UNITED STATES DEPARTMENT OF LABOR

Office of the Solicitor

March 24, 1943

Legal Field Letter
No. 87

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.

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21 AB 402.24

Beverly R. Worrell
Regional Attorney
Richmond, Virginia

August 25, 1942

SOL:RB:HBW

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

American Oil Company
South Barre, Vermont
LE:BMB:NM

American Oil Company
Rosslyn, Virginia

American Oil Company
Columbus, Georgia

Reference is made to your memorandum of July 7, 1942, submitting the files on the subject company for an opinion on the nature of the relationship between the subject company and the operators of the bulk distributing plants who are paid on a commission basis.

The subject company contends that the bulk plant operators paid on a commission basis as well as the persons engaged in performing the work of the bulk plants, are not to be considered its agents or employees, while those paid on a salary basis are to be regarded as employees or agents. The contract form for the commission operators found in the files states that the subject is to provide the bulk plant facilities, and ship to that plant on consignment to the contractor such stocks of gasoline and petroleum products as the subject company judges proper. The subject also reserves to itself the right to fix the prices at which the alleged contractor must sell its products. In return, the contractor is to solicit the patronage and distribute the gasoline products from the bulk plant to service stations and other business customers, maintain the plant in proper condition, furnish and maintain at his own expense trucks to deliver the gasoline products and labor and help to run the plant and trucks, and pay all the pay roll and business taxes, light, heat, power, water and telephone bills. In addition the contractor is required to remit daily to the company all monies received from the sale of the gasoline products, render and transmit whatever accounting reports the company may require from time to time, furnish a fiduciary bond or guarantee to the company to cover all products delivered to the bulk plants as well as company funds collected by the contractor, and carry at his own expense workmen's compensation and public liability and property damage insurance on motor vehicles operated in connection with the business. The contract further gives the subject company the right to take stock inventories and inspect all the bulk plant records at any time, and to charge and deduct from the contractor's personal commissions any credit sales not approved by it or in excess of the approved credit amount. The subject company agrees to pay the contractor a commission of a certain number of cents per gallon for all gallons of gasoline and petroleum products delivered to dealers and other buyers, reserving to itself alone the right to change the rate of commission on any or all of the products at any time. The contract is termed personal and does not give the contractor any right or interest in the bulk plant or its premises, or to any exclusive sales territory, and can be terminated by either party upon ten days' written notice. The files do not reveal the actual nature or course of business operations conducted by the bulk plant operators at the subject locations, nor whether they faithfully follow the agreement. Nor is there any evidence on the kind or degree of supervision actually exercised by the subject company over its commission operators, except a self-serving statement by the subject's cashier to the effect that the

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company exercises no control over the methods by which the operator performs his part of the contract, outside of that set forth in the contract itself. There is also no evidence on the nature of the operations carried on by the bulk plant operators who are paid on a salary basis, or on how those operations and the subject's control over them differ from those conducted by the commission operators.

On the basis of these facts, it is our opinion that the subject company stands in an employer-employee or principal-agent relationship to the bulk plant contractors in question, and that the employees hired by the bulk plant operators are the employees of the subject company. It is clear that there is in these contractual relationships no such degree of separation, independence, and freedom from control from the subject company as to make the commission operators independent contractors. The fact that (1) the subject company can ship to the bulk plants whatever gasoline and petroleum products it alone decides; (2) the subject company can fix the prices at which the bulk plant operator must sell those products; (3) the subject company has the sole right to fix the operator's commission rates on his deliveries; (4) the bulk plant operators must remit daily to the subject company all monies received from the sale of the products, and must render whatever accounting reports the subject company may desire; (5) the bulk plant property and equipment, as well as the petroleum products delivered there, belong to the subject company; (6) the subject company has the right to take stock inventories and inspect all bulk plant records at any time it desires; and (7) the contract can be terminated on ten days' notice, all point to such a lack of independence on the part of the contractor and to such a degree of control over his business operations by the subject company as to clearly indicate that the commission operator is not an independent contractor running his own business and dealing with the subject company on an equal footing. On the contrary, the contract alone reveals that the commission operator is at best an agent of the subject company engaged in carrying on a functional part of its business, the wholesale distribution of gasoline and petroleum products, in and with company property and under company control. The employees hired by such an agent are likewise engaged in work which is a functional part of the subject's business, and are to be considered employees of the subject company since they are, under the contract, hired with its knowledge and consent to do its work.

The company concedes that bulk plant operators and employees doing similar work are its employees when the bulk plant operator is paid on a salary basis instead of on a commission basis. In our opinion, the mere fact that an agent is paid a commission based on sales or deliveries, instead of a salary, does not prove that he is an independent contractor, particularly where, as here, the principal reserves to itself the right to change the commission rates at any time. Nor does the fact that the contract and the subject company label the commission agent an independent contractor prove that he is one where, as here, his principal business operations are strictly controlled by the company and the contract reveals the facts discussed above.

The foregoing is based on the application of common law principles dealing with the principal-agent or employer-employee relationship to the subject company. However, as you know, sections 3(e) and 3(g) of the Act bring within its scope all individuals "suffered or permitted to work" by an employer.

This language, in our opinion, is broader than that used to describe the traditional employer-employee relationship measured by common law principles. It is, therefore, not necessary to chart the boundaries of the relationships covered by the language of the Act to be of the opinion that it at least includes the relationship disclosed here.

Although the files disclose two decisions holding that the traditional employer-employee relationship did not exist in similar cases within the meaning of the Federal Social Security Act (Texas Co. v. Higgins, 118 F. (2d) 636; (C.C.A. 2d, 1941); Indian Refining Co. v. Dallman, (119 F. (2d) 417 (C.C.A. 7th, 1941)), there are other cases holding that such a relationship did exist for the purpose of determining liability for negligence (Gulf Refining Co. v. Brown, 93 F. (2d) 870 (C.C.A. 4th, 1938)). Furthermore, the Texas Company case is distinguishable from the subject case in so far as the contractor there built and equipped his own bulk distributing plants at a cost to himself of about $60,000. The court there decided as it did solely on the basis of the regulations promulgated by the Commissioner of Internal Revenue which stressed certain common law tests of the employer-employee relationship not present there. Moreover, the consignment agreement in the Indian Refining Co. case does not appear to have provided for such strict controls over the contractors' business as those provided for in the subject contract.

Attachments (3 files)

(12,437)

Charles A. Reynard
Regional Attorney
Cleveland, Ohio

November 4, 1942

Donald M. Murtha
Acting Chief, Wage-Hour Section

SOL:RB:DH

The H. Blonder Company
Prospect at E. 40th Street
Cleveland, Ohio
XCL:GED:rh

In your memorandum of September 17, 1942 on the subject company, you asked whether an employer may lawfully pay an employee two rates of pay during the year so as to maintain a constant wage during the slow and busy seasons.

You indicate that the subject company contemplates establishing an arrangement by agreement whereby employees will work a set and fixed number of hours for each of two periods during the year. During the busy season employees are to be worked 52 hours a week at one rate of pay and during the slow season 48 hours a week at a higher rate. The two rates will, as noted above, effectuate a constant wage throughout the year. The individual salaries in each case include overtime compensation at time and one-half the hourly rates for the hours over 40.

You refer to a memorandum from Assistant Solicitor Poole to Regional Attorney Cohen, dated October 4, 1941, which expressed the opinion that such an arrangement would not be in violation of section 7 of the Act, and that the regular rate of pay in such a case should be determined in accordance with paragraph 11 of Interpretative Bulletin No. 4 (dealing with regular rate computations for salaried employees working a regular workweek). However, you indicate that this opinion appears to have been modified by a subsequent opinion from Solicitor Gardner to Regional Attorney Reyman, dated February 6, 1942 (Legal Field Letter No. 73, page 8) which expressed the position that an employer may pay an employee at a lower hourly rate during the busy productive season, when it is necessary to work overtime, than during the slow nonproductive season when little or no overtime is necessary. The latter opinion, however, distinguishes that situation from the one discussed in paragraph II(D) of Inspection Field Letter No. 2 (which deals with an employee working the same number of hours in both seasons and earning the same amount weekly in both seasons) by assuming that its employee does not work the same number of hours in the nonproductive season as he does in productive season and that his weekly earnings do not remain constant. You therefore ask whether that assumption narrows the opinion expressed to Mr. Cohen and invalidates the subject's plan inasmuch as the employee's wages in this case do remain constant.

In our opinion, an employer may validly establish <u>by prior agreement</u> with an employee a lower <u>specific</u> rate of pay for the busy season when more hours are worked than for the slack season when less hours are worked, even if the purpose and effect of the two rates is to maintain a constant wage for the employee. So long as those rates are specified in advance and are bona fide in that they represent the rates at which the employee is actually paid at all

times during each of the two periods, we believe they should be regarded as the employee's regular rates for purposes of computing any overtime compensation due him under the Act. The assumption expressed in Legal Field Letter No. 73, page 8, that the employee in that case did not work the same number of hours in both seasons and that his weekly earnings did not remain constant was intended merely to distinguish that case from the one discussed in Inspection Field Letter No. 2, paragraph II(D), where an employer claimed that an employee's regular rate had been reduced when his seasonal exemption ended even though the employee's weekly wages and hours remained the same. Since the case discussed in Legal Field Letter No. 73, page 8, also dealt with an employer who wished to reduce his employee's regular rate when his seasonal exemption ended, it was necessary to distinguish between the two situations, and the fact that in the latter case the employee worked different hours and received different weekly earnings during the two seasons was used to justify the opposite results. In the subject case, however, we do not believe that the fact that the employee receives the same wage for a 52-hour week that he receives for a 48-hour week discredits the genuineness of the two different regular rates of pay which achieve that result, in view of the fact that those rates are specified and agreed to in advance, and operate over substantial periods of time.

