UNITED STATES DEPARTMRNT OF LABOR

Office of the Solicitor

September 26, 1942

Legal Field Letter

No. 80

Attached Opinions

Copies of recent opinions on subjects indicated below are funished herewith for your information and proper notation in the Index to Legal Field Letters.

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7-10-42	Charles H. Livengood, Jr. (FUR)	Llewllyn B. Duke	Pioneer Oil Company Clayton, New Mexico File No. 30-42 Office workers under section 541.4 21 BK 102.32
7-11-42	Charles H. Livengood, Jr. (JHS)	George A. Downing	Palmetto Pigeon Plant Sumter, South Carolina File No. 39-1511 Breeding and slaughtering pigeons under section 13(a)(6); relationship to sections 7(c) and 13(a)(6) 21 BC 207.3397 23 CF 202.430
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MEMORANDA

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7-18-42	Charles H. Livengood, Jr. (EGL)	Arthur E. Reyman	Campbell Soup Company Cinnaminson, New Jersey Administrative exemption for employees advising farmers as to proper planting, growing and harvesting methods 21 BB 301.33
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MEMORANDA

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(11244)

COPY

A. A. Cohen
Regional Attorney
Cleveland, Ohio

June 15, 1942

SOl:RB:HH

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Phoenix Machine Company
Cleveland, Ohio
File No. 34-53,618

This is in reply to your memorandum of April 9, 1942 regarding the legality of crediting pay for unworked holidays, vacations and sick leaves against subsequently-worked overtime, under the prepayment plan discussed in Interpretative Bulletin No. 4.

You state that the subject company has stipulated with its employees that they will be paid for time off due to holidays, vacations and illness, but that the amount paid for such time off will be credited by the company as an advance which is to be applicable against subsequently-worked overtime. You further state that company records bear out this system of computation and refer to release R-1625 as supporting your contention that such an arrangement is valid.

The Division has discussed this question in paragraphs 38, 62 and 65 of Interpretative Bulletin No. 4. Paragraph 38, although it refers specifically to the time off plan, also applies to the prepayment plan. Your attention is directed to the last two sentences in that paragraph 38, in which it is stated that:

> * * * if the employee's salary is <u>not normally</u> decreased when he is off on a holiday, vacation, sick leave, or other miscellaneous periods of leave during one week, such time off may not be used to balance overtime worked another week within the pay period. <u>In other words, the hours which the employer lays off the employee in one week of the pay period, to balance overtime worked in another week of the same pay period must be hours off for which the employee is not entitled to nor customarily receives compensation</u>. /Underscoring supplied./

Similar language is found in paragraph 62 in the discussion of the prepayment plan.

On the basis of that language we have held that payments for time off due to holidays, vacations or sick leave may be credited by an employer under an overtime prepayment plan against overtime pay due for subsequently-worked overtime if, and only if, the employer expressly and clearly makes his employees understand that:

(1) They are not, or are no longer entitled to vacations, holidays or sick leave with pay;

(2) The amount advanced for unworked vacations, holidays or sick leave is a loan or advance against future overtime pay that may become due them; and

(3) The amount advanced, if not offset by future overtime compensation due them, will have to be repaid in cash.

Whether or not the subject company's stipulation with its employees meets these tests (see paragraph 58 of Interpretative Bulletin No. 4), and whether or not the actual facts support its expressed provisions, are factual questions that, in our opinion, can best be answered by the regional office.

(11244)

COPY

21 BK 102.32

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

July 10, 1942
SOL:FUR:SMT

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Request for opinion
Pioneer Oil Company
Clayton, New Mexico
File No. 30-42

This will reply to your memorandum of June 15, 1942, inquiring as to the applicability of the local retailing capacity exemption to two office employees of the subject company. It appears that the company receives gasoline from Texas and oil and grease from Oklahoma and sells these products through New Mexico filling stations, all of which are exempt under section 13(a)(2). You state that the employees in the central office "take care of the paper work for the purchase of the goods sold and also all paper work in connection with the operation of the stations."

It is possible, but unlikely, that the central office employees to whom you refer are exempt under section 541.4. Any work which they do in connection with the purchase and transportation of goods to the retail establishments, or in connection with nonretail distribution from the retail establishments, or in connection with the firm's general business operations, including all bookkeeping activities not related to specific retail sales, would be considered nonexempt work. However, bookkeeping activities with respect to particular retail sales would be considered exempt work.

For example, the entry of a retail sale, the billing of a customer, etc., would be considered exempt work. On the other hand, work related to inventories in the several exempt stations or work related to profit and loss statements of the several stations would not be considered work of an exempt type.

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In other cases, however, we have laid down some tests which we believe are helpful in making a determination as to whether operations come within this part of section 13(a)(6). In deciding whether section 13(a)(6) will apply, we believe you should consider the following factors: the number of employees employed in the operations of breeding, feeding, and general care of the pigeons as contrasted with the number working in the slaughtering, packing and shipping of the pigeons; the number of man-hours worked in the first type of operations as compared with the number worked in the slaughtering, packing and shipping operations; the amount of the pay roll of employees engaged in one activity, as compared with the amount of the pay roll in the other activity; and the extent, if any, to which employees are exchanged between the two different types of work; the investment that the employer has in equipment used in the breeding, feeding and general care of the pigeons as compared with its investment in equipment employed in the slaughtering, shipping and related activities; and, finally, whether or not it has a sales organization.

It is believed that you will appreciate the reasons for laying down these tests. As to the final criterion, it seems to us that where a concern has its own sales organization this is one indication that the processing operations are part of a separate business and are not merely incidental to or in conjunction with the farming operations.

If you determine that section 13(a)(6) is applicable to the slaughtering, packing and shipping operations of subject, it would seem clear that sections 10(c), (d), and (e) of the bulletin would be applicable to the extent that subject engages in the operations described in these sections. If such is the case, these sections would not be limited to live pigeons, but would equally apply to dressed pigeons.

