelmen employed by a company engaged in the manufacture and sale of custom-made clothes.) (p. 65, par. J; p. 101, par. 3; p. 147, par C.)
11-25-41	Rufus G. Poole (ADH)	Arthur E. Reyman	13(b)(1) exemption (Application of, to an employee engaged exclusively in operating a tractor moving trailers to and from loading platforms at a railhead where railroad cars are unloaded into motor truck trailers.) (p. 62, par. F; p. 115, par. MM.)

69

Legal Field Letter
No._____

MEMORANDA

Date	From	To	Subject
11-25-41	Rufus G. Poole (GFH)	Beverley R. Worrell	_____ Baltimore, Maryland (Coverage under the Act of real estate brokers who represent non-residents of the state (a) in the sale of real estate, (b) in the collection and remittance by mail of rent money, (c) in the negotiation of mortgage loans and the collection and remittance of payments thereon and who also represent national life insurance companies whose headquarters are located in another state in the matter of negotiating mortgage loans on property in the state; whether salesmen employed by such real estate brokers can be considered "outside salesmen".) (p. 72, par. N; p. 102, par. 5; p. 179, par. 3.)
11-27-41	Rufus G. Poole (EB)	Arthur E. Reyman	_____ Avenue Brooklyn, New York (Application of Section 13(a)(5) exemption to employees of a distributing company engaged in reprocessing frozen fish by placing it in brine.) (p. 65, par. I; p. 106, par. GG.)
12-4-41	Rufus G. Poole (MLE)	A. B. Long	Applicability of Jewelry Wage Order to Manufacture of Rosaries (p. 199, par. C; p. 256, par. R.)

Legal Field Letter
No. _____

LETTERS

Date	To	Subject
11-24-41	_____ (KCR) Boston, Massachusetts	("Hermetically sealed containers, meaning of, as used in R-1609.) (p. 196, par. 9; p. 258, after par. N.)
11-24-41	_____ (FUR) Akron, Ohio	(Application of the Section 13(a)(2) exemption to stores engaged in so-called "accommodation" transfers.) (p. 69, par. M; p. 102, par. DD.)
11-25-41	Mr. _____ (ADH) Oil City, Pennsylvania	(Deductions from wages -- whether a deduction for gasoline sold employees in an allowable deduction under Section 3(m).) (p. 88, par. k; p. 248, par. E.)
12-4-41	_____ (FUR) Tuscola, Illinois	(Computation of hours worked -- whether time spent for rehearsal of a radio program shoul be considered hours worked.) (p. 120, par. B.)

COPY

A. A. Cohen
Regional Attorney

SOL:RUB:DH

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

Nov. 19, 1941

Meaning of "Public Messenger Service" as defined in Child Labor Regulation No. 3.
XCL:CAR:ET

This will reply to your memorandum of September 18, 1941 in which you inquire whether an employer engaged in the manufacture and production of photostatic and commercial photography may employ a minor below 16 years of age in delivering and collecting photostatic materials by bicycle.

Section 441.2(d) of Child Labor Regulation No. 3 provides that this regulation will not be applicable to minors engaged in public messenger service. The term "public messenger service" as used in this section of Regulation No. 3 is interpreted to mean the kind of messenger service performed by delivery companies, and also, to the extent the law applies to them, telegraph companies. Delivery work performed as an incident to other kinds of business is not considered to be within the meaning of section 441.2(d).

As you know, the standards of the child labor provisions are applicable only with respect to employment in or about establishments in which goods are produced within the meaning of section 3(j) of the Act.

(9766)

C O P Y

Charles H. Livengood, Jr.
Regional Attorney
Nashville, Tennessee

SOL:EGL:IDP

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

Nov. 21, 1941

Hopkinsville, Kentucky

In your memorandum of November 3, 1941, you state that the subject company has eighty employees engaged in receiving, stripping, grading, packing and otherwise handling loose leaf tobacco in its auction warehouse.

The company wishes to know whether the section 13(a)(10) exemption would be applicable to the employees engaged in stripping, if they performed that operation in a partitioned-off part of the warehouse and if the number of employees so engaged were less than ten. Under this proposed arrangement, a separate pay roll would be maintained for the stripping employees, and all the tobacco stripped would come from the general vicinity. After the stripping had been performed, the partitioned-off space would be used for the sale of tobacco.

As you know, section 536.2(a) of Regulations, Part 536 provides that an employee is employed in the "area of production" within the meaning of section 13(a)(10) if he performs the operations enumerated in section 13(a)(10) "on materials all of which come from farms in the general vicinity of the establishment where he is employed and the number of employees engaged in those operations in that establishment does not exceed ten."

Obviously, the only purpose of partitioning off part of the warehouse and of having the stripping employees work behind the partition would be to evade the wage and hour provisions of the act in regard to such employees. If we were to say that, for the purpose of determining whether the "area of production" definition is satisfied, the employer could in this way set up separate establishments within his plant, every employer engaged in handling agricultural commodities could defeat the ten or less employee qualification of the regulations, regardless of his total number of employees, by merely setting up a partition and a separate pay roll for every ten employees he has engaged

(9766)

in the operations enumerated in section 13(a)(10). While it is contrary to our usual policy to render an opinion on a hypothetical set of facts, the subject warehouse under the proposed arrangement would obviously be, as it is now, but one establishment, and therefore all the employees of the warehouse operator who are engaged in stripping or in otherwise handling the tobacco must be counted to determine whether the "area of production" requirement is satisfied. Since that number would be, as it is now, greater than ten, none of the employees, including those engaged in stripping, would be exempt under section 13(a)(10).