The memorandum from Poole to Regional Attorney Gallagher, dated November 18, 1941, to which you referred is, in our opinion, inapposite since the employee's hours in that case alternated from week to week.

21 BC 207.3131
207.3363

AIR MAIL

November 7, 1942

Dorothy M. Williams
Regional Attorney
San Francisco, California

SOL:JHS:DH

Donald M. Murtha
Acting Chief, Wage-Hour Section

Paul A. Mariani
Box 299
Cupertino, California
File No. 4-51923
LE:IS:MC

This will reply to your memorandum of August 25 with respect to the application of the section 13(a)(6) exemption to the operations of subject.

You state that Mr. Mariani is primarily engaged in growing cherries, apricots and prunes. He operates a dry yard for apricots and a dehydrator for prunes. In addition to fruit grown on his land he may buy, prior to harvesting, up to 5 percent of the total cherries handled, about 15 percent of the apricots, and approximately 60 percent of the prunes. You further state that Mr. Mariani's method of operation is to make arrangements with local growers for the purchase of fruit in their orchards. These arrangements may be made at any time during the year. Once a deal is concluded, Mr. Mariani thereafter by and through his employees, does all of the orchard work such as cultivating, irrigating, spraying and harvesting. Depending largely on the time of the year when he concludes his contract with the owner, Mr. Marinani completes whatever cultivating and harvesting operations have yet to be done. If he makes a deal immediately before the fruit is ripe, he merely harvests it.

The application of section 13(a)(6) to drying and dehydrating of fruit presents a rather difficult problem. In order for the drying and dehydrating of the fruit to be practices performed by a farmer incidental to farming, it is clearly not necessary that the operator drying and dehydrating the fruit shall have planted the fruit trees. We have recognized generally that if a person obtains a bona fide leasehold interest and packs and dries only products of the leased land, the section 13(a)(6) exemption will apply if the practices involved are in fact subordinate to the farming operation.

(12437)

No exact line can, of course, be laid down as to just how long before fruit is harvested an orchard must be leased by a processor of the fruit in order to qualify his operations for the section 13(a)(6) exemption if other circumstances support application of the exemption. However, we agree fully with your conclusion that if the fruit is bought by Mr. Mariani immediately prior to gathering it, the section 13(a)(6) exemption is inapplicable.

As you know the Division has adopted a strict attitude with respect to arrangements which do not involve a bona fide lease, and we believe that the courts will also be strict in construing such arrangements.

However, in the ordinary case if Mr. Mariani obtained a bona fide leasehold interest in the land before the beginning of the cultivation period for a particular crop year, it would seem that the orchard could be considered as his farm during that year for purposes of the section 13(a)(6) exemption.

If, however, he obtained the lease after cultivation of the particular fruit crop had begun, we believe that in the absence of exceptional circumstances, the orchard should not be considered as his farm during that crop year for purposes of the exemption.

You are, of course, familiar with the other necessary requirements for application of section 13(a)(6) in this situation particularly the requirement that an establishment shall not dry or dehydrate any fruit grown by other farmers.

It is hoped that this memorandum will be sufficient to answer your questions. If it is not, will you please furnish us additional information in order that we may answer your questions more specifically.

(12437)

21 AC 409.31

Arthur E. Reyman
Regional Attorney
New York, New York

November 9, 1942

SOL:RB:KLC

Donald M. Murtha
Acting Chief, Wage-Hour Section

Lane Construction Company
Meridan, Connecticut

In your memorandum of September 11, 1940, you asked whether the construction of a "cut-off" or "by-pass" from an existing interstate highway to carry interstate traffic around a town constitutes original construction, or the reconstruction or repair, of an instrumentality of interstate commerce.

It appears that the subject company is engaged in constructing cut-offs or by-passes from highways carrying interstate commerce through cities and towns. To avoid the local traffic, a by-pass is built from a point on the existing highway before the city proper is reached to a point on the other side of the city on that same highway so that the traffic can skirt the main section or all of the city. The by-pass is at most points one-half to three-quarters of a mile away from the existing highway. The old road is continued in operation during the construction of the by-pass and continues to operate even after the by-pass is complete, traffic having the choice of taking the old route through the town or going around it on the by-pass. There may be signs indicating the old road, which runs through the business section of the town, as an alternate route. In building the by-pass the old highway may be torn up to some extent at the points of intersection and connection with the by-pass. We assume that the by-pass is cut through virgin territory and will not run over any existing road or streets, but we cannot ascertain the length of the by-pass from the facts in your memorandum. In skirting the city, the existing highway is moved somewhat from its present course, but it still remains the same highway in designation and function.

In our opinion, the construction of such a by-pass road, which is designed to and does facilitate the movement of interstate traffic along an existing highway, constitutes the reconstruction of an existing instrumentality of interstate commerce, rather than the original construction of a new instrumentality of commerce. The by-pass will, when completed, become part of the existing highway and will undoubtedly be given the same number or designation as the old highway. As a matter of fact, the by-pass will have the effect of "shortening" the distance between points on the existing highway on either side of the town with respect to the time required to traverse such distance, just as the straightening of a road which we have said is reconstruction work covered by the Act (see Legal Field Letter 34, page 20) is calculated to shorten the distance along the existing highway.

We therefore are of the opinion that the employees engaged in the construction of the cut-offs and by-passes are covered by the Act as employees engaged in the reconstruction of instrumentalities of interstate commerce.

(12,437)

23 CF 202.431

Frank J. Delany
Acting Regional Attorney
Chicago, Illinois

SOL:JHS:DMH

November 28, 1942

Donald M. Murtha
Chief, Wage-Hour Section

Litman & Company
Chicago, Illinois
File No. 12-1467
LEXI:FJD:eab

Reference is made to your memorandum of November 17.

In the memorandum of April 29, 1942 from John F. Droz, attorney, to you, he discussed the application of section 7(c) to the handling of dressed poultry.

He pointed out that the inspection division had allowed this exemption only as to employees engaged solely in the handling of live poultry. Authority for this position was a memorandum of November 4, 1941 from the Regional Attorney to a District Supervising Inspector with respect to the Peter Fox Sons Company

Mr. Droz questioned the position taken in this memorandum. It seems clear that the memorandum adopted the correct view that the section 7(c) exemption is inapplicable to the handling of dressed poultry. It is true that the language referred to by Mr. Droz in paragraph 21 of bulletin 14 and in press release G-207 is somewhat ambiguous. However, the subject company does not dress poultry, and since the section 7(c) exemption for poultry handling, slaughtering or dressing ceases with the last named operation and operations incidental to it, the handling of dressed poultry falls outside the scope of the exemption.

While the section 7(c) exemptions for the handling, slaughtering or dressing of poultry and livestock are not coterminous, attention is directed to the fact that the Swift case held the section 7(c) exemption ceased when the dressed meat was removed from the coolers.

(12437)

AIRMAIL

Miss Dorothy Williams
Regional Attorney
San Francisco, California

SOL:JHS:RBW

Donald M. Murtha
Chief, Wage-Hour Section

December 10, 1942

Michael-Leonard Co.
Spokane, Washington
File No. 46-519
LE:KMR:JKM

This will reply to your memorandum of October 7 with respect to the application of the section 7(b)(3) exemption to the operations of the subject company.

As you point out, press release R-755 granted a section 7(b)(3) exemption for the cleaning and preparing of garden seed and seed corn at country cleaning plants. Neither this release nor press release R-702 making a prima facie finding of seasonality for this industry give a description of the kinds of seed which should be included under the term "garden seed." You ask whether the cleaning of seed peas would come within the scope of the exemption. Examination of the material on file in connection with the application for a seasonal exemption for this industry does not answer this question, but in view of all the facts it is our opinion that garden seed would include seed peas.

You further ask whether the large scale operations conducted by the subject company would come within the meaning of the term "country cleaning plants" as used in release R-755. It appears that the greatest number of employees employed by the establishment is 88. We do not believe that employment of this number of employees would defeat the exemption if otherwise applicable.

You further point out that the subject company has another branch at Billings, Montana, from which occasional shipments of seed peas are received at the subject plant for cleaning. You call attention to the fact that release R-755 defines the term "country cleaning plants" to designate "those establishments wherein the seed crop is received direct from farmers (no part of which is shipped from other plants) and is cleaned, purified, sorted, dried, graded, and otherwise rendered suitable for seed * * *."

The language quoted above from the seasonal determination is very specific. Since shipments of seed peas are received at the subject plant from the Billings plant, the subject plant is not a "country cleaning plant," and its employees are not exempt under section 7(b)(3).

(12437)

23 CF 202.2296
23 CE 205.6396

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:JHS:KLC

Donald M. Murtha
Chief, Wage-Hour Section

December 15, 1942

Application of the 7(b)(3) and 7(c) exemptions to canning of vegetable soup.
ENV:al

This will reply to your memoranda of October 5 and December 4, 1942 with respect to a problem as to the scope of the application of the section 7(c) and 7(b)(3) exemptions.

You state that the P. J. Ritter Company raised the question as to whether employees engaged in the canning of vegetable soup were within the 7(b)(3) and 7(c) exemptions if some of the vegetables used in the soup were not fresh vegetables. The company contended that if more than 50 percent of the vegetables were fresh the canning of the vegetable soup was within the exemption.

It was further brought to your attention that Mr. Leon B. Schachter, of the Meat and Cannery Workers Local Union 56 of Camden, New Jersey wrote to the Administrator for a ruling on this same point. He received a letter from Mr. Grogan, as Acting Administrator, dated September 28 of this year in which it was stated that if in excess of 20 percent of the ingredients used are not fresh fruits and vegetables, the exemption does not apply.

