UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

January 7, 1943

Legal Field Letter

No. 83

Attached Opinions

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

MEMORANDA

Date	From	To	Subject
8-14-42	Charles H. Livengood, Jr. (RB)	Dr. James G. Johnson	Georgia Air Service Bennettsville, South Carolina File No. 39-1039 Pilot training program -- what employees covered 21 AC 102.1211
8-17-42	William B. Grogan (FUR)	Joseph C. Noah	Arkansas Fuel Oil Company Deductions -- employer procuring claims of third persons against employees 27 FB 201.21
8-20-42	Charles H. Livengood, Jr. (JHS)	Vernon C. Stoneman	E. F. Hodgson Company Boston, Massachusetts File No. 20-4314 Interstate contracts of sale -- prefabricated houses 21 AC 101 21 AC 408.1
8-20-42	Charles H. Livengood, Jr. (RB)	E. R. Strempel	The Texas Company Tulsa, Oklahoma File No. 35-989 Employer-Employee relationship -- removing dirt from oil wells 21 AB 305
8-21-42	Charles H. Livengood, Jr. (RB)	Dorothy M. Williams	Request for opinion on application of the FLSA to employees of the Federal Reserve System 21 AB 102.2421

MEMORANDA

Date	From	To	Subject
8-26-42	Charles H. Livengood, Jr. (FUR)	Arthur E. Reyman	The Helix Company, Inc. Section 13(a)(2) -- Purchases at retail price for resale 21 BU 402.23421
8-27-42	L. Metcalfe Walling (FUR)	Leo A. Gleason	Lumber and pulp operations - payment of employees at end of season 27 GA
8-31-42	Charles H. Livengood, Jr. (RB)	Llewellyn B. Duke	Mr. I. C. Little Dallas, Texas File No. 42-3806 General coverage of FLSA - construction of loop pipeline 21 AC 409.396
8-31-42	Charles H. Livengood, Jr. (FUR)	Frank J. Delany	Training Within Industry Agency - effect of payment for learning time Hours worked -- training periods and lunch periods 26 CD 302.1
9-16-42	Charles H. Livengood, Jr. (JHS)	George A. Downing	Caldwell and Company Spartanburg, South Carolina File No. 39-50,868 Cotton linters -- application of sections 13(a)(10) and 7(b)(3) 21 BD 302.296 21 BD 301.95 23 CE 205.4
9-17-42	Charles H. Livengood, Jr. (FUR)	Dorothy M. Williams	Yosemite Sugar Pine Lumber Co. Merced Falls, California File No. 4-139 Deductions -- payments by tokens 27 CB 101
9-21-42	Charles H. Livengood, Jr. (FUR)	Arthur H. Reyman	General Foods Sales Co., Inc. New York, New York File No. 31-55319 Deductions - interest on loans 27 CC 303.4

MEMORANDA

Date	From	To	Subject
9-21-42	Charles H. Livengood, Jr. (TJK)	Aaron A. Caghan	Opinion Requested -- Release R-1789 Wage orders - applicability on industry basis Regs. 551 et. seq.
9-26-42	Charles H. Livengood, Jr. (TJK)	Llewellyn B. Duke	Oklahoma Auto Company Oklahoma City, Oklahoma File No. 35-725 Section 13(b)(1) - towing cars from factories to points in other States 23 CB 203.1
10-12-42	Milton C. Denbo (EB)	Elizabeth B. Coleman	Reuben H. Donnelley Corp. Child labor - delivery of telephone directories
10-14-42	Donald M. Murtha (RB)	Beverly R. Worrell	Request for an Opinion Niles, Barton, Morrow & Yost Application of FLSA to research work essential to national defense 21 AC 202.10
10-16-42	Irving J. Levy (HK)	Edith M. Boretz	Opinion Requested Re Army Contract Repair of cars and trucks Walsh-Healey, Davis-Baco and FLSA
10-17-42	Donald M. Murtha (JHS)	Frank J. Delany	Grain & Feed Journals Consolidated Chicago, Illinois Shucking and shelling corn sections 13(a)(10) & 7(c 21 BD 301.923 23 CF 202.325
10-19-42	Donald M. Murtha (RB)	Russell L. Kingston	Ellerbe and Company Great Falls, Montana Construction of additional runways at an existing air field 21 AC 409.34
10-21-42	William B. Grogan (RB)	Gus C. Street, Jr.	Mr. Bart McClellon Glenfield, New York See 15(a)(3) -application where suit filed by ex-employee 214 A

MEMORANDA

Date	From	To	Subject
10-26-42	Donald M. Murtha (JHS)	Arthur E. Reyman	Sodus Cold Storage Company, Inc. Sodus, New York Storage of frozen cherries - Sections 13(a)(10) and 7(b)(3) 23 BD 302.296
10-29-42	Donald M. Murtha (FUR)	Ernest N. Votaw	Robert Morris Building Philadelphia, Pennsylvania File No. 37-57032 Executive exemption - office building as establishment 21 BF 303.420 21 AC 409.4213
10-31-42	Donald M. Murtha (RB)	Russell L. Kingston	Cardox Corporation Van Meter, Pennsylvania File No. 37-3898 Filling shells for use in mines necessary to production 21 AC 205.23
10-31-42	Donald M. Murtha (RB)	Ernest N. Votaw	Pine Brook Iron Works Analomink, Pennsylvania Construction of bridge and approacher covered under FLSA 21 AC 409.31
10-31-42	Donald M. Murtha (JHS)	Merle D. Vincent	R. E. Schanzer, Inc. Linwood, Michigan File No. 21-50705 Chicory as a fresh vegetable 23 CF 202.24 23 CE 205.631
11-4-42	Donald M. Murtha (TJK)	Arthur E. Reyman	Service Transportation Company Secaucus, New Jersey Section 13(b)(1) - inspecting, changing and repairing tires 23 CB 204.3

LETTERS

Date	To	Subject
8-5-42	Mr. E. A. Donnan The Federal Glass Company Columbus, Ohio (RB)	Deductions - Requisites for legal deductions through credit cards 27 CC 303.8
9-14-42	Mr. J. P. Hollabaugh The C. H. Musselman Company Biglerville, Pennsylvania (JHS)	Drying of pomace - Application of section 7(c) and 7(b)(3) 23 CF 202.2296
10-6-42	Mr. E. B. Jones Schiller-Cable Piano Mfg. Co. Oregon, Illinois (RB)	Application of Fair Labor Standards Act to employees of plant not in operation 21 AC 409.81
10-8-42	Mr. Charles Speddon Phillips Packing Company, Inc. Cambridge, Maryland (JHS)	Sections 7(c) and 7(b)(3) - plant canning exempt and nonexempt items 23 CE 205.630
10-12-42	Mr. William T. Pomeroy The Sterling China Company East Liverpool, Ohio	Walsh-Healey Act - manufacture of "frit"

COPY

2700303.8

Public Contracts Division
165 West 46th Street
New York, New York
SOL:RB:FB

August 5, 1942

Mr. E. A. Donnan
President
The Federal Glass Company
Columbus, Ohio

Dear Mr. Donnan:

This will acknowledge receipt of your letter of May 15, 1942, stating you make pay roll deductions for Social Security taxes, group life and health insurance premiums, Columbus Community fund, war bonds, union dues, and employee credit cards for use in the factory lunch room or canteen.

Neither the Walsh-Healey Public Contracts Act nor the Fair Labor Standards Act imposes special limitations on deductions for social security. Deductions for group life and health insurance are permissible under both acts when made upon the voluntary authorization of the employee which authorization may be revoked at any time and the monies deducted are paid to an independent unaffiliated third person with the employer deriving no profit or benefit directly or indirectly from the transaction and provided the employer is under no obligation to provide the insurance. Union dues are permissible deductions under both acts when paid to independent unaffiliated third persons pursuant to a collective bargaining agreement with bona fide representatives of the employees. In this connection see paragraph 17 of Interpretative Bulletin No. 3.

Deductions for Columbus Community fund and war bonds are permissible under both acts when made upon the voluntary authorization of the employee, which authority may be revoked at any time and the monies are paid to independent unaffiliated third persons with the employer deriving no benefit or profit directly or indirectly from the transaction.

You also inquire whether deductions for credit cards in the amount of $1.00 for use at the plant lunch room are permissible. Such credit cards are not "facilities" as that term is used in section 3(m) of the Act which provides that the "wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by such employer to his employees. Under this provision, the employer may deduct for meals actually furnished to the employees provided they are furnished at reasonable cost to the employer as such cost is defined in section 531.1 of the enclosed Regulations, Part 531. The use of credit cards is only permissible for the purpose of conveniently and accurately measuring the value of the meals furnished to the employees during the pay period. To the extent that the credit card is not used within the pay period, it is like scrip and as a technical matter not within section 3(m). (Cf. paragraph 4 of Interpretative Bulletin No. 3)

(11837)

However, as a practical matter, I shall not consider deductions for the credit card as being in violation of the Act if the following conditions are met:

(1) You discharge your obligation under sections 6 and 7 of the Act within a month after the credit card is purchased;

(2) The price of the meal furnished to the employee is not in excess of the reasonable cost of such meal to the company;

(3) The employee has the right instead of using the card to purchase meals, to redeem it at any time, in full or in part, at its par value for cash without any discount; and

(4) The loss of the credit card is not charged to the employee.

Your obligation to each employee under the Act will not be considered discharged until such time as the employee receives the full value of the card (a) in the form of meals furnished him by you at cost to you, or (b) in the form of cash for redemption of the card without discount, or (c) in the form partly of meals furnished at cost to you and the balance in cash without discount.

The propriety of the deduction for credit cards under the Walsh-Healey Act will be judged by the same principles.

Very truly yours,

William B. Grogan
Acting Administrator

Enclosures (2)

cc: William R. McComb
Assistant Administrator
Division of Public Contracts
Room 1114, Dept. of Labor
Washington, D. C.

(11837)

COPY

21 AC 102:1211

Dr. James G. Johnson
Assistant to the Administrator
Wage and Hour Division

SOL:RB:FB

August 14, 1942

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

Georgia Air Service
Bennettsville, South Carolina
File No. 39-1039

Reference is made to your memorandum of June 23, 1942, submitting the files on the subject company and requesting an opinion as to the status of its employees under the Act.