You further inquire: "Would the situation be changed if the warehouse makes a bona fide lease of physically separated space therein to be used in the stripping of tobacco and the lessee's employees fulfill the requirements of Section 13(a)(10) and Regulations, Part 536, Section 536.2(a)?" Apparently the lessee would be an independent contractor engaged by the warehouse operator to perform the stripping operations.

This scheme is apparently another attempt by the warehouse operator to evade the provisions of the act in regard to the stripping employees, and while we are unable to render a definite opinion until the plan is put into actual operation and we know all the pertinent facts, it would seem that the stripping operations under such a scheme would be performed in the same establishment where the warehouse employees engage in grading, packing, and otherwise handling the tobacco. This would be even more apparent if the warehouse operator used the "leased" space for the sale of tobacco. Further evidence of the fact that the establishment is all one establishment would probably be found in the fact that, aside from the so-called lease, all the facts in the case concerning method of operation would be the same as the situation where no lease of "stripping space" is made. Assuming that the employees of the "lessee" work in the same establishment as the warehouse employees, they, of course, must be counted with the warehouse employees in determining whether the "area of production" definition is satisfied, and since that number would be greater than ten, they would not be exempt under Section 13(a)(10).

Since the ten or less employee qualification of the "area of production" definition apparently is not satisfied in the situations you present, it seems unnecessary to decide whether the subject warehouse receives all the tobacco it handles from the "general vicinity."

Alex Elson
Regional Attorney
Chicago, Illinois

SOL:SE:ESR

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

November 22, 1941

_____ Corporation
_____
Chicago, Illinois
_____

Participation in the savings and profit sharing trust fund of the subject concern is an employment requirement for every eligible employee. The trustees of the fund are chosen as follows: two are chosen by the company, two by the employees, and the fifth by the other four trustees. Each eligible employee authorizes the employer to deduct two per cent of his salary and credit it to his account in the trust fund. The company makes a contribution at the close of each fiscal year on the basis of the net profits of the company and subsidiaries. This contribution, which is out of its net earnings, is in such amount as a majority of the board of directors determines. During the first two weeks of each year, the board of directors announces whether the company will continue or discontinue its policy. Although the company may prepay part of its expected contributions, such prepayment is not to be considered an asset of the trust fund. If the board of directors decides at the beginning of a year not to contribute, the participants will not have to pay their share. The funds are invested in certain types of securities and participants may borrow from the fund in unusual cases to the extent of one-half the amount credited to their account.

At the end of each year the board of directors notifies the trustees the amount to be posted to the account of each participant. The trust terminates on December 1, 1945, as to participants who are with the company at that time. If a participant resigns or is dismissed prior to that date, the amount he receives will be reduced by one-half of the company's contributions to his account, unless the board of directors gives him permission to retire. Amounts forfeited by participants who have resigned or have been dismissed are credited to the remaining participants.

Amendments to the trust agreement are subject to the approval of the board of directors and of participants representing 51 per cent of the total amount contributed. The trust agreement can be discontinued at the end of any year upon three months' advance notice to the trustees by the board of directors.

(9766)

You inquire whether the amounts paid by the company into the trust fund are to be considered a part of the regular rate of pay computations.

Before an opinion can be rendered with respect to this question, we must examine another aspect of the plan, namely, whether the deduction of two per cent of each eligible employee's salary payment is a proper deduction under the act. This deduction is certainly not a deduction for "board, lodging, or other facilities" within the meaning of section 3(m) of the act.

As you know, we have taken the position that where an employer makes a deduction from the employee's regular wage and pays it to an independent unaffiliated third person for the benefit of the employee pursuant to the employee's voluntary request, the payment will be considered equivalent to payment to the employee. This does not seem to be the case with respect to the plan of the subject company. That the deduction is not voluntary is demonstrated by section 2(a) of the trust agreement, which states that the term "eligible employee" means "any employee who, at or after the date hereof has been in the company's employ for at least twelve calendar months prior to his making written application for participation * * * Each eligible employee shall become a party hereto * * *" Further, in the questions and answers accompanying the agreement it is stated in answer to question 2 that "participation is an employment requirement for every eligible employee."

Moreover the trustees do not appear to be unaffiliated independent third persons by reason of the manner in which the trustees are selected. Two of the five trustees are appointed by the company and have an equal voice in the choice of the fifth trustee. In addition to this, an examination of the entire plan gives rise to serious doubts as to whether the company has completely divorced itself from the management and control of the fund.

In view of these considerations, therefore, the deductions involved are illegal deductions under the act. It may not be necessary, therefore, to pass upon the question of whether the company's contributions should be included in regular rate of pay computations. If, however, you find that it is necessary to pass upon this question anyhow, we shall be glad to reconsider the matter further upon resubmission of the file to us. The file is herewith returned to you.