You call attention to the statement in the "Canning Kit" that: "the canning of fruit cocktails, ketchup, and related products shall be considered exempt under both sections 7(c) and 7(b)(3), if the finished product is composed predominantly of fresh fruits or vegetables.

You will find enclosed a copy of the letter of September 28 from Mr. Grogan to Mr. Schachter. This letter states the position of the Division, and to the extent that it is contrary to the statement quoted from the Canning Kit, the position set forth in the letter governs.

Moreover, there seems to be no reason for distinguishing between the section 7(c) and 7(b)(3) exemptions with respect to the problem which you present. Therefore, the position stated in the letter with respect to the section 7(c) exemption applies also to the section 7(b)(3) exemption. You are aware that in a number of situations the Division has taken the position that 20 percent is the line to be drawn in determining what is an "insubstantial" percentage of nonexempt work.

Attachment

(12437)

21 AC 101.5
409.4213

Beverley R. Worrell
Regional Attorney
Richmond, Virginia

SOL:EG:DMH

Donald M. Murtha
Chief, Wage-Hour Section

December 30, 1942

Court Square Building
Baltimore, Maryland

Your memorandum of December 12, 1942 referred for opinion the question of whether Government agencies are engaged in interstate commerce within the meaning of the Act.

As you know, section 3(b) of the Act defines commerce to mean "* * * transmission, or communication among the several States or from any State to any place outside thereof." We have consistently taken the position that employees who are regularly engaged in the preparation of reports, publications, pamphlets and other material for interstate transmission, or who regularly use instrumentalities of interstate commerce in the performance of their duties are within the coverage of the Act. It would seem that employees of Government agencies engaged in similar activities are also engaged in interstate commerce or in the production of goods for interstate commerce.

Section 3(d) of the Act, which provides that the Act shall not apply to persons employed by the United States, simply acts as an exception for Government employees. It does not, however, affect in any way the issue of whether or not a Government agency is engaged in interstate commerce. Accordingly, it is our opinion that such agencies as the F. B. I., Wage and Hour Division, etc., which customarily and regularly prepare reports, opinions, pamphlets and other information for transmission to other States are engaged in interstate commerce or in the production of goods for interstate commerce. Custodial and maintenance employees of such buildings are, in our opinion, within the coverage of the Act. Of course, for administrative purposes, you should apply the 20 percent test.

(12437)

26 CE 401.2

Vernon C. Stoneman
Regional Attorney
Boston, Massachusetts

SOL:IMM:SRA

Donald M. Murtha
Chief, Wage-Hour Section

January 14, 1943

Wolf Secret Service
Boston, Massachusetts
File No. 20-3634
BL:VCS:MAF

This is in reply to your memorandum of December 24, 1942 with respect to the inclusion of commissions earned by certain employees of the subject concern in the computation of their regular rate of pay.

The employees in question are guards engaged in covered work during some workweeks. These guards also solicit business for the subject company, but generally the solicitation of business is not done during a workweek in which they act as guards. They receive a salary for their work as guards and are paid on a commission basis for the business which they solicit. Apparently the contracts solicited are either terminable at will, or are contracts from week to week. The commissions are paid to the employees in the week in which the fees are collected by the subject from the client. Thus, the employees may in a week in which they are engaged as guards receive commissions for contracts solicited by them many weeks before.

Mr. Breen's memorandum of August 13, 1942, took the position that the commissions were earned during the week in which the contracts were solicited, and are, therefore, not to be included in computing the regular rate of pay during subsequent workweeks in which they are paid. (Indeed, he went further and argued that there is nothing "regular" about the commissions, and because of "consequence foreign to legal or administrative contemplation," the commissions should be completely disregarded in regular rate calculations.) Mr. Epstein's memorandum of September 29, 1942, held that the commission was not earned until and unless the subject company realized income from the job solicited. This conclusion was deemed to follow from the fact that the commission "is payable when, as, and if such income is realized."

In my opinion Mr. Epstein's views are well founded. It would seem that a guard's right to commissions does not accrue until they are paid by the client to the subject, because unless the subject does receive a fee there is nothing on which a commission may be paid to the guard. Furthermore, it is fair to assume that the guard's salary is fixed with due regard to the fact that he will be augmenting that salary with commissions.

Accordingly, both salary and commissions received in any workweek constitute the earnings for that workweek, and the commissions are to be included in calculating the regular rate of pay for the workweeks in which they are received.

Attachment
(File)

AIR MAIL

23 CF 202.328
23 CF 202.326

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

SOL:JHS:FH

January 15, 1943

Donald M. Murtha
Chief, Wage-Hour Section

National Cottonseed Products Association
1024 Exchange Building
Memphis, Tennessee
RJB:HZ

This will reply to your memorandum of October 26, with respect to the above subject. We regret that a delay has occurred in answering your inquiry, but it was necessary to obtain economic data both from the Economics Branch of this Division and from experts employed by the United States Department of Agriculture.

As you know, there are two divisions of section 7(c) which must be considered in connection with your soybean problem. One is the outright 14 workweek exemption for first processing, canning or packing perishable or seasonal fresh fruits or vegetables; the other is the 7(c) area of production exemption.

It seems clear that soybeans in their green state are perishable or seasonal fresh vegetables within the meaning of the section 7(c) exemption whether or not the area of production requirements are satisfied. Information obtained from experts in the Department of Agriculture and from available literature indicates that the moisture content of green soybeans suitable for canning varies from approximately 67 percent to 80 percent. This is comparable with the moisture content of Irish potatoes. As you know, the Division has held that Irish potatoes are fresh vegetables as that term is used in section 7(c). Green soybeans may be canned, used in salads or used as a green vegetable. Dried soybeans are used for most purposes other than those listed above. They may be canned or pressed to obtain oil. They may also be used in making plastics, paints, soybean flour, oleomargarine, cooking oils, lubricating oils and for numerous other purposes.

Dried soybeans have a moisture content of from 7 percent to 10 percent and occasionally less than 7 percent. Since they are dried out to this extent it seems clear that they cannot be properly termed "fresh" vegetables. The drying process has converted them into a relatively nonperishable state. They are relatively unaffected by heat or cold and are rarely attacked by weevils or other grain insects. They are very similar to dry edible beans which have been ruled by the Division not to be fresh vegetables.

According to Department of Agriculture experts, oil is always pressed from dried beans. They also state that there is little or no utilization of soybeans having a moisture content less than 67 percent and more than 10 percent. If the beans are allowed to dry out beyond the stage where they are usable as a fresh vegetable, they are allowed to dry to a point where the moisture content is 10 percent or less and they are usable as dried beans.

As stated above, it seems clear that the dry beans are not a fresh vegetable. They are, however, an agricultural commodity within the meaning of

the subsection of 7(c) relating to first processing within the area of production. Accordingly, if the area of production requirements are satisfied, the first processing of dried soybeans is within the scope of the 14 workweek exemption. As was stated above, however, the canning of green soybeans is exempt for 14 weeks regardless of whether the area of production requirements are satisfied.

Since green soybeans are fresh vegetables, the section 7(b)(3) exemption (R-974) applies to canning them. Operations on dried soybeans are not within this exemption, however.

You also ask with respect to peanuts. Peanuts are an agricultural commodity within the meaning of section 7(c), and their first processing is exempt if performed within the area of production. As you will note from paragraph 30 of Interpretative Bulletin No. 14, first processing includes roasting and extracting oil from unshelled nuts and shelling. There may also be other first processing operations performed on peanuts.

Cottonseed is an agricultural commodity within the meaning of section 7(c), and employees crushing it are to be counted for purposes of determining the number of employees engaged in processing under section 536.1(a) of Regulations, Part 536. While it is theoretically possible to combine an exemption under 7 (c) for processing cottonseed and an exemption under the 7(c) area of production subsection, it is almost certain that in weeks in which an establishment is engaged in both types of work, more than ten employees will be engaged in processing so that the area of production definition will not be satisfied.

As you know, a limited number of operations performed on soybeans or peanuts may be exempt under section 13(a)(10). These include cleaning, sorting and grading. But crushing of soybeans and other processing operations are outside the scope of section 13(a)(10) as are the operations on peanuts enumerated in the second paragraph preceding.

I trust that the foregoing discussion will enable you to prepare a reply to the letter from the National Cottonseed Products Association dated October 14.

January 22, 1943

SOL:HK:REB

Dorothy M. Williams
Regional Attorney
San Francisco, California

Irving J. Levy
Acting Solicitor

Child Labor Hazardous Occupations Order No. 5, as amended.

This is in reply to your memorandum of December 17, 1942, in which you state that Mr. Archie J. Mooney, Secretary of the California Apprenticeship Council, has raised a question concerning the application of the term "ship joiners" as used in section 442.5(c) of Child Labor Hazardous Occupations Order No. 5, as amended, to apprentices in small boat yards. You further state that Mr. Mooney has advised you that in a small boat yard an employee performs all of the operations which in a big shipyard would be performed by ship joiners, and in addition, performs all other operations in connection with the building of the boat, as, for example, the "laying of the keel," and that the term "ship joiners" is not used in small boat yards. He further stated that none of the occupations other than those involving the duties of joiners, when performed by the employees in the small boat yards, come within the definition of a hazardous occupation; and that the employment of apprentices meets all the other requirements of subsection (c).

You state that you have advised Mr. Mooney that the apprentices in small boat yards are exempt under the provisions of subsection (c) to the extent that they perform operations classified as those of ship joiners in the large shipyards provided they meet the other requirements of that subsection, and you inquire whether your opinion is correct.

I am attaching a copy of Report No. 5-A, issued by the Children's Bureau, which supplements Report No. 5 and which deals with the exemption in question to Order No. 5. From this report you will see that the exemption for apprentices from provisions of Order No. 5 is based on the consideration that an apprentice "is employed in a specified craft recognized as an apprenticeable trade and which <u>as a whole</u> is not particularly hazardous for the apprentice," and that the apprentice uses power-driven woodworking machines "infrequently and intermittently as a necessary part of his training * * * and only under the direction and supervision of an instructor." At page 8 of the report consideration is given to the apprenticeable trade of ship joiners.