It appears from the file that the subject company is engaged in training airplane pilots for the United States Army Air Corps under contract with the United States War Department. In this business it operates an airfield, classroom building, barracks, hangars, messhall, and other real and personal property leased from the Defense Plant Corporation, a subsidiary of the R.F.C., or owned by it. It employs pilots and ground school instructors to instruct the student pilots, mechanics and helpers to service the training planes, dispatchers to regulate their flights, clerks and stenographers, cooks, waiters and messhall attendants to feed the students and instructors, and a maintenance crew, including guards and janitors, to take care of the grounds and buildings. It also appears that the airport is located near the State line and that the pilots and students cross that State line daily in their training flights. The files further indicate that the maintenance crew picks up, crates and ships to factories outside the State parts from wrecked planes, and picks up at the railroad depot or express office airplane parts, food, and other supplies received directly from outside the State. The contract between the subject company and the War Department obligates it to pay time and one-half to mechanics and laborers under the eight-hour act, but the inspector indicates that this obligation was not met. Regional Director McLeod, in his memorandum of June 10, 1942 to Administrator Walling, also states that in a similar case recently handled by his office the air school's contract with the War Department specifically stated that the Act does not apply to the school's employees since they were not engaged in interstate commerce or in the production of goods for commerce.

It is clear from these facts that the status under the Act of the various categories of employees employed by the subject company depends upon the nature of the work performed by them and not upon the character of the subject's business. Although a school may not, generally speaking, be engaged in interstate commerce or in the production of goods for commerce, certain of its employees may be engaged in such commerce or production of goods for commerce. Thus, in the subject case it is clear that the employees engaged in picking up, crating, and shipping wrecked airplane parts outside the State, or in ordering, picking up, or delivering parts and supplies received directly from outside the State, are engaged in interstate commerce within the coverage of the Act. Similarly, the pilot instructors who regularly operate planes in interstate flights, and the dispatchers, mechanics and helpers who service such planes are

(11837)

also, in our opinion, engaged in interstate commerce under the Act. On the other hand, the employees who operate or service training planes used wholly in intrastate flights would not be covered by the Act.

The cooks, waiters and messhall attendants engaged in feeding the students and school staff would likewise seem to be engaged in purely local activities and, accordingly, not covered by the Act, as are also the ground school instructors.

The files indicate that the subject company is paid by the War Department on the basis of a stipulated sum per hour for each hour any trainee is kept in the air. If this calls for the preparation and filing of flight reports, financial statements, etc., with the War Department in Washington or in another State, the clerks and stenographers engaged in the preparation of those reports would be covered by the Act. Similarly, the clerks and stenographers engaged in preparing orders for supplies purchased outside the State would also be covered by the Act.

The status of the maintenance men, guards and janitors who take care of the grounds and buildings would depend on the locale of their work. Those who take care of the office building in which the clerical staff prepares the reports, statements or orders for other States would be covered by the Act, as would also those who take care of the hangars and field used by the planes engaged in interstate flights. On the other hand, the maintenance employees engaged in caring for the barracks, messhalls and school building would not be covered by the Act.

It should also be noted with respect to all the foregoing that if an employee spends any part of a workweek in activities which are covered by the Act, his work for the entire week falls within the Act's coverage. On the other hand, additional facts may reveal that some of the covered employees may be exempt from the Act's minimum wage and/or overtime provisions as executive and administrative employees, or as motor carrier employees subject to the Interstate Commerce Commission under section 13(b)(1).

It is suggest that Mr. Dantzler or Mr. Dorsett, supervising inspector and inspector in the South Carolina office, explain the subjects's status to Mr. Dudley, the attorney to whom you refer, since they have been in contact with him and have promised to do so, and since any specific coverage questions he may have could best be answered by them in the light of the foregoing principles and all the facts in his particular case. Senator Maybank could then be advised to that effect.

The files are returned herewith.

Attachments (2)
(Insp. and cor. files)

(11837)

COPY

Joseph C. Noah
Acting Regional Director
Birmingham, Alabama

27 FB 201.21

August 17, 1942

William B. Grogan
Acting Administrator

SCL:FUR:SMT

Arkansas Fuel Oil Company

This will reply to your memorandum of July 27, requesting that we expedite our reply to the subject's letter of June 29, 1942, addressed to the Administrator. You state that the subject supplied you with a copy of this letter.

It is my opinion, based solely on the facts stated in the letter, that under prargraph 17 of Interpretative Bulletin No. 3 the deductions in question insofar as they are authorized by the employee may be proper. As I understand it the employees voluntarily purchase gasoline from a dealer in refined petroleum products (filling station operator) and the employer later procures the right of the filling station in lieu of an obligation owed him by the station. In other words A (employee) owed X to B (filling station) and B owed X to C (employer), so by agreement between all three parties A paid C, or more accurately, C reduced his own debt (wages) to A by the amount X.

Although the employer derived a profit out of the transaction with the filling station, he apparently derived none from the employee's transaction with the station. Under paragraph 17 of Interpretative Bulletin No. 3, the employee could authorize the employer to pay the station. Therefore, since the employer's entrance in the role of creditor is subsequent to the employee's entering into the debt, the employee should be able to authorize the payment directly. To put it differently, the employee could authorize the employer to pay the gas station which would repay the employer. The employee's position is, therefore, unchanged by his authorizing the deduction even though the money does not actually go from employer to station and back.

Unless you are in serious disagreement with the opinion expressed above or believe that I have misunderstood the relevant facts, will you kindly advise the subject in accordance with this opinion.

(11837)

COPY

21 AC 101
21 AC 408.1

Wage-Hour Section
165 West 46th Street
New York, New York

Vernon C. Stoneman
Regional Attorney
Boston, Massachusetts

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

SOL:JHS:MF
August 20, 1942

E. F. Hodgson Company
Boston, Massachusetts
File No. 20-4314
BL:MJF

This will reply to your memorandum of July 2 supplying further information in regard to the subject company as requested in our memorandum of June 10.

This company manufactures and sells prefabricated houses which are shipped by freight directly to customers all over the country. The houses are built in completed sections, sides, roofs and floors, at the company's Dover, Massachusetts plant. In some cases the company sends a supervisor to erect the houses which it sells, and whether or not such an employee is provided is at the option of the purchaser of the house. If a customer elects to have the services of a Hodgson supervisor, he is charged at the rate of $1.35 an hour for time which this man spends on the job as well as for his traveling time, unless he travels at night and has a sleeper. Of the $1.35 paid by the customer, you state that the supervisor receives between 68 and 75 cents an hour.

All the houses sold are shipped directly to the sites on which they are to be erected. Most orders for the houses come through the mail. The firm exhibits houses on premises in Boston and at its factory in Dover, Massachusetts, and also has exhibits at fairs.

Although supervision by a Hodgson representative is not necessary for the erection of houses, it is recommended by the company, especially for the larger houses, which constitute 50 percent of the business. When the customer wishes the services of a representative of the company, the cost for the supervisor is incorporated in the contract of sale. You state that subject sends representatives to supervise erection of houses in "40 percent of the dollar value of sales."

Subject has never supplied labor other than the supervisor to erect the houses. The customer hires whatever other help may be necessary. The company representative is so familiar with the erection of these houses that he knows exactly how to proceed with the work, and it is more economical for the customer to hire him than it would be to hire any other labor. The work of the Hodgson representative

is not wholly supervisory, however, since he assists with much of the erection.

It is not necessary to employ skilled labor in the erection of the houses, but you state that the nature of the work is similar to that done by carpenters. All parts have been cut and painted or varnished before they leave the factory. The laborers, together with the supervisor, first place the floor, then assemble side walls and later the roof.

On the basis of all the facts presented, it is our opinion that the supervisors are entitled to the benefits of the Act during all weeks in which they are engaged in work pursuant to a contract for the erection of a house outside the State of Massachusetts. Your attention is directed to the case of York Mfg. Co. v. Colley, 247 U.S. 21 (1918). It should be compared with Browning v. City of Waycross, 233 U.S. 16 (1914). You will note that both opinions were written by Chief Justice White.

In the Waycross case plaintiff in error was convicted in the lower court of violating a city ordinance imposing a general occupation tax of $25.00 on "lightning rod agents or dealers engaged in putting up or erecting lightning rods" within the corporate limits of the city of Waycross. The rods had been shipped in from St. Louis, and the price included erection of the rods. The court said:

> The sole question, therefore, here is whether carrying on the business of erecting lightning rods in the state under the conditions established, was interstate commerce beyond the power of the state to regulate or directly burden.

The court determined that the privilege of erecting the lightning rods was subject to taxation by the subdivision of a State, and it therefore affirmed the conviction.

In the York case there was a contract for erection in Texas by a Pennsylvania corporation of a complicated ice-making machine. Work was under the supervision of an engineer supplied by plaintiffs in error assisted by mechanics furnished by defendants in error. The State court held that since plaintiff corporation had engaged in intrastate business without securing the permit required for foreign corporations by the Texas statutes, it was not authorized under the Texas statutes to maintain suit. And the suit was accordingly dismissed. The judgment of dismissal was reversed by the United State Supreme Court which held that the services of an engineer for the work in question, including testing the machinery, was "relevant and appropriate to the interstate sale of the machinery."

In the York case, Chief Justice White distinguishes the Waycross case. Although he did not put the distinction on this ground, it is well to note that the Waycross case involves a problem of taxation, while the

York case involves whether or not a corporation was engaged in intrastate commerce so as to subject it to State statutes qualifying the right of a corporation to do business in the State.

It seems clear to us that the latter question is more apposite to the present issue. States may sometimes constitutionally levy taxes on interstate transactions, provided such taxes are not discriminatory. And the Supreme Court has repeatedly held that the initiation or termination of interstate commerce for purposes of Federal control is not limited by the propriety of State regulation. See Page 3 of the introductory analysis to Litigation Manual Memorandum No. 244.

The following cases may also prove helpful to you:

85 F.(2d) 886
64 Fed. 406
178 Fed. 721
40 F.(2d) 189
77 F.(2d) 570
206 S.W. 188
73 So. 403

For a dissenting opinion containing an excellent outline of the reasoning involved see also 20 F.(2d) 593.

It seems clear that in considering the manufacture and erection of a single prefabricated house, the manufacture is far more important than the erection. You point out that at its Dover plant the company cuts and paints or varnishes all parts. Compared, therefore, to the work at the factory, the erection of the house would seem a small part of the work.

It is assumed that subject is a corporation. In the event that it contests the application of the Act to its employees engaged in supervising the erection of houses, you might inquire whether or not in each State where houses are erected it complies with the local statutes conditioning the right of a corporation to engage in intrastate business.

It seems clear that the employees in question are not exempt under section 541.1 of Regulations, Part 541. It will be noted from subsection (E) of this section that to be exempt as executives the employees are required to be paid on a salary basis. Your letter indicates that the employees here involved are paid at hourly rates.

COPY

Mr. E. R. Strempel
Senior Liaison Officer
Wage and Hour Division

21 AB 305

August 20, 1942

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

SOL:RB:FB

The Texas Company
Tulsa, Oklahoma
File No. 35-989

In your memorandum of August 6, 1942, on the subject compayn, you asked whether men engaged by it to remove dirt from its oil wells and to do general roustabouting are its employees or independent contractors where they furnish their own wagon, tools, and team of horses in return for an hourly rate for all hours worked.