Attachment
(file)

AIR MAIL

Philip F. Herrick
Regional Attorney
San Juan, Puerto Rico

SOL:GFH:BSA
November 24, 1941

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

Road Construction in Puerto Rico

This is in reply to your memorandum of November 5, 1941, on the above subject. There was attached to your memorandum a blue print of a construction project regarding which you seek to be advised on the matter of coverage.

It appears from your memorandum that a large Army air base is now being constructed in the _____ corner of Puerto Rico. We gather that while at the present time one principal road leads to this air base, another road, which you describe as "entirely new," and which we assume is being built over virgin territory, is being constructed, to connect a third road, which is marked on the blue print as _____ Road No. ____ with the air base. You state, however, that since the employees engaged in building this new road are in fact employees of the Federal Government, no question as to coverage is raised in their cases.

In connection with the completion of this new road it will be necessary to construct an overpass above an existing railroad at the point where the new road crosses in line of the _____ Company. This overpass will be built by employees of an independent contractor and not by employees of the United States Government. You state that since, in your opinion, the construction of this overpass is to be regarded as "entirely new construction," you have concluded that such construction work is not covered by the Fair Labor Standards Act.

Since, from your statement, only the employees of the United States Government will work on the new road, with the exception of the overpass, and since you indicate that you are concerned only with the status of the employees who will construct such overpass, we shall consider only the question of the status of the latter employees under the act.

(9766)

While your memorandum has been carefully prepared, it does not state whether the railroad over which the overpass is to be built is regularly used in the transportation of goods in interstate commerce and properly to be regarded as an essential instrumentality of commerce. We presume, however, from the fact that it is a line of the _____ Company, which is apparently a common carrier engaged in the interstate transportation of goods, that this line is in fact to be regarded as "an essential instrumentality of interstate commerce," as that term is used in paragraph 13 of Interpretative Bulletin No. 5.

If our assumption in this regard is correct, we find ourselves unable to agree with your conclusion that the construction of an overpass above such a railroad line is not covered by the act. Certainly, if the situation involved were one in which the automobile road presently contemplated were already in existence and being used, but one upon which an overpass was being substituted for a dangerous grade crossing at the point of the road's intersection with the _____ Company line, we would have no difficulty in concluding that employees engaged in constructing such an overpass were covered by the act as being engaged in reconstructing an essential instrumentality of interstate commerce. Without in any way affecting our conclusion on this point, we could, in such a situation, completely disregard the fact that the existing automobile road might itself be an instrumentality of commerce which was likewise being reconstructed by the substitution of an overpass for a grade crossing. In such a case we could base our opinion entirely upon the fact that the original construction of such an overpass constituted a reconstruction of an interstate railroad line which was presently sustaining a stream of interstate commerce. We would take this view because the completion of such a construction project in connection with, and directly above an existing railroad, directly and materially tends to facilitate the movement of such commerce over the railroad tracks. As the result of the construction of such an overpass, interstate commerce would be facilitated not only by the elimination of the duty of the carrier to exercise the special precautions which were previously required each time a train approached the grade crossing, but also by eliminating the expense and inconvenience of maintaining special grade crossing safeguards, signal lights or other warning devices. It seems clear to us that the construction of such an overpass would materially and directly facilitate the movement of commerce over the existing railraod track by largely reducing, if not entirely eliminating, the grade crossing hazards which previously existed.

We do not believe that the consideration in the present case, that the automobile road will not yet be in operation at the time the overpass is being constructed, is of sufficient importance to cause us to take a different view. In the situation previously supposed, the construction of the overpass serves to facilitate the movement of commerce over the railroad by eliminating existing obstructions; in the present situation, the construction of the overpass serves to present precisely the same obstructions to commerce, which without the performance of such construction work would inevitably occur. In either situation, by reason of the direct functional relationship existing between such construction work and the freedom of the commerce of the railroad to move without hindrance from grade crossing hazards, it is our opinion that the new construction of an overpass is properly to be regarded as a reconstruction of the railroad itself. The added consideration that such an overpass is also logically to be viewed as an integral part of the automobile road which crosses the railroad line, in our opinion, is merely a fortuitous circumstance which in no degree establishes that the overpass is not itself an integral part of the railroad, or that the addition of the overpass facilities either in substitution for, or in prevention of grade crossing hazards imperiling the free movement of interstate commerce over the railroad line, does not constitute a substantial reconstruction of the latter.

C O P Y

George A. Downing
Regional Attorney
Atlanta, Georgia

SOL:ADH:MS

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

NOV 24 1941

Paying Employees with Two Checks

This is in reply to your memorandum of November 12, 1941 in regard to the propriety of a practice engaged in by the _____ Company of _____, Florida. The company operates a commissary which is operated at a profit. No deductions are made from the wages of the employees for purchases made at the commissary but the concern desires to make out two checks each pay day to each employee, one representing the amount due at the commissary while the other would be for the remainder of the employee's pay. You point out that this constitutes a broad hint to the employees to endorse to the company the checks in the amounts due the commissary. We regard this observation as something of an under statement.