Whether the apprentices referred to by Mr. Mooney are apprentice ship joiners is doubtful, for the report does not indicate that ship joiners engage in any duty such as "the laying of the keel." On the other hand, it seems that the apprentices in question might be classed as shipwrights or wooden boat builders, both of which crafts are discussed in the report beginning at page 8. These latter crafts are considered to be particularly hazardous "as a whole," and, consequently, apprentices in such crafts are not within the exemption to Order No. 5. Therefore, unless the apprentices in question belong to the craft of ship joiners, they would not be exempt from the operation of Hazardous Occupations Order No. 5. It may be that the apprentices in question use power-driven woodworking machines no more frequently than do ship joiners, yet if the craft to which the apprentices belong is hazardous as a whole, it was not intended to exempt them from Order No. 5

Attachment

(12,437)

23CB204.3

Arthur E. Reyman
Regional Attorney
New York, New York

Donald M. Murtha
Chief, Wage-Hour Section

SOL:PKD:KLC

February 13, 1943

Fleet Carrier Corp.
1775 Broadway
New York, New York
SOL:RAL:MS

This is in reply to your memorandum of December 7, 1942, in which you inquire regarding the applicability of the exemption contained in section 13(b)(1) of the Act to certain employees of subject firm who are known as hook-up men. A summary of the facts is as follows:

The company is a contract carrier engaged in the transportation of automobile trucks by drive-away methods. The duties of the hook-up men are to mount and otherwise attach trucks to one another preparatory to their transportation and delivery. Such attaching and mounting is done in several methods such as (1) attaching one truck to another by means of a tow-bar, or (2) erecting a wood framework on the rear of the truck on which another vehicle is placed and attaching a third vehicle to the carrying and transporting truck by means of a tow-bar, or (3) erecting a saddle or framework on the rear of the transporting truck where the front wheels of the towed vehicle are placed. In connection with such work, the hook-up men are charged with the duties of: (a) disconnecting the drag link on the towed vehicle, (b) installing steering heads of tow-bars on the front axles of towed vehicles, (c) aligning the front wheels of towed vehicles, (d) disconnecting the drive shaft or removing the rear axle shaft of the towed vehicle, (e) removing the front wheel of the towed truck, and (f) frequently disconnecting the speedometer and regulating the lights of towed vehicles.

For additional information you enclosed a statement by the company describing the nature of the work and six picture exhibits.

We have inquired of the Interstate Commerce Commission as to whether or not such men would be subject to regulation by it under section 204 of the Motor Carrier Act.

I am enclosing a copy of the reply of the Commission. These hook-up men are classed as mechanics and as such, exempt from the overtime provisions of the Act under section 13(b)(1).

I am returning to you herewith the company's statement and the six picture exhibits.

Attachments (8)

(12437)

23CF202.221
23CE205.631

AIR MAIL

Dorothy M. Williams
Regional Attorney
San Francisco, California

Donald M. Murtha
Chief, Wage-Hour Section

SOL:JHS:RHH

February 16, 1943

Application of 7(b)(3) and 7(c)
to employees of warehouse company

Reference is made to your memorandum of July 24 and December 4, 1942 with respect to the above subject.

On December 28, 1942 we advised you that the answer to your inquiry would be affected by the proposed press release clarifying the scope of the 7(c) exemption. As you know, that release has been issued as R-1892. On January 8, 1943 you wrote us further with respect to this problem.

You state that in connection with the national inspection of the Lawrence Warehouse Company, questions have arisen regarding the application of sections 7(c) and 7(b)(3) to those of their employees who work in plant warehouses (using that term to describe warehouses which are a part of the canning establishment and which store only goods canned in that cannery). You state further that it is a common practice, at least on the West Coast, to bond plant warehouses in connection with bank loans to canners upon the security of their product.

The subject firm takes control of the canned goods and issues to the canner warehouse receipts against which money may be borrowed. Thereafter, the goods may only be removed upon a release issued by the subject firm. In order to take control of the canned goods, the firm leases a warehouse which is usually that of the canner and attached to the canning establishment. It thereupon hires a manager and enough warehousemen to take charge of the goods on which receipts have been issued. The manager and warehousemen are usually and in the instant case former employees of the canner, and although now employees of the Lawrence Warehouse Company, they have certain special duties to perform in connection with the control and release of the pledged goods. They continue to perform substantially the same warehouse duties as are performed by employees of the canner. The warehouse company pays all salaries to these employees but bills the canner for the amount of the salaries, plus a percentage, generally 10 percent.

You refer to the fact that the position was taken in the Canning Kit that employees in a plant warehouse are within both the 7(c) and 7(b)(3) exemptions, and that employees of a consolidated or central warehouse are not within these exemptions. You then refer to volume I, No.10, page 1, and volume I, No. 12, pages 2 and 3, of the Field Operations Bulletins. The statement contained in the latter bulletin is almost identical with release R-1561. You state that it appears that the opinions in the Field Operations Bulletins insofar as they relate to bonded warehouses are based

upon the assumption that plant warehouses are not bonded and that all bonded warehouses are necessarily consolidated or central warehouses. You say that this is not the fact, at least not on the West Coast.

In your memorandum of January 6, 1943 you state that the usual practice in the canning industry in California is to label, stamp and box the canned goods and then to transport them immediately to an adjoining building or part of the same building for storing purposes. When the goods are moved to the separate building they come under the control of the warehouse company and of the employees of the warehouse company. Sometimes, however, the goods are transferred to the warehouse before they have been labeled, and in such a case the warehouse or canning company employees, or both, will do some of the labeling. You ask whether it is our position that where the storing and warehousing activities occur after labeling, stamping and boxing have taken place the 7(c) exemption is inapplicable, since such warehousing or storing is too remote from the actual hermetic sealing of the cans to be considered part of "canning."

As to the application of the section 7(c) exemption, consideration must of course be given to whether or not the warehouse company is engaged in the operations described in the section. If employees of the warehouse company do not label, box or stamp immediately after hermetic sealing and cooling they are not engaged in "canning" within the meaning of section 7(c). Of course unless the employer is engaged in canning in the establishment, his employees are not within the scope of the section 7(c) exemption.

In weeks in which the employees of the warehouse company are so engaged, however, the principles of the Swift case are applicable. The premises where labeling, stamping and boxing are performed immediately after hermetic sealing and cooling are portions of the establishment where exempt operations are being performed within the meaning of section 7(c). However, employees whose work during the same workweeks relates to the handling or storing of goods which have not been labeled, stamped or boxed in the warehouse are not in our opinion performing an operation which is a necessary incident to canning and are therefore not within the scope of the section 7(c) exemption. Therefore, if the storing and warehousing activities occur after labeling, stamping and boxing have taken place, the 7(c) exemption is inapplicable if the labeling, stamping or boxing was not performed in the warehouse. However, if the section 7(c) exemption is otherwise applicable as to particular employees, it is not defeated simply because they are handling or storing goods which have been labeled, stamped or boxed in the warehouse.

On the basis of the facts you state, we believe that the section 7(b)(3) exemption is applicable to the operations performed in the warehouse by employees of the Lawrence Warehouse Company. We are not sure that the terms plant, bonded, consolidated and central warehouses have always been consistently used in the various statements of the Division with respect to the section 7(c) and 7(b)(3) exemptions. It may also be that there is some variation among sections of the country in the way these terms are used. In the case you present, you state that the plant warehouse is a part of the canning establishment. We assume that you mean that the cannery and the warehouse

(12437)

together constitute a single establishment as we have defined that term in interpreting sections 7(c) and 7(b)(3). You state that employees of the warehouse continue to perform substantially the same warehouse duties as the employees of the canner. In your memorandum of December 4, 1942 you indicate that the warehouse stores only the goods canned in the cannery, On the basis of the facts presented, it is our opinion that you are correct in believing that the section 7(b)(3) exemption is applicable to all employees of the warehouse. This is true regardless of whether the section 7(c) exemption is applicable to such employees. The section 7(b)(3) exemption is applicable to all employees employed in the fresh fruit and vegetable canning industry, and since the warehouses of the subject company are apparently used only in connection with the canning of fresh fruits and vegetables, the section 7(b)(3) exemption is applicable to all employees employed in these warehouses. We do not wish to be understood as deciding that the section 7(b)(3) exemption would not be applicable where the warehouse handled canned goods received from other canning establishments since in a memorandum of June 30, 1942 from Mr. Livengood to Regional Attorney Montgomery the section 7(b)(3) exemption was held applicable in such a situation. We should, however, want further facts before expressing an opinion as to the application of the section 7(b)(3) exemption in such a situation.

You are familiar with our position that where two employers are operating in the same establishment, the same exempt weeks must be taken under sections 7(c) and 7(b)(3) respectively for employees of both employers. Since the employees of the cannery and warehouse are employed in the same establishment, the same weeks of exemptions under sections 7(c) and 7(b)(3) respectively must be taken for employees of both employers.

Llewellyn B. Duke
Regional Attorney
Dallas, Texas

SOL:JHS:RHH

Donald M. Murtha
Chief, Wage-Hour Section

February 26, 1943

Segregation of Government work from
commercial work in same workweek
under Walsh-Healey Act
SOL:IDD:BM

This will reply to your memorandum of February 9, 1943 relative to the recent change in the interpretation contained in section IV, paragraph 2, of Rulings and Interpretations No. 2 under the Walsh-Healey Public Contracts Act.

You raise two questions on the following state of facts:

> An employee may work 10 hours a day and six days a week, devoting 2 hours of each day to work on government contracts and 3 hours of each day to commercial work, the government work bearing an industry rate of 40¢ an hour and the commercial work bearing a rate of 10¢ an hour.