You indicate that in the subject case the complainant hired extra workers to assist him and supplied two extra teams for which the subject hired extra drivers. The subject company did not pay social security taxes on the complainant, claiming that he was an independent contractor for purposes of the Social Security Act as well as under the Fair Labor Standards Act, but did pay such taxes on the employees whom he hired. The complainant states that there was no understanding or agreement that he was to be considered an independent contractor, and that he took orders each day from employees of the subject company as to where he was to work and what was to be done, being supervised at all times by company employees. He was paid $1.00 an hour for his services, receiving a check from the subject company covering the amount due him plus the wages of the two assistants hired by him less social security deductions on their wages.

You seem to doubt that the complainant was not considered an independent contractor despite his claim to that effect, in view of the fact that he agreed to furnish equipment in return for an over-all price for that equipment and his services. You also note that the Social Security Board used to consider such contractors and their assistants as employees of the company, but that two recent court decisions in the cases of Texas Co. v. Higgins, 118 F.(2d) 636 (C.C.A. 2d, 1941) and Indian Refining Co. v. Dallman, 119 F.(2d) 417 (C.C.A. 7th, 1941) have cast doubt on their position.

The status of the subject's team owners and drivers under the Act is, as you recognize, not wholly free from doubt. Nevertheless, we are of the opinion that the facts in this case indicate the existence of an employer-employee or principal-agent relationship, rather than an independent-contractor relationship, between the subject company and the teamsters whom it hires to remove dirt from its wells and do general roustabouting. The fact that the subject company pays social security taxes on the assistants hired by the alleged contractor reveals that it considered him an employee or at least an agent for social security tax purposes since it would not have paid or been required to pay any such taxes on the wages of the employees of a true

(11837)

independent contractor. Only if the complainant were regarded as its agent or employee would the subject be responsible for the social security taxes on his assistants. While the relationships recognized by the parties or by the Social Security Board for social security tax purposes are not necessarily conclusive under our Act, they do in this case cast grave doubt on the subject's claim that the complainant is an independent contractor.

Moreover, other facts indicate that the work of the complainant was constantly supervised and controlled by the subject company as to his manner and method of performance. This fact, if true, would be decisive in establishing the existence of an employer-employee or principal-agent relationship here. The fact that the complainant furnished his own team and tools would not rebut such a conclusion since employees, as well as independent contractors, often furnish their own tools, particularly where they are of a simple nature. The payment of an hourly rate for services and equipment is perhaps more consistent with the existence of an employer-employee relationship than with an independent contractor relationship since most independent contractors are paid a flat price for the whole job rather than a rate dependent upon the time needed to perform the work. Furthermore, it is our understanding that the removal of dirt from oil wells and the performance of general roustabouting are a functional and normal part of an oil producer's operations, usually performed by its own employees, and are not normally an independent trade or practice in the industry. All these facts, but particularly the subject's control over complainant's work, support our opinion that the complainant was an employee or agent of the subject company, and not an independent contractor, although it is apparent that the subject company attempted to relieve itself of liability under the Act for such work by some kind of independent contractor device.

The two cases to which you refer are not in point since they dealt with the status of the operators of an oil company's bulk distributing plants who carried on complicated and important business activities, invested a great deal of their own capital, and, the courts found, were not subject to company control over their manner of work.

(11837)

AIRMAIL COPY 21AB102.2421

Dorothy M. Williams
Regional Attorney
San Francisco, California

August 21, 1942

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

SOL:RB:RBW

Request for Opinion on Application of the
Act to Employees of the Federal Reserve System
LE:EMR:DB

In your memorandum of July 24, 1942, you asked whether an employee of the Federal Reserve Bank of San Francisco, Los Angeles branch, is an employee of the United States within the meaning of section 3(d) of the Act. You also asked whether the work of the subject employee is covered by the Act where he interviews, instructs and informs Japanese and other aliens with respect to their evacuation from California, and checks on their property.

It is our understanding that Federal Reserve Branch Banks are merely branches of the Federal Reserve Bank in the particular Federal Reserve District. They are owned and controlled by the district Federal Reserve Bank, which, in turn, is owned by the private member banks in the district, since these member banks own practically all of the stock of the Federal Reserve Bank. The majority of directors of the Federal Reserve Branch Bank are appointed by the Federal Reserve Bank for the district, and six of the nine directors of the District Reserve Bank are nominated and elected by the member banks. The directors of the District Reserve Bank and its branches, through their subordinates, hire the employees of the district and branch banks, fix their salaries, control their hours and conditions of employment, and discharge them. The employees of the District Reserve Bank and its branches are not appointed under Civil Service laws or regulations, and are paid solely out of the funds of the district Reserve Bank or branches. (See U. S. C., tit. 12, secs. 248 to 592.)

On the basis of these facts, it is our opinion that, although the financial operations of the Federal Reserve Banks and their branches may be strictly controlled by the United States Government through the Board of Governors of the Federal Reserve System, the Federal Reserve Banks and their branches are not synonomous with the United States. Therefore, their employees cannot be considered employees of the United States within the meaning of section 3(d) of the Act.

We cannot, on the basis of the few facts submitted in your memorandum, definitely determine the status of the subject employee. However, the mere fact that the Federal Reserve Branch Banks are acting only as property custodians for the evacuation of Japanese does not, in our opinion, prove that the subject employee is outside the coverage of the Act. If his work aids or facilitates the transportation of the enemy aliens outside the State, or if it entails the preparation of reports or information for transmission outside the State, or requires him to regularly cross State lines in the performance of his duties, he may well be covered by the Act (see Yunker v. Abbye Employment Agency, 5 Wage-Hour Rept. 57 (Munic. Ct. N.Y.C., 1942).

(11837)

COPY

21BJ402.2341

Arthur E. Reyman
Regional Attorney
New York, New York

August 26, 1942

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

SOL:FUR:YS

The Helix Company, Inc.

This will reply to your memorandum of July 21, 1942 inquiring as to the applicability of the retail establishment exemption to the stores of the subject company. The applicability of the exemption turns upon the question of whether certain of the sales of the stores are to be regarded as sales for resale purposes.

These sales are made to so-called agents who in point of fact resell the goods. However, the agents purchase from the stores in the sense that other customers purchase, paying the same price and paying a retail sales tax. The stores regular retail prices are sufficiently lower than other retail prices, however, so the agents are able to resell the goods at a profit to themselves. In the event that the goods are not resold, the agents may return the goods, usually obtaining credit in merchandise although occasionally (and particularly recently) receiving cash refunds.

On the basis of the Detroit file, the inspector reported that the sales slips to the agents carried the statement: "Purchaser herein warrants that the goods purchased are for resale purposes only." The sales slips submitted from the New York store did not contain such a statement, but apparently a different color was used to differentiate the sales to the agents from sales to other customers.

Virtually any person may become an agent merely by indicating his desire to do so. Agents normally pay in cash for the goods when they receive them, but certain agents upon satisfying certain requirements may obtain credit rating and remit only when goods are sold by them. Agents may keep for personal use goods which they have not sold but this rarely occurs.

The company lays great stress in its argument upon the fact that the agents come to the store like any other retail customer and that any retail customer may become an agent. Company also emphasizes that agents pay the retail sales tax even when purchasing for resale purposes. The company therefore contends that the sales to agents are retail sales (company's further contention that its employees are not engaged in commerce is contrary to the position of the Division in view of the fact that by company's own estimates approximately 20% of its merchandise is received from without the State, and approximately 5% of its sales are made across State lines).

Notwithstanding the fact that a retail sales tax is paid,

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it is our opinion that sales for resale purposes cannot be considered retail sales. This is particularly true when the seller is fully aware of the purchaser's intention to resell. The so-called agents cannot be held to be employees of the stores. The stores exercise no control whatsoever over the agents' hours or place of work or over the amount the agents receive for their work. The agents are clearly independent contractors purchasing for resale purposes and sales to them may not be considered retail sales.

Accordingly, in any store in which the nonretail sales, including the sales to the agents, exceed 25% of the dollar volume of the establishment, the exemption provided by section 13(a)(2) is inapplicable.

You indicate that you have been considering the case for possible litigation. You are, of course, aware that authority to institute suit in any matter must be obtained from Washington.

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Mr. Leo A. Gleason
Regional Director
Boston, Massachusetts

August 27, 1942

SOL:FUR:MPJ

L. Metcalfe Walling
Administrator

Lumber and Pulp Operations
BI:PJB:KMD

This will reply to your memorandum of May 18, 1942, inquiring as to the proper period for the payment of compensation in the pulpwood and timber industries in Maine. There is no Maine statute compelling payment of wages at any specific intervals.

On October 31, 1941, Mr. Baird Snyder advised you that there is no regulation of the Division which prevents the pulp buyers and subcontractors then in question from paying their employees at the end of the season although records must be kept on a workweek basis. You now inquire as to the meaning of the term "season" as used in Mr. Snyder's memorandum.

I believe Mr. Snyder used the term "season" to refer to the regular logging season. The Act does not fix any particular pay period but merely requires that employees, when they are paid, receive at least the minimum wage and time and one-half their regular rate for overtime. The period of payment remains a matter of private contract. In my judgment the employer and employee may agree that payment is to be made at the end of the logging season or at any other interval consistent with the practice and custom of the industry in that locality.

Under these circumstances and in view of the fact that accurate records are being kept, I believe it perfectly proper for the employer and employee to agree to the payment of wages after the conclusion of the scaling which determines the amount of compensation to which the employee is entitled.

The question then arises as to how the compensation should be attributed to the past weeks in which it has been earned. In that connection, we believe the problem is analogous to the question of allocating bonus payments over the period in which they were earned.

This problem is discussed at the bottom of page 3 and the top of page 4 of release R-1548(a). You will note that the method suggested by you will be acceptable.

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August 31, 1942
SOL:RB:FB

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

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

I. C. Little
Dallas, Texas
File No. 42-3806
HG:MBR

In your memorandum of August 10, 1942, you asked whether the construction of a "loop" pipeline by the subject company should be considered "new construction" or "reconstruction, maintenance or repair," within the meaning of release G-162.

You state that the "loop" pipelines are built in connection with preexisting pipelines, extending parallel to and generally within a few feet of the existing lines for distances varying from 5 to 50 miles. Each end of the "loop" is tied into the existing pipeline, the "loop" being used to increase the pressure and flow of the gas or petroleum in the lines and also as an auxiliary or safety line. The pipelines are used to carry gas or petroleum in interstate commerce or to refineries for processing and shipment in interstate commerce.