Under the present interpretations of the Wage and Hour Division deductions for purchases made at the company store must be made at cost and are governed by Part 531 of the Regulations. The device which the company proposes to adopt in the present case is merely an attempt to do indirectly what the law prohibits directly and to recapture a part of the employee's wage by a "kick-back." In conformity with the opinions which we have consistently maintained, we do not believe that a court will permit something to be done by indirection which the law prohibits to be done directly. It is, therefore, our opinion that if profit made by the company on sales of goods to its employees at the company store cuts into the minimum wage or affects the total compensation in weeks where overtime is worked, the act has not been complied with.

(9766)

C O P Y

Dorothy M. Williams
Regional Attorney
San Francisco, California

SOL-GFH-BSA

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

NOV 24 1941

_____ and Company
_____, Arizona

This will reply to your memorandum of October 29, 1941, inquiring as to the applicability of the act to employees of the subject company. You state:

> "Subject concern acts as customs broker for products entering and leaving the United States at _____, Arizona. The employees concerned begin their duties by arranging the contents or railway cars so that the officials of the United States Department of Agriculture can examine the same. All this work is done in old Mexico. After the Agriculture inspection is completed the railway car containing the products being imported is moved across the international border into Nogales, Arizona, where the same employees perform the identical function for the convenience of the United States Custom Service. It should be noted that nothing is removed from the car during this latter operation. When their work is terminated the United States Custom Service gives a clearance on the car and it is then shipped to any destination in the United States that the importer desires. A large percentage of the importations ultimately leave the State of Arizona in the same car in which they arrived from old Mexico.
>
> "The function of the _____ Company is solely to clear thru the United States Customs. They serve as agents for the ultimate consignee of the car and are bonded to the United States Government.

(9766)

> "As noted above this employee also acts as customs broker for products leaving the United States and entering old Mexico. However, the employees do not handle the goods moving in that direction as they are all of small quantity and do not require any rearranging to meet the Mexican customs inspection.

We agree with your opinion that the employees engaged in handling the shipments as they have arrived in the United States and prior to their transportation across state lines into other states, are engaged in interstate commerce. Although it is not entirely clear what types of goods are handled by these employees and what the actual "arranging" consists of, it is possible that the employees are also engaged in a process or occupation necessary to the production of goods for interstate commerce. No comment is possible regarding the application of the act to the particular employee whom you describe as "a customs broker for products leaving the United States," in the absence of a fuller description of his duties.

(9766)

Arthur E. Reyman
Regional Attorney
New York, New York

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

SOL:FUR:LEK

NOV 25 1941

_____ Company

We have given careful consideration to the problem raised in your memorandum of October 16 concerning the possible applicability of the local retailing capacity exemption to the bushelman employed by the subject company. The matter was discussed at some length with Mr. Holland, Director of the Research and Statistics Branch of the Wage and Hour Division. The matter was also discussed with Mr. Schlossberg, representing the Amalgamated Clothing Workers of America. Although we recognize that the matter is close to the border line, it is our opinion that on the basis of the facts in this particular case the exemption in question is not applicable.

The facts in the case many be briefly summarized as follows:

The subject company is engaged in the manufacture and sale of custom-made clothes. The customer is measured and the pattern is drafted and cut in the _____ Avenue store of the subject. The cut goods used in making the pants and vest are sent out to contracting shops, made up there, and returned to _____ Avenue for alterations. The cut goods used in making the coat are sent to subject's _____ Street shop where the coat is partially completed and then sent back to _____ Avenue for a first fitting. After this try-on, the coat is sent back to _____ Street for "completion." Following that "completion," however, the coat is returned to _____ Avenue for further alterations. All the alterations on the coat, pants, and vest are performed by the bushelman in the _____ Avenue store.

Even apart from the work of the bushelman, the _____ Avenue store is not a retail establishment in view of the fact that the pattern drafting and pattern cutting are there carried on and are apparently not segregated from the rest of the store. In a letter to A. Sulka & Co. we stated that pattern drafters and pattern cutters are engaged in a manufacturing process, and that even though they were working in an otherwise retail store, the 13(a)(2) exemption

was defeated for the establishment in which those workers were engaged. The work of the bushelman is as essential to the production of the garment as is the work of any of the other men connected with its manufacture. The situation is completely different from the case of alteration men in a retail store. In that case the suit is manufactured in a factory having absolutely no relationship with either the retail store or the ultimate customer. The suit is then sold to a store, which proceeds to sell the suit to a customer. After the suit is sold to the customer, alterations may be performed incidental to that sale. In the case of the subject company there is no such break between the productional and distributional operations. The work of the bushelman is no more incidental to the sale than the work of any of the other productional employees. If the bushelman is performing work immediately incidental to a retail sale when he completes the manufacturing process by making the coat, pants, and vest conform to the customer's requirements, the work of all the other productional employees is similarly incidental to the retail sale, since they are attempting to make the garment conform to the customer's requirements. In point of time, the bushelman's work is less "immediately incidental" to the retail sale than is the work of any of the other productional employees, since their work is the first to be done after the sale is consummated.