If, however, you should determine that the slaughtering, packing and shipping are not incidental to or in conjuction with the farming operations of subject, then we believe that your memorandum reaches the correct result as to the application of the section 13(a)(6) exemption. However, we believe that the subsections of paragraph 10 of bulletin No. 14 to which you refer are not necessarily limited to live poultry.

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COPY

23 CB 203.1
23 CB 203.23

~~Kenneth P. Montgomery~~
Regional Attorney
Kansas City, Missouri

July 17, 1942

SOL:EJG:HH

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Crooks Terminal Warehouses, Inc.
Kansas City, Missouri
KCL:TOM:LG, KCL:TOM:LEG

This will reply to Mr. McChesney's memorandum of April 30, 1942, with which he attached a copy of a letter received from the attorney of the subject firm, Mr. J. Francis O'Sullivan, and his memorandum of May 25 with respect to the matter. Certain questions were raised by Mr. O'Sullivan with respect to the applicability of the section 13(b)(1) exemption to employees of the subject company. Discussion will be treated in the same order as that adopted by Mr. O'Sullivan. We regret that the difficult questions involved, and a recent amendment to section 202(c) of the Transportation Act of 1940, Public No. 558, 77th Cong., c. 318, approved May 16, 1942, delayed this reply.

(1) It appears that certain drivers, drivers' helpers, loaders and unloaders (50 percent to 60 percent of the employees in the subject company's transfer department) perform work exclusively in connection with the transfer of freight in the Kansas City railway terminal from one railroad to another. They are engaged in performing "connecting line hauling for seven railroads." Such employees (except unloaders) are exempt under section 13(b)(1) of the Act by virtue of the above-noted amendment to the Transportation Act of 1940, which rendered inoperative the doctrine of the Scott Brothers, Inc. decision (see paragraph 8(a) of Interpretative Bulletin No. 9). Employees engaged in unloading activities are exempt under section 13(b)(1) only if they are "loaders" and unloading is just part of their loading activities. This applies also with respect to question (2) below.

(2) From 22 percent to 25 percent of the employees (drivers, helpers, loaders, unloaders and dockmen) of the transfer department apparently perform activities exclusively in connection with the pick-up and delivery of freight for Acme Fast Freight Forwarding Company. Mr. O'Sullivan referred to paragraph 8(b) of Interpretative Bulletin No. 9 as a basis for his belief that these employees are exempt from the overtime provisions under section 13(b)(1). While

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AIR MAIL

Dorothy M. Williams
Regional Attorney
San Francisco, California

July 17, 1942

SOL:RB:HH

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Tayton Company
Hollywood, California
LE:KMR:HMP

In your memorandum of May 16, 1942 you asked for an opinion on the status under the Act of cosmetics sample girls employed by the subject company to distribute to the general public free samples of goods which it sells to retail stores in the locality.

From the facts submitted in your memorandum and presented in the letter addressed to your office by the subject's attorney, it appears that the subject company is engaged in the wholesale distribution and sale of certain cosmetics. To help its customers retail those cosmetics and thus aid its own sales, the subject company from time to time employs girls to distribute free samples of face powder to the general public in the immediate vicinity of the retail stores handling its products. These samples are specially packaged for such advertising purpose by the subject company, apparently at its place of business in Hollywood, California, from bulk products purchased by it from the manufacturer. The samples are shipped only when the supervisor decides to organize a particular campaign and immediately before the girls are employed.

On the basis of these facts, we are of the opinion that the powder sample distributors located outside of California are engaged in interstate commerce within the coverage of the Act, since they constitute an integral and essential part of the company's method of interstate distribution of cosmetics. Such activities are obviously of commercial value to the subject company and its retailers, being designed to increase both the wholesale and retail sales. The sample distributors are covered for the same reason that inventory takers working in retail branches of a chain store are covered or that demonstrators of a manufacturer's products in a retail store are covered--the purpose and effect of their work is to facilitate the flow of their employer's goods across State lines.

A second basis for holding these sample distributors to be covered by the Act lies in their distribution of goods received directly from without the State. The fact that the samples are first

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Arthur E. Reyman
Regional Attorney
Newark, New Jersey

July 13, 1942

SOL:EGL:RBW

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Campbell Soup Company
Cinnaminson, New Jersey
SOL:JBE:MSL

In your memorandum of June 12, 1942, you refer to our memorandum of March 27, 1942, which deals with the application of the sections 7(c), 7(b)(3) and 13(a)(6) exemptions to certain employees of the subject company, and you inquire whether the employees discussed in part 4 of our memorandum come within the scope of the section 13(a)(1) exemption. You state that many of these employees receive at least $200.00 a month, and that from an examination of the work they perform and their "educational background," it may be that they should be regarded as employed in an administrative or professional capacity.

It appears from your memorandum of June 5, 1942, that from approximately December 1 to February 15 or March 1 of each year the employees in question work at the firm's experimental farm, assisting in the testing of soil and also taking special courses two hours a day for four to six weeks. From about March 1 to the end of May, each of these employees is assigned a certain territory in which he negotiates acreage contracts with farmers to supply the subject company with various kinds of vegetables for use in its canning operations. After this work has been completed, some of the employees go south to purchase vegetable plants; others work on the farm distributing plants to those farmers with whom the company has acreage contracts, and the rest assist in soil testing. During the planting season, these employees advise the farmers with whom the company has acreage contracts in regard to the proper methods of planting their crops. During the growing season, they continue to visit the farms to determine whether the farmers are complying with their acreage contracts and to furnish advice concerning the proper care of the crops. During the harvesting season, the employees inform the farmers when they should pick their vegetables, aid them in securing labor for the harvest and keep the canneries informed as to the probably quantities of vegetables which from time to time will be sent from the farms.