On the basis of the foregoing facts, it is our opinion that the building of a "loop" pipeline should, under the principles expressed in part V, subdivision B, of release G-162, be considered the reconstruction of an existing pipeline rather than the original construction of a new instrumentality of interstate commerce. The "loop" is not completely physically segregated from the existing pipeline, being tied into it at both ends and running parallel to it ordinarily at a distance of only a few feet. The tying-in of the "loop" with the pre-existing line requires the reconstruction of the existing line at the points of contact. And the "loop" would constitute an insignificant addition to most existing pipelines even if it ran 40 to 50 miles since most pipelines extend hundreds of miles across the country. Moreover, the "loop" is intended to and does become a functional part of a single, integrated pipeline system since it is used to increase the pressure and flow of gas or petroleum in lines which function as a unit.

The building of the "loop" appears analogous to the construction of additional lanes on an existing highway, which we regarded as reconstruction rather than original construction. (Legal Field Letter No. 76, page 18) The "loop" and the preexisting line, in point of fact, still constitute just one pipeline system running between the same points, parallel and close to each other and connected at some points, used for an identical purpose and by the same "traffic" that would otherwise use the preexisting line. The new "loop" is in such close physical proximity to the existing pipeline and performs such a closely related function in facilitating the movement of petroleum and gas in interstate commerce that both lines must, in our opinion, be regarded together as forming an integrated, uniform, and single two-lane pipeline.

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Aug 31 1942
SOL:FUR:SMT

Frank J. Delany
Acting Regional Attorney
Chicago, Illinois

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

Training Within Industry Agency - Effect of payment for Learning Time

Midway Chemical Company - Effect of Payment for Lunch Hour

We regret the delay in replying to your memorandum of June 9 inquiring whether payment for time spent in training periods or for lunch periods should be considered part of the regular rate of pay, assuming that both the training period and the lunch period are not to be considered hours worked.

You indicate your opinion that payment for time spent in the training program need not be considered part of the regular rate, but that payment for the lunch period should be so considered. We agree with your conclusions. The following language, quoted from a memorandum addressed to us by the Solicitor, is applicable:

> "The problems are entirely practical in nature. They involve exceptions to the general rule that all straight time compensation should be included in computing regular rate of pay, and we believe they may be dealt with individually without fear of creating inconsistency of treatment in closely analogous situations. The situations covered by R-1625 and paragraph 70(8) of Interpretative Bulletin No. 4 do not permit and should not provoke widespread treatment for allegedly "analogous" problems. We may of course extend the exception principle where necessity demands, but it would seem that extension should not be necessary often because of other situations "on all fours."
>
> "As far as paid training periods or payments to apprentices during periods of supplemental instruction are concerned, the exception may be invoked, either because of similarity to absence from work due to vacation, holiday or illness, or because those situations independently considered are such as to warrant exceptions. In either event the exceptions will be granted under special circumstances for absences of limited duration not subject to indefinite recurrences week by week.
>
> "It is our view that payment for lunch periods is quite another matter. To begin with, payment for lunch periods is not similar to payment for vacation, holiday, or illness and we know of no reason why such payments warrant exclusion from regular rate of pay computations on their own account. Given holidays occur once a year, the occurrence of illness is totally unpredictable, and

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employees are not ordinarily given a vacation every week in the year. In other words, in such situations the possibility of evading the act by creating an increase in pay under the guise of payment for time not worked is negligible. On the other hand, lunch periods occur every day in every week; if one-half hour in length they will amount to two and one-half hours for a five day week, if one hour in length, five hours for the same number of work days. Moreover, if an employer magnanimously decided to pay for a lunch period there would seem to be no reason why he could not decide to pay the employee for his time spent traveling to and from work. Then he might create one or two half hour rest periods per day for which he would also pay. The result might be eight hours of work per day with pay for eleven or more.

"In short, we believe it is enough to say that lunch periods are not like vacations, holidays, or illness, and we see no compelling reasons for independently determining that payments for lunch periods should be excluded from regular rate of pay computations."

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23CF202.2296

165 West 46th Street
New York, New York
SOL:JHS:YS

September 14, 1942

Mr. J. P. Hollabaugh
Treasurer
The C. H. Musselman Company
Biglerville, Pennsylvania

Dear Mr. Hollsbaugh:

This will supplement the letter of August 3, 1942 from Mr. Charles H. Livengood, Jr. concerning the application of section 7(c) and section 7(b)(3) of the Fair Labor Standards Act to the pomace operations of your concern. Pursuant to the conference which you and Messrs. Knouse and Arthur had with Mr. Livengood and other representatives of the Division on July 17, careful consideration has been given to this question.

It is my understanding that after apples are received at your plant they are graded, and the best grade apples are sent to the canning department. Here they are peeled, cored and sliced, and the best slices are canned. The peel, cores and slices of poor quality are immediately conveyed to the pomace department and mingled with cull whole apples, which apples constitute about 25 percent of the mixture. This material is placed under hydraulic presses to remove the juice, which is run into tanks and made into vinegar. The material remaining, called wet or green pomace, is placed in dehydrating units to remove the moisture. After being properly dried, the product, now called dry pomace, is sacked and prepared for shipment. Ordinarily the pomace is either sold to manufacturers for conversion into pectin or sold as cattle feed. The pomace is a byproduct, the primary reason for producing it being to get rid of perishable waste material that would otherwise accumulate around your plant.

As you know, section 7(c) of the Act provides a partial exemption from its overtime provisions for the first processing of "perishable or seasonal fresh fruits or vegetables." In dealing with similar problems of interpreting exemptions under the Act, the courts have held that an employee is exempt only in cases where his employment is within both the letter and purpose of the exemption. Fleming v. Hawkeye Pearl Button Co., 113 F.(2d) 52, 56 (C.C.A. 8th); Bowie v. Gonzales, 117 F.(2d) 11, 16 (C.C.A. 1st).

There is no indication that Congress used the words "fresh fruits" in any but their ordinary sense, and in its ordinary sense, I think this term means the main edible portions of the fruits and not by-products produced by processing together edible and inedible portions of the fruits. The pomace which you produce is made from a combination of the edible and inedible portions of the apples. In my opinion, therefore, operations such as the making of pomace are outside the scope of the section 7(c) exemption. The Administrator's finding that the canning and first

processing of "fresh fruits" is a seasonal industry, within the exemption provided by section 7(b)(3), is similarly inapplicable to the production of pomace by your employees. See Federal Register, Vol. V, No. 166, p. 3167, August 24, 1940.

As you have been advised, any opinion expressed herein can only represent the best judgment of the Wage and Hour Division as to the proper interpretation of the law. It will guide the Division in its enforcement policy but is not binding upon the courts.

Very truly yours,

William B. Grogan
Acting Administrator

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21 BD 301.95
23 CE 205.4

George A. Downing
Regional Attorney
Atlanta, Georgia

September 16, 1942

SOL:JHS:YS

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

Caldwell and Company
Spartanburg, South Carolina
File No. 39-50,868
RA:ABS:MM

This will reply to your memorandum of May 29, 1942 with regard to the above subject. It is regretted that a reply has been so long delayed, but it seemed advisable to have the operations in question analyzed by the Economics Branch.

It appears from Mr. Dartzler's memorandum that subject operates "an oil mill, a cotton gin, seed and meal storage house, cotton warehouse and fertilizer mixing plant, retail coal and wood yard, all on the same premises". It also appears that:

> The cotton warehouse is attached to the fertilizer plant and the company stores cotton and cotton linters. The information secured by the inspector from all sources indicates that this cotton warehouse does not employ more than 10 employees at any one time and that all of the cotton does come from within the general vicinity.

The question has arisen whether or not the storage of cotton linters in the warehouse would defeat the application of the section 13(a)(10) exemption

The critical question would seem to be whether cotton linters are "agricultural commodities" within the meaning of section 13(a)(10). We are informed by the Economics Branch that the better grades of cotton linters can be used interchangeably with the lower grades of cotton lint. While cotton lint can be used to make all the products now manufactured from linters, the reverse is not true. Only the higher grades of linters are used interchangeably with some of the lower grades of cotton lint. Linters are identical with cotton lint chemically, the only difference between the two being in the length and color of the fiber. Linters are usually green, buff or gray in color, in contrast to the white color of the cotton lint. Linters, like lint, are always packaged in bales.

You will recall that in the Acting Assistant Solicitor's memorandum of August 29, 1941 to Mr. A. B. Steed, concerning Humphrey-Ocker Seed Company of Hartsville, South Carolina, it was stated that the storing of cottonseed was under proper circumstances within the scope of the section 13(a)(10) exemption, since cottonseed is an agricultural commodity within the meaning of section 13(a)(10). Except for delinting by seed breeding concerns, it was formerly almost universal for delinting operations to be performed by cottonseed oil mills. We are advised by the Economics Branch, however, that recent

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high prices of the two best grades of linters have caused some ginners to delint before selling to the cottonseed mills. However, in such cases only the higher quality linters are removed by the ginners; and further delinting is necessary before hulling.

Since the Division has already determined that cottonseed is an agricultural commodity within the meaning of section 13(a)(10), it is not believed that a distinction should be made between cottonseed before and after linters are removed from it. And if the cottonseed after the removal of the linters is an agricultural commodity, it seems clear that linters are similarly agricultural commodities. There is the further point that chemically lint and linters are identical and that there is considerable overlapping of their uses.

Therefore, we are of opinion that cotton linters are an agricultural commodity within the meaning of section 13(a)(10). It would follow from the facts stated by Mr. Dantzler that the storage of cotton linters with cotton lint would not defeat the application of the section 13(a)(10) exemption.

A related question arises as to whether the storage of cotton linters may properly be regarded as a part of the cotton storage industry, which the Administrator found to be of a seasonal nature within the meaning of section 7(b)(3) of the Act (press release R-1050).

You state that it is your opinion that such storage does not fall within the definition of the cotton storage industry included in the finding of seasonality since the industry described in the Administrator's finding engages in the storing of "raw cotton in bales". While the matter is not wholly free from doubt, the information obtained from the Economics Branch leads us to conclude that no distinction should be made between cotton lint and cotton linters as far as the section 7(b)(3) exemption for the storage of cotton in cotton warehouses and compress-warehouse facilities is concerned. Since storage takes place here in a warehouse where cotton lint is also stored, it is our opinion that the section 7(b)(3) exemption is applicable.

You further quote from Mr. Dantzler's memorandum as follows:

> In the case of the oil mill the company meets the exemption as set forth in section 7(c); however, the question arises as to the storing of the hull and meal which are produced by this oil mill. The hull and meal are transported to a separate building through conveyor pipes. These products are then either stored in bulk or placed in sacks or other containers and throughout the entire year are sold to the farmers in the surrounding community and to other dealers in hull and meal and are shipped out to other branches of this company, such as gins, etc., who in turn sell these products to the general public. It is my belief that all employees of this establishment, that is, the storage house, would be entitled to the same exemption as the crushing plant during the operating season of the crushing plant. The question arises in the operations of this company as to whether or not the employees who work in the crushing plant during the crushing season for five days a week and then work either in the storage house where meal and hulls are stored, in the cotton warehouse, in the fertilizer plant or in maintaining the several buildings on the property would lose the exemption as set forth under Section 7(c).