You inquire first whether any daily or weekly overtime would be due under Walsh-Healey, and second, if so, at what basic rate the overtime should be calculated.

In my opinion, the new interpretation does not affect the question of whether overtime need be paid. The requirement for overtime compensation is derived from article 103 of the regulations of the Secretary of Labor, the last paragraph of which provides:

> If in any one week <u>or part thereof</u> an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after eight hours in any one day or after 40 hours in any one week during which no single daily total of employment may be in excess of eight hours without payment of the overtime rate. (Underscoring supplied.)

Thus, in the example cited, overtime pay would be required for 20 hours.

As to the determination of the basic rate of pay, it would seem that the two rate of pay formula would be applied, and the overtime pay be based on the average hourly rate or on the rate applicable during the overtime hours. In general, however, the Fair Labor Standards Act will be applicable at least to the Government work, and the commercial work during such a week would accordingly be subject to the Fair Labor Standards Act minimum. It should be noted that the opinion to which you refer (which is also set forth in Field Operations Bulletin, volume IV, No. 2, page 1) represents the Administrator's policy in enforcing the Public Contracts Act. Attorneys should be careful not to confuse enforcement policy under the Public Contracts Act (or under the Fair Labor Standards Act) with legal interpretation of the Fair Labor Standards Act since the latter Act does not provide (save in certain specific sections) for binding administrative regulations.

(12437)

William A. Lowe
Regional Attorney
Birmingham, Alabama

SOL:PRD:RHH

Donald M. Murtha
Chief, Wage-Hour Section

February 26, 1943

North Alabama Motor Express, Inc.
Gadsden, Alabama
File No. 1-51119
RA:WAL:IG

Reference is made to your memorandum of January 18, 1943 in which you present two questions concerning the computation of hours worked. They involve two employees of the subject company which Operates a motor express line. In the one case the sole duty of the employee is to work on a trip from Huntsville to Gadsden. He resides in Gadsden for his own convenience and makes the trip to Huntsville where his duties begin on the truck on which he works on its return trip to Gadsden. He has no duties in connection with his trip from Gadsden to Huntsville and is not required to travel on the truck, other means of conveyance being available. In the other case the sole duty of the employee is to work on a trip from Huntsville to Albertville. This employee, for his own convenience, resides in Huntsville. The employer purchases for him bus tickets for his return home each day.

The question is whether hours spent on the first employee's trip from Gadsden to Huntsville and the second employee's trip from Albertville to Huntsville should be considered hours worked. The distances involved are from 50 to 75 miles.

I agree with your tentative opinion that this travel time should be considered hours worked in each case. In each case the employee is required by his employer to travel back to Huntsville to pick up his truck. The location of the employee's home is immaterial; the travel back to Huntsville is performed for the purpose of reporting for work there, and the absence from Huntsville was occasioned by the employer's business.

(12437)

Ernest N. Votaw
Regional Attorney
Philadelphia, Pennsylvania

SOL:RB:DH

Donald M. Murtha
Acting Chief, Wage-Hour Section

March 1, 1943

Drydock Associates
Philadelphia, Pennsylvania
FED:vs
ENV:al

Reference is made to your memoranda of August 19 and October 1, 1942 regarding the applicability of the Act to various operations performed by the subject company as a general contractor in the Philadelphia, Pennsylvania Navy Yards. You also ask what uniform inspection policy is to be followed with respect to contractors operating within Navy Yards under present war conditions, and what meaning is to be given the term "marine equipment" as used in section 3(i) of the Act.

It appears that the subject company is engaged in the following operations at the Philadelphia Navy Yard:

(a) New construction of drydocks for use in building and repair of United States naval vessels

(b) New additions to old buildings, in which manufacture takes place

(c) Repair and remodeling of existing railroad tracks

(d) Construction of marine railway

(e) Building of a steam tunnel into a fabricating shop

(f) Building of duct lines and steam tunnel into the power house

(g) Repair and reconstruction of duct lines which distribute power, lighting and telephone wires underground throughout the navy yard

(h) Making a new quay or sea wall.

It further appears that the workers involved include employees who receive and check materials sent into the yard from other States, that the yard repairs as well as builds ships which move in interstate and foreign commerce, and that railroad lines carry cars into the yard which come from other States.

You indicate that operations (e) and (f) might be considered covered by analogizing them to the construction of a road into a timber tract, and express the opinion that operations (c) and (g) are clearly covered but that the other operations seem to involve the original construction of instrumentalities of commerce or plants to be used for the production of goods for commerce.

Associate Attorney Darkow, however, suggested that the building of a drydock for use in repairing naval vessels can be considered the production of goods for interstate commerce if a drydock can be deemed "marine equipment" and therefore "goods" within the meaning of section 3(i), and if the term "for commerce" is construed to mean "to supply the need of," along the lines indicated in the decision of Fleming v. Atlantic Company, 40 F.Supp. 654.

It is our understanding that the term "marine equipment" as used in the trade refers to all kinds of vessels, floating machinery or equipment, fittings, parts, accessories, machines, hardware and other products installed on vessels as part of their normal equipment, and does not include drydocks, plants, railways, quays or other shore facilities and installations used in the production or repair of ships. Moreover, we are not at this time prepared to adopt the broad interpretation of the term "for commerce" used in the Fleming v. Atlantic Company decision. Consequently, the status under the Act of the various operations described in your memorandum is to determined under our outstanding interpretations relating to construction and reconstruction work, and to activities necessary to the production of goods for interstate commerce, rather than under an interpretation that would consider the construction and reconstruction of shipbuilding and ship repairing shore facilities as the production of marine equipment for commerce.

Accordingly, we agree with your position that employees engaged in operations (c) and (g) are covered by the Act, provided, as seems probable, the railroad tracks and the power, light and telephone wire ducts being repaired function either as instrumentalities of interstate commerce or as part of the plant and equipment used to produce or repair ships for interstate commerce.

The original construction of ship ways and drydocks to be used in building and repairing ships for commerce, however, is not, in our opinion, covered by the Act any more than is the original construction of a factory to be used in the production of goods for commerce.

The status of the construction of new additions to old buildings in which manufacture (presumably of products for interstate commerce) takes place, depends upon whether or not such construction constitutes at the same time a reconstruction of the existing buildings under the principles expressed in release G-162, part V. In the absence of any of the details necessary for such determination, we cannot pass upon the status of these operations.

Similarly, the status of operations (d), (e) and (f) depends upon whether or not they are properly to be deemed original construction or reconstruction work under the principles expressed in Part V of release G-162. We do not believe, however, that such construction of marine railways, steam tunnels, and duct lines can be analogized to a building of a road into a timber tract, which we have said is covered for the same reason as the construction of an oil derrick, both being regarded as an integral part of the productive processes in producing timber or oil (See Part I(d) in release G-162). The building of the marine railway, steam tunnels or duct lines cannot be said to constitute an integral part of the process of producing power or fabricated products.

The building of a new quay or sea wall would, in our opinion, be covered, if it either improved the navigability of the river as an instrumentality of commerce, or (as seems more probable) constituted reconstruction of the navy yard as a physical and functioning unit engaged in producing or repairing ships or other goods for commerce, within the meaning of Part V of Release G-162.

Moreover, any employees of the subject contractor engaged in receiving and checking materials sent to the ship yard directly from outside of the State would, of course, be covered by the Act, regardless of the particular operation to which they are attached.

With respect to the inspection policy to be followed under present war conditions in cases involving contractors engaged in work at navy yards, your attention is directed to the memorandum on the applicability of the Act to construction contractors working for the Government from John R. Dille, Director of Field Operations Branch to All Regional Directors, dated February 20, 1943, a copy of which is, undoubtedly, in Mr. Dorsey's possession.

Arthur E. Reyman
Regional Attorney
Newark, New Jersey

25 BD 101
25 BE 202.1

Donald M. Murtha
Chief, Wage-Hour Section

SOL:EG:RHH

March 1, 1943

Gould & Eberhart, Inc.
Irvington, New Jersey
SOL:JD:DK

This will reply to Mr. Rozen's memorandum of February 18, 1943 in which you request our opinion on whether time spent by armed guards of a factory, wholly engaged in war work, in traveling to and from and attending a compulsory course of instruction given by the United States Army should be considered "hours worked" under the provisions of the Public Contracts Act and Executive Order No. 9240.

It appears that the subject concern pursuant to the direction of the Army requires their armed guards to attend a course of instruction given one hour a week for the duration. The classes are conducted by the Auxiliary Military Police, S.O.S. An individual guard may sometimes be required to attend a lecture during his working day and sometimes outside his regular working hours.

As you know, section IIIb(4) of Rulings and Interpretations No. 2 excludes custodial employees from the coverage of the Public Contracts Act. Accordingly, working hours of the armed guards, who are engaged in a capacity of custodial employees would not be governed by the wage and hour requirements of the Public Contracts Act. However, their employment would appear to be subject to the Fair Labor Standards Act.

It has been the position of the Division that where an employee is required as a condition of his employment to attend a class, the time spent at the class should be considered as time worked. Where a guard is required as a condition of his employment to attend a lecture during his regular working hours, time spent in traveling to and from the lecture should also be considered as time worked for purposes of computing overtime compensation under the Fair Labor Standards Act.

The question of whether travel time to and from the lecture on days when the lecture is held outside of a guard's regular working hours is regarded as time worked, should be resolved in accordance with the principles contained in paragraph 12 of Interpretative Bulletin No. 13.

The payment of $1.00 for attending the lectures may be proper, since there is no requirement that the guards receive the same hourly rate at lectures that they receive while guarding. See R-809, R-1913 and R-1913a. The subject company should be advised that they are required to include all working time in determining whether six or seven days have been worked in a workweek under Executive Order No. 9240.