From the facts presented in your memoranda, it appears that, with the exception of those periods during which the employees in question test soil and attend school, their work involves the exercise of discretion and independent judgment and directly relates to general business operations, within the meaning of section 541.2(B)(3) of the regulations and page 28 of the presiding officer's report. Accordingly, during periods of the year when the employees engaged in such work and receive at least $200.00 a month, we believe that they are exempt under section 13(a)(1) as being employed in a bona fide administrative capacity.

Your memoranda do not contain sufficient information concerning the "educational background" of these employees to enable us to determine whether they are employed in a "bona fide * * * professional * * * capacity" during periods in which they engage in making soil tests and in attending school. The making of soil tests would not seem to be work of an administrative nature, but employees engaged in such work may possibly be exempt as professionals.

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Commerce Act exceeded 20 percent of the total number of hours worked by him during that same week, the employee would not be within the section 13(b)(2) exemption under the principles expressed in Legal Field Letter No. 56. The question in the subject case, therefore, boils down to (1) whether the subject's yarding, feeding, weighing and handling of livestock is subject to Part I of the Interstate Commerce Act and, therefore, exempt work under section 13(b)(2); and (2) whether or not the employees in question spend more than 20 percent of their time during a given week on such work, if those operations are found to be not subject to Part I of the Interstate Commerce Act and thus nonexempt work under section 13(b)(2).

On the basis of the Interstate Commerce Commission's decision in Ex Parte 127, 245 I.C.C. 241, we are of the opinion that the subject's yarding, feeding, watering and handling activities are not subject to Part I of the Interstate Commerce Act and, therefore, not exempt under section 13(b)(2). In that decision, which passed on the status of the subject's stockyard, as well as other stockyards, the Interstate Commerce Commission expressly ruled that it had jurisdiction over the loading and unloading of livestock onto and from railroad cars but not over other stockyard activities, such as the yarding, feeding, watering and handling of livestock before or after the loading or unloading operations. The Interstate Commerce Commission carefully described the loading and unloading activities which it intended to cover (p. 246, supra), and in its findings on the subject company and other similar companies stated (p. 272, supra) that these companies were common carriers by railroad subject to the Interstate Commerce Act--

> * * * in respect of the transportation services performed at the stockyards of said companies in connection with the loading and unloading of carload shipments of livestock transported by railroad in interstate commerce to and from the public yards of said companies * * *. /Underscoring supplied./

It then went on to find (p. 274, supra) that the stockyards at Omaha, Sioux City, Burlington, Kansas City, St. Louis and Fort Worth were not common carriers subject to the Interstate Commerce Act because they no longer engaged in the loading and unloading of livestock onto and from railroad cars. It pointed out, however (p. 271, supra), that if the Kansas City, St. Louis, Sioux City and Forth Worth stockyards resumed such loading and unloading operations, it would reopen investigations thereon and enter the proper orders.

Thus, it is clear that the Interstate Commerce Commission has jurisdiction only over the subject's loading and unloading operations, and not over any other of its stockyard activities. As a matter of fact, it expressly stated at page 256 of the Ex Parte 127 decision, in referring to the prior case of M. Kahn's Sons Co. v. Baltimore & Ohio R.R.Co., 192 I.C.C. 705, affirmed sub nom., United States ex rel. Kroger Grocery & Bakery Co. v. Interstate Commerce Commission, 73 F.(2d) 948:

> Although the stockyard company there contended that it was not a common carrier, we did not pass upon that question, it being unnecessary to do so because of our determination that our jurisdiction ended when the animals are unloaded into suitable pens at the stockyards. /Underscoring supplied./

COPY

26 CD 402.527

AIR MAIL

Dorothy M. Williams
Regional Attorney
San Francisco, California

July 20, 1942

SOL:JHS:FB

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Western Union Telegraph Company
San Francisco, California
File No. 4-136
LE:IS:DB

This will reply to your memorandum of March 27, relating to the above subject. We regret the delay which has occurred, but the problem presented was a difficult one, and we have given it thorough consideration.

You state that you are confronted with the question of whether payment of time and one-half for work performed on Saturday and Sunday is to be regarded as increasing an employee's regular rate of pay in a situation where the employee is regularly required to work on Saturday and Sunday.

You state that the employer in question for years has regarded Saturday and Sunday as "premium pay" days and has compensated his employees for work performed on these days at a rate one and one-half times the employee's regular rate of pay regardless of the number of hours worked by the employee during the workweek. The employer also pays time and one-half for hours worked in excess of 40 a week.

You call our attention to the language of paragraph 69 and paragraph 70(6) of Interpretative Bulletin No. 4. In the latter subparagraph it is stated that:

> However, it is our opinion that generally work on Sundays and holidays may properly be considered as overtime work and the interpretation set forth herein may be considered applicable.

It is our opinion that bulletin No. 4 fails to answer the exact problem which you present. However, we feel that Saturdays and Sundays should in and of themselves be regarded for overtime purposes as days not normally worked by employees. These days differ from night shifts which occur daily.

COPY

Arthur E. Reyman
Regional Attorney
New York, New York

July 24, 1942

SOL:EGL:HH

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Ackerly & Sandiford, Inc.
New York, New York
SOL:REC:JS

In your memorandum of June 23, 1942, you inquire whether the section 13(a)(5) exemption is applicable to the three bookkeepers employed by the subject company, which engages in the wholesaling and distribution of fresh fish. During part of each day these employees record the lot numbers and sale prices of fish as they are called out by the sidewalk salesmen of the concern. During the rest of the day, these bookkeepers engage in ordinary office work pertaining to their employer's business of selling and distributing fish.