This same question arises in respect to the employees of the cotton warehouse and the cotton gin.

We are aware, of course, that during off-season operation in these plants, the employees would not be entitled to the applicable exemption.

You express the opinion that Mr. Dantzler's question concerning the application of the section 7(c) exemption to employees engaged in the storing and sacking of hulls and meal is answered in General Fleming's letter of July, 1941, to the National Cotton Seed Products Association. We agree that the language of the letter would exempt work performed in the seed and meal storage house. But we further believe that the language of the letter was too broad, particularly the statement that: "The term 'processing of cotton seed' is descriptive of an industry, to wit, that industry which is engaged in producing cotton seed oil and the by-products of the oil making operations, i.e., cake and meal".

However, on the facts of this particular case, we believe that the employees employed in the seed and meal storage house are exempt under section 7(c) provided that this house is part of the same establishment as the oil mill. When an establishment is exclusively engaged in performing operations specifically mentioned in section 7(c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary part of the described operations and working in a portion of the premises devoted by his employer to such operations (cf. Conclusion of Law No. 8, Fleming v. Swift, 41 F.Supp. 825, 831).

You state that Mr. Dantzler's remaining question is answered in paragraph 37 of bulletin 14. Although Mr. Dantzler is probably familiar with the fact, you might point out that it is possible to tack exemptions under the Act. Thus, if an employee was employed during part of a workweek in crushing operations in the cottonseed plant, which is exempt under section 7(c), and during the remainder of the week in work in the cotton warehouse, which is exempt under section 13(a)(10), the sections 7(c) and 13(a)(10) exemptions could be tacked to provide an exemption from the overtime but not the minimum wage provisions of the Act during that workweek.

AIRMAIL September 17, 1942
SOL:FUR:RBW

Dorothy M. Williams
Regional Attorney
San Francisco, California

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

Yosemite Sugar Pine Lumber Co.
Merced Falls, California
File No. 4-139
LE:PBP:CB

This will reply to your memorandum of August 25, 1942, inquiring as to the legality under the Act of the subject company's method of paying by tokens.

It appears that the subject company operates a box factory, planing mill, and sawmill at Merced Falls, California. The company also owns the village drug store, grocery, and pool hall. In addition there is a garage, a filling station, a bar, a restaurant, and a theatre--each independently owned. The company frequently pays its employees by check in full at the end of the pay period. However, the employees may if they wish obtain advances on their salaries. These advances are given in the form of tokens in varying denominations, ranging in redemption value from 5 cents to $5.00. You state:

> These tokens are accepted by all places of business at Merced Falls both company owned and independently owned. They are further accepted at par for cash, and change is given in cash. For example, an employee may attend the independently owned local picture show, admission 30 cents, tender a $5 token, and receive $4.70 change in cash.

You inquire whether under these circumstances and notwithstanding the various field letters and bulletin to which you refer, the company may deduct from the amount paid at the end of the pay period the redemption value of tokens previously advanced. You indicate that if the deductions for tokens delivered are not considered permissible you would like to be in a position to advance reasons for so holding. You also inquire whether if the use of tokens is not permissible salary advances may be made by check or whether all advances must be in cash.

In our opinion the giving of tokens does not constitute the payment of wages as the term "wage" is used in the Act. The term "wage" includes case, negotiable instruments, and "board, lodging, or other facilities" as limited under section 3(m). See Fleming v. Pearson Hardwood Flooring Co., 39 F. Supp. 300 (Lit. Man. Memo 203). Although the tokens in this case are more readily negotiable than ordinary scrip, they can hardly be termed "negotiable instruments" as that term is customarily used.

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As indicated in paragraph 4 of Interpretative Bulletin No. 3, the tokens may, however, be used to measure the amount of facilities furnished to the employee. Therefore, insofar as an employee has used the tokens in exchange for cash or facilities at the company drug store or grocery (assuming that only the reasonable cost of furnishing facilities is charged), the employer may deduct the redemption value of the tokens from the employee's salary. Furthermore, insofar as an employee has used the tokens in exchange for cash or purchases from independent businesses from which the subject company derives no benefit, the company may deduct the redemption value of the tokens from the employee's salary. The employer may not deduct from the employee's salary the amount represented by tokens which the employee has directly used for the purchase from the employer of anything which is not a facility nor may he deduct more than the reasonable cost (as determined under Regulations, Part 531) of the facilities furnished in exchange for tokens. Such deductions are prohibited to the extent to which they cut into the minimum wage or overtime compensation provided for in the Act.

Furthermore, the company may not cut into an employee's guaranteed minimum wage or overtime compensation due at the end of the pay period by deducting for any unused or lost or destroyed tokens. To this extent, of course, the company will undergo some risk if it continues to use the tokens. It is our suggestion, therefore, that the company be encouraged to use checks when making salary advances since checks qualify as negotiable instruments and are a proper means of payment under the Act.

As you implied in your memorandum, the device used by the company in this case does not seem to work a hardship on the employee and the view expressed above that tokens may not be used under these circumstances may be difficult for you to explain to laymen. The company's attorney, however, should find little difficulty in understanding that we operate within the framework of a statute and that Congress through section 3(m) of the Act has carefully limited the means of payment. It is doubtless true that the careful limitation of section 3(m) was inserted to render illegal scrip and token methods of payment more undesirable from the employee's standpoint then is the method in use by the subject company. Nevertheless, since section 3(m) has been construed by the courts as permitting payment only in cash or by negotiable instrument (in addition to payment in the manner specified in the section), the result which we have reached in this case is the only one consistent with the mandate of the statute.

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Regs. 551 et seq.

September 21, 1942
SOL:TJK:DH

Aaron A. Caghan
Regional Attorney
Cleveland, Ohio

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

Opinion Requested--Release R-1789
XCL:CED:cp

This is in reply to your memorandum of July 9, 1942, wherein you state that since the issuance of R-1789 extending our interpretation of coverage, numerous questions have been presented with respect to the coverage of truck drivers who haul coal from small mines to factories where goods are produced for commerce.

I believe that a general statement of the position of the Division with respect to coverage of these truck drivers will best answer your inquiry.

It appears from your memorandum that your questions arise out of a misunderstanding of coverage under a wage order. The policy of this Division has always been that a wage order is issued on an industry basis. Such wage order is applicable only to the industry as defined and under such wage order only employees in the industry engaged in commerce or in any occupation necessary to the production of goods for commerce are entitled to receive the prescribed minimum.

Thus, in the case of these truck drivers, if they are employees of the coal operators they are employees of that industry. The hauling of coal to a factory whose operations are subject to a wage order such as the textile wage order, would not extend coverage under the wage order to these drivers since they are not employed in the industry defined by the wage order.

On the other hand if such truck drivers are hired by employers in an industry covered by a wage order, they would be deemed employees of such industry and entitled to the minimum prescribed, since they would be engaged in an occupation necessary to the production of goods for interstate commerce.

Also, if these truck drivers were employees of a for-hire carrier, they would be subject to the property motor carrier industry wage order, if their employer engaged in the transportation of property in interstate commerce or in the transportation of property necessary to the production of goods for interstate commerce. Thus, if such employer under a contract or agreement with a mine operator engages in the transportation of coal to any industry engaged in the production of goods for commerce, the employees

of the "for-hire" carrier would be entitled to receive the 40-cent minimum prescribed by the property motor carrier wage order since such operations are within the definition of the property motor carrier industry. This would also be true in the case where an industry engaged in interstate commerce contracts with the for-hire carrier to transport coal for such industry's use.

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Arthur E. Reyman
Regional Attorney
New York, New York

September 21, 1942
SOL:FUR:RBW

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

General Foods Sales Co., Inc.
250 Park Avenue
New York, New York
File No. 31-53319
SOL:AER:MS

This will reply to your memorandum of September 9, 1942, inquiring as to whether the subject company may deduct interest on loans which it has made to its employees from their salaries. You state:

> As I understand the general practice, the company in worthy cases advances money to an employee and repayment of the principal is made according to an arrangement between the company and the borrowing employee in instalments which are deducted according to the arrangement from pay checks from time to time. It may be that a loan of $120 will be made for one year, repayable in twelve equal monthly instalments. Interest charges at the rate of 3% per annum are not deducted until the end of the year; or, if the loan runs beyond the period of one year, an interest charge may be made at the end of the year and the loan continued on to payment, at which time a final interest charge is made. It would appear from the report given to me that the interest charge is reasonable and probably results in no profit to the subject firm.

You indicate that you are fully conversant with the position of the Division in the Union Manufacturing Company case but state that although you agree with the determination in that matter in principle, you--

> cannot agree that it applies in a case where the loan is for the direct benefit of the employee and the interest or fee charged is small and does not result in a profit to the employer.

You conclude:

> I think the general size and reputation of a firm and its manner of making loans to employees should be considered as well as the convenience and aid resulting to the employee by reason of the loan. In the instant case I feel quite strongly that the interest charged is reasonable. In other words,

I can find no violation of the statute in such an arrangement and no conflict with the definition contained in Section 3(m) of the Fair Labor Standards Act.

Although I recognize the force of your arguments, I cannot agree with your position that the deduction for interest in this case is permissible under the statute if the deduction cuts into the amount due the employee under section 6 or section 7 of the Act.

It should be clearly understood that the affect of our opinion in this case (or in the Union Manufacturing case) is not to deprive the employee of the right to receive the loan, nor does it deprive the employer of the right to charge whatever interest is permissible under the laws of usury applicable in the jurisdiction. The effect of our opinion in these matters is merely to prohibit the collection of interest through the medium of deductions from the employee's wages insofar as such deductions cut into the amount due the employee under the Fair Labor Standards Act. The employer-creditor may collect interest from the employee-debtor through any of the means customarily available to creditors against debtors. We believe, however, that the Fair Labor Standards Act prohibits his collecting the interest through the relationship which he bears as employer insofar as the interest collected would cut into the amount guaranteed by the Act.

The statutory basis for this position is found, of course, in section 3(m) as read in connection with sections 6 and 7. Section 3(m) as construed by the Division and by the courts requires that the employee be paid his wages in cash or its equivalent (i.e., negotiable instrument payable on demand at par), board, lodging, or other facilities (payment in board, lodging, or other facilities being further limited in section 3(m)). At the end of any pay period, therefore, the amount due the employee under sections 6 and 7 must be paid through one or more of the above-listed means of payment.

