UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

February 14, 1942

Legal Field Letter

No. 72

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
1-17-42	Rufus G. Poole (SE)	Aaron A. Cohen	_____ Company _____, Ohio XCL:CAR:FMB (Computation of overtime; an analysis of conditions where extra compensation is paid and whether it may be considered as part of the overtime pay.) (p. 241, par. B.)
1-21-42	Rufus G. Poole (FUR)	Arthur E. Reyman	_____ _____, New Jersey File No. 29-2157 (Application of Section 13(a)(2) exemption to employees of a cemetery.) (p. 69, par. M; p. 102, par. DD.)
1-22-42	Rufus G. Poole (EGL)	Jerome A. Cooper	Request for Opinion - Sugar Industry (Whether employees working at yards and hauling sugarcane to mills are handling the cane "for market" within the meaning of the Section 13(a)(10) exemption.) (p. 59, par. 3(f); p. 114, par. 3(b).)

(10164)

MEMORANDA

Date	From	To	Subject
1-26-42	Rufus G. Poole (EB)	Samuel P. McChesney	_____ File No. 14-376 and _____, Iowa File No. 14-50, 572 (Employer-employee relationships; whether truck drivers who haul dcad stock to the rendering plants of a company are independent contractors rather than employees of the company.) (p. 38, par. 9(b); p. 49, par. B.)
1-27-42	Rufus G. Poole (EGL)	George A. Downing	Application of the Sections 7(c) and 7(b)(3) Exemptions to Operations Performed by the _____ Company, _____, Florida (p. 68, par. 6; p. 74, par. P; p. 94, par. T; p. 99, par. 4(c).)
2-6-42	Thomas W. Holland (KM)	William S. Tyson	_____, North Carolina File No. 32-2386-1 (Application of the wage order for the converted paper products industry to seals, etc., made by a lithographing company.) (p. 199, par. C; p. 256, par. R.)

LETTERS

Date	To	Subject
1-9-42	_____ Baltimore, Maryland (GFH)	(Whether ice cream manufacturers engaged in distributing within a state, products which they receive direct from other states are covered by the Act.) (p. 151, par. 3; p. 193, par. J.)
1-10-42	_____ Washington, D.C. (GFH)	(Application of the Act to employees of law firms.) (p. 1, par. 2; p. 197, par. K.)
1-14-42	_____ Chicago, Illinois (FUR)	(Application of the Fair Labor Standards Act to a laundry some of whose work is of an exempt type under Section 13(a)(2).) (p. 69, par. M; p. 102, par. DD.)

LETTERS

Date	To	Subject
1-15-42	_____ Esquire _____ _____ Building _____, Ohio (SE)	(Computation of Regular Rate of Pay - analysis of certain bonuses paid by a company to its employees, whether the bonuses should be considered in figuring the regular rate of pay.) (p. 240, par. A; p. 245, par. 2.)
1-15-42	_____ Esquire _____ _____ Missouri (EGL).	(Application of the Section 7(c) and Section 13(a)(10) exemptions to employees engaged in making jams and jellies from wild fruits.) (p. 58, par. 3(c); p. 68, par. 6; p. 99, Par. 4(c); p. 113, par. 3(d).)
1-20-42	_____ Esquire _____ _____ Chicago, Illinois (EB)	(Whether certain enumerated employees of a lumber company are exempt under Section 13(a)(1) and Section 541.1 of the Regulations as executives.) (p. 62, par. H; p. 101, par. 2.)
2-2-42	Mr._____ _____ _____, North Carolina	(Computation of hours worked; whether fire drills should be considered hours worked.) (p. 120, par. B.)

Aaron A. Cohen
Regional Attorney
Cleveland, Ohio

SOL:SE:MMT

Rufus G. Poole
Assistant Solicitor
In Charge of Opinions and Review
_____ Company
, Ohio
YCL:CAR:FMB

The contracts which the subject company has entered into with the employees' union provide for the payment of varying hourly rates to the employees depending upon when the work is done. Thus, pursuant to one contract, the rate is 87-1/2 cents for work performed between the hours of 6:00 a.m. and 6:00 p.m., $1.31 for work done between the hours of 6:00 p.m. and 6:00 a.m., and $1.31 for work done on Sundays and holidays. Although the rate for night work, Sunday and holiday work is one and one-half times the rate for daytime work, it is not referred to as overtime compensation. Under the second contract, day work is compensated for at 90 cents per hour, night work at $1.00 per hour, and Sunday and holiday work at $1.25 per hour.

The employer computes the employee's regular rate of pay on the basis of the regular daytime rate for all hours worked during the week and takes credit against any overtime due under the act for the excess paid over the regular day rate pursuant to the union agreement. For example, an employee may work 50 hours during a week, 40 of which are daytime hours, 6 of which are Sunday hours, and 4 of which are night hours. Assuming the second type of contract to be in effect under the employer's theory of regular rate of pay, the employee is entitled to $49.50 under the act (50 hours x 90 cents + 10 hours x 45 cents). Pursuant to the contract, the employee is entitled to $47.50 (40 hours x 90 cents + 4 hours x $1.00 + 6 hours x $1.25). The employer takes credit for $2.50 extra compensation under the contract and pays the employee only $2.00 in order to meet the requirements of the act.

You state that it is your opinion that the employee's regular rate of pay is computed by dividing the total earnings by the actual number of hours worked. Thus, in this case the regular

rate of pay would be 95 cents ($47.50 ÷ 50 hours). Under your theory, the employee is entitled to receive $4.75 in addition to the sum paid pursuant to the union agreement.

As you know, paragraph 69 of Interpretative Bulletin No. 4 states that the employer may consider as overtime compensation paid by him only the extra amount of compensation paid as compensation for overtime work; that is, for hours worked outside the normal or regular working hours. In making a determination as to whether an employee is receiving overtime compensation or is being paid at a higher rate, there are two factors to consider, namely the hours of work which are being compensated for, and the understanding of the parties as to the nature of the compensation. Extra compensation may be considered as overtime compensation only if the following conditions exist.