The section 13(a)(5) exemption is applicable only to those employees who actually engage in operations described in the section. Thus, as release R-1609 indicates, only those office employees of a wholesale fish establishment who direct the shipment of a product, such as clerks in the shipping department, are engaged in "marketing" or "distributing" within the meaning of the section and therefore exempt. Since bookkeepers recording sales of fish do not direct the shipment of the product, we are of the opinion that such employees are not exempt. Even though the recording of such sales were exempt work, the employees in question would not come within the exemption for the reason that they perform other office work which is not exempt.

(11244)

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21 AC 408.1
21 AC 408.2
21 AC 408.4

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

July 24, 1942

SOL:FUR:HH

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Installation and service employees
ENV:al

Your memorandum of June 24, 1942 raises several questions concerning the applicability of the Act to installation and service employees. You are uncertain as to the proper interpretation of some of the passages of Legal Field Letter No. 74. Two distinct situations are presented, although each has many important variations. Furthermore, with respect to each situation we must consider separately installation employees and service employees. The two situations are (1) a sale by a person in State "A" to a person in State "B" and (2) a sale between persons in State "B" of goods received by the vendor from State "A". Unless otherwise indicated, we shall assume in discussing these situations that no exemption is applicable and that the sole issue is the coverage of the Act.

I. Sale in which product moves across State lines in passing from vendor to vendee.

A. Installation--covered.
B. Servicing pursuant to contract of sale--covered.

II. Sale in which product does not move across State lines between vendor and vendee but was received by vendor from another State.

A. Installation--covered
B. Servicing even if by vendor pursuant to contract of sale--not covered. (Situation would differ in the case of the drop shipment. Compare paragraph 45 of Interpretative Bulletin No. 6. For the purposes of this memorandum, the term "drop shipment" will be used to include not only the situation described in paragraph 45 of Interpretative Bulletin No. 6, but also the situation in which

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vendor orders goods from another State pursuant to a specific sale even though the goods may pass through vendor's establishment.)

With respect to the specific questions asked in your memorandum I shall answer them in the order that they appear.

(1) "Is it intended that a contract of sale between two parties located in the same state which involves the installation of apparatus which the vendor will receive directly from another state is not an interstate contract of sale?"

Answer: Contract is not an interstate contract of sale within the meaning of Legal Field Letter No. 74. The installer, however, is covered. Compare the first and second sentences of Legal Field Letter No. 74.

(2) "Does such an interstate contract of sale include a contract between a vendor and a vendee situated in the same state which involves the bringing of the apparatus from another state?"

Answer: The answer to this question is, of course, the same as that for question (1). In the first question you were dealing with installation employees who were covered. In this question you are dealing with service men who are not covered unless, of course, the drop shipment case is presented.

(3) With respect to the Peirce-Phelps memorandum, you ask: "Do we have to infer from this that an interstate contract of sale only means one in which it is contemplated that the vendor will ship the apparatus from the state in which the vendor is situated to another state before installing it?"

Answer: For purposes of Legal Field Letter No. 74, yes. The drop shipment case is an exception to this, of course.

(4) "Is * * * installation or servicing covered when performed in a private house or as part of an unquestioned retail sale? In other words, where the interstate contract of sale is a retail sale, is the employee installing or servicing it engaged in a local retailing capacity?"

Answer: Here you have confused questions of coverage and exemption. If the goods cross State lines as between vendor and vendee or if the drop shipment case is presented, both the installation and servicing are covered. If the goods do not cross State

lines as between vendor and vendee and the drop shipment case is not presented, but the goods simply come to the vendor from without the State, the installer is covered but the service man is not. With respect to the local retailing capacity exemption, that can possibly apply both to the installer and the service man only if the installation or servicing is contracted for in the retail sale. Even then the exemption will not apply if as much as 50 percent of the sales with which the employee is connected are sales in interstate commerce. For the purpose of section 13(a)(1), the sale is in interstate commerce if the goods cross State lines as between vendor and vendee or if the drop shipment case is presented.

(5) "Does 'direct shipment from another state' mean only cases in which the apparatus is brought in from another state for the specific job in question, or does it include apparatus which has been brought in from another state, placed in the seller's stock of goods, and then taken from that stock for the purpose of installation in the same state as the seller's warehouse?"

Answer: I am not clear as to the source of the phrase which you placed in quotation marks and hence do not know the context in which any answer would be understood. I believe that the foregoing discussion, however, will clarify your general problem here.

The general test in all these matters is, of course, the degree of relationship to interstate commerce. It has been the view of the Division, particularly in the light of the case of York Mfg. Co. v. Colley, that employees engaged in the installation of goods are covered by the Act if the installation may be deemed to be pursuant to an interstate contract of sale. The servicing as a logical proposition would seem to be covered to the same extent as the installation; namely, insofar as servicing is done pursuant to an interstate contract of sale, coverage should exist. Until the Division's general views on wholesalers selling locally receive further support, however, it is our belief that we should go no further in determining what constitutes an interstate contract of sale for purposes of covering installation and service men than is indicated in Legal Field Letter No. 74. Installation then may be covered on the usual wholesaler principle even though the installation is not pursuant to an interstate contract of sale as that phrase is used in Legal Field Letter No. 74. Service men under such circumstances are more removed from the stream of commerce than are installation men, since they do not enter the picture until the goods have come to rest in the consumer's establishment or home.

(11244)

COPY 26 CD 601

Vernon C. Stoneman July 30, 1942
Regional Attorney
Boston Massachusetts

SOL:JHS:FB

Charles H. Livengood, Jr.
Chief, Wage-Hour Section

Computation of overtime pay for paper machine crews
BL:MAF

This will reply to your memorandum of March 11. We are sorry that a reply has been so long delayed; however, such delay was necessary in the interests of a well-considered opinion.

You enclosed a memorandum of March 10 from Mr. Gleason to you. In the situation which he presents an employer inquires as to the method to be used in computing the regular rate of pay of employees operating paper machines. Whenever a Fourdrinier wire breaks or becomes worn out on one of the paper machines, it is necessary to have two crews of men work together to put on a new wire.