It should also be pointed out that the work of the bushelman may frequently be more in the nature of a refashioning of the entire garment than is the work of an alteration man in a retail store. In fact, the work of the bushelman is such that the question of whether the coat shall be sent back to the _____ Street shop or shall be altered by the bushelman at _____ Avenue is one which is frequently determined simply by the relative pressure of work at the two establishments. Indeed, the only reason the company maintains a _____ Street shop as well as the _____ Avenue store is to conserve space and hence lower rent at the expensive _____ Avenue location. Inasmuch as the activities of the bushelman take up little space, he is located at _____ Avenue, thus avoiding a retransmittal of the garment to _____ Street. But that is no reason for applying the exemption to him and not to other productional workers. Particularly since the _____ Avenue store is itself not a retail establishment.

It should be noted further that the bushelman is a member of a union composed of factory workers rather than of one composed of retail employees. It is clear from that fact that a bushelman is generally considered to be an employee of the same nature as other productional employees.

We suggest that in view of the above considerations, you address Mr. Schlossberg in reply to his letter to you of September 4, 1941, and set forth the views of this office.

COPY

Arthur E. Reyman
Regional Attorney
New York, New York

SOL:ADH:MS

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

NOV 25 1941

13(b)(1) exemption

This is in reply to your memorandum of November 12, 1941 in which you inquire as to the applicability of the exemption contained in section 13(b)(1) of the act to an individual whose duties consist exclusively in operating a tractor moving trailers to and from loading platforms at a railhead where railroad cars are unloaded into motor truck trailers.

Section 203(a)(13) of the Motor Carrier Act provides "The term 'motor vehicle' means any vehicle, machine, tractor, trailer or semi-trailer prepared or drawn by mechanical power and used upon the highways in the transportation of passengers or property . . ." If the employee in question operates the tractor pulling trailers over the highways, his hours of service would be regulated by the Interstate Commerce Commission and he would be within the exemption contained in section 13(b)(1) of the Fair Labor Standards Act. If, on the other hand, the employee merely uses the tractor to move the trailers around the railroad yard in order to facilitate the loading of the trailers, his hours of service would not be regulated by the Interstate Commerce Commission and he would not be within the scope of the exemption contained in section 13(b)(1).

The above opinion was formed after consultation with representatives of the Interstate Commerce Commission.

SOL:GFH:BSA
November 25, 1941

Beverley R. Worrell
Regional Attorney
Richmond, Virginia

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

_____
Baltimore, Maryland

This is with reference to your memorandum of October 28, 1941, on the above subject, and will supplement our previous correspondence. We regret that an earlier reply has not been possible.

There was attached to your previous memorandum of April 18, 1941, also on the above subject, a copy of a letter addressed to Mr. Bernard S. Needle by Mr._____ _____of Baltimore, in which Mr. _____raised various questions regarding employees employed by real estate brokers and engaged in occupations relating to the real estate business. The questions raised by Mr. _____in that memorandum were a trifle vague and in some respects somewhat novel, and consequently, in our reply of August 29, we stated that we should like more facts regarding these employees before attempting to render a definite opinion on the matter of coverage.

There was attached to your most recent memorandum a copy of a memorandum addressed to you by Mr. Bernard S. Needle, in which he states that Mr._____is "no longer pursuing the questions contained in paragraphs 3 and 4 of his original letter of inquiry /concerned, respectively, with employees of operators of buildings, the tenants of which are engaged in such buildings in covered activities, and the status of employees of building associations and mortgage and loan companies which have nonresident stockholders/ but he is still interested in the first question relating to real estate brokers." There was also attached to your most recent communication a copy of a letter addressed to Mr. Needle by Mr. _____under date of September 26, 1941, in which additional information, regarding the situation referred to in the first inquiry contained in his original letter, is set forth. From Mr. Needle's comment, above quoted, and the tenor of Mr. _____most recent letter, we understand that Mr. _____ seeks advice only with reference to the first inquiry raised in his original letter, which we quote:

"Does the Fair Labor Standards Act of 1938 apply to the employees of employers such as:

(1) Real estate brokers who represent non-residents of this State (a) in the sale of real estate; (b) in the collection and remittance by mail of rent money; (c) in the negotiation of mortgage loans and the collection and remittance of payments thereon?"

In order further to clarify his inquiries, Mr. _____ in his letter of September 26, poses a case in which a licensed real estate broker, operating "as an individual" under the laws of Maryland maintains an office " on X Street," and employs a bookkeeper, stenographer and clerk, in addition to "five outside salesmen whose duty it is to procure purchasers or tenants for property located in Maryland, and who receive a commission for each transaction which they succeed in closing." In some instances, such purchasers or tenants are residents of other states, "and we may carry on a considerable interstate correspondence regarding the transaction." Conversely, the owner of the Maryland properties in some cases may be residents of other states, "necessitating similar interstate correspondence as well as the collection and remission of money in the mail."

Mr. _____ letter continues:

"I also represent a large national life insurance company whose headquarters are in New York in the matter of negotiating mortgage loans on property in this State. I may personally do this work or any one of my salesmen may handle the transaction and some of the detailed work involved, such as bookkeeping, correspondence, etc. may be done by anyone or all of the office employees.

"My office collects these mortgage debts including interest and installment payments and remits them to the said life insurance company of New York.