> 1. The hours compensated for must be hours not normally worked by the employee; for example, work on Sundays, holidays, or at a time of the day when the employee does not normally work.
>
> 2. It must clearly appear from the agreement of employment that the payment of extra compensation is overtime compensation for such hours and is not merely a higher rate of pay.

If these two conditions are not met, the employer may not regard the extra compensation as discharging all or any part of his obligations under section 7 of the act. In such a case, the employee must be treated as working at several different rates of pay during the week.

Paragraph 70(6) of Interpretative Bulletin No. 4 is not inconsistent with this interpretation, for the hours worked on Sundays and holidays are generally outside the "normal or regular working hours." In such instances, if the agreement of employment treats the extra compensation as overtime compensation, the employer may apply it towards payment of overtime compensation due under the act.

We can not express any final opinion concerning the position which you have taken with respect to the contracts of employment of the subject company. While it is true that the rates are not generally described in the contracts as overtime rates, there is a reference to overtime rates in section (e) of the first agreement. Furthermore, there is no information concerning the working schedules of the various employees. Such information might be elicited through interviews with the employees. Application of the tests we have outlined to the facts will enable you to resolve the question raised by the contracts.

To: Arthur E. Reyman
Regional Attorney
Newark, New Jersey

In Reply Refer To:
SOL:FUR:MIB

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

Subject: _____ File No. 29-2157

This will reply to your memorandum of January 12, 1942, requesting a reply to Mr. Marx' memorandum of March 26, 1941, concerning the subject company. We regret that the earlier memorandum had been mislaid and that our reply was so long delayed.

The subject operates a cemetery whose employees are within the general coverage of the act because they receive goods such as curb cement, ornamental gates and similar materials directly from without the state. It is our opinion that the employees of a cemetery are engaged in a service establishment within the meaning of section 13(a)(2).

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

220562

(10164)

Jerome A. Cooper
Regional Attorney
Birmingham, Alabama

SOL:EGL:HH
January 22, 1942

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

Request for Opinion - Sugar Industry

It appears from your memorandum of November 7, 1941, and from Supervising Inspector Mahlon S. Hale's memorandum to you of November 4, 1941, that many sugarcane growers in Louisiana are situated at such distances from the nearest sugar mill that it is not convenient for them to haul their cane to the mill. Accordingly, they transport it to a so-called concentration yard, which consists of little more than a hoist and a scale. Here the cane is weighed, and transferred by the hoist from the farmers' wagons into large trailer trucks. The cane from several different farms is often placed in the same truck. When a truck is loaded, it transports the cane to the mill, where it is again weighed.

Mr. Hale states, "In most instances, the operator of the sugar factory makes the arrangements with the operator of the concentration point and the operator of the trucks if the two operations are separately owned." Mr. Hale also states that the mill operator pays the farmer directly, deducting a stipulated amount per ton for the handling of the cane at the concentration yard and for the hauling of it to the mill.

It appears that all of the sugarcane delivered at any one concentration yard is generally sent to the same mill, but each mill "places a quota on the daily deliveries from each farmer, based upon the volume processed daily by the raw sugar factory." Accordingly, when a farmer has exceeded his quota at the mill where his cane is usually hauled, the perishable nature of the product demands that it be hauled from the concentration yard to any mill in the vicinity that can handle it.

You inquire whether the employees who haul the cane from the concentration yards to the mill are handling the cane "for market," within the meaning of the section 13(a)(10) exemption.

We have been informed by authorities in the Sugar Division of the United States Department of Agriculture that, under the practice existing in the industry, the operator of the sugar mill assumes the responsibility of getting to the mill the cane of those farmers whose fields are not situated in close proximity to the mill. These experts tell us that in making fair price determinations under the Sugar Act, this practice is taken into consideration by the Division. They inform us that it is the usual practice in eastern Louisiana for the operator of the mill to own and operate the necessary concentration yards and to have his employees haul the cane from the yards to the mill. They say that in western Louisiana the concentration yards and trailer trucks are often operated by third persons, who make agreements with the mill operator that they will haul the cane to the mill for a certain fixed amount per ton.

Mr. Hale in his memorandum states that in cases of this latter type the amount paid for these services is deducted by the mill operator from the price he pays the farmer for his cane. The above-mentioned experts, however, tell us that, as a direct or indirect result of the provisions of the Sugar Act of 1937 and of the fair price determinations issued thereunder, the mill operator must pay the farmer at least a set minimum price for his cane, and the operator may not deduct any charge for handling the cane at concentration yards or for hauling it to the mill, if such deductions bring the price paid to the farmer for his cane below the prescribed minimum.

These authorities say that all of the cane delivered at any one concentration yard is hauled to the same mill, except in those rare instances when the mill is operating at full capacity and is unable to process any more cane. The perishable nature of the product requires under such circumstances that it be sent to the nearest mill having the capacity to process the cane and that is willing to purchase it. Even under these unusual circumstances the operator of the mill, who pays the operator of the concentration yard for hauling the cane to his mill, cannot legally deduct the hauling charges from the price he pays the farmer for his cane, if such deductions reduce the purchase price below the prescribed minimum.

The section 13(a)(10) exemption is applicable to employees who are engaged within the area of production in handling agricultural commodities "for market." As you know, we contended in the first Bowie case that where employees of a mill operator transport sugarcane

to his mill, they are not handling the cane "for market"; the court in that case held that such employees are not within the section 13(a)(10) exemption, apparently for the reason we advanced. Thus, in those situations where the mill operates the concentration yards and its employees haul the cane to the mill, it is clear that the exemption does not apply to the employees working in the yards or to those doing the hauling.

Furthermore, from the facts we have gathered from the Sugar Division, it appears that even in those situations where the employees of the mill operator do not perform the operations conducted in the concentration yards and do not transport the sugarcane to the mill, the mill operator assumes the responsibility of getting the cane to his mill. In such situations he engages a third person to perform the necessary operations for him. Authorities in the Sugar Division inform us that the price paid to the farmer for his cane is seldom more than the minimum set under the Sugar Act, and therefore any deduction that the operator may make for the handling of the farmer's cane at the concentration yards and for transporting it to the mill would appear to be either fictitious or illegal.