Mr. Gleason states that it has long been the practice in the paper industry in both union and non-union mills, including those mills which do not normally pay time and a half over eight hours per day, to pay to each member of a machine crew who is called in outside the regular shift, a full day's pay for changing a wire. This job normally takes about four hours, and therefore the employees called in usually receive substantially more than their regular rates of pay for the special work involved, and it appears that this higher rate has been established to give the men a minimum amount for being called in when they would ordinarily be off duty and to compensate them for overtime. It is stated that another extremely important consideration is that this plan gives the men an incentive to complete the job as soon as possible. This is most important, since a paper machine carries a substantial amount of fixed charges, and the company is losing a considerable sum of money while the machine is shut down.

The particular mill which has raised this question has operated for many years under a union agreement containing the following provision:

> When a man is off tour (shift) and is called in, or remains after his tour ends to put on a wire, he shall receive one day's pay extra in addition to the pay he receives for his regular shift.

The union contract in question also calls for time and a half for all hours worked in excess of eight per day, which is the normal shift, but in the case of changing wires the flat sum of eight hours' pay takes the place of the time and a half, and no time and one-half is paid for changing wires.

It seems clear to us that none of the flat amount of pay

as compensation for changing a wire can be credited against overtime otherwise due under the Act. If an employee is called back to the plant to change a wire, he receives a day's pay for this work whether or not his total hours worked during the week exceed 40. The payment in question is for the particular job, and none of it can be credited as overtime for hours worked by an employee during a week at his regular work.

You further ask whether in such a situation the flat payment may include overtime compensation for the time spent in changing wires. If it may not include such overtime compensation, then it would seem clear that overtime would be computed as set forth in paragraph 70(9) of bulletin 4.

We believe that the compensation so paid may be deemed in proper cases to include pay for both straight and overtime for the hours spent in changing wires, provided:

(1) the arrangement is voluntary, bona fide and mutually satisfactory to employer and employees;

(2) the extra compensation is paid for extra work, and this extra work is of a special type;

(3) the rate for the extra work equals at least time and one-half the regular rate for the normal work; and

(4) there is no intention to evade section 7.

We recognize that this rule involves a departure from paragraph 70(9) of bulletin 4. However, we feel that the practical arguments for this result justify it provided that the criteria set forth above are met. It is not intended to apply the present interpretation in cases where bonus payments are involved or to any other situation except the limited one involved in the present inquiry.

In the example submitted by Mr. Gleason an employee is employed at $1.00 an hour. His straight-time compensation for 48 hours is $48.00. In addition he works four hours in a week changing a wire, for which he receives a flat day's pay of $6.00. The $6.00 paid for the four hours spent in changing the wire will include both straight and overtime compensation since it equals at least time and one-half the regular rate for the normal work. For the other eight hours of overtime he will be entitled to $4.00 of overtime compensation. Therefore, his total wages for the week in question will be $60.00.

Another illustration may be helpful. Suppose in the following week there is a half holiday, and the same employee works only 36 hours at his regular work. However, after he has completed a regular eight-hour shift on one day during the week, a wire breaks down, and he spends eight additional hours repairing it. This work is outside his regular shift, and he receives $8.00 for it. In our opinion he is entitled to $2.00 overtime compensation for such work and must, therefore, be paid a total of $46.00 for the week's work. The eight dollars paid for repairing the wire was sufficient only to cover straight time compensation at the regular rate. Therefore, overtime must be paid for four hours.

Since in our opinion the principles of paragraph 70(9) of bulletin 4 are inapplicable, it is not necessary to answer the question presented at the end of Mr. Gleason's memorandum.

The principles set forth in this memorandum are equally applicable to employees of companies having union and non-union shops.

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C O P Y

86/957 JKB/MLB

May 2, 1942

Mr. R. J. McGinty
Secretary and Treasurer
Southeastern Division
General Shoe Corporation
16 Yonge Street, S. E.
Atlanta, Georgia

Dear Mr. McGinty:

This will acknowledge receipt of your letter of April 14, 1942, inquiring whether you may make pay-roll deductions for old age benefits, group insurance, benefit associations, credit associations and for the purchase of company stock.

Under both the Public Contracts Act and the Fair Labor Standards Act, deduction which reduce the employee's cash wage below the wage he is required to receive under the wage and hour provisions of the Acts are permitted if the the deductions are made upon the voluntary authorization of the employee, which authorization may be revoked at any time, and the moneys deducted are paid to an independent unaffiliated third person, with the employer deriving no profit or benefit directly or indirectly from the transaction. In the case of the Public Contracts Act, there is a further requirement that the authorization of the employee be in writing.

If these requirements are satisfied there would be no objection under either of the Acts to deductions for old age benefits, group insurance, benefit associations or credit associations, assuming that the employer is under no obligation to supply insurance or any of the other items to his employees. Deductions for company stock, however, would not be permissible if the employees' wages were thereby reduced to an amount less than they were entitled to receive under the Acts, since the employer derives a direct benefit from this deduction.

Sincerely yours,

Wm. R. McComb
Assistant Administrator

C O P Y

63/402 JKB:BM

May 14, 1942

C. B. Gentry Company
Los Angeles
California

Gentlemen:

This will acknowledge receipt of your telegram of May 6, 1942, inquiring whether contracts for the first processing of agricultural products are exempt from the Walsh-Healey Public Contracts Act, and if first processors are exempt under section 7(b)(3) and 7(c) of the Fair Labor Standards Act, they are equally exempt from the Public Contracts Act.

As indicated in section 1(3) of the enclosed Rulings and Interpretations No. 2, section 9 of the Act exempts purchases of "agricultural or farm products processed for first sale by the original producers." This exemption is not coextensive with exemption granted under the Fair Labor Standards Act since this exemption applies only when a person or a single legal entity is both the original producer and the processor whereas section 7 of the Fair Labor Standards Act exempts certain processors from the hourly provisions of that Act regardless of whether they are also producers.