(9766)

> "The vast majority of real estate brokerage business handled by local brokers is purely local business with no interstate correspondence involved.
>
> "The question is are my office employees and/or outside salesmen entitled to the benefits of the Federal Act above mentioned"

We believe that Mr. _____ will agree that real estate brokerage firms, to the extent that they operate in more states than one, and regularly use the mails and other channels and instrumentalities of interstate commerce and communication in the conduct of their business, are engaged in activities of an interstate commerce character. The concepts of "operating in more states than one" and "regularly using the mails and other channels and instrumentalities of interstate commerce," are in their essence overlapping and interdependent, rather than mutually exclusive, or even clearly separable. Whether a company uses the mails and channels of commerce in the transaction of its business, will depend almost entirely upon the extent to which it may be said to be operating in more states than one. Likewise, operating in more states than one requires using the mails and other channels and instrumentalities of interstate commerce and communication to a degree commensurate with the extent to which operations in more than one state occur. Moreover, it should be pointed out that both concepts depend for their application in specific factual situations upon questions of degree, which we do not believe can be squarely anticipated by any precise formula or convenient rule of thumb. The determination of whether in a given situation an employee of a real estate broker's office is contributing to a type of activity which is included within either of these concepts must, in the last analysis, depend upon a full knowledge of the facts of his company's operations and the circumstances of his employment. It may be pointed out, however, that there are contained in Mr. _____ letters, references to activities which this Division will consider as highly significant in determining if employees of a particular real estate broker are covered.

We believe that the procuring of tenants or purchasers for Maryland properties, when such purchasers or tenants are residents or domiciliaries of states other than Maryland, may be said generally to constitute an activity of an interstate character.

inasmuch as the conduct of such activities may be said to constitute operating in more states than one (at least to the extent to which such activities are carried on) and such transactions will, in some degree at least, almost of necessity involve the use of the channels and instrumentalities of interstate commerce and communication. The negotiation and consummation of a transaction carried on in one state between a resident of that state and a representative of a real estate broker's office located in another state, having as its object the sale or rental of property situated in such other state, appears to us to constitute a transaction in interstate commerce, especially in situations where, as Mr. _____ states in his letter of September 26, there is often carried on, "considerable interstate correspondence regarding the transaction." There can hardly be doubt under existing precedents, that "considerable interstate correspondence regarding the transaction." There can hardly be doubt under existing precedents, that "considerable interstate correspondence" carried on with respect to the consummation of business transactions of this nature is an activity of an interstate commerce character. The case would appear to be little different in the situation further cited by Mr._____ where "the owners of this Maryland property may be residents of other states necessitating similar interstate correspondents as well as the collection and remission of money in the mails." As Mr._____ is probably aware, this Division has always considered the fact that activities of specific employees contribute to the transmission or receipt of interstate remittances or funds as highly significant in determining if such employees are properly to be regarded as "engaged in commerce" within the meaning of the act.

In connection with the insurance activities which Mr._____ describes, employees whose activities contribute to the negotiation for a New York insurance company of mortgage loans on property situated in Maryland and the collection of mortgage debts, including interest and installment payments, along with the remittance of such funds in interstate commerce through the mails, would likewise appear in the normal case to be engaged in activities of an interstate commerce character.

As has been indicated, the peculiarities of the activities carried on by real estate brokers are such that it is impossible to formulate any exact principles which could serve as an infallible guide to employers of this type in determining whether in any given instances a particular employee is covered by the law. We believe, however, that the activities which we have listed above as significant in determining if coverage exists, will be of aid to this group of employers in complying with the act. It should be em-

phasized to Mr._____that we have addressed our opinion solely to those activities to which reference was made in his letter and that we realize that the list of activities which he has submitted does not comprise a completely exhaustive enumeration of all the activities of an interstate commerce character in which real estate firms may engage. Consequently, we do not consider ourselves precluded from looking to other activities of an interstate commerce character not specifically mentioned herein in which employees of such enterprises may be engaged, in determining if their employment is properly to be considered covered by the law.

With reference to the employees to whom Mr. _____refers as "outside salesmen," it would seem that their activities in procuring purchasers or tenants for property should be considered as "obtaining orders or contracts for the use of facilities for which a consideration will be paid by the client or customer," within the meaning of sub-section (A)(2) of section 541.5 of the regulations. If the employees in question meet the other tests of section 541.5 they will be exempt from the act as "outside salesmen."

C O P Y

Arthur E. Reyman
Regional Attorney
New York, New York

SOL:EB:ELM

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

November 27, 1941

_____ Avenue
Brooklyn, New York

This will reply to your memorandum of November 13, 1941, your reference LE:JLG:MF, in which you request our opinion concerning the application of the section 13(a)(5) exemption to the employees of the subject firm, and will supplement our previous correspondence in this matter.

It appears that the firm is engaged in the processing and distribution of fish products. One group of employees is engaged in thawing and brining frozen fish and in washing and cleaning fresh fish and placing it in brine. Another group of employees is engaged in smoking fish, another one in packing fish. You ask particularly whether employees engaged in the reprocessing of frozen fish by placing it in brine or performing other preserving operations on the fish should be considered exempt under section 13(a)(5).