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

(12,437)

21 AB 305
403.1

Arthur E. Reyman
Regional Attorney
Newark, New Jersey

SOL:PKD:GG

Donald M. Murtha
Chief, Wage-Hour Section

March 3, 1943

Jersey Truck Renters, Inc.
Paterson, New Jersey
File No. 29-2391
SOL:JDB:MSL
SOL:WBM:MEF

This is in further reference to your memoranda of June 18, and December 10, 1942. See also our memoranda of December 21, 1942 and February 2, 1943.

You request our opinion regarding the employer-employee relationship in this case and the applicability of the 13(b)(1) exemption to the drivers in question. The subject is engaged in the business of renting trucks on a contract basis to various firms located in the State of New Jersey. The trucks are used by these firms in the interstate transportation of goods. Seventy-five percent of the business of this company consists of renting trucks only and the rest consists of "renting" truck drivers in connection with the trucks. The only difference in the charges made between the two types of rental is that the salary of the truck driver is added to the normal rental charge. Social security, unemployment compensation, and workmen's compensation payments are also added to the charge.

When the customer calls the subject and states that it is in need of a driver for a day or longer the customer usually specifies which driver should be sent to it. The subject then either selects the driver at its place of business if the driver happens to be there or calls the union headquarters and asks that the driver come to its place of business and drive the truck to the customer. The subject pays the drivers but bills the customer for the exact wage and does not make any profit on the services of the driver. Subject claims that in this service they are only acting as agents for the customer in hiring the drivers. The question of the employer-employee relationship will be treated first.

EMPLOYER-EMPLOYEE RELATIONSHIP

It is our opinion that the subject company is the employer of the truck drivers in question and also that the employer-employee relationship does not exist between the shipper and the drivers. The claim of the subject company that it is only the agent of the shipper is not sound for the reason that those drivers are sent to the shippers only in connection with the leased trucks. The fact that the subject company does not make any money on the services of the drivers is also not of consequence. The profit is already made on the trucks and the fact that subject does not require more profit when a driver is supplied is only evidence that it is satisfied with the profit already made plus the goodwill created by not requiring additional profits because of the services of a driver.

These drivers are hired and paid by the subject company. The power to dismiss them also is with the subject company. Although those factors are not conclusive in determining the employer-employee relationship, yet they are of material value in such considerations. The important element which is controlling in such determinations is that of the power of ultimate control over the employee. There is no doubt that in these cases the shippers have control over the details of the duties of the drivers. To my mind this is not the kind of control which creates the relationship. It is the fact of the ultimate control rather than the immediate control of details which is controlling. Those drivers are, of course, ultimately controlled by the subject company and it is only because of the nature of their duties that the shippers exercise such immediate control.

It is admitted that a taxi driver is not the employee of his passenger and yet a taxi driver is subject to the control and direction of the passenger as to the details of the performance of his duties. The passenger hires the taxi and the driver to conduct him to a certain place. During the course of the trip the passenger may instruct the driver to take a certain route to reach the destination. He may tell him to turn around a certain corner. He may tell him to drive slowly or fast. He may also tell him to stop to pick up a friend whom he saw standing on the sidewalk. In the course of the trip he may take a dislike to the driver or his method of performance and terminate his services. Before arriving at his destination the passenger may change his mind and tell the driver to take him back, or after arriving at his destination he may tell him to wait for him or otherwise pay him and conclude his services. In spite of all those evidences of control the employer-employee relationship is lacking. This is a situation where the question of ultimate control is decisive.

By way of analogy the truck drivers are not employees of the shippers even though the shippers may exercise immediate control over the duties and operations of the drivers. When a driver is dismissed by the shipper he is no more discharged from his employment than a taxi driver is discharged when the passenger terminates his services. It is evident that in some situations where the contractual relationship exists some delegation of power to control the duties of an employee is necessary. Such situations are where the performance of the duties would be impossible without the delegation of such authority. Control over the details of the work does not imply control of the employee.

SECTION 13(b)(1) EXEMPTION

In our memorandum to you of February 2, 1943 we stated that we expect to receive further information from the Interstate Commerce Commission. However, on February 6, 1943 the Commission wrote us that it was unable to assist us further in this matter. A copy of the letter is attached.

It would seem from previous decisions of the Commission that the question of whether its jurisdiction attaches in this case depends upon whether the subject company is the employer of the drivers. Thus, in the Casale Company case to which you refer in your memorandum of June 18, 1942, the Commission declined to assert jurisdiction because the company supplied only trucks and not drivers and was, therefore, not a "carrier" subject to the Commission. That this distinction is of controlling importance is indicated by the following excerpt from the Commission's decision in the case of H. B. Church Truck Service, 27 M.C.C. 191, (196):

> Clearly, so-called leases of equipment by a carrier to a shipper may differ materially in their results from a regulatory standpoint from leases by one carrier to another. The former are sometimes subterfuges and devices to evade regulation, particularly as to operating authority and rates. The public interest requires that we use diligence to prevent evasions of regulation through such devices. Consequently, in cases in which the question of the status created by a lease of equipment with drivers by a carrier to a shipper is presented, in the absence of a showing to the contrary, the presumption arises that the transportation is performed by a carrier for compensation, in other words is for-hire transportation and as such is subject to regulation. This presumption will, of course, yield to a showing that the shipper has the exclusive right and privilege of directing and contracting the transportation service, <u>as, for example, if the equipment were operated by the shipper's employees.</u>/<u>Underscoring supplied.</u>/

Accordingly, we believe that if the Commission were to find (as we have found) that the subject is the employer of the drivers, the Commission would assert jurisdiction over the drivers as employees by a contract carrier. If the Commission should find that the lessees are the drivers' employers the drivers would be exempt as employees of a private carrier.

Since the drivers are thus exempt under either theory the sole question is the possible exemption for mechanics; there are no loaders and no drivers' helpers. But since the subject is apparently in compliance with respect to the mechanics, we believe that the case may be treated as moot provided the subject pays the drivers at least 40 cents an hour.

Attachment

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

Charles A. Reynard
Regional Attorney
Cleveland, Ohio

Donald M. Murtha
Chief, Wage-Hour Section

SOL:IMH:RHH

Request for opinion:
Sharples Chemical Inc.
Wyandotte, Michigan
sol;car;st

March 4, 1943

This will reply to your memorandum of January 16, 1943 in which you request an opinion relative to the compensation to be paid for the last day worked in a year under the payment plan used by the subject company.

It appears that the year is divided into 13 pay periods of 4 weeks or 28 days each. I shall assume that the first pay period begins on the first day of the year. Thus, using the present year as an example the thirteenth pay period ends on Thursday, December 30. Friday, December 31, would be the first day of the next workweek. However, since the next pay period will begin on Saturday, January 1, a change of workweek will be involved. The Administrator has had under consideration for some time the overtime problem raised by changes in workweek. He has decided to reverse the position formerly adhered to by the Division.

Where a workweek is changed from one period of seven consecutive days to another seven consecutive days the overlapping days must be viewed as falling within both the old workweek and the new one. Under the new enforcement policy, however, overtime paid for one workweek may be credited against overtime worked in the other workweek of the period with the result that overtime pay equal to the overtime hours in the week in which the greater amount of overtime is worked will be viewed by the Administrator as satisfying section 7.

The situation presented in your memorandum may be viewed graphically as follows (I am assuming that 8 hours are worked in each day):

	Old Week						
/31	1	2	3	4	5	6/	7
F	S	S	M	T	W	T	F
8	/8	8	8	8	8	8	8/
	New Week						

The overlapping days are Saturday, Sunday, Monday, Tuesday, Wednesday and Thursday. In the last complete workweek under the old schedule 56 hours would be worked and should be paid accordingly. The first complete workweek under the new schedule which begins on Saturday also would include 56 hours but since payment has already been made for 48 of these hours including overtime as worked in the old week payment need be made only for the remaining 8 hours in the new week. Thus, the employee would be entitled to payment of straight time for 56 hours with overtime pay for 16 hours in one workweek and to straight time pay for 8 hours in the other workweek or a total of 64 hours at straight time plus 16 at half-time.

James M. Miller
Regional Attorney
Minneapolis, Minnesota

SOL:RB:KLC

Donald M. Murtha
Chief, Wage-Hour Section

March 5, 1943

Setchell-Carlson, Inc.
2233 University Avenue
St. Paul, Minnesota
SOL:WCJ:ABA

Reference is made to your memorandum of February 5, 1943 inquiring as to the legality under the Walsh-Healey Act of the subject's proposal to have its radio choke-coils manufactured by home workers.

It appears that the subject company has a Government contract subject to the Walsh-Healey Act calling for the manufacture of radios, and that it is a practice in the industry of which the company is a member to manufacture the choke-coils for the radios. Since the subject company is crowded for space and since the wife of one of the company's present employees is an expert at winding choke-coils, but cannot go to the factory to do that work because she has a small child at home, the subject proposes to have that work performed at this woman's home.

In order to avoid the ban against home work on articles manufactured for the Government under the Walsh-Healey Act (see section 1(a) of the Act; Regulations, Article 101(a); Opinion of the Public Contracts Division 1/11/41) the subject company wishes to engage this woman under an arrangement which would place her in the position of an independent contractor rather than in the position of an employee. The subject proposes to give Mrs. Y an order for a certain number of choke-coils specifying certain standards as to quality, dimensions, materials, shapes, sizes, etc. The woman will manufacture these coils in her home with tools and equipment paid for and furnished by her husband, who, as already indicated, is presently employed by the subject company. In this connection it appears that although the subject's employees furnish their own tools it buys those tools from the employees when they cease working for the company, this scheme being designed to prevent employees from stealing company tools. The company will furnish Mrs. Y with an electric motor to provide the power for the coil winding machine. Mrs. Y, in conjunction with her husband, will buy all of the materials required for the making of the choke-coils and will have the assistance of her father and her husband in producing those coils. Mrs. Y, her father, and her husband will be the only persons in Minneapolis and St. Paul who make choke-coils exclusively since, as already indicated, the practice in the industry is for the radio manufacturers to produce those coils themselves.