Very truly yours,

William R. McComb
Assistant Administrator

Enclosure

COPY

JKB/LMA

May 21, 1942

Mr. George Terborgh, Secretary
Machinery and Allied Products Institute
744 Jackson Place
Washington, D. C.

Dear Mr. Terborgh:

This is in reply to the telephone inquiry from your office regarding the provision, "This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market" as contained in section 9 of the Public Contracts Act.

Open market purchases have been construed to be those purchases permitted by statute to be made without advertising for bids. The determination of whether a purchase is an open market purchase does not turn on the character of the product or article purchased but upon the statutory limitations regulating the purchasing procedure. The principal statutory limitation on open market purchases is as follows:

> "All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchases or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals. (R.S. § 3709.)" (41 U.S.C. sec. 5; 41 U.S.C.A. sec. 5.)

Because of the National Emergency, several recent acts of Congress have authorized the negotiation of contracts without the requirement of advertising for bids. Any possibility that the Walsh-Healey Act would not apply to these contracts was negatived by specific provisions in these acts. Thus, if the Walsh-Healey Act would otherwise apply, it continues to apply even though contracts authorized under these recent enactments are made without advertising for bids.

Very truly yours,

W. R. McComb
Assistant Administrator

(11244)

COPY

25 BE 205.512
25 BE 205.5132
25 BE 205.52

165 West 46th Street
New York, New York

SOL:FUR:RBW

July 18, 1942

Mr. Albert L. Cuff
Secretary and General Counsel
Blaw-Knox Company
Pittsburgh, Pennsylvania

Dear Mr. Cuff:

This will reply to your letter of June 23, 1942, inquiring as to the necessity of including time spent in a program of "Passive Defense," to be conducted for employees of your plant known as Martins Ferry Division, as hours worked under the Fair Labor Standards Act. With respect to the various training programs you indicate that certain of them may subsequently be transferred to quarters located on company property, and you inquire whether such change of circumstances would alter my views.

Generally speaking, time spent by employees in safety programs should be considered hours worked unless attendance is voluntary, the programs are conducted outside the employee's regular working hours, no productive work is done, and the course is not directly related to the employee's regular work. I shall assume for purposes of this letter that the only one of those tests which may not be met in your case is the question of relationship to the employee's regular work. Generally speaking, a safety program which is not restricted to the hazards of the job at hand or to the personal responsibilities of employees in doing their job safely and efficiently will not be considered directly related to the employee's work.

I shall discuss each of the aspects of your training program separately. In each case if the program is not otherwise altered on being transferred to company premises, the mere fact of transfer to the company premises would not alter my opinion.

(1) TRAINING OF AIR RAID WARDENS: Some 52 foremen in our plant have accepted an invitation to volunteer for this course which is to be given outside regular working hours at the City Volunteer Firehouse, located off the premises of our plant. The course of instruction will not exceed 20 hours in all and will be given by an employee of our Company who was recently hired to serve as Passive Defense Coordinator. This instructor holds a certificate to the effect that he has completed the Office of Civilian Defense Course for Instruction of Air Raid Wardens.

Upon these facts, it appears that the time spent by the foremen taking the course need not be considered working time.

(2) TRAINING IN FIRST AID: (a) The Medical and Safety Director of Martins Ferry Division has issued a call for volunteers to participate in a 20-hour course of instruction

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in first aid to be given three nights a week, one and one-half hours each evening, to those of our employees wishing to attend. The course will consist of lectures and practical training to be held at the City Volunteer Firehouse, off the premises of our plant, and will be given by the Medical and Safety Director of our plant, a regular employee of our Company, who holds proper authority to issue United States Bureau of Mines Certificates of first aid training to those passing the course. We are advised that this Bureau of Mines first aid training course is recognized by the Office of Civilian Defense.

(b) Earlier this year, before the Passive Defense Program was formulated, a ten-hour course in first aid was given off the premises to more than 100 shop employees who volunteered to act as auxiliary firemen. This course was likewise conducted by an employee of our Company under the standards of the United States Bureau of Mines.

Time spent by the employees taking the first-aid course described under "(a)" above apparently need not be considered hours worked since as I understand the course, it will cover the general field of elementary first-aid training and will not be designed particularly for employees in departments in which, because of the possibility of industrial accident, training in first-aid might be considered an essential part of an employee's fitness for his job. Whether the time spent by the auxiliary firemen to whom you refer under "(b)" should be considered hours worked depends on facts not fully set forth in your letter. I believe that you will be able to answer that question, however, on the basis of the general principles which I shall discuss hereinafter.

(3) TRAINING IN FLOOD CONTROL: Measures will be taken to instruct employees in the protection and removal of articles, supplies and equipment in the event of a flood of the Ohio River. It is intended that this course will be given by the Passive Defense Coordinator, the above-mentioned employee of our Company, at the City Volunteer Firehouse, and that it will consist of only one or two evening sessions. Those who have volunteered as air raid wardens, auxiliary police and auxiliary firemen will particularly be requested to volunteer attendance.

It seems clear, on the basis of principles discussed above, that attendance at a training program of this sort should be considered working time, inasmuch as the purpose of the program is considered the protection of the employer's property. The program is directly related to the hazards of the job.

It is my opinion that a court might draw a very careful distinction between training air raid wardens or general first-aid training on the one hand and training employees for flood control work on the other. The air raid and general first-aid training has as its primary objective the safeguarding of life. The flood control work you describe, on the other hand, has as its primary objective, the safeguarding of the employer's property. Accordingly, work in connection with flood control may well be considered part of the employee's job.