In our opinion, the fact that a distributing plant also engages in the reprocessing of frozen fish does not change the application of the principles expressed in release R-1609. The section 13(a)(5) exemption would apply to the employees engaged in the processing operations

(9766)

December 4, 1941

SOL:MLE:SHT

Mr. A. B. Long
Acting Director, Industry Committee Branch
Wage and Hour Division

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

Applicability of Jewelry Wage Order
to Manufacture of Rosaries

Returned herewith is a letter addressed to Mr. David J. Susskind, in which the opinion is expressed that rosaries are covered by the jewelry wage order.

Volume 7, Court of Customs Appeals Report, page 132, contains the following case which may be helpful in determining whether rosaries are covered by the wage order for the jewelry manufacturing industry. Rosaries of silver plated metal and colored glass were classified by the collector as "articles designed to be carried on or about the person" and assessed accordingly under paragraph 356 of the Tariff Act of 1913.

> **** articles **** designed to be worn on apparel or carried on or about or attached to the person such as * * * cigar cases * * * buttons, mesh bags and purses, hair ornaments, vanity cases, etc."

The importer protested the classification and the board of general appraisers sustained the protest. The Government appealed. The court found that "Rosaries are usually kept in the home and carried when required for devotions at church. The law of the church does not require them to be carried. Nearly all Catholics have rosaries. Few carry them continuously."

The court held they were not designed or made to be worn on apparel or carried on or about the person, and were not specifically enumerated. They are "not intended to be worn on apparel as are buckles. Neither are they suitable to be carried on or attached to the person as * * * hair ornaments." They are susceptible of being carried but not designed for that purpose. Cigar cases, etc., are carried to be available for instant use. Rosaries are carried to transfer them from one place to another. The other enumerated items were not used on apparel. Use also distinguishes rosaries from the other articles. The others are for comfort while these are for the spirit.

The board of general appraisers was sustained and the articles were held to be not subject to the assessment.

(9766)

> "The question as to whether articles made up in the form of rosaries but which are designed for use as jewelry or which are intended to be worn on or as a part of the attire or which have other than devotional uses, is not involved in this case and is therefore not considered."

- - - - - - - - - - - - - -

It would appear from this decision that rosaries would not be subject to the wage order for the jewelry manufacturing industry unless they were designed for use as jewelry or to be worn as articles of ornament or adornment

Attachment

292348

November 24, 1941

_____

_____

_____

Boston, Massachusetts

Dear Mr. _____:

Reference is made to your letter of October 30, 1941, in which you request clarification of the phrase "fishery products packed in hermetically sealed containers" which was contained in our release of October 17, 1941, R-1609, outlining the status of wholesale fish dealers under the Fair Labor Standards Act.

You state it is your assumption that the quoted phrase does not refer to fillets of fish that may be packed in tin, scallops that may be packed in air-tight, friction-top cans, raw oysters that are packed in machine-crimped tins, and other packages of fresh or frozen sea food products that may be air-tight. You also assume that the quoted phrase would refer to canned salmon, shrimp, sardines, etc.

The words "hermetically sealed containers" were intended to refer to fishery products packed in hermetically sealed containers, and sterilized by heat, to prevent spoilage and other deterioration. The phrase was not intended to include fishery products packed in sealed containers without sterilization when the products are still perishable.

It is expected that a clarification of the problem will be made available to the industry at an early date.

Sincerely yours,

Acting for Philip B. Fleming
Administrator

SOL:KCR:NEG
293148

(9766)

November 24, 1941

_____ Esquire

_____

_____ Company

Akron, Ohio

Dear Mr. _____:

This will reply to your letter of September 25, 1941, in which you inquire as to the applicability of the exemption provided by section 13(a)(2) of the Fair Labor Standards Act of 1938 to certain Firestone stores engaging in so-called "accomodation" transactions which you describe as follows:

> "(1) Salesmen employed by and traveling out of the tire manufacturer's District Offices under the direction of the District Manager call on tire dealers and solicit orders. Some of these orders taken from small dealers are of such small quantities and urgently needed by the dealer, that the District salesman will get in touch with the nearest Firestone Home and Auto Supply Store and request it to deliver the merchandise to the dealer. The store records the name and address of the dealer, the order number, and lists the quantity and sizes of merchandise delivered, taking a receipt for the merchandise from the dealer on Form S-1754C . . . This form is immediately sent to the District Office where the sales price to the dealer is entered. The District Office bills the dealer direct for the merchandise so sold. The collection solicitation is made by the District Office. Payment for the goods is made to the District Office. Monthly, these orders are accumulated by the District Office and a credit memorandum issued to the store involved, in the amount of the commission or handling fee. The same procedure is followed where a dealer makes delivery to another dealer at the request of the District salesman.
>
> "(2) Dealers occasionally pick up from nearby dealers or stores merchandise for their immediate use. Frequently this dealer has already made the sale or has the customer waiting at his place of business for the merchandise. On occasion he may bring his customer

directly to the other dealer or store and deliver the merchandise to the customer there. The procedure thereafter by the store or dealer making these accomodation pick-up deliveries and the District Office as to recording the transaction, billing, collection, and the other steps set out in (1) above is followed, and the store or dealer receives nothing except the delivery service commission or fee.