It seems clear from this information that where a mill operator arranges to have a third person or persons perform the necessary operations at the concentration yards and haul the cane from the yards to the mill, these operations are performed for the mill operator and not for the farmer; the farmer has delivered his cane to market when he has delivered it at the concentration yard. Thus, the employees working at the yards and those hauling the cane to the mill from the yards are in such situations not "handling * * * agricultural * * * commodities for market," and therefore are not within the section 13(a)(10) exemption.

If you believe that pertinent facts exist of which we have not taken cognizance, or if you feel that we have been misinformed concerning any relevant matters, please notify us to that effect.

Samuel P. McChesney
Regional Attorney
Kansas City, Missouri

SOL:EB:AS

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

January 26, 1942

File No. 14-376
and
File No. 14-50, 572

This will reply to your memorandum of January 6, 1942 (KCL:TOM:HN), in which you ask me to review the opinion expressed by you to the effect that certain truck drivers who haul dead stock to the rendering plants of the subject company are independent contractors rather than employees of the company.

It appears from the inspection file that these haulers haul dead stock to the plant from farms in the neighborhood of their home stations. They are paid so much per hundred for stock brought in. The price they are paid per hundred depends on the condition of the stock brought in. These haulers furnish their own trucks, and pay the gas, oil, license and upkeep costs of these trucks. They also pay for their own advertising and their own phone bill and bear the cost of maintaining their own office whenever they have one. These haulers have a general area from which they pick up dead stock, but the company states that they have no definitely set territory. The haulers do not perform any work around the plant and are not required to report at the plant at any particular time of the day or any determined number of days per week. The company states that these men may, if they wish, sell their "business" to others, and that the company has no way of preventing this. The company pays neither social security nor unemployment taxes on these haulers and the employer states that this matter has been taken up with and cleared by the appropriate government agencies in Iowa and Nebraska. The inspector states that the drivers spend most of their time hauling to the subject company, but often haul coal or feed for other companies on the return trip from the plant, in order to get a pay load both ways.

This plan of handling the hauling was in effect when _____ took the plant over in 1933, and it was continued until 1936 when the company bought the trucks and equipment and put the haulers on an employment basis. This latter method was abandoned in the fall of 1937 when the company sold the trucks and equipment to the drivers whenever they would buy them, and put them back on a contract basis. The trucks were sold outright to the drivers if they had the money to pay for them. Otherwise, they were sold under a chattel mortgage agreement. The inspector states that a considerable number of the mortgagees have entirely paid off their mortgage and now own their trucks outright.

The findings of the inspector are generally supported by written statements made by two of the haulers with respect to their status and activities.

On the basis of the facts contained in the file, we agree with your conclusion that the haulers are independent contractors rather than employees of the company. While the haulers seem to devote most of their time to hauling for the subject company, it appears from the inspector's report and the haulers' statements that they are free to work for other companies and have actually taken other hauling jobs. There is no evidence that the company exercises any control over the work of the haulers. Although the company has financed the purchasing of the trucks by the haulers, this fact would not necessarily imply a measure of control by the company over their activities sufficient to maintain the assumption of an employment relationship; it also appears that a considerable number of haulers have already paid up the purchase price on the trucks. The haulers pay for the upkeep of the trucks,and the company is not required to pay social security and unemployment tax on these men. It is true that the haulers were at one time put on an employment basis by the company, but they were changed back to a contract basis in the fall of 1937, i.e. a considerable time before the enactment of the Fair Labor Standards Act. In view of these circumstances, the balance of the facts seem to be in favor of an assumption of an independent contractor relationship between the company and the haulers.

Attachment file

George A. Downing
Regional Attorney
Atlanta, Georgia

SOL:EGL:DEA

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

January 27, 1942

Application of the Sections 7(c) and 7(b)(3) Exemptions to Operations Performed by the ---------- Company,------ Florida

In your memorandum of January 19, 1942, you state that the subject company is engaged in processing grapefruit and oranges under contract with the Federal Surplus Commodities Corporation, and you inquire about the applicability of the sections 7(c) and 7(b)(3) exemptions to those processing operations.

The process is described as follows: After the peel has been removed, the fruit is placed in tanks, mashed and cooked. At this point an employee of the Federal Surplus Commodities Corporation adds a small amount of acid (apparently a preservative), which we have been informed by officials of the corporation here in Washington constitutes but .2 percent of the finished product. After the fruit has been cooked for about a half hour, it is strained and the unpalatable membrane and seeds are removed.

While the fruit is being mashed and cooked, the peel is separately cooked in hot water and is then cut into shreds 1/16 inch in width. The shreds are mixed with the strained fruit pulp and juice, and the resulting product goes directly into wooden barrels where it is mixed with sulphurous acid. According to a bulletin prepared by the Federal Surplus Commodities Corporation concerning processing operations of the type described in your memorandum, the sulphurous acid, which acts as a preservative, comprises but 5.5 percent by weight of the mixture that is sealed in the barrels.

The corporation apparently ships the barrelled product to England where it is consumed as food. Once the mixture has been removed from the barrels and cooked, all traces of the sulphurous acid disappear.

Mr. _____, secretary of the subject company, has informed us orally that once the processing of the fruit has commenced, the material is highly perishable and all of cooking, mashing, and mixing operations must be performed within a very short time so as to prevent spoilage. As you indicate in your memorandum, he states that all of the operations, from the peeling of the fruit to the closing of the barrels, are usually performed within the space of one hour.

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From the facts contained in your memorandum and from what we have been told by Mr. _____ and by experts of the Federal Surplus Commodities Corporation, it is our opinion that the described operations are exempt under sections 7(c) and 7(b)(3) as constituting the first processing of perishable or seasonal fresh fruits. All of these activities appear to be performed as one continuous series of operations throughout which the product remains perishable. Furthermore, ingredients other than fresh fruit make up but a very small portion of the finished product.