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June 10, 1942

SOL:FUR:HH

Mr. Charles Wesley Dunn
General Counsel
American Pharmeceutical Manufacturers'
Association
608 Fifth Avenue
New York, New York

Dear Mr. Dunn:

I regret the delay in replying to your letter of May 8, 1942 in which you inquire whether the $200.00 salary requirement must be met if a pharmacist employed in a manufacturing pharmaceutical house is to be considered exempt as an employee engaged in a professional capacity within the meaning of section 13(a)(1) of the Fair Labor Standards Act and section 541.3 of the regulations issued thereunder. You are aware that the salary requirement has been thought by the Division to be inapplicable in the case of licensed pharmacists engaged in the practice of their profession, but you state that the pharmacists in question, although they have a valid academic certificate, do not have a license such as is normally required of a pharmacist who dispenses drugs in a drug store.

You will note from a study of section 541.3 of the regulations that an employee, to qualify for exemption as a professional, must, in addition to meeting several other requirements, receive a salary of $200.00 per month unless he is "the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and * * * is actually engaged in the practice thereof." If the employee falls within the scope of this last proviso, he will be exempt as a professional, regardless of his salary, if he meets the other requirements of the regulations.

The reason for not including a salary test in the case of employees engaged in the practice of law or medicine is discussed at page 42 of the report and recommendations of the presiding officer, a copy of which was sent you with my letter of May 2. You will note that the presiding officer said:

> This special consideration is, of course, applicable only to those who have actually acquired the special status referred to--in other words, to those who have received a State license or certificate to practice law or medicine. The action of the appropriate State authority in

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issuing the certificate or license may be taken as an adequate substitute for the salary test in the case of the professions of law and medicine.

It seems apparent from the language just quoted that the exemption would not extend to a graduate of a medical school or a law school who had not received a certificate entitling him to practice medicine or law even though he was engaged in work which, if performed by a licensed doctor or lawyer, could be said to be the practice of medicine or law. Your statement, therefore, that the employees in question are the holders of valid academic certificates would not seem to be conclusive of the point at issue. It does not appear that the State requires that they hold such certificates before engaging in the work described.

It is my opinion that the possession of a license is essential under the regulations to permit the waiving of the salary requirement of section 541.3. The failure of the employees in question to possess a license would therefore result in their being denied exemption as professionals if they receive less than $200.00 per month. It is also not entirely clear that the employees are engaged in the practice of a branch of medicine. Although the Division has taken the position that pharmacists making up prescriptions to order are so engaged, it does not necessarily follow that pharmacists in a manufacturing pharmaceutical house are similarly engaged. Those employees who receive $200.00 a month or more on a salary or fee basis will be considered exempt as professionals if they meet the requirements of section 541.3(A).

Very truly yours,

L. Metcalfe Walling
Administrator

334323

I might add that when employees are "particularly requested to volunteer attendance" a good deal of doubt may be cast on the actual voluntary nature of their presence.

(4). TRAINING OF AUXILIARY FIREMEN AND POLICEMEN: A theoretical course of instructions will be given off the premises of the Company, outside working hours, to those volunteering to act as auxiliary firemen and policemen in the event of air raids. (Practical training and drills will be given on the premises during regular working hours, but it is intended to consider the time consumed in practical training as part of working hours for the purpose of wage payments.)

It would seem that voluntary attendance at a theoretical course of instruction need not be considered hours worked under the air-raid protection training program section of release R-1794, a copy of which was furnished you by the Navy Department.

You will appreciate that the most difficult problem in all these matters is the determination of whether the special training is part of the employee's work for his employer, or whether it is something undertaken by the employee for his own purposes. Thus, whether training in fire brigade work should be considered directly related to an employee's regular work depends on facts which may well vary in each particular case. For example, employees in a department in which, by the very nature of the work, fires are apt to break out, would seem to be engaged in activities related to their regular work when engaged in fire brigade instructions. The situation is comparable to the flood control work discussed above. On the other hand, employees whose duties are of an entirely different type, as, for example, office employees or employees in other departments in which extraordinary measures for fire prevention and control are not normally considered essential, might not be deemed to be engaged in activities directly related to their jobs when attending fire brigade instruction classes, particularly if the instruction were of a general type and not limited to conditions apt to occur on the premises.

I trust that the foregoing discussion will be of assistance to you in answering the questions propounded in your letter of June 23. You will understand that I cannot make binding rulings in these situations but can merely express my best judgment of the principles which I think will guide the courts.

Very truly yours,

William B. Grogan
Acting Administrator

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C O P Y

SOL:SF:DH

165 West 46th Street
New York, New York

JUL 20 1942

Frank G. Kiesler, Esquire
Waseca
Minnesota

Dear Mr. Kiesler:

Your letter of May 23, 1942, inquires whether an egg hatchery which you describe is exempt from the provisions of the wage and hour law or the National Labor Relations Act.

From your letter it appears that this hatchery and two local grocery stores purchase eggs from farmers who deliver the eggs to them. The eggs are pooled and the hatchery employs up to four people in candling, sizing, grading and crating them. The hatchery also employs a boy to assemble knocked down crates at two cents per crate. The crated eggs are carried by the truck of one grocer to a refrigerator car and shipped to a commission merchant in Chicago, who sends checks in payment to the grocers and the hatchery.

The Fair Labor Standards Act applies to employees engaged in interstate commerce or in the production of goods for interstate commerce, including those engaged in handling or working on the goods and those engaged in processes or occupations necessary to the production of goods for interstate commerce. Thus, all employees of the hatchery whose occupations are necessary to the candling, grading, crating and otherwise handling of eggs which the employer has reason to believe will be shipped out of the State are subject to the Act, and they must be paid not less then 30 cents an hour and time and one-half their regular rate of pay for all hours worked in excess of 40 during any workweek, unless otherwise specifically exempted.