The only exceptions which can be permitted to that general rule are set forth in paragraphs 15 through 17 of Interpretative Bulletin No. 5. In substance, the examples in those paragraphs refer to debts owed by the employee to a third party. Either the State (acting through taxing authorities or through the courts in garnishment proceedings) or the employee through his voluntary action may direct that part of the employee's wages be paid to a third party. Phrased positively, it might be said that the employee may receive (in addition to cash or its equivalent, and the reasonable cost of board, lodging, or other facilities if customarily furnished) a discharge of his indebtedness to a third party as part of his wages, provided such discharge is authorized by constructive or voluntary assignment by the employee.

This discharge of indebtedness will not be accepted as a substitute for wages, however, if the indebtedness runs to the employer. The basis of this position is that the employer's economic advantage over the employee is such as would give the employer an unconscionable advantage. Whether in a particular case the employer avails himself of such an advantage is a matter which, if open to examination in every instance, would place a severe administrative burden on the Division and would cause the applicability of

the Act in any specific case to depend largely on the economic and social views of the particular inspector, attorney or administrative official to whom the problem is being presented.

The Administrator has declined to assume that burden and therefore (although under certain circumstances for administrative purposes he has relaxed the limitations of section 3(m) to permit payment to be made in the form of discharges of indebtedness) he has limited that relaxation to exclude discharges of indebtedness to the employer. Indeed, an employer is permitted to deduct from his employee's wages the principal of a loan made the employee only because (perhaps fictionally) the loan is treated as an advance in wages, not because the loan is a debt running from the employee to the employer. Thus, if the loan is made in other than cash, its equivalent, or customarily furnished board, lodging, or other facilities, the employer cannot deduct even the value of the principal from the employee's wages if the deduction would cut into the amount due the employee under sections 6 and 7.

(11837)

SEP 26 1942
SOL:TJK:RBW

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

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

Oklahoma Auto Company
Oklahoma City, Oklahoma
File No. 35-725
HC:HZ

This is in reply to your memorandum of August 18, 1942. You ask for an opinion as to the applicability of the section 13(b)(1) exemption to employees engaged in driving automobiles from factory points to points in other States, one car towing another by means of a "tow-bar" and such transportation being for the purpose of delivery to a dealer for resale. Your memorandum of November 14, 1941 to the Solicitor, attention Rufus G. Poole, to which you refer, was apparently misplaced.

The Interstate Commerce Commission has held that the driving of passenger cars from factory points to points in other States, by the driveaway method (including single cars, one car towing another, and caravanning) constitutes transportation and is within its jurisdiction under the terms of the Motor Carrier Act of 1935. (See 1 Fed. Carrier Cases 245 (7272) CCH, 1938.)

In view of this fact, it is my opinion that drivers employed by an employer who either for compensation or in furtherance of his own business engages in the transportation of passenger cars by the driveaway method fall within the exemption provided by section 13(b)(1) in accordance with paragraphs 3 and 5 of Interpretative Bulletin No. 9.

While you do not inquire as to the minimum wage rate applicable to such drivers, I call your attention to the fact that if the subject firm transports cars for other dealers, from factory points to points in other States, for compensation, the property motor carrier wage order is applicable. On the other hand, if such transportation is solely in furtherance of the subject firm's business as an automobile dealer and incidental thereto, such transportation would be that of a private carrier and excluded from the wage order. In the latter case the statutory minimum would apply.

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October 6, 1942

SOL:RB:HH

Mr. E. B. Jones
President
Schiller-Cable Piano Mfg. Co.
Oregon, Illinois

Dear Mr. Jones:

This will further reply to your letter of August 31, 1942 regarding the status under the Fair Labor Standards Act of night watchmen and maintenance men employed to take care of your piano manufacturing plant which, as a result of the national defense program, has ceased operations.

You indicate that the watchmen and maintenance men in question number only six employees and that your company has not been engaged in interstate or any other business since it ceased manufacturing on July 31, 1942.

The Fair Labor Standards Act applies to all employees engaged in interstate commerce or in the production of goods for interstate commerce regardless of the number of workers employed. Employees engaged in guarding or maintaining plants or machinery used in the production of goods for interstate commerce are considered engaged in work necessary to such production and, hence, are covered by the Act. Furthermore, the Division has consistently taken the position that the Act applies to employees engaged in maintaining or guarding such equipment or plants used to produce goods for commerce, even though the machinery or plant is not in use at the precise moment when the maintenance or guarding takes place. Where a plant or machinery is used intermittently for the production of goods for commerce, it is my opinion that maintenance employees engaged to watch or repair such equipment during idle periods in order to preserve it for future operation in the production of goods for commerce are to be deemed covered by the Act as engaged in work necessary to such production.

However, the application of this opinion to your particular situation presents a problem of some difficulty in view of the few facts submitted in your letter regarding the future use of the plant in question. Whether the services of your watchmen and maintenance men are rendered with a view to preserving the plant in contemplation of its future operation in the production of goods for commerce is a question which cannot be answered save on the basis of a full statement of the relevant facts. The mere fact that you have ceased manufacturing pianos at this time is not conclusive evidence that you contemplate no future production of any goods for commerce. All the relevant facts and circumstances which would shed light on the course of operations which your company might contemplate would have to be taken into consideration. For

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example, such factors as the availability of the plant for the production for interstate commerce of war materials or of other products as well as of pianos, the likelihood of such production, the disposition made of other piano plants shut down under Government order, the convertability of the plant to other uses, and the possibility of some resumption of piano production within a reasonable time, might all indicate that future production in the plant is or should reasonably be contemplated. And, of course, if production of goods for interstate commerce should in fact take place in the plant in the future, that would be some evidence that interstate production was or should have been contemplated at this time. Under such circumstances, the watchmen and maintenance men would be covered by the Act and entitled to a minimum wage of not less than 30 cents an hour and to time and one-half of their regular rate of pay for all overtime worked in excess of 40 hours a week.

In view of these considerations and the few facts presented in your letter, I regret that I cannot definitely determine the status of your watchmen and maintenance men under the Act. However, if you care to submit additional information along the lines indicated above, I shall be glad to advise you further.

Very truly yours,

William B. Grogan
Acting Administrator

361359

(11837)

COPY

25 CFR 201.600

165 West 46th Street
New York, New York

SOL:JHS:SMT

October 8, 1942

Mr. Charles Spedden
Phillips Packing Company Inc.
Cambridge, Maryland

Dear Mr. Spedden:

This is in response to your letter of August 8, in reply to a letter of July 15 from Mr. Merle D. Vincent, Director of the Hearings Branch.

Where the disassembling, cleaning and greasing of machinery is performed after a period of active packing, the section 7(b)(3) exemption will apply to employees so engaged if these operations are a part of a seasonal industry within the meaning of section 7(b)(3). Similarly, the rearrangement of machinery preparatory to packing a different commodity is included within the term "maintenance" and may, under proper circumstances, be exempt under section 7(b)(3).

You state that you have several plants which can perishable items only. You express the opinion that the 7(b)(3) exemption is applicable to the work of employees in these plants performed before or after the active canning season, whether this work consist of disassembling, cleaning and moving out the machinery or the rearrangement and repair of machinery for a new product. I agree with this conclusion. Where a plant cans, for example, first peas and then corn (both operations being part of a seasonal industry under section 7(b)(3)), the removal of the pea machinery from the floor and the installation of the corn machinery are both exempt under section 7(b)(3).

Where a plant cans some perishable products and some non-perishable products (the latter work being outside the scope of the section 7(b)(3) exemption), a more difficult question is presented. However, it is my opinion that the work performed on the exempt machinery is exempt and work performed on the nonexempt machinery is nonexempt under section 7(b)(3). Thus, an employer who cans first pork and beans and then tomatoes in a plant would ordinarily have his employees first remove the pork and bean canning machinery and then install the tomato canning machinery. It is my opinion that the removal of the pork and bean machines would be nonexempt under section 7(b)(3) while the installation of tomato canning machinery would be within the scope of that exemption.

(11837)

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If the order were reversed, and tomato canning was carried on prior to the canning of pork and beans, the removal of the tomato canning machinery from the cannery floor, greasing it and otherwise preparing it for storage in the dead season would be exempt. On the other hand, the installation of the pork and bean canning machinery would be outside the scope of the exemption.

As you correctly point out, the section 7(b)(3) exemption is inapplicable to the installation of new machinery in a plant. I am sure you are also familiar with the fact that the doing of any nonexempt work in a workweek will defeat the application of the section 7(b)(3) exemption as to any employee so engaged. In Mr. Vincent's letter of July 15, he stated: "Employees engaged in the rearrangement of the plant, the setting up or removing of machinery would, therefore, not be entitled to the exemption provided by section 7(b)(3)." To the extent that this statement is contrary to the above discussion, it should be regarded as superseded.

Very truly yours,

William B. Grogan
Acting Administrator

358841

(11837)

COPY

October 12, 1942

SOL:EB:ERC

Elizabeth B. Coleman
Industrial Division
Children's Bureau

Milton C. Denbo
Chief, Interpretation Section

Applicabilty of Public Messenger Restriction in Child Labor Regulation No. 3 to Minors Employed by the Reuben H. Donnelley Corporation in the Delivery of Telephone Directories.

This is in reply to your memorandum of October 2, 1942, in which you request our opinion as to whether the employment of minors under 16 years of age by the Reuben H. Donnelley Corporation in the delivery of telephone directories is prohibited under Child Labor Regulation No. 3, which excludes from its scope minors engaged in "public messenger service." We understand that the company is engaged in printing and publishing various kinds of directories, including telephone directories.

As was pointed out in Mr. Poole's memorandum to Mr. Cohen dated November 19, 1941, concerning the meaning of the term "public messenger service" in Child Labor Regulation No. 3, this term should be held to mean the kind of messenger service performed by delivery companies and telegraph companies. Delivery work performed as an incident to other kinds of business should not be considered to be within the meaning of section 441.2(d) of the Regulations. It would seem that delivery work performed by the company is incidental to the printing and publishing business in which the company is primarily engaged. Moreover, it is our understanding that the delivery boys, unlike Western Union messenger boys, do not hold out their services to the general public but deliver the telephone books solely in performance of a contract between the company and its customers.

If our understanding of the facts is correct, we believe that the employment of minors of 14 and 15 years of age by the Reuben H. Donnelley Corporation in the delivery of telephone directories is not prohibited by section 441.2(d) of Child Labor Regulation No. 3, and that the employment of such minors is permissible under the terms of that regulation unless it falls within some other restriction in the Regulations.

Mr. Warner's letter is herewith returned.

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October 12, 1942

Mr. William T. Pomeroy
The Sterling China Company
East Liverpool, Ohio

Dear Mr. Pomeroy:

This is in reply to your letter of September 25, 1942, inquiring whether two of your employees who operate a furnace in connection with the manufacturing of "frit" in a separate building apart from your factory proper come within the coverage of the Walsh-Healey Act. You state that the two men in question were employed during the past several months operating this furnace which is used to produce what the pottery industry calls "frit". The production of the frit consists of fusing together to a complete glass certain raw materials. The glass or frit is then transferred to the factory proper and used as a component in the glaze mixture. You state further that it has been the practice in the industry in most cases to purchase this frit from outside sources but that your company found it desirable to manufacture the frit itself. The men in question, in a number of instances, have worked in excess of eight hours a day without receiving extra compensation.