It should be pointed out that the operations performed by the described company are entirely different from those connected with the processing of citrus waste into cattle food. The latter type of activity, which is nearly always conducted in an establishment separate from the fruit processing establishment, is performed on a product which is itself the result of the first processing of fresh fruit, and accordingly any processing operations performed on such waste are not first processing operations. Further, citrus waste is not a fresh fruit. On the other hand, in the situation under consideration, the operations constitute one continuous process whereby all portions of the fruit (except membrane and seeds) are used to produce the finished product.

Enclosure
312532
dea

William S. Tyson
Attorney
Raleigh, North Carolina

February 6, 1942

SOL:KM:SB

Thomas W. Holland
Administrator

_____, North Carolina
File No. 32-2386-1

In your memorandum of October 24, 1941, you request our opinion on the applicability of the wage order for the converted paper products industry to products manufactured by the subject company, samples of which you submitted. You say that on October 11, 1941, you ruled that the sample designated as Exhibit No. 1 is covered by the order and is subject to a 40 cent minimum wage rate thereunder, but that on October 21, you were advised that a letter from the Washington office held that none of the samples submitted are covered by the wage order since graphic art is the exclusive medium through which the products function.

We have studied the samples submitted by you, and it is our conclusion that Exhibits Nos. 1 and 2, consisting of special designs, or lettering, transferred from roll to tissue paper with hot wax ink for use in printing labels on hosiery are graphic arts items and are not covered by the wage order for the converted paper products industry.

Exhibit No. 3 consists of a number of different types of seals made by a process of printing from rolls of paper by passing same through a die press which prints, embosses and die cuts the seals from the paper. Seals are designed to facilitate the packaging of a number of different kinds of articles, such as hosiery, as well as, through the designs and printing thereon, to advertise the articles, the brand and the make thereof. In these circumstances, they are not products "in which graphic art is the exclusive medium through which the product functions." In our opinion their manufacture is included in the converted paper products industry and is subject to the minimum wage of 38 cents per hour which is applicable under the wage order for this industry to "products not elsewhere classified."

January 9, 1942

In reply refer to;
SOL:GFH:MF

_____
_____
_____
_____
Baltimore, Maryland

Dear Mr. _____

Mr. Baird Snyder has referred to me your letter of December 6, 1941, which was addressed to him and to which was attached a copy of your letter of the same date, addressed to me. In the latter communication you explain at some length a situation of apparent hardship to your company which has arisen under the Fair Labor Standards Act.

You state that your company manufactures ice cream cones, wafers, and cups of an edible nature, and that it employs in 11 plants situated throughout the United States approximately 750 persons. All of these employees, as we gather from your account, are compensated in accordance with the requirements of the Fair Labor Standards Act. It appears that your products are shipped in interstate commerce to, and distributed by ice cream manufacturers throughout the country, who resell such products to their dealers or ice cream outlets in the territories in which they operate. It appears from your letter that the distribution of cones by an ice cream manufacturer normally constitutes but a small part of his business, and you cite as a typical example that of an ice cream manufacturer who purchases and resells $500 of your products in the course of a year as compared to doing a business in ice cream ranging from $75,000 to $100,000 over the same period of time. You state that many of the ice cream manufacturers in the United States have been led to believe that while their ice cream business of itself would not be covered by the Fair Labor Standards Act, the distribution for local consumption of your products which they have received directly from other states would bring their employees engaged in connection with such activities, within the act's general coverage. As a consequence, it appears, you are daily receiving cancellations of orders, and met with refusals by many of your customers to make further purchases from you. You point out that one of the largest cracker and biscuit companies in the United States is not faced with this condition, since it employs trucks to distribute its ice cream cones and other products directly to

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retail establishments which, presumably, are exempt from the provisions of the Fair Labor Standards Act. You state, however, that you are not in a position to effect distribution of your merchandise direct to retail outlets, and thereby eliminate the ice cream manufacturers as distributors of your products. By reason of this condition, you state, it may be necessary for you to cease selling your products in most of the states of the Union. Your letter indicates that you have the impression that an ice cream manufacturer would not be covered by reason of the fact that he received ice cream cups from other states, which were filled at his plant with his ice cream prior to the time that such ice cream was distributed for local consumption within the state. You argue further that it appears to you that the practice of distributing ice cream cabinets to retail stores, which is common among ice cream manufacturers, is also an activity which is covered by the Fair Labor Standards Act, and that if the distribution of ice cream cones in the situation which you describe is covered, the distribution of cabinets under similar circumstances should also be deemed covered by the act. You state that you feel that "a ruling is in order to give us relief."

While your letter describes your situation very well, we are not sure that we comprehend your request "for a ruling to give us relief." According to Mr. Hirmon's recollection of his conversation with you, however, you desired in the alternative (1) either an opinion by the Wage and Hour Division that ice cream manufacturers who engage in distributing within a state products which they receive directly from other states are not covered by the Fair Labor Standards Act solely by reason of such activities, or (2) in the event that the Wage and Hour Division did not subscribe to that view, that the distribution of the ice cream cups and cabinets under the circumstances described by you be deemed by this Division to be as much a covered activity as the distribution of the cones, since, in the latter event, as Mr. Hirmon recalls that you stated to him, it is your opinion that practically every ice cream manufacturer in the United States would be covered by the act anyway. Of course, if your customers were covered by the act because of activities performed by them aside from their distribution of your particular products, the fact that their employees who are engaged in distributing your cones might be deemed by this Division to be engaged in interstate commerce for that additional reason, should not deter your customers from dealing with you.