"(3) On occasion the order from the dealer is received at the District Office either direct from the District salesman or from the dealer by phone, wire or mail. Thereupon the District Office requests a nearby store or dealer to make the delivery. The procedure thereafter by the store or dealer making these accomodation pick-up deliveries and the District Office as to recording the transaction, billing, collection, and the other steps set out in (1) above is followed, and the store or dealer receives nothing except the delivery service commission or fee."

You state:

"These 'accomodation' deliveries from Firestone stores to dealers have never been considered nor handled by The Firestone Tire and Rubber Company as store sales. They have always been billed by the manufacturing company to the tire dealer purchaser and the collection is made by the tire manufacturer with credit passed, and subsequent replacement of tires so borrowed to the store which made these accomodation deliveries to the dealer in its behalf. A commission or fee to the store was established to compensate the store for this delivery and handling service, and in recording the transaction."

This matter has been thoroughly considered by the Division and by the Office of the Solicitor of Labor. Inasmuch as these are regularly recurring transactions forming a regular part of the general pattern of distribution of tires from factory to consumer and inasmuch as the "transfers" are always made from a Firestone dealer to a store and are not mere accomodations which one store may extend on one day and receive in its turn on the next, we do not believe that they may be disregarded in determining whether the establishment in question does a substantial non-retail business. For the reasons just indicated, the case is clearly distinguishable from the type of accomodation transfer referred to in paragraph 12 of Interpretative Bulletin

No. 6. It is our view that the transactions referred to are not retail transactions by the distributing store and cannot be so considered in determining whether the establishment in question may qualify for the retail establishment exemption provided by section 13(a)(2) of the act. We believe that the amount of the non-retail transaction in such a case is the amount originally billed by the district office to the dealer for the tire which he later "trnasfers" plus the commission which the dealer receives for handling the "accommodation transfer."

Sincerely yours,

Philip R. Fleming
Administrator

SOL:FUR:ESR

280314

In reply refer to:
SOL:ADH:MS

November 25, 1941

Mr. _____

_____

_____ Corporation
Oil City, Pennsylvania

Dear Mr. _____:

This is in reply to your letter of November 6, 1941 in which you inquire as to the propriety under the Fair Labor Standards Act of making deductions from the wages of your employees for gasoline sold to them by the company. You state that you propose either to have the employee sign a sales slip at the time his car is filled with gasoline or to have him write the company a letter requesting it to make the sales to him. In either case the price of the gasoline is to be deducted from his pay check and the company will make a small profit on the sales.

Under the wage and hour provisions of the act it is required that all employees engaged in interstate commerce or in the production of goods for interstate commerce shall be paid a minimum wage of not less than 30 cents per hour and time and one-half their regular rate of pay as overtime compensation for all hours worked in excess of 40 hours in any workweek, unless they are otherwise exempt. We are enclosing a copy of the act and copies of Interpretative Bulletins Nos. 1 and 5, dealing with its general coverage.

It is our opinion that gasoline is not a "facility" within the meaning of section 3(m) of the act and that it is, therefore, improper to make any deduction for gasoline from the wages of employees where such a deduction either cuts into the minimum wage required by the act or affects the total amount of compensation due the employee in a week in which overtime is worked.

You also inquire whether it would be permissible for you to sell your employees gasoline and collect cash at the time of the sale. It is our opinion that whether wages are paid in cash or facilities they cannot be considered to have been paid by the employer and received by the employee, unless they are paid finally and unconditionally or "free and clear." The wage requirements of the act will not be met where

(9766)

the employee kicks back, directly or indirectly to the employer, the whole or part of the wage delivered to the employee. If, however, no element of compulsion enters into the sale of gasoline to the employee for cash and such dealing is at "arm's length", it is our opinion that there is no violation of the Fair Labor Standards Act involved therein.

Very truly yours,

For the Solicitor

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

Enclosures (3)

294492

December 4, 1941

In reply refer to:
SOL:FUR:MPJ

_____

_____
Tuscola, Illinois

Dear Mr. _____:

This will reply to your letter of November 17, 1941, in which you request a copy of the Fair Labor Standards Act of 1938, and also raise the problem concerning the applicability of that act to employees of a radio station. A copy of the act is enclosed.

You inquired whether time spent for rehearsal for a radio program should be considered hours worked under the act, and indicated your opinion that rehearsal time at the studio should be considered hours worked when two or more rehearsed in a group, but that when the performer rehearsed alone at the studio, the time need not be considered hours worked.

The views of the Wage and Hour Division with respect to the proper determination of hours worked are to be found in the enclosed Interpretative Bulletin No. 13, and your attention is directed to paragraphs 2 and 3 thereof. In our opinion all time spent rehearsing at the studio should be considered hours worked, whether the performer rehearsed with a group or alone. Furthermore, time spent in rehearsing a program should be considered hours worked even though the rehearsal was not conducted at the studio. The problem of recording hours in such a case is no more difficult than in the case of any other outside employee who performs his work without any supervision.

For your information I am also enclosing copies of Regulations, Parts 516 and 541, and an Employers' Digest. If, after studying the enclosed materials, you have further questions, please do not hesitate to call upon me again.

Very truly yours,

For the Solicitor

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

Enclosures (5)
297985