Mr. Y admits that his wife's activities as described above would be covered by the Walsh-Healey Act, and that she would be willing to comply with all of its provisions. Both Mr. Y and the President of the subject company contend that these arrangements would set up an independent contractor relationship between the company and Mrs. Y and that the home work would therefore be permissible under the Act. You indicate, however, that there is no way of knowing at this time just what degree of control the company intends to exercise over the coil manufacturing activities to be carried on at Mr. and Mrs. Y's home. You further indicate that you advised the President of the subject company that you could not definitely determine whether or not the proposed arrangement would constitute a bona fide independent contractor relationship which would not violate the home work prohibitions of the Walsh-Healey Act. You point out that a definite position could be taken only after a physical inspection and a determiniation of the actual facts.

We agree with your position that it is not possible at this time to definitely determine whether or not Mrs. Y will operate as an employee of the subject company or as an independent contractor in view of the fact that we do not know what degree of control the company intends to exercise over the coil manufacturing activities. However, it is our opinion that the manufacture of these coils in the home would constitute a violation of the Walsh-Healey ban on home work regardless of whether Mrs. Y operated as an employee of the subject company or as an independent contractor. Even if Mrs. Y should be found to operate as an independent contractor she would be acting in the capacity of a substitute manufacturer rather than as a subcontractor for the subject company. The fact that it is a practice in the industry for the radio manufacturers to produce these choke-coils in their own plants, and that Mrs. Y will be the only person in the locality who makes such choke-coils exclusively, indicates that her choke-coil manufacturing activities would be those of a substitute manufacturer for the subject company. As such, she would be prohibited from producing the choke-coils at home since the Walsh-Healey ban on home work applies to substitute manufacturers as well as primary contractors. Therefore, the manufacture at home of these choke-coils would be prohibited in any event, whether or not Mrs. Y be deemed an independent contractor. Of course, if the facts concerning the control exercised by the subject company over the coil manufacturing activities should indicate that Mrs. Y is an employee of the subject company rather than an independent substitute manufacturer we would prefer to base our ban on the home work on that ground.

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21 BN

Mr. Cornelius J. Danaher
Commissioner of Labor
Hartford, Connecticut

March 5, 1943

L. Metcalfe Walling
Administrator

SOL:FR:SMT

The Connecticut Co.
New Haven, Connecticut

This will reply to your memorandum of February 26, 1943, concerning the applicability of the exemption provided by section 13(a)(9) to two watchment employed at the power plant of the subject company.

The subject company operates lines of local and inter-urban trolleys and busses entirely within the State of Connecticut. It also maintains and operates the power plant in question and from it derives the electrical power used in the operation of the trolleys. Approximately 70 percent of the power produced at the power plant is consumed by the subject company; the balance is sold to local consumers, principally to the New York, New Haven and Hartford Railroad, which incidentally owns all the stock in the subject company. As a matter of fact, of the revenue derived from the sale of the surplus 30 percent, 99 percent came from sales to the New Haven Railroad.

Section 13(a)(9) exempts from the minimum wage and overtime provisions "any employee of a street, suburban, or inter-urban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section." Your memorandum of February 26, indicates that the company operates local and inter-urban trolleys which constitutes exempt work under that section. Your memorandum also indicates that the firm operates busses within the State. The bus work may be considered as work of an exempt type under that section only if the busses are local, a matter on which your memorandum is silent. Even assuming for the sake of this discussion, however, that the company's transportation business is of the sort which would qualify for exemption under section 13(a)(9), we do not believe that the exemption should be extended to the two employees here in question. The fact that 30 percent of the power produced at the power house at which these employees are employed is sold rather than consumed in the operation of the exempt business indicates that the power plant may properly be viewed as an enterprise separate from that of operating the transportation system. (In view of the fact that virtually all the surplus power is sold to the railroad which owns all the stock in the subject company, it is quite probable that the railroad views the power plant as an asset of some importance in its railroad operations. This situation strengthens, but is not necessary to, our conclusion.)

The somewhat similar exemptions provided by sections 13(a)(4) and 13(b)(2) have been construed, as we are now construing this exemption, to apply only to employees of the employer who are engaged in connection with the work which creates the exemption. An employer may not operate a business which is subject to the Act and claim an exemption therefor simply because he also operates another business under which all of his employees are exempt.

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21 AC 409.92

AIR MAIL

Dorothy M. Williams
Regional Attorney
San Francisco, California

Donald M. Murtha
Chief, Wage-Hour Section

SOL:RB:FH

March 5, 1943

Del E. Webb Construction Co.
Phoenix, Arizona

Reference is made to your memorandum of February 2, 1943 inquiring as to the applicability of the Fair Labor Standards Act to pay roll clerks and accountants working for a construction company, who prepare pay roll records and other financial data at the site of a construction project.

It appears that the subject company is engaged in the construction of an army camp in Phoenix, Arizona, under contract with the United States Engineers Office and that the pay roll records and other financial data prepared by the employees in question at the construction site are submitted by the company to the army engineers there who, in turn, submit these reports to their superiors in Los Angeles, California.

You ask whether, assuming that these reports are sent out of the State, the Division would regard the employees in question as covered by the Act by reason of the fact that they are engaged in the production of reports for interstate commerce. In this connection you cite the decision in N.L.R.B. v. Idaho-Maryland Mines Corp.(98 F. (2d) 129), which held that the shipment of gold by the United States Treasury outside of the State constituted an "administrative act of Government" rather than a commercial transaction under the National Labor Relations Act.

Although we cannot, without knowing more facts, definitely determine whether or not the employees in question are covered by the Act, it is our opinion that the result should not be affected by the decision in the Idaho-Maryland Mines case or by any other similar argument that goods shipped across State lines by the Government are not shipped in interstate commerce.

As the United States District Court for the Southern District of Iowa pointed out in the recent case of Timberlake v. Day & Zimmerman (6 Wage Hour Rept. 208, February 4, 1943), the holding by the Ninth Circuit Court of Appeals that such shipments were

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"administrative acts of Government" was dictum. As a matter of fact this Federal district court specifically ruled that employees engaged in producing goods for delivery within the State to the Federal Government, which in turn shipped those goods outside the State, were engaged in producing goods for interstate commerce within the meaning and coverage of this Act. Moreover, the Division is appealing the decision in the Hails Gold Mines case (44F. Supp. 641) on these very grounds. Therefore, if the employees in question are in fact engaged in the production of goods which are shipped outside the State by the United States Army Engineers, they would, in our opinion, be covered by this Act.

Whether or not these employees are so engaged is, as already indicated, a question of fact which can best be answered by your office. We do not believe that coverage should be based upon an occasional or infrequent preparation of reports which are transmitted outside the State. On the other hand, if the employees are regularly and frequently engaged in preparing pay rolls, statements and other commercial or financial information for transmission outside the State by the United States Engineers, we would be inclined to assert coverage. However, here too we would prefer to base a coverage position on the additional ground, assuming that the facts justify it, that the employees in question prepare pay rolls for other employees who are engaged in covered work (such as, for example, the procurement and receipt of materials, supplies and equipment from outside the State or the preparation of payments, orders, designs, specifications and blue prints for transmission outside the State).

With respect to the restitution policy to be followed in the instant case if coverage is found, we direct your attention to the memorandum on the applicability of the Act to construction contractors working for the Government sent by Director of Field Operations John R. Dille to all regional directors dated February 20, 1943, a copy of which is, undoubtedly in Mr. Ash's possession.

21AC409.4113

165 West 46th Street
New York, New York

SOL:RB:RBW
Nov. 14, 1942

M. Clarence Smith, Esquire
Smith and Perry
Tazewell, Virginia

Dear Mr. Smith:

This is in reply to your letter of October 29, 1942 regarding the status under the Fair Labor Standards Act of a contracotr engaged in rebuilding and remodeling a building used as a rooming and boarding hourse for employees of a coal company.

You indicate that the building in question is located near the coal company's mining operations, and that the building contractor receives some of the remodeling materials from outside the State.

As you know, the Fair Labor Standards Act applies to all employees engaged in interstate commerce or in the production of goods for interstate commerce. Employees engaged in the original construction of buildings are not generally covered by the Act, while those engaged in repairing, reconstructing or maintaining buildings used in the production of goods for interstate commerce or as instrumentalities of interstate commerce are covered by the Act. But the Division is not prepared at this time to take a position on the applicability of the Act to employees engaged in reconstructing a rooming and boarding house owned and operated by a coal mining company for the use of its mine employees. Accordingly, the Division will not seek restitution of any unpaid wages due under the Act in such a case until it does take the position that such employees are covered by the Act. Nevertheless, since the Division's failure to take a position in this situation is not binding on the courts, your attention is directed to section 16(b) of the Act which gives the employees an independent right to bring their own suit to recover whatever unpaid wages may be due them thereunder plus an additional equal amount as liquidated damages, plus court costs and a reasonable attorney's fee.

It is my opinion, however, that employees engaged in ordering, receiving or unloading materials, supplies, or equipment coming directly from outside the State would be covered by the Act regardless of the nature of the project on which they are employed. The fact that the out-of-State materials are delivered by the supplier and are purchased by the contractor on a delivery basis would not render the Act inapplicable to employees of the contractor engaged in receiving and unloading such materials.

If you need any further information or assistance in the matter I would suggest that you communicate with the Division's regional office at Richmond, Virginia, located at 215 Richmond Trust Building, since they will be in a better position to ascertain all the necessary facts.