As you know, the act, a copy of which is enclosed, applies to employees who are engaged in commerce or in the production of goods for commerce. We are enclosing copies of Interpretative Bulletins Nos. 1 and 5 dealing with the general coverage of the act. As you will note

from paragraphs 14 through 16 of Interpretative Bulletin No. 5, this Division has consistently taken the position that the act applies to employees engaged in connection with the distribution within a state of goods received directly from other states, even though such goods thereafter never leave the state of distribution. The application of the act, in our opinion, does not depend upon the percentage of goods which are produced for, or distributed in interstate commerce. As the Supreme Court of the United States declared in the case of United States v. Darby Lumber Co., 61 Sup. Ct. 451:

> "The Congress, to attain its object in the supervision of Nation-wide compilation in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in interstate commerce or of production for commerce by any particular shipper or producer."

Consequently, it is our opinion that all employees of an ice cream manufacturer who in any workweek perform duties contributing to the distribution within the state, of ice cream cones received directly from other states, are covered by the act, regardless of the fact that the gross sales of cones by their employer over the course of a year, or other representative period of time, are very small in comparison with their employer's gross sales of ice cream.

In addition, we wish to direct your attention to paragraph 1 of Interpretative Bulletin No. 1, in which it is stated that the statute does not confer upon the Administrator any general power to issue rulings including industries within the coverage of the act, or excluding them. Under the act, employments are included or excluded by the terms of the statute itself as interpreted by the courts, and not by the force of any administrative action. If an employee is "engaged in commerce" or "in the production of goods for commerce," and not subject to any specific exemption set forth in the act, the minimum wage and maximum hour benefits of the statute are automatically available to him, and it would be beyond the power of the Administrator to remove such an employee from the coverage of the act through the force of any administrative ruling or order.

Regarding your alternative request for an opinion, however, it is our opinion that where ice cream cups which are received directly from other states by ice cream manufacturers are filled at the manufacturing establishment with ice cream and subsequently distributed to retail dealers for local consumption, the ice cream cups are merely a means or

wherewithal employed to accomplish the main purpose to which their distribution, after filling, is only incidental; namely, the local distribution of ice cream which is locally manufactured. Ice cream cones, on the other hand, are distributed by the ice cream manufacturer in precisely the same form in which they are received, and their function of aiding or contributing to the purely local activity of distributing to retail outlets ice cream which has been manufactured within the state, is not accomplished until after their distribution in commerce by the ice cream manufacturers. For this reason, it is our view that the distribution of ice cream cups in the situation which you have mentioned is not covered while the distribution of ice cream cones is. But of course employees engaged in unloading, unpacking, or otherwise in receiving such cups directly from other states, or in purchasing them, would be covered under principles which we have consistently expressed. See in this connection paragraph 10 of Interpretative Bulletin No. 5. Further, employees whose activities contribute to the interstate distribution of ice cream cabinets under the circumstances previously outlined, in our opinion, are covered by the act. Moreover, particular employees of ice cream manufacturers producing ice cream purely for local consumption might be covered by the act, even though their activities do not contribute to the local distribution of cones, cabinets, or ice cream cups received from other states. Thus, employees of such a concern who were engaged in purchasing, unloading, unpacking, or otherwise in connection with the receipt of raw materials such as milk, sugar, flavorings, gelatins, etc., from other states would, in our opinion, be engaged in commerce and covered by the act for that reason.

We hope that this information will aid you in dealing with the particular problem with which you are confronted.

Very truly yours,

For the Solicitor

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

Enclosures (3)

301444

In reply refer to:
SOL:FUR:MR

January 14, 1942

_____
_____
_____
_____
Chicago, Illinois

Dear Mr. _____:

We have been reconsidering the problem involved in your letter of August 11, 1941, to which we replied on August 27, 1941. You will recall that you inquired as to the applicability of the Fair Labor Standards Act of 1938 to employees in a laundry whose business is divided as follows:

> "45% represents service to hotels, restaurants, beauty parlors, rooming houses and tourist houses. All of this business is local in character — none of it is done across State lines, and none of it is done with railroads or manufacturing concerns — all of it with other service establishments which are exempt.
>
> "16% of the total is retail family business done in another State, in a town just across the river from Davenport.
>
> "39% is retail family business, done locally, intra-state.
>
> "The 45% mentioned above, which represents service to hotels, restaurants, etc. is a different type of laundry business than that which is sold to the families. Our client uses a short formula for washing, and a speedier production method on flatwork ironers. Our contention is that this service is considered retail to hotels, etc., and is not a wholesale service."

Although it is not entirely clear, we shall assume that more than 25% of the gross receipts is derived from work which we would not consider to be of an exempt type under section 13(a)(2). See paragraphs

18 through 28 of the enclosed Interpretative Bulletin No. 6. If this assumption is correct, the establishment would not be considered exempt under section 13(a)(2).

In determining whether an employee is subject to the act, there are two propositions which must be answered: (1) Is the employee within the general coverage of the act; i.e. is he engaged in interstate commerce or in the production of goods for interstate commerce? (2) Is the employee exempt from the wage or hour provisions or both? In the case you present the employees are within the general coverage of the act, since some of the goods on which they work are shipped across State lines.

Having disposed of that question, we must next ascertain whether or not they are exempt. They are not exempt under section 13(a)(2) because the establishment in which they are engaged does a substantial amount of work which is not of a type exempt under that section.

It is possible, of course, that some of the employees may be exempt under some other section of the act.

Please consider this letter as superseding our opinion of August 27 in which we said: "Unless some of this 45 percent consists of work on goods which the launderer has reason to believe will thereafter leave the State, it is our opinion that the act does not apply to employees of this laundry."

Very truly yours,

For the Solicitor

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

In reply refer to:
SOL:SE:VOC

January 15, 1942

_____, Esquire
_____
_____ Building
_____, Ohio

Dear Mr. _____

This will reply to your letter of January 7, 1942, concerning the application of the Fair Labor Standards Act to a situation which you present. Pursuant to an agreement with the union your client agrees to distribute and pay to its employees one-third of the difference between the net profits, after provision for all Federal taxes for the year 1941, and the sum of $15,365. The union determines which employees are to participate in the distribution and in what proportions and amounts.