Under the Public Contracts Act when a contractor to whom a contract subject to the act is awarded operates an integrated establishment which manufactures or produces materials or supplies that are incorporated into or otherwise used in the manufacture or supply of the materials, supplies, articles, or equipment called for by the contract, the act is applicable to those departments which are engaged in the manufacture or production of the materials or supplies to be so incorporated into or used in the manufacture or processing of the ultimate product to be delivered to the Government as well as to the employees engaged in the manufacture or processing of that ultimate product. Accordingly, the operation of the furnace by the two men in question for the manufacture of frit, which is a component of the product furnished by you under your contract with the Government, is an activity subject to the act.

Since these furnace men should have been paid in accordance with the act's requirements and our "integrated establishment" rule has been consistently followed, you are hereby requested to compute the overtime compensation due the two men in question and make restitution of the amount due. After you have made restitution, please advise us of the amount thereof.

Very truly yours,

Wm. R. McComb
Assistant Administrator

(11837)

COPY

21AC202.10

Beverly R. Worrell
Regional Attorney
Richmond, Virginia

October 14, 1942

SOL:RB:RBW

Donald M. Murtha
Acting Chief, Wage-Hour Section

Request for an Opinion—
Niles, Barton, Morrow & Yost,
Attorneys at Law
LE:BRW:NM

Reference is made to your memorandum of August 19, 1942, transmitting for our opinion as to coverage a letter from the subject law firm dated August 13, 1942, inquiring as to the status of one of its clients under the Act.

The letter from the subject law firm reveals that its client is a nonprofit educational institution engaged in performing secret research and development work essential to National defense for the Federal Government under a contract with the United States Office of Scientific Research and Development. The processes and devices with which the client is experimenting will, when developed, be manufactured by private manufacturers under contract with the Government, but the client has not and will not have any interest in the commercial manufacture of any of these devices. In connection with its research work, the client buys various articles from commercial firms which are shipped to it in interstate commerce, and transports some of the devices across State lines to test them in an appropriate place. The Government reimburses the client for all costs, including wages.

The subject law firm claims that the client is not, under the decision in Gill v. Electro Manganese Corporation, 146 S.W. (2d) 352, engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Act since it is not contemplated that the products or devices involved will be used or available commercially, except by the United States for National defense purposes, and since the patents for those processes and devices being developed by the client are owned by the United States and any patentable inventions perfected by any of the client's employees in connection with this work must be assigned to the Government.

On the basis of these facts, it is our opinion that the employees engaged in ordering, receiving, or unloading supplies or equipment coming directly from outside the State, or in packing, loading or transporting materials or equipment for shipment across State lines are

covered by the Act during those weeks in which they engage in such work, regardless of whether or not the employer is a nonprofit educational institution performing essential National defense work for the Government.

With respect to the employees engaged in the actual research and development work or any work necessary thereto, it is our opinion that they are engaged in an occupation necessary to the production of goods for interstate commerce within the coverage of the Act. The devices and products which they develop will, their employer has reason to believe, be manufactured commercially by private manufacturers under contracts with the Government and will undoubtedly be shipped across State lines. The research work carried on by the client's employees is "necessary" to the production of the devices by commercial manufacturers for the Government, since the contemplated commercial production could not be carried on without it and would require the performance of such research work by the manufacturers themselves if the experimentation were not done by the client's employees in question. The fact that the employer of the research workers has reason to believe that the devices being developed will be produced for interstate shipment is sufficient, in our opinion, to bring those workers within the coverage of the Act. Insofar as the decision in the Electro Manganese Corporation case, mentioned above, runs counter to this view, we believe it is incorrect. The decision in that case seems to have been also based on the nature of the experimental samples shipped interstate, the court deeming the production and shipment of such samples not to be for commerce since they were not intended for any commercial sale or use. We believe that the court was incorrect on that point too.

The fact that the Government owns the patents on the processes and devices being developed by the client, and that the devices will be used only for defense purposes for the Government is, as already suggested, immaterial in view of the fact that the client has reason to believe that the devices will, when developed, be manufactured commercially by private producers and sold and shipped in interstate commerce to the Government.

Some of the employees in question may, of course, be exempt from the Act's minimum wage and/or overtime requirements under section 13(a)(1) as "professional", "administrative", or "executive" employees, or under section 13(b)(1) as motor carrier employees subject to the jurisdiction of the Interstate Commerce Commission.

Outstanding administrative instructions direct that no restitutic be sought with respect to work performed under contracts providing that the cost shall be borne by the Government. Accordingly, aside from advising the inquirer in accordance with the foregoing, no administrative or legal action appears to be necessary at this time.

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October 16, 1942

AIR MAIL

SOL:HK:JG

Miss Edith M. Boretz
Assistant Inspector
Honolulu, Hawaii

Irving J. Levy
Acting Solicitor

Opinion Requested Re Army Contract

This is in reply to your memorandum of October 1, 1942, inquiring whether a contract entered into by the Office of the District Engineer, Corps of Engineers, U. S. Army, for the repair of automobiles and trucks, the District Engineer to furnish all materials and parts, comes within the Walsh-Healey Act or the Davis-Bacon Act.

Under the Public Contracts Act a contract if exclusively for personal services is not covered by the act. The contract in question for the repair of automobiles and trucks would be a contract for personal services and accordingly not within the coverage of the act.

The Davis-Bacon Act as amended, and the regulations issued to effectuate its purposes, do not contain any provision making the act applicable to the performance of any work for the Government upon personal property except ships and vessels.

With respect to your inquiry about the Eight Hour Law, the Department has no authority to interpret that act. Accordingly, inquiries concerning the act should be referred to the Government contracting agency concerned.

We should also like to point out that although the Public Contracts Act is inapplicable, the Fair Labor Standards Act is probably applicable to the employees here. See paragraph 13 of Interpretative Bulletin No. 5.

(11837)

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21 BD 301.923
23 CF 202.325

AIR MAIL

Frank J. Delany
Regional Attorney
Chicago, Illinois

October 17, 1942
SOL:JHS:DH

Donald M. Murtha
Acting Chief, Wage-Hour Section

Grain & Feed Journals Consolidated
327 South LaSalle Street
Chicago, Illinois
LEXI:RJS:MAH

This will reply to your memorandum of August 6, 1942, concerning the application of the sections 7(c) and 13(a)(10) exemptions to the shucking and shelling of corn.

You first ask whether the shucking of corn constitutes first processing within the area of production under section 7(c) of the Act. As you know, it has been the consistent position of the Division that "processing" and "preparing in their raw or natural state" as used in sections 7(c) and 13(a)(10), respectively, are mutually exclusive. It seems clear that shucking is preparing of an agricultural commodity in its raw or natural state. While we have held that the shelling of peanuts is not preparing in their raw or natural state, that operation, when performed in commercial quantities, is performed by machinery. It is our understanding, on the other hand, that corn shucking is customarily performed by hand, and it is a relatively simple process.

You next ask about the shucking and shelling of corn when the two operations are performed by one and the same machine as one operation. As you state, it seems clear that this constitutes first processing within the meaning of section 7(c) of the Act if performed within the area of production.

As to your further question as to the application of section 13(a)(10) to the shucking of corn, it seems clear, as stated above, that this operation if performed alone constitutes preparing in their raw or natural state, as used in section 13(a)(10) and is exempt if the area of production definition is satisfied. As you state, the shelling of corn is a processing operation, and where shucking and shelling of corn are performed as a continuous operation the section 13(a)(10) exemption is inapplicable.

(11837)

COPY

21AC409.34

Mr. Russell L. Kingston
Director, Field Operation Branch
Wage and Hour Division

October 19, 1942
SOL:RB:MPJ

Donald M. Murtha
Acting Chief, Wage-Hour Section

Ellerbe and Company
Great Falls, Montana
FO:ASF:AK

Reference is made to the memorandum of October 1, 1942 from Dr. Johnson to Mr. Livengood inquiring whether the subject's construction of additional runways and buildings at an existing airfield constitutes original construction work outside the coverage of the Act or reconstruction within its coverage.

It appears that the subject company is engaged in extending and rebuilding a commercial airfield for use as an Army air base. New buildings are being constructed and existing runways are being enlarged. The field is being used as a commercial airport during this work. A diagram of the work on the field's runways indicates that the new runways are connected to the existing runways and that their area almost equals that of the old runways (approximately 1,422,500 square feet as compared to about 1,627,500 square feet).

Regional Director Hill and Regional Attorney Murtha were of the opinion that the building of the additional runways constituted a reconstruction of the existing runways and therefore covered work, while the building of the new barracks and administration buildings appeared to constitute original construction work not covered by the Act. We assume that the field is being used and will continue to be used by planes engaged in interstate transportation.

We agree with the position expressed by Regional Director Hill and Regional Attorney Murtha that the extension of the runways is covered reconstruction work while the construction of the new buildings constitutes original construction work not covered by the Act. In the case of the runways, the attached diagram reveals that the additions to the existing NE-SW runway and to the old E-W runway will become an integral part of those runways and that the area of those extensions is much smaller than the area of the existing

runways. In view of these facts, and especially the fact that the work will, when completed, result in each instance in a single enlarged runway, it is our opinion that the building of these extensions to those two old runways constitutes reconstruction work within the principles expressed in Part V of release G-162. Not so clear, however, is the status of the work on the new N-S runway, whose area is larger than that of any of the old runways and which is connected to the old runways only by one of the new additions, However, although it may be argued that the building of the N-S runway constitutes the original construction of a new runway, looking at the field and the runways as a single functional and physical unit, we believe that the building of the N-S runway can be considered the reconstruction of the runway system and airfield as a unit. When all this runway work is completed, it will, from a physical and functional point of view, result in the enlargement of an existing airfield unit functioning as a single instrumentality of interstate commerce.

The new barracks and administration buildings, however, are apparently separate units which are physically segregated from any existing buildings so that their construction constitutes, in our opinion, original construction work not covered by the Act.

The views expressed with respect to the status of the respective employees engaged in the building work discussed above would, of course, apply equally to other employees engaged in work connected with that building work, such as the employees of the H. W. Miller Electric Company engaged in installing wiring at the field. Those employees of the subcontractor engaged in wiring the new buildings would not be covered, assuming no other basis for coverage existed, while those engaged in extending the landing light system to the runway additions would be covered as engaged in part of that reconstruction work.