Section 13(a)(10) of the Act exempts from both the minimum wage and overtime requirements any individual employed within the "area of production" and engaged in handling, packing or preparing in their raw or natural state of agricultural commodities for market. The definition of "area of production", as used in section 13(a)(10), is contained in section 536.2(a) of the enclosed Regulations, Part 536. If the requirements of this definition are met, employees exclusively engaged in candling, sizing, grading, crating and otherwise handling of eggs come within the scope of the exemption. On the other hand, employees who assemble crates or who engage in activities other than those enumerated in section 13(a)(10) are not exempt.

I suggest that any question you may have concerning the applicability of the National Labor Relations Act be directed to the National Labor Relations Board, Washington, D. C.

Very truly yours,

William B. Grogan
Acting Administrator

Enclosure

(11244)

C O P Y

25 BD 202.23

JUL 21 1942

SOL:FUR:HH

W. L. Irons, Esquire
Shell Oil Company
50 West 50th Street
New York, New York

Dear Mr. Irons:

This will reply to your letter of July 14, 1942 in which you inquire as to the necessity of considering time spent by certain employees in being transported to and from work as hours worked for purpose of the Fair Labor Standards Act.

The employees to whom you refer are oil well drillers, pumpers, roustabouts and other field employees who at the present time customarily drive their own cars to and from work. You contemplate in the near future that the tire and tube shortage will seriously curtail the ability of these employees to drive their own cars to and from work. It is your tentative plan, if and when conditions reach such a state, to designate convenient meeting places where employees will be picked up at specified times by company-owned equipment and transported to and from work in groups. You state that no employee will be obligated to ride in the company conveyance unless he wishes and any employee may continue using his own car or making any other arrangements agreeable to him. You inquire whether time spent in travel in a company-furnished conveyance by those employees who take advantage of it should be considered working time under the Act.

In my opinion, employees who are transported to and from work in a company-furnished conveyance need not be compensated for the time so spent if other reasonable means of transportation are available. The condition would be altered if an employee were required to report at a certain place before proceeding to the place of work. However, on the basis of the facts set forth in your letter it would seem that the time spent in travel in a company-furnished conveyance by the employees to whom you refer need not be considered working time.

Very truly yours,

William B. Grogan
Acting Administrator

(11244)

C O P Y

July 30, 1942

SOL:EB:MAB

Charles F. Hanson, Esquire
Law Department
Chicago, Milwaukee, St. Paul and
Pacific Railroad Company
Seattle, Washington

Dear Mr. Hanson:

In your letter of July 11, 1942, you inquire about the applicability of the child labor provisions of the Fair Labor Standards Act to minors employed by a railroad company. You state that you are particularly interested in obtaining information as to the applicability of these provisions in cases where there is some overlapping or conflict between the Fair Labor Standards Act and State statutes regulating child labor. You point out, for instance, that the minimum age for the employment of children in the State of Washington is 18 years but that the State authorities may grant permits allowing the employment of minors between the ages of 12 and 18 under certain circumstances. You express the view that the railroad company might be guilty of a violation of the Fair Labor Standards Act if it should employ any minor under 16 years even though he had obtained a permit from the state department.

In answering your question, we shall assume that the child labor provisions of the Fair Labor Standards Act as well as the Washington State Law are applicable to the railroad in question.

Section 18 of the Fair Labor Standards Act, in its relevant portion, provides as follows:

> "* * * no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act."

In other words, if the standards otherwise applicable are higher than those established by the Fair Labor Standards Act, the former will apply; if the standards established by the Fair Labor Standards Act are higher, then the standards of that Act will apply. Applying this general principle to the particular problem presented by you, we reach the following conclusions:

A Washington statute establishing a general minimum age of 18 years for the employment of minors sets a higher standard than that established by the Fair Labor Standards Act. The latter act provides for a general minimum age of 16 years; a minimum age of 18 years applies only in occupations which have been declared particularly hazardous for the employment of minors between 16 and 18 by order of the Chief of the Children's Bureau. For your information we are enclosing Folder No. 27, issued by the Children's Bureau, which discusses the hazardous-occupations orders which have been issued thus far.

(11244)

In our opinion, the railroad could not generally, under the Washington law, employ children under 18 years even though their employment would be permissible under the Fair Labor Standards Act. You point out, however, that the State Board in the State of Washington has the power to permit the employment of minors between the ages of 12 and 18 under certain conditions. As far as children between the ages of 16 and 18 are concerned, their employment under a State permit would not be in conflict with the Fair Labor Standards Act unless these minors are subject to one of the hazardous-occupations orders issued by the Chief of the Children's Bureau under that act. In the latter case, their employment would constitute "oppressive child labor" under the Fair Labor Standards Act in spite of the fact that their employment was authorized by the State Board.

Section 3(l) of the Fair Labor Standards Act authorizes the Chief of the Children's Bureau to permit the employment of minors between 14 and 16 in occupations other than manufacturing and mining if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being. The conditions under which children between 14 and 16 may be employed are set forth in Child Labor Regulations No. 3, a copy of which is enclosed. In our opinion the railroad may employ children between 14 and 16 under a State permit as long as their employment would also be permitted under Child Labor Regulations No. 3. On the other hand, we believe that children between 14 and 16 whose employment would not be permitted under the Child Labor Regulations No. 3, could not be lawfully employed by the company under the Fair Labor Standards Act even though the State had authorized their employment.

Children between 12 and 14 may not be employed at all under the provisions of the Fair Labor Standards Act. Under the Washington statute, as you point out, their employment may be authorized by the State under certain conditions. It is clear that, with respect to the employment of these children, the standard set by the Fair Labor Standards Act is higher than that established by the State Law; hence, such children may not be lawfully employed under the Fair Labor Standards Act even though they may have a permit from the State.

I trust that this information will sufficiently answer your inquiry.

Sincerely yours,

BEATRICE McCONNELL
Director, Industrial Division

Enclosures: 2