There is an additional bonus based on "standard production." If the standard is exceeded during a period of four consecutive weeks the average weekly excess for the four weeks is taken as the excess over the standard and a corresponding percentage of the remuneration paid during those four weeks is paid to the employees of the particular department. "This bonus is a percentage of contract overtime as well as of contract regular rates."

You inquire first as to whether this latter production bonus must be included in regular rate of pay computations. As is indicated on page 4 of the enclosed press release R-1548(a), where an arrangement for payment of a bonus provides for a simultaneous payment of overtime compensation on the bonus, payment according to the arrangement will satisfy in full the overtime provisions of the act. If the production bonus does in fact provide for the payment of the same percentage of the overtime earnings as of the straight time earnings, the overtime compensation is already provided for and no further payment is necessary.

Your next inquiry concerns the annual profit-sharing bonus which is paid pursuant to a written contract providing for the payment of a lump sum by the company to be determined by application of the

(10164)

formula set forth in the contract. It is our opinion that such an arrangement causes the bonus to come within category B as described in R-1548(a), in view of the fact that the company has not retained its discretion as to the payment of the bonus or as to its amount.

While it is true, as you indicate, that the company is not "obligated to pay any specific employee or any specific amount to any employee" because the amount of such distribution is up to the union, this factor does not mean that the company has retained its discretion. The union represents the interests of the employees and it, rather than the company, has complete discretion as to the individual distributions. It is our position that the company must ascertain the amount of the individual distributions and include such amounts in regular rate of pay computations for purposes of overtime.

You inquire further as to the period of time within which the overtime due on the bonus must be paid. Overtime compensation should be paid at the same time as straight compensation or as soon thereafter as the overtime can be determined.

With respect to your final inquiry concerning which weeks the bonus is to be allocated to, your attention is directed to the discussion of methods of allocation appearing on pages 3 and 4 of R-1548(a). In general, a bonus is to be apportioned back over the workweeks of the period during which it was earned. However, if it is impossible to allocate the bonus over the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted.

Very truly yours,

For the Solicitor

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

Enclosure

306786

In reply refer to:
SOL:EGL:VAS

January 15, 1942

_____, Esquire
_____
_____
_____, Missouri

Dear Mr._____

We sincerely regret the delay that has occurred in replying to your letters of August 29, 1941 and November 29, 1941.

You inquire about the applicability of the exemptions provided by sections 7(c) and 13(a)(10) of the Fair Labor Standards Act to the employees of one of your clients who engage in the making of jellies and jars from wild fruits. You describe the processing as follows:

> "The operations of this company consist of sorting, standing, and cleaning fresh fruit consisting of various berries, plums, grapes and peaches. The fruits are then cooked in a kettle to extract the juice and then placed in a bag and squeezed. The strained juice is then again cooked with sugar and pectin and in the case of some of the fruits the fruit itself is cooked with sugar to make preserves. After sufficient cooking the product is placed in glass jars and hermetically sealed with a metal cap, then covered with a paper cap and a label is pasted on the jar. The jars are then packed and some of them shipped in interstate commerce. The entire process of making the jelly and preserves is a continuous one and completed in one day. There is no storing of the juice after the first cooking, but it is made into jelly or preserves the same day, except that occasionally in the grape season when it is impossible to complete the making of the jelly in one day and some of the juice is held over until the next day."

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As it is indicated in paragraphs 14, 19 and 22 through 24 of the enclosed copy of Interpretative Bulletin No. 14, section 7(c) of the act, a copy of which is enclosed, provides an exemption from the overtime provisions, for an aggregate of 14 workweeks during the calendar year, for employees of an employer engaged in the first processing or canning of perishable or seasonal fresh fruits or vegetables.

As we understand it, the making of jellies and preserves is very often not performed as a continuous series of operations on fresh fruits, such that it can be said that the operations are all part of the "first processing of, or * * * canning * * * perishable or seasonal fresh fruits or vegetables," within the meaning of section 7(c). It seems, however, from the facts presented in your letters that the jams and jellies made by your client are produced by one continuous series of operations throughout which the commodities remain perishable, and therefore those operations would seem to come within the scope of the section 7(c) exemption.

We should also like to call your attention to section 7(b)(3) of the act, which provides an exemption from the overtime provisions of the act, for an aggregate of 14 workweeks during the calendar year, for employees engaged in an industry found by the Administrator to be of a seasonal nature, provided that during the exempt 14 workweeks one and a half times the regular rate of pay is paid for all hours worked in excess of 12 in any workday and in excess of 56 in any workweek.

As it is stated in the enclosed releases G-61 and R-974, the Administrator has determined that the section 7(b)(3) exemption is applicable to the first processing and canning of perishable or seasonal fresh fruits and vegetables. For the reasons expressed in the previous paragraph, it is our opinion that your client's operations, as described in your letters, are exempt under section 7(b)(3), as well as under section 7(c). Similar to the section 7(c) exemption, the section 7(b)(3) exemption does not relax the 30 cents an hour minimum wage requirement of the act.

As it is stated on page 2 of release R-974, it is the position of the Administrator that the exemptions provided by sections 7(c) and 7(b)(3) may be taken consecutively.

You will notice from paragraphs 25, 26 and 34 of Interpretative Bulletin No. 14 that section 13(a)(10) exempts from the wage and hour provisions of the act any employee employed within the

"area of production" (as that term is defined by the Administrator) and engaged in handling or canning of "agricultural or horticultural commodities" for market. The term "area of production" is defined in section 536.2(a) of the enclosed copy of Regulations, Part 536.

The phrase "agricultural or horticultural commodities," as used in section 13(a)(10), in our opinion includes only commodities that are cultivated by man, and since the jellies and jams manufactured by your client are made from wild fruits, none of his employees fall within the scope of the section 13(a)(10) exemption.

We trust that this will answer your inquiries, but if you have any further questions, please do not hesitate to communicate with us again.