We do not believe it possible to lay down any general principles other than those already described in part V of release G-162 that would enable one to distinguish between construction and reconstruction work in similar situations, and emphasize again the statement in that release that the distinction is largely one of degree and dependent upon all the facts and circumstances in each particular case.

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214A

Mr. Gus C. Street, Jr.
Regional Director
Dallas, Texas

SOL:RB:DH
Oct. 21, 1942

William B. Grogan
Acting Administrator

Mr. Bart McClellon
Glenfield, New York

Reference is made to your letter of June 25, 1942, to the subject employee advising him that section 15(a)(3) of the Act was not violated in his case because he filed suit against his employer after he left its employment.

It appeared that the subject employee quit his job with the W. O. Perkins & Son Lumber Company in August 1941 and then filed suit under section 16(b) against the company for unpaid minimum wages and overtime compensation allegedly due him under the Act. The suit was unsuccessful, the employee claims, because of the court's opinion that the company was not subject to the Act due to its small percentage of interstate sales. The subject employee further claimed that the company has blacklisted him because of his suit and has prevented him from obtaining or keeping any other job in the vicinity.

If the claims advanced by the subject employee are found to be in accord with the facts, it would appear that section 15(a)(3) of the Act has been violated by his former employer. The broad language of that section and the evident purpose of Congress in adopting it makes it possible and necessary to take the position that a violation of section 15(a)(3) occurs where a past employer blacklists or in any other way discriminates against a former employee because he filed a complaint or instituted a proceeding against that former employer. The fact that the employee filed his complaint or instituted his proceeding after he left the employment of such an employer would not, in my opinion, render section 15(a)(3) inapplicable in view of the broad purposes of the Act and the intent of Congress to give protection to employees who disclose violations of the statute.

It is, therefore, suggested that you further investigate Mr. McClellon's complaint and take appropriate action if you find that he was in fact blacklisted by his former employer because he filed suit against it under the Act after he left its employment.

(11837)

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23BD302.296

Arthur E. Reyman
Regional Attorney
New York, New York

October 26, 1942

SOL:JHS:FB

Donald M. Murtha
Acting Chief, Wage-Hour Section

Sodus Cold Storage Company, Inc.
Sodus, New York
SOL:RAL:fvf

This will reply to your memorandum of September 14, 1942 with respect to the application of section 13(a)(10) to the storing of frozen cherries by the Sodus Cold Storage Company, Inc., of Sodus, New York.

We agree that this exemption is inapplicable to the storage of frozen fruit. As stated in paragraph 25 of Bulletin 14, agricultural commodities as used in section 13(a)(10) means those commodities as they come from the farm and before any change has been effected in their natural form. We have held freezing to be a processing operation, and this processing therefore results in a change in the natural form of the fruit. See also the final sentence on page 21 of Legal Field Letter No. 66.

It may also be noted that the storage of frozen fruit is outside the scope of the section 7(b)(3) exemption for storing fresh fruits and vegetables. Cf. release R-974.

(11837)

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21 BF 303.420
21 AC 409.4213

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

October 29, 1942

SOL:FUR:DH

Donald M. Murtha
Acting Chief, Wage-Hour Section

Robert Morris Building
Philadelphia, Pennsylvania
File No. 37-57032
ENV:al

This will reply to your memorandum of October 20, 1942 inquiring as to whether a building superintendent is "in sole charge of an independent or a physically separated branch establishment" as the quoted phrase is used in subsection (F) of section 541.1 of Regulations, Part 541.

In our opinion an office building may be considered an establishment as that word is used in the language in question. See pages 17 and 18 of the Report and Recommendations of the Presiding Officer. In the ordinary case the establishment will be either an independent establishment or a physically separated branch establishment. The question of whether the employee is "in sole charge" can be answered on the basis of the facts of a particular case. It would seem that such an employee was not "in sole charge" if his employer or some employee of his employer who was the superior of the employee in question was located on the premises. For example, if a renting agent is located in the building, it is probable that the "building superintendent" is not "in sole charge".

(11837)

COPY

21 AC 409.31

Ernest M. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:RB:KLC

Donald M. Murtha
Acting Chief, Wage-Hour Section

October 31, 1942

Pine Brook Iron Works
Analomink, Pennsylvania
FED:fcs

In your memorandum of October 16, 1942, you asked whether the Act covers the subject company's construction of a new bridge and approaches thereto at Analomink, Pennsylvania where such construction work at the same time straightens an existing interstate highway and replaces an old bridge.

It appears that the work in question involves the replacement of an old bridge with a new bridge at a site about 30 feet away from the old bridge, and the straightening of a section of an existing interstate highway which forms the approaches to the bridge. A little more than half of the new approach to the new bridge will run over virgin territory, although only at a distance of from 10 to 30 feet from the existing roadbed, and the other half of the approach will run over the existing roadway which will be reconstructed. The building of the new approach as part of the existing interstate highway will eliminate two bad curves of that highway. The new approach and bridge will, when completed, constitute part of the existing interstate highway and will replace the old bridge and approach, running very close and almost parallel to the old roadway and bridge for a distance of about 1/5 of a mile. The files do not indicate whether some of the subject's employees work only on the bridge while others work solely on the approaches, or whether the employees work on both jobs interchangeably.

In our opinion, the work on the Analomink project should be considered reconstruction work within the coverage of the Act under the principles expressed in Legal Field Letter No. 34, page 20, where the straightening of an existing interstate highway was considered covered reconstruction work even though a new roadbed was built. The fact that the road straightening in the subject case involves the construction of a new bridge would not appear to present a situation different in principle from a case where the road straightening requires the construction of a new roadbed (as in Legal Field Letter No. 34, page 20), especially when the new bridge merely replaces an old bridge at the same location as part of an existing highway. Looking at the job as a whole, and at the existing and contemplated highway as a single physical and functional unit, it seems clear that the subject's straightening of the highway and building of the replacement bridge as a part of the highway constitutes the reconstruction of an existing instrumentality of interstate commerce. The employees engaged in such work, would, therefore, be covered by the Act. This conclusion would, of course, be strengthened if the subject employees work interchangeably on both the bridge and its approaches.

The subject file is returned herewith.

Attachment
(File)

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21AC205.23

Mr. Russell L. Kingston, Director
Field Operations Branch
Wage and Hour Division

SOL:BB:KLC

Donald M. Murtha
Acting Chief, Wage-Hour Section

October 31, 1942

Cardox Corporation
Van Meter, Pennsylvania
File No. 37-8898
FO:ERR:CK

Reference is made to your memorandum of October 8, 1942 transmitting the file on the subject company for an opinion as to the applicability of the Act to its operations.

It appears that the subject's employees in question are engaged at mine sites in filling shells with explosive materials for use by the mines in blasting coal during mining operations. The empty steel shells are manufactured by some steel company for the subject company, and are sent to the mines where they are filled by the subject's employees with carbon dioxide gas, which comes from Ohio, and a heater element from West Virginia. All shells made at a mine are used at that mine and are not shipped elsewhere. The subject's employees work close to the opening of the mine but do not enter the mine, the placing of the shells in the coal and their explosion being the work of the mine employees. We assume that the coal involved is produced for interstate commerce.

On the basis of these facts, it is our opinion, that the subject employees are engaged in an occupation necessary to the production of the coal for interstate commerce and are therefore covered by the Act.

It would seem that the preparation of such explosive charges for blasting purposes is as essential and immediate to the mining of the coal as is the production of fuel or power for use by factories in producing goods for interstate commerce, which we have said in release R-1789 is covered by the Act. As a matter of fact, the preparation of these blasting charges at the mine site would appear to constitute an integral part of the mining operations and the mere fact that the employer of the employees performing such work is the subject company and not the mine owner would not rebut such a conclusion in view of the principles expressed in the Kirschbaum decision.

The file is returned herewith.

Attachment
(File)

(11837)

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23 CF 202.24
23 CE 205.631

Mr. Merle D. Vincent
Director, Hearings Branch
Wage and Hour Division

SOL:JHS:DH

Donald M. Murtha
Acting Chief, Wage-Hour Section

October 31, 1942

R. E. Schanzer, Inc.
Linwood, Michigan
File No. 21-50705

This will reply to your memorandum of October 9 transmitting the above file for a determination as to whether or not the drying of chicory is subject to the section 7(b)(3) exemption. Since the question involved is primarily an economic one, we wrote a memorandum to Mr. Weiss, Director of the Economics Branch, requesting an opinion as to whether chicory is a "perishable or seasonal fresh vegetable" within the meaning of section 7(c) and of release R-974, granting a section 7(b)(3) exemption.

In a memorandum of October 26, the Economics Branch expressed the opinion that chicory is a perishable or seasonal fresh vegetable within the meaning of both section 7(c) and section 7(b)(3).

Since it is stated in paragraph 19 of bulletin 14 that drying of a perishable or seasonal fresh vegetable is a first processing operation, it follows that the drying of chicory is within the scope of both the section 7(c) and section 7(b)(3) exemptions.

We are returning the Schanzer file which you forwarded to us with your memorandum.

Attachment
(File)

COPY

23 CB 204.3

Arthur E. Reyman
Regional Attorney
Newark, New Jersey

Donald M. Murtha
Acting Chief, Wage-Hour Section

SOL:TJK:KLC

November 4, 1942

Service Transportation Company
Secaucus, New Jersey
SOL:WBH:HBL

This is with further reference to your memorandum of August 19, 1942 with respect to the difference of opinion between our memorandum of June 26, 1942 (50L:3F:Y5) and the letter of the Bureau of Motor Carriers of the Interstate Commerce Commission to the regional office regarding the applicability of the section 13(b)(1) exemption to employees engaged in inspecting, changing and repairing tires of trucks used to transport goods in interstate commerce. This question was submitted to the Solicitor for clarificaton and consultation with the Commission.

Director Blanning of the Bureau of Motor Carriers of the Interstate Commerce Commission by letter of August 29, 1942, has advised the Administrator that such employees are "mechanics" within the scope of the decision of Ex Parte, Nos. MC-2 and MC-3. That letter states that (a) employees of interstate motor carriers engaged in repairing and changing tires, (b) employees of interstate motor carriers engaged in inspecting and changing tires, and (c) employees of interstate motor carriers engaged in rebuilding tires are "mechanics" within the meaning of Ex Parte, Nos. MC-2 and MC-3. Moreover, the decision in Anuchick v. Transamerican Freight Lines, 5 Wage Hour Rept. 683 (E.D.Mich. 1942) appears to support this view.

The basis of our opinion as expressed in my memorandum of June 26, 1942 was that in June, 1941 the Commission had informally expressed the opinion that employees engaged in such duties would not be deemed "mechanics" within the meaning of Ex Parte, Nos. MC-2 and MC-3. Since the Commission now takes a contrary position, it is now our opinion that employees of common and contract carriers engaged in transportation in interstate commerce, who perform the above-listed duties are within the section 13(b)(1) exemption.