Very truly yours,

L. Metcalfe Walling
Administrator

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(12437)

PUBLIC CONTRACTS DIVISION
165 West 46th Street
January 5, 1943

SOL:RB:YS

Mr. Joseph Magliscano
Furniture, Bedding & Allied Trades
Workers Union, Local 92
180 William Street
Newark, New Jersey

Dear Mr. Magliscano:

Your letter of December 9, 1942 to Secretary of Labor Perkins regarding the overtime compensation due an employee working for two independent firms covered by the same collective bargaining agreement, has been referred for reply to the Wage and Hour Division, U. S. Department of Labor.

You indicate that the employee in question worked 5 days, 40 hours in a week for one firm and the sixth day for an entirely independent firm in the same industry. Both firms are members of a trade association which has a master collective agreement with your union. That agreement provides for time and one-half for all hours worked in excess of 8 a day or 40 a week. You ask whether or not the employee in question is to be compensated for his work at the rate of time and one-half his regular rate of pay for the hours worked on the sixth day for the second shop.

I am enclosing for your information a copy of Interpretative Bulletin No. 13, which contains the Division's interpretations on the proper computation of hours worked under the Act, and direct your attention to paragraphs 16 and 17 thereof which deal with employees having more than one job. You will note that where two different companies arrange to employ a common employee or are affiliated with each other, the hours worked by the employee for both companies are to be totaled to ascertain whether or not the employee has worked more than 40 hours for the joint employers during the week. If on the other hand, the two companies act entirely independently of each other with respect to the employment of the same employee, both companies in ascertaining their obligations under the Act could disregard all work performed by the employee for the other company.

As a general rule, I do not believe that two independent companies are in the position of joint employers where they do not make any arrangements for the employment of the same employee, even though they are jointly parties to the same collective bargaining agreement. For employers to be joint employers under paragraph 17 of Interpretative Bulletin No. 13 it is, in my opinion, necessary that they be associated with respect to the employment of the particular employee. The mere fact that the employers have jointly contracted with a union with regard to wages, hours and other working conditions does not necessarily prove that they are joint employers with respect to any particular employee. Nor is mere knowledge on the part of the employer that an employee has worked 40 hours for another person sufficient to establish that the two employers are joint employers. However, if it should ever be apparent that the several employers and the union are contriving to exchange employees for the purpose of evading the overtime provisions of the Act, a different result might well be reached. The collective bargaining contract is not conclusive evidence of the existence of an arrangement between employers for the interchange

of employees. The facts in each case must be examined to determine whether the employers have made an actual agreement to interchange employees.

I regret, therefore, that I cannot upon the basis of the few facts presented in your letter definitely determine whether or not the employee in question worked for a joint employer when he worked for shop A and shop B during the same week, but you may be able to do so by applying the foregoing principles to the particular situation. If you need any further information or assistance in the matter, I would suggest that you communicate with the Division's branch office located at 31 Clinton Street, Newark, New Jersey.

Very truly yours,

L. Metcalfe Walling
Administrator

(12437)

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Public Contracts Division
165 West 46th Street

SOL:IMH:KLC

January 26, 1943

Mr. A. B. Goetze
Personnel Director
Western Electric Company
195 Broadway
New York, New York

Dear Mr. Goetze:

This will reply to your letter of January 14, 1943 relative to overtime compensation.

Your inquiry relates to whether the principles expressed in release R-1913 as qualified by release R-1913(a) apply to an employee whose regular hourly rate of pay is $1.00 and who works part of the week on a night shift for which he is paid a night work bonus of 10 cents an hour.

It is my opinion that the employee is employed at two rates of pay within the purport of the said releases. Accordingly, under release R-1913(a) you may elect whether to pay for overtime on the basis of the rate of pay applicable for the work performed during the overtime hours or on the basis of the average rate of pay for the week.

Very truly yours,

L. Metcalfe Walling
Administrator

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WESTERN ELECTRIC COMPANY
Incorporated
195 Broadway New York
Cortlandt 7-7700

A.B. Goetze
Personnel Director

January 14, 1943

MR. L. METCALFE WALLING, Administrator
Wage and Hour, and Public Contracts Division
United States Department of Labor
165 West 46th Street
New York, New York

Dear Sir:

Your release No. R-1913 covering routine to be followed in paying for time worked in excess of 40 hours to employees receiving more than one rate of pay in a work week provided that "an employee will be considered as paid his overtime over 40 hours in compliance with the Acts if he is paid on the basis of the old rule which was that of his average hourly rate, or if he is paid time and one-half the hourly or piece rate that is applicable during his overtime hours." This statement has now been modified as follows: "The administrative policy expressed in R-1913 was intended to apply solely to cases in which the employee during a week performs different types of work which call for different rates of pay."

A question has been raised in our Company as to whether this qualifying provision applies in the case of an employee who works part of the week on a night shift and is paid night work bonus and the remainder of the week on the day shift during which no night work bonus is paid. The following example is a case in point:

	3:00 P.M. - 11:00 P.M			7:00 A.M. - 3:00 P.M.		
	M	T	W	T	F	S
Hours Worked	8	8	8	8	8	8
Hourly Rate	$1	$1	$1	$1	$1	$1
N.W. Bonus	.10	.10	.10			

In this case should the employee's overtime pay for time worked on Saturday, i.e. after 40 hours, be determined on the basis of his average rate of pay for the week including the effects of night work bonus, in this case $1.05 per hour, or may we assume that when the employee starts work on the day shift after having worked at night during the early part of the week, he is performing a "different type of work", in which case the rate in effect on Saturday, i.e. $1.00 per hour, would apply.

We shall appreciate a ruling on this question.

Yours very truly

/s/ AB Goetze
Personnel Director

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23 CF 202.2296
23 CE 202.6396

Public Contracts Division
165 West 46th Street

February 20, 1943

SOL:JHS:RHH

AIR MAIL

G. L. Reeves, Esquire
Sutton, Reeves & Allen
Post Office Box 2111
Tampa, Florida

Dear Mr. Reeves:

This will reply to your letter of February 4, 1943 addressed to Regional Attorney George A. Downing with respect to the applicability of the Fair Labor Standards Act (and particularly the exemption provided by section 7(c) thereof) to the labeling, stamping, boxing and storing of canned citrus fruits. Your letter of February 8 and telegram of February 12 to Mr. Murtha were also received.

You state that as a result of the Government orders now in effect with respect to canning, there are now in the possession of citrus canners tremendous stocks of canned goods which are too large to be held in the canning plant. As an emergency measure the canners have been forced to store their product in every available space. The product cannot be labeled when it comes off the line and, therefore, it is transported to some building for storage purposes.

Your letter inquires only concerning the application of the section 7(c) exemption, but consideration must of course be given also to the application of the section 7(b)(3) exemption.

You inquire whether the section 7(c) exemption applies to employees who perform services in the moving or transportation of the finished product from the end of the line to the warehouse and to employees who stack the cans in a temporary warehouse. If a temporary warehouse is a part of the same "place of employment" as the cannery, the principles set forth in release R-1892, a copy of which is in your possession, will apply. If only operations exempt under section 7(c) are performed in the cannery, the section 7(c) exemption may be applicable to the warehousing of canned goods in the same place of employment during the weeks in which section 7(c) applies to the cannery establishment. As you know, the exemption is applicable only during the active season.

If, on the other hand, the warehouse is a separate place of employment from the cannery, it is clear that the warehouse is not a place where the employer is engaged in the exempt operations described in section 7(c). This exemption is therefore inapplicable to employees employed in such a warehouse. The section 7(b)(3) exemption may apply, however, if the warehouse is storing only canned fresh fruits.

If transportation takes place within an establishment where the section 7(c) exemption applies to both the cannery portion and warehouse portion, section 7(c) will apply to transportation of the finished product to the warehouse. If, however, transportation is from a cannery exempt under section 7(c) to a warehouse exempt under section 7(b)(3), only the section 7(b)(3) exemption

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will be applicable, since the employee transporting the goods will not be employed "solely in those portions of the premises devoted by their employer to the described operations."

However, a distinction must be made as to truck drivers between the situation discussed above and that of a truck driver engaged solely in transporting canned citrus from a cannery to market. Such an employee insofar as he is employed in the establishment of his employer is employed in those portions of it devoted by the employer to the operations described in section 7(c), and the section 7(c) exemption may apply to him.

You next state that you assume that when the Government orders the goods out, or when the shipper is permitted to move them to the civilian public, the goods could be brought back to the cannery and, if labeled in that portion of the premises devoted by the employer to canning, such services would be exempt under the release. Assuming that the goods have been transported outside the cannery premises, I cannot agree with this conclusion. The Division has consistently held that the section 7(c) exemption does not apply to the labeling, stamping or boxing in one cannery of canned goods received from another cannery. I believe the same rule would apply where the goods are transported from a cannery to a warehouse on other premises and returned for labeling. It seems clear, however, that the described work would fall within the scope of the section 7(b)(3) exemption if the section 7(b)(3) exemption was being taken in the establishment where the work was done.

If stacking is performed in an establishment where no operations within the scope of section 7(c) are performed, it is clear that such stacking is not within the scope of the section 7(c) exemption.

You ask whether the section 7(c) exemption is inapplicable to the handling in one plant of goods received from another plant of the same canner. The Division has taken the position that such handling is not a necessary incident to the operations in that canning plant and therefore not exempt under section 7(c). Section 7(b)(3) may, however, of course apply.

A copy of this letter is being furnished to Mr. Downing. If you have further questions in connection with your problem, I believe he will be in a position to advise you.

Very truly yours,

L. Metcalfe Walling
Administrator

cc: George A. Downing
Regional Attorney
Atlanta, Georgia

(12,437)