Very truly yours,

For the Solicitor

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

Enclosures (5)

300867

SOL:EB:HH
January 20, 1942

_____, Esquire
_____
_____
Chicago, Illinois

Dear Mr. _____

This will reply to your letter of December 24, 1941, addressed to Mr. Snyder, a copy of which was sent by you to Mr. Poole. With this communication you enclosed a copy of your letter to Mr. Elrey of our Portland office. You request a ruling concerning the status under the Fair Labor Standards Act of the head filer and other employees of the _____ Lumber Company, _____, Oregon.

Head filer

This employee is in charge of the company's filing department. He is paid a lump sum of $58.60 a day and receives approximately from $5500.00 to $6000.00 a year. He is employed for the purpose of maintaining all saws in the sawmill and lathe mill in first-class condition, including all guides and equipment necessary for the complete operation thereof. He supervises a filing crew of not less than five men whom he has authority to hire and fire. You state that the work of the head filer involves a constant exercise of discretion and judgment, and that the technique of properly setting and filing the teeth and hammering the saws requires craft skill of an extraordinary type. You point out that the head filer is engaged in training an assistant known as a "bench man" whose work is partly of the same nature as that of his instructor.

It is our opinion, based upon the facts presented by you, that the head filer is exempt from the act as an executive employee within the definition set forth in section 541.1 of Regulations, Part 541. Although, in addition to his supervisory

duties, he performs a considerable amount of manual work, it would seem, as evidenced by the high salary paid to this employee, that his work is of "an unusually difficult nature which his subordinates cannot perform and which directly affects the continued operation of his whole department" (cf. page 18 of the report of the presiding officer, a copy of which is enclosed). The fact that the head filer trains an assistant who partly performs the same type of work, would not necessarily destroy the nonexempt character of the work if the assistant is able to perform this work properly only after extensive training and instruction, and if none of the other employees in the department is in a position to do this work. Concerning the salary requirement in subsection (E) of section 541.1, we assume that the head filer is guaranteed a weekly salary of not less than $30.00 in any workweek in which he performs any work.

_____ ("Cat" maintenance foreman)

You state that this employee is in charge of a department maintained for the repair of logging caterpillar tractors, and that he has at least six mechanics under his supervision who are hired and fired by him. He does a considerable amount of physical work, which you point out is "principally that of laying out the jobs and doing the more difficult and technical work, which is beyond the knowledge and experience of the men under his supervision." He is paid $225.00 per month. While it appears from your letter that the inspector has estimated the manual work of _____ as amounting to 50 percent of his activities, you express the opinion that the inspector failed to distinguish between the particularly difficult tasks which are a necessary incident to _____'s conduct of the department as a whole and his routine work of a nonexempt nature. You believe that _____'s work of the latter type does not exceed 20 percent of his time.

It is not possible for us to determine on the basis of the limited facts whether or not _____, in addition to his supervisory duties, performs work of "an unusually difficult nature which his subordinates cannot perform." As you will note from the discussion appearing on page 18 of the report of the presiding officer, the Wage and Hour Division considers instances of such

types of work as rare. We have written to Mr. Elrey for further information on this question.

Shade Rushing

You point out that this employee receives a salary of approximately $275.00 a month and has full direction and control of 24 or 30 men in the shop. In addition to his supervisory work he is engaged in designing and fitting flues and boilers on railroad equipment which, in your opinion, is work of a highly technical and specialized character. You express the view that the physical work he performs is necessarily incident to his supervisory responsibility.

In this case, again, no definite ruling as to exemption or nonexemption of the employee can be given. If the physical work done by the employee is of a highly specialized and technical character which cannot be performed by ordinary nonexempt employees and affects the continued operation of the whole department, such work might be considered as exempt work. We have asked Mr. Elrey to furnish us with more detailed information regarding this employee.

We expect to hear from Mr. Elrey concerning the restitution policy to be adopted with regard to the other employees mentioned in your letter to him.

Sincerely yours,

Thomas W. Holland
Administrator

Enclosure

307534

SOL:FUR:NT

FEB - 2 1942

Mr. "_____"
"_____" Manufacturing Co.
"_____," North Carolina

Dear Mr. "_____"

This will reply to your letter of January 20, 1942 inquiring whether fire drills held every sixty to ninety days at the suggestion of the F.P.I. and the War Department should be considered hours worked for purposes of the Fair Labor Standards Act of 1938.

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 specifically directed to paragraph 2 thereof. It is the view of the Division that when fire drills are conducted during regular working hours at a time fixed by the employer, the time spent in the drill should be considered hours worked for purposes of the act. It would seem that the workers continue in the status of employees under sections 3(d), (e), and (g) of the Fair Labor Standards Act since they are subject to the supervision and control of their employer.

Sincerely yours,

Thomas W. Holland
Administrator

Enclosure
313808

(10164)

In reply refer to:
SOL:GFH:JG

January 10, 1942

_____
_____
Washington, D. C.

Dear Congressman _____:

This is in reply to your letter of December 4, 1941, addressed to General Philip B. Fleming, former Administrator of the Wage and Hour Division. We regret the delay in replying, but it was unavoidable.

There was attached to your letter a letter addressed to you by your constituent, Mr._____, of the firm _____ _____ Attorneys at Law, _____ Denver, Colorado. In this letter Mr. _____inquires concerning the application of the act to employees of law firms. In your letter you also inquire whether "stenographers employed in law offices are intended to be included in the provisions of the Wage and Hour Act." We shall consider the points raised in Mr. _____ letter, and we believe that a reply to his inquiries should serve equally to reply to the question which you have presented.

In his letter Mr. _____stated it to be his impression that this Division has expressed the opinion that employees of law firms who "write business letters to lawyers in other states" are covered by the Fair Labor Standards Act. We understand that the purpose of his letter is to ascertain if this Division has taken such a position.

As you know, the act, a copy of which is enclosed, applies to employees who are engaged in commerce or in the production of goods for commerce. We are enclosing copies of our Interpretative Bulletins Nos. 1 and 5 which deal with the act's general coverage. As Mr. _____ has indicated, it is stated in paragraph 8 of Interpretative Bulletin No. 5 that certain employees, of which typical examples are employees of trade associations and research and compilation services, who are engaged in the dissemination of information through the mails "may well be 'engaged in commerce' inasmuch as the continued use of the mails and the channels of interstate commerce in collecting and disseminating information may bring the employees' work within the category of work in interstate commerce." Undoubtedly law firms in varying degrees,

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pending upon their size and the locations of their clients' residences or places of business, use the interstate mails for the transmission of information and the conduct of general business correspondence. But you will note that the lanuguage of paragraph 8 of Interpretative Bulletin No. 5, which is quoted above, cannot be construed as a categorical statement that any use by an employer or the mails is sufficient to bring his employees within the coverage of the act. The quoted statement does recognize, however, that any regular and continuous use of the mails or other channels and instrumentalities of interstate commerce or communication by an employer in connection with the conduct of his business should be sufficient under the existing precedents to bring employees whose activities contribute to the conduct of such regular and continuous interstate intercourse or communication, within the coverage of the act.

We believe that if Mr. _____ will reexamine the leading case of International Text Book Company v. Pigg, 217 U. S. 91, with which we assume he is familiar, it will be clearly indicated to him that the question of whether the use of the interstate mails and the other channels and instrumentalities of interstate commerce and communication constitutes an engagement in commerce subject to regulation as such, is one of degree, and that in any situation it is properly to be approached as a question of degree. In a small law office without out-of-state clientele, it may be difficult to establish that the employees are engaged in interstate commerce activities which Congress intended to cover by the Fair Labor Standards Act, since in the ordinary course the volume of interstate commerce and communication may be, relatively speaking, too insignificant to be considered by the courts as regular and continuous within the doctrine set forth in the Pigg case. In the case of the larger law firms, on the other hand, who in the ordinary course conduct a regular correspondence with numerous out-of-state clients, and whose employees through their activities directly aid and contribute to the compilation of data for regular transmission in interstate commerce in the forms of briefs, pleadings, legal documents, and general business correspondence, sometimes merely typewritten, but often mimeographed or printed, we believe it probable that the courts will hold such employees to be "engaged in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act and the doctrine of the Pigg case. Between the types of law firms lying at these two extremes, as has been indicated, there is to be found an almost limitless variety of situations involving minute gradations of degree, and in such cases it seems clear that a sound determination of the question of coverage in any given instance

can only be predicated on a full knowledge of all the facts of a particular firm's activities and the circumstances of the employment of each individual employee whose status under the act is sought to be determined. If Mr. _____ is concerned with the status under the act of any individual employee of a particular firm, we shall be glad to attempt to advise him on this matter if he will submit to us a full account of the situation.

As Mr. _____ has noted, this Division does not consider employees of law firms to be exempted from the wage and hour provisions of the act as being engaged in "any retail or service establishment, the greater part of whose selling or servicing is in interstate commerce" under section 13(a)(2) of the act. This opinion is expressed in paragraph 29 of Interpretative Bulletin No. 6, a copy of which is enclosed. Mr. ___ apparently is laboring under the impression that since it is the opinion of the Wage and Hour Division that employees of law firms are not exempt from the act as being engaged in a "service establishment" it follows that this Division is of the opinion that all employees of all law firms are necessarily covered by the act and entitled to its benefits. This inference, however, does not logically follow, since the questions of whether a particular employee is "engaged in commerce" or "in the production of goods for commerce," on the one hand, and whether an employee is exempt as being engaged in a "service establishment" within the terms of section 13(a)(2) of the act, on the other hand, are entirely distinct and separate. As is indicated in paragraph 3 of Interpretative Bulletin No. 1, the question of whether a particular employee falls within the coverage of the act is an individual matter depending upon the precise duties which are performed by him. Some employees in a given establishment may fall within the general coverage of the act while other employees in the same establishment may not. And as has been previously indicated, the employees of some law firms may be covered by the act while employees of other law firms may not. If, however, the exemption provided by section 13(a)(2) of the act is applicable, all employees engaged in the establishment are exempt from the minimum wage and overtime compensation provisions of section 6 and 7 of the act. See paragraph 5 of Interpretative Bulletin No. 6. The import of the opinion expressed in paragraph 29 of Interpretative Bulletin No. 6 is merely that if and when a particular employee of a law firm is covered by the act by reason of his being engaged in commerce or in the production of goods for commerce, his employment will not be exempted from the operation of the wage and hour provisions by reason of his being engaged in a "service establishment" within the meaning of section

13(a)(2). But it is certainly not meant to say that as a result of the inapplicability of that exemption all employees of law firms are necessarily "engaged in commerce" or "in the production of goods for commerce." If particular employees of law firms are not "engaged in commerce" or "in the production of goods for commerce," the act has no application to their employment and the question of whether such particular employees are engaged in a "service establishment" within the meaning of section 13(a)(2) is moot.

We have given careful consideration to Mr. ____'s reference to an opinion, purportedly rendered by this Division, that "an employment agency whose interstate business does not exceed 34% of its gross income is not a service establishment within the exemption of section 13(a) under Bulletin 6 and 'Inasmuch as the employees of the employment agency would seem to be necessarily engaged in the transmission and dissemination of information to other states, in the form of written materials, it would seem that they are engaged in interstate transactions.'" However, since Mr. _____ did not identify this memorandum or letter by date or by the name of the addressee, we are unable to locate it in our files. Since the complete opinion is consequently unavailable, we have no knowledge of the exact factual situation to which it may have been addressed. As a result, as Mr. _____ will realize, we do not feel in a position to comment upon this quoted statement. If Mr. ____ has any questions regarding this opinion we shall be glad to offer our comments regarding the situation involved upon receiving the data above referred to which will aid us in locating it in our files.

We trust that the foregoing opinion will furnish you and Mr. _____ with the information you desire. If we can be of further assistance to you or to your constituents in connection with problems arising under the Fair Labor Standards Act, we shall be happy to offer all possible assistance.

Pursuant to your request, we are returning Mr. ____'s letter herewith.

Sincerely yours,

Thomas W. Holland
Administrator

Enclosures (